IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Patrick K. Donnelly, 8 Church Street, Charleston, South Carolina 29401, Plaintiff, v. Linden Capital Partners III, L.P., 150 N. Riverside Plaza, Suite 5100 Chicago, Illinois 60606, Defendant.	Civil Action No. 2:20-cv-3719-RMG **ORDER AND OPINION**

Before the Court are Plaintiff's motion for leave to file amended complaint, (Dkt. No. 50), Plaintiff's emergency motion to seal provisionally, (Dkt. No. 61), and Defendant's motion to seal and redact. (Dkt. No. 59). For the reasons set forth below, the Court grants Plaintiff's motion for leave to amend, denies Plaintiff's emergency motion to seal provisionally, and grants in part and denies in part Defendant's motion to seal and redact.

I. Background[1]

Plaintiff Patrick K. Donnelly is an executive who works in the medical device and pharmaceutical field. Defendant Linden Capital Partners, III, L.P. ("Linden") is a private equity

[1] All facts are drawn from Plaintiff's proposed First Amended Complaint ("FAC"), (Dkt. No. 52), and viewed in a light most favorable to Plaintiff. *See Sed, Inc. of S.C. v. E. Coast Sweepstakes LLC*, No. 7:10-CV-135-H, 2010 WL 5477748, at *1 (E.D.N.C. Dec. 30, 2010) (noting the allegations in a proposed amended complaint "must be construed in the light most favorable to" plaintiff where a defendant opposes amendment); s*ee also Black & Decker, Inc. v. Greenfield Industries Inc.,* 1991 WL 239121 (D.Md.1991) (Memorandum Opinion) ("an amendment is considered futile if it could not survive a motion to dismiss or a motion for summary judgment").

firm that invests exclusively in healthcare companies. Proposed defendant Linden Capital Partners, IV, L.P. ("Linden IV") is a fund Linden formed in November 2017.

Around December 14, 2015, Donnelly signed an Operating Partner Agreement ("OPA") with Linden. (Dkt. No. 52-1). Under the OPA, Donnelly agreed to provide advisory services to Linden "as an independent contractor." (*Id.* ¶¶ 1, 3). The OPA "anticipated" that Donnelly would "serve as a Chief Executive Officer if Linden acquires or invests in a target company for which [Donnelly] will have performed services as outlined in this agreement." (*Id.* ¶ 1). Under the OPA, Donnelly's compensation was comprised of a yearly "consulting fee of $180,000 . . . payable monthly" and discretionary "transaction fees." (*Id.* ¶ 2) (noting that upon completion of "an equity investment by Linden in a Target Company for which [Donnelly] has significantly contributed to sourcing, winning and/or performing due diligence as determined solely by Linden," Donnelly would receive a "cash fee of 10% of the transaction fee related to the capital invested by Linden Capital Partner III LP and Linden Capital Partners III-A LP"). The OPA permits either party to terminate with "30 days prior written notice." (*Id.* ¶ 1).

In late 2017, Linden formed Advarra, Inc. ("Advarra") and Donnelly signed an "Employment Agreement" with Advarra to become its CEO. (Dkt. No. 52 at ¶¶ 126-27). Donnelly served as Advarra's CEO from around November 7, 2017 through January 31, 2020. (*Id.* ¶¶ 165, 179). Concurrently with serving as CEO of Advarra, Donnelly alleges he "carried out his duties as a Linden Operating Partner and consultant" under the OPA. (*Id.* at ¶ 169).

The proposed First Amended Complaint (the "FAC") brings four causes of action: (1) breach of contract—failure to pay consulting fees against Linden; (2) breach of contract—failure to pay earned transaction fees against Linden; (3) unjust enrichment against Linden; and (4) unjust enrichment against Linden IV. The crux of Donnelly's complaint is that, although he continued

to perform work for Linden under the OPA while serving as CEO of Advarra, Linden never compensated Donnelly for that work.

II. Procedural History

On October 22, 2020, Donnelly filed his complaint with this court. (Dkt. No. 1).

On February 1, 2021, the Court granted in part and denied in part a motion by Linden for judgment on the pleadings. (Dkt. No. 45) (the "Prior Order"). The Prior Order granted Linden judgment on the pleadings as to Donnelly's second claim for breach of contract—failure to pay earned transaction fees. (*Id.* at 8). The Prior Order also held that: (a) the OPA was governed by Illinois law, (*id.* at 5), and (b) the Advarra Employment Agreement was not integral to the Donnelly's complaint and could not be considered on a motion for judgment on the pleadings, (*id.* at 6).

On March 12, 2021, Donnelly timely moved to amend his complaint. (Dkt. No. 50).[2] The proposed FAC purports to correct deficiencies identified by the Court in the Prior Order and seeks to add Linden IV as a defendant. Linden opposes Donnelly's motion. (Dkt. No. 58). Donnelly filed a reply. (Dkt. No. 62). Donnelly also filed an emergency motion to seal provisionally portions of his reply. (Dkt. No. 61).

On April 9, 2021, Linden moved to seal and redact portions of the proposed FAC and portions of Linden's response in opposition to Donnelly's motion to amend. (Dkt. No. 59).

The parties' motions are fully briefed and ripe for disposition.

III. Legal Standards/Discussion

A. Donnelly's Motion to Amend

[2] See Scheduling Order, (Dkt. No. 42) (motion to amend pleadings due by April 7, 2021).

Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, after the time has passed to amend a pleading as a matter of course, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Rule 15(a) is a "liberal rule [that] gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities." *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (en banc). However, "[m]otions to amend are committed to the discretion of the trial court." *Keller v. Prince George's Cty.*, 923 F.2d 30, 33 (4th Cir. 1991). Specifically, the "district court may deny a motion to amend when . . . the amendment would be futile." *Equal Rights Ctr. v. Niles Bolton Assoc.*, 602 F.3d 597, 602-03 (4th Cir. 2010).

Linden argues that amendment here would be futile. Specifically, Linden argues that Donnelly's proposed amendments do not adequately allege that Linden made equity investments in target companies such that Donnelly is entitled to earned transaction fees under the OPA. (Dkt. No. 58 at 6-10). Linden also argues that Donnelly's unjust enrichment claim against Linden IV is either barred by the Advarra Employment Agreement or the doctrine of judicial estoppel.

After a careful review of the proposed FAC, including its unredacted exhibits, the Court finds that amendment would not be futile and grants Donnelly leave to amend his complaint.

As to Count II—Failure to Pay Earned Transaction Fees Under the OPA, the proposed FAC adequately alleges that Linden made equity investments in target companies such that Donnelly may plausibly be entitled to transactions fees under the OPA. *See* (Dkt. No. 50 at 10-18).[3] In opposing Donnelly's motion to amend as to Count II, Linden argues that the exhibits

[3] *See also* Prior Order, (Dkt. No. 45 at 8) (holding that, "[s]imply stated, the OPA provides that, when Linden completes an equity investment in a target company for which Donnelly 'significantly contributed to sourcing, winning and/or performing due diligence,' then Donnelly is entitled to—at Linden's discretion—a cash fee of 10% of the 'transaction fee related to the capital invested by Linden.'").

attached to the proposed FAC, (Dkt. Nos. 52-3, 52-4, 52-5, 52-6, and 52-7), do not actually support Donnelly's claims. *But see* (Dkt. No. 58 at 12 n.8) (admitting that "ProPharma's acquisition of Xendo, Sofus, and Solutions did involve an equity investment by [Linden]"). Linden's arguments, however, go beyond the face of the exhibits, turning on information not found within the four corners of the proposed FAC. *See, e.g.*, (Dkt. No. 58 at 8) (arguing that Exhibit 6 references only an "original" equity investment by Linden in Project Flight and not a "new capital investment"). The Court may not appropriately consider, however, such arguments in ruling on a motion to amend. *Imperial Textiles Supplies, Inc. v. Peerless Indem. Ins. Co.*, No. 7:11-cv-689-HMH, 2011 WL 13220339, at *1 (D.S.C. Oct. 6, 2011) (noting "the court must restrict its inquiry to the sufficiency of the complaint rather than 'resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses'") (citing *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992)); *Curtiembre Becas, S.A. v. Arpel Leather Corp.*, No. 1:05cv622, 2006 WL 8446029, at *4 (M.D.N.C. June 12, 2006) ("It is clear from [defendant's] response that there are disputes over the meaning of salient facts in the case, and the in-depth investigation of the facts required to resolve such a dispute has not been held to be proper on a motion to amend."). In sum, the Court finds that Donnelly's Count II is adequately pled.

The Court also finds that the proposed FAC's Count IV—Unjust Enrichment against Linden IV is not frivolous on its face. *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4th Cir. 1986) ("Leave to amend, however, should only be denied on the ground of futility when the proposed amendment is clearly insufficient or frivolous on its face."). Under Illinois or South Carolina law, to recover under a theory of unjust enrichment a plaintiff must establish the following elements: "(1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make

it inequitable for him to retain it without paying its value." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 257, 715 S.E.2d 348, 356 (Ct. App. 2011); *see Stephen & Hayes Const., Inc. v. Meadowbrook Homes, Inc.*, 988 F. Supp. 1194, 1200 (N.D. Ill. 1998) ("The elements of unjust enrichment are: (1) the defendant unjustly retained a benefit to the plaintiff's detriment; and (2) the defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience."). Here, Donnelly adequately alleges these elements—namely that Linden IV benefited from Donnelly's work on Project Bearcat even though Donnelly did not have a contractual relationship with Linden IV. (Dkt. No. 52 at 17-18); *see also* (*id.* ¶ 197) (alleging that Linden structured Project Bearcat to "flow through" Linden IV such that Donnelly would not earn transaction fees under the OPA); (*Id.* ¶ 229) (alleging that the OPA "serves as evidence of the fair market value of Mr. Donnelly's services").

In arguing that Donnelly's unjust enrichment claim against Linden IV is futile, Linden first argues that Donnelly's Employment Agreement with Advarra bars the claim. (Dkt. No. 58 at 15). The Court rejects this argument, however, as it requires consideration of a document which is neither attached to nor integral to the proposed FAC. *See also* Prior Order, (Dkt. No. 45 at 6) (declining to consider the Advarra Employment Agreement while ruling on Linden's motion for judgment on the pleadings because it was neither attached nor "integral" to the allegations in Donnelly's complaint); *Goines v. Valley Cmty. Servs. Bd.,* 822 F.3d 159, 166 (4th Cir. 2016) (explaining that a document is "integral" to the complaint "where the complaint relies heavily upon its terms and effect"). Second, Linden argues that Donnelly is "judicially estopped" from proceeding against Linden IV on a claim for unjust enrichment. (Dkt. No. 58 at 16). *See Bresler v. Wilmington Tr. Co.*, 348 F. Supp. 3d 473, 490 (D. Md. 2018), *aff'd,* 761 F. App'x 160 (4th Cir. 2019) ("Courts generally consider three factors when deciding whether a party is estopped under

the doctrine: first, whether the party's positions are 'clearly inconsistent'; second, whether the party has succeeded in persuading the court to accept its earlier position; and third, if allowing the party seeking to assert the inconsistent position would award it an 'unfair advantage.'"). The Court rejects Linden's argument as Linden does not establish in its briefing all required elements of judicial estoppel. *See* (Dkt. No. 58 at 17-18) (failing to identify, for example, a new position taken in the proposed FAC that directly contradicts a prior position explicitly adopted by this court). In fact, Linden appears to *admit* in its briefing that it cannot meet its burden of showing judicial estoppel applies. *See* (*id.*) ("In fact, regardless of whether Donnelly's about-face fully satisfies the judicial estoppel standard, it is a sufficient basis to deny leave to amend under Rule 15."). Put simply, Donnelly's complaint contains sufficient factual matter, accepted as true, to state a claim for relief as to Count II that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

For the above reasons, the Court grants Donnelly's motion to amend. (Dkt. No. 50).

B. The Parties' Motions to Redact and Seal

Local Civil Rule 5.03 provides that a party seeking to file documents under seal shall "file and serve a 'Motion to Seal' accompanied by a memorandum" that must:

> (1) identify, with specificity, the documents or portions thereof for which sealing is requested; (2) state the reasons why sealing is necessary; (3) explain (for each document or group of documents) why less drastic alternatives to sealing will not afford adequate protection; and (4) address the factors governing sealing of documents reflected in controlling case law.

Local Civil Rule 5.03, D.S.C.

When a party makes a request to seal judicial records, a district court "must comply with certain substantive and procedural requirements." *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 576 (4th Cir. 2004). Procedurally, the court must (1) give the public notice and a reasonable opportunity to challenge the request to seal; (2) "consider less drastic alternatives to sealing"; and

(3) if it decides to seal, make specific findings and state the reasons for its decision to seal over the alternatives. *Id.* "As to the substance, the district court first must determine the source of the right of access with respect to each document, because only then can it accurately weigh the competing interests at stake." *Id.* (internal quotation marks and alteration omitted). "While the common law presumption in favor of access attaches to all 'judicial records and documents,' the First Amendment guarantee of access has been extended only to particular judicial records and documents," such as materials filed in connection with a summary judgment motion. *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988) (internal citation omitted).

As a threshold matter, the procedural requirements of Local Rule 5.03 have been met here. (Dkt. No. 59). Linden complied with the rule, the public received notice of the request to seal when the motion was docketed, and no parties objected.

Next, applying the common law right of access to the documents in question,[4] the Court grants in part and denies in part Linden's motion to seal.

As it pertains to sealing Exhibits 3, 4, 5, 6, and 7 of the proposed FAC, the Court grants Linden's motion. The Court has reviewed these exhibits *in camera*. Said documents are emails and "excerpts from three deal-specific slide decks, and a funds flow memorandum." *See* Affidavit of Anthony B. Davis, (Dkt. No. 59-12). The exhibits appear to contain confidential business information and are, as best the Court can tell at *this* stage of the litigation, not necessary for understanding Donnelly's claims. Accordingly, the Court finds that Linden has met its burden of

[4] *Smartsky Networks, LLC v. Wireless Sys. Sols. LLC*, No. 1:20-CV-834, 2021 WL 929729, at *5 (M.D.N.C. Mar. 11, 2021) (applying the common law right of access on a motion to seal portions of plaintiff's complaint and its exhibits); *Spence v. ITC Deltacom Commc'ns, Inc.*, No. 5:07-CV-15-BR, 2007 WL 9718658, at *1 (E.D.N.C. July 30, 2007) (applying common law right of access to sealing portions of complaint where the complaint was not verified, portions sought to be sealed were not necessary to an understanding of the claims, and the court had not yet adjudicated any substantive rights).

showing its countervailing interests heavily outweigh the public interest in access to the documents in question. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) (noting that public access may be inappropriate for "business information that might harm a litigant's competitive standing").

As it applies to sealing Exhibit 2 and redacting portions of the of the FAC, however, the Court denies Linden's motion. Exhibit 2 is a chart which details the transaction fees Donnelly alleges he is entitled to. By prior order, the Court declined to seal a document substantially similar, if not identical, to Exhibit 2. *See* Order and Opinion, (Dkt. No. 36). Accordingly, the Court finds no reason to seal the proposed FAC's Exhibit 2. *See In re The Knight Publishing Co.*, 743 F.2d 231, 235 (4th Cir. 1984) (noting "[t]he Supreme Court has suggested that the factors to be weighed in the balancing test include . . . whether the public has already had access to the information contained in the records"). As it regards Linden's proposed redactions to the proposed FAC, said redactions aim to prevent disclosure of the precise dollar amounts Linden allegedly invested in certain target companies. The Court finds that such figures alone are not confidential or proprietary information which, if disclosed, would irreparably damage Linden. Further, if Donnelly were to one day prevail on his claims, such figures would necessarily become public knowledge. *See Higdon v. Nestle Purina Petcare Co.*, No. CV 8:14-3737-HMH, 2014 WL 12613270, at *2 (D.S.C. Oct. 10, 2014) ("If the Agreement were sealed, the public would have no way of discerning the basis for any decision in this case. Further, any jury trial in this case would require disclosure of the Agreement in a public courtroom.").

Last, given the above, the Court denies both Linden's request to seal portions of its opposition to Plaintiff's motion to amend, *see generally* Linden Response in Opposition to Motion to Amend, (Dkt. No. 58) (redacting the value of Linden's alleged equity investments in target

companies) and Plaintiff's motion emergency motion to seal provisionally portions of its reply, Reply to Motion to Amend, (Dkt. No. 62) (same).

IV. Conclusion

For the foregoing reasons, Plaintiff's motion to amend, (Dkt. No. 50), is **GRANTED**, Plaintiff's emergency motion to seal, (Dkt. No. 61), is **DENIED**, and Defendant's motion to redact and seal is **GRANTED IN PART AND DENIED IN PART**, (Dkt. No. 59). Specifically, Defendant's motion to redact and seal is **GRANTED** as to the proposed FAC's Exhibits 3, 4, 5, 6, and 7. Defendant's motion is otherwise **DENIED.** Within ten (10) days of this Order: (1) Plaintiff is directed to file on the docket a version of the FAC redacted in accordance with this Order and (2) both parties are directed to provide the Clerk with unredacted versions of Defendant's response in opposition to Plaintiff's motion to amend, (Dkt. No. 58), and Plaintiff's reply to his motion to amend, (Dkt. No. 62). At such time, the Clerk shall replace the redacted versions of these filings with the unredacted versions.

AND IT IS SO ORDERED.

s/ Richard Mark Gergel
United States District Judge

April 27, 2021
Charleston, South Carolina