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STATE OF MINNESOTA
CARVER COUNTY

DISTRICT COURT
FIRST JUDICIAL DISTRICT
PROBATE DIVISION

Case Type: Special Administration

In the Matter of:

Court No. 10-PR-16-46

Estate of Prince Rogers Nelson,

Decedent.

AFFIDAVIT OF LEITA WALKER IN SUPPORT OF MOTION OF MEDIA COALITION TO INTERVENE FOR THE LIMITED PURPOSE OF ENSURING ACCESS TO COURT PROCEEDINGS AND RECORDS

COUNTY OF HENNEPIN)
) SS
STATE OF MINNESOTA)

LEITA WALKER, being first duly sworn, states:

1. I am an attorney with Faegre Baker Daniels LLP, representing intervenors American Public Media Group (owner of Minnesota Public Radio), The Associated Press, Cable News Network, Inc., Star Tribune Media Company LLC ("Star Tribune"), TEGNA Inc. (owner of NBC network affiliate KARE 11), CBS Corporation, Hubbard Broadcasting, Inc., and USA Today Network (collectively, the "Media Coalition").

2. I submit this Affidavit in support of the Motion of Media Coalition to Intervene for the Limited Purpose of Ensuring Access to Court Proceedings and Records. This Affidavit is based upon my personal knowledge and my review of the files, records, and proceedings in this action.

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3. Attached as the indicated exhibits are true and correct copies of unpublished court decisions and decisions reported in Media Law Reporter (BNA), provided for the convenience of the court and parties:

EXHIBIT 1 *Baloga v. Maccabee*, No. C3-92-11589, 20 Media L. Rep. 2201 (Minn. Dist. Ct., Ramsey Cnty. Nov. 13, 1992).

EXHIBIT 2 Order Granting Motion to Intervene and Denying, In Part, Motion to Unseal Court Records, *Dean v. Gall*, No. MP 99-5258 (Minn. Dist. Ct., Hennepin Cnty. Nov. 17, 2000).

EXHIBIT 3 *Ex Parte Weston*, No. 91-DR-23-881, 19 Media L. Rep. 1737 (S.C. Fam. Ct., Greenville Cnty. Nov. 25, 1991).

EXHIBIT 4 *Friederichs v. Kenney & Lange*, No. CT 94-004038, 22 Media L. Rep. 2530 (Minn. Dist. Ct., Hennepin Cnty. Aug. 22, 1994).

EXHIBIT 5 Order on Motion to Proceed *In Camera*, to Intervene and to Modify Sealing Order, *General Mills, Inc. v. Whalen*, No. 93-21913 (Minn. Dist. Ct., Hennepin Cnty. Dec. 27, 1994).

EXHIBIT 6 Order, *Hecker v. Hecker*, No. 27-FA-98805 (Minn. Dist. Ct., Hennepin Cnty. July 14, 2010).

EXHIBIT 7 Order and Memorandum re Unsealing of File, *In re Fry*, No. 27-FA-296122 (Minn. Dist. Ct., Hennepin Cnty. Oct. 18, 2011).

EXHIBIT 8 *Lutz v. Lutz*, No. 90-42992-DO, 20 Media L. Rep. 2029 (Mich. Cir. Ct., Washtenaw Cnty. Nov 12, 1992, Nov. 20, 1992, and Nov. 23, 1992).

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EXHIBIT 9 *Williams v. Heins Mills & Olson, PLC*, No. 27-CV-07-6495 (Minn. Dist. Ct., Hennepin Cnty. Mar. 21, 2008).

Dated: June 23, 2016

FAEGRE BAKER DANIELS LLP

Leita Walker #387095
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2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: (612) 766-7000

Subscribed and sworn to before me
This 23rd day of June, 2016.

DEBRA A NOREN
Notary Public
Minnesota
My Commission Expires January 31, 2020

Notary Public

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EXHIBIT 1

BALOGA v. MACCABEE

Minnesota District Court
Second Judicial District
Ramsey County

MARK A. BALOGA v. PAULA MACCABEE, individually and in her official capacity as St. Paul City Council Member, and CITY OF ST. PAUL, No. C3-92-11589, November 13, 1992

NEWSGATHERING

1. Judicial review—In general (§66.01)

Best method for challenging order to seal court file is to move for intervention as of right.

2. Access to records—Judicial—Civil—Pre-trial/discovery (§38.1505.04)

Restraints on access to information—Privacy (§50.15)

Civil litigant's assertion that she may suffer public humiliation and damage to her reputation if discovery material is made public is not sufficient to warrant protective order closing all such information, in view of presumption in favor of public access to judicial records; rather, protective order should encompass only limited areas involving parties' medical, financial, and psychological records.

News media organizations filed motion to intervene in civil action in order to challenge issuance of protective order.

Motion to intervene granted; limited protective order issued.

Laurie A. Zenner, of Hannah & Zenner, St. Paul, Minn., for intervenor Northwest Publications Inc.

Thomas S. Schroeder, of Faegre & Benson, Minneapolis, Minn., for intervenor Minneapolis Star & Tribune.

Stephen W. Cooper, St. Paul, for the plaintiff.

Ann Huntrods and Toni Halleen, of Briggs & Morgan, St. Paul, and Frank Villuame, assistant city attorney, St. Paul, for defendants.

Full Text of Order

Fitzpatrick, C.J.:

The above matter came October 30, 1992, before the Honorable Kenneth J. Fitzpatrick, Chief Judge, for: (1) a scheduling order, (2) motion to intervene by Northwest Publications, and the Minneapolis Star & Tribune, and (3) motion by Defendant Maccabee for a protective order. Appearing on behalf of the plaintiff was Stephen W. Cooper, 419 Galtier Plaza Box 19, 175 Fifth Street East, St. Paul, MN 55101. Defendant Maccabee was represented by Ann Huntrods and Toni Halleen of Briggs & Morgan, P.A., 2200 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101. Defendant City of St. Paul was represented by Frank Villuame, Assistant City Attorney, 339 Lowry Professional Building, St. Paul, MN 55102. Intervenor Northwest Publications was represented by Laurie A. Zenner, of Hannah & Zenner, 1122 Pioneer Building, St. Paul, MN 55101. Intervenor Minneapolis Star & Tribune was represented by Thomas S. Schroeder, of Faegre & Benson, 2200 Norwest Center, 90 South Seventh Street, Minneapolis, MN 55402-3901.

Based upon all the files, records and proceedings herein, together with arguments of counsel, and the Court being duly advised in the premises,

IT IS HEREBY ORDERED:

1. That motion by Northwest Publications and the Minneapolis Star and Tribune to intervene is granted.

2. That all parties will stipulate to agreed upon schedule by November 13, 1992 or such schedule will be determined by the Court.

3. That any discovery dealing with the medical, financial, or psychological history of the parties involved will be temporarily protected until the trial. All other restrictions proposed by Defendant Maccabee are denied. This issue may be reopened by any party upon proper notice if during discovery some issue is uncovered which the moving party believes warrants further restrictions.

4. That the attached memorandum is included herein.

MEMORANDUM

[1] On October 30, 1992, this Court conducted a preliminary hearing to discuss scheduling, and motions filed by the parties. The two issues addressed here are the motion to intervene and the motion for the protective order to seal the record. First, the best method for chal-

lenging an order to seal a court file by the media is to move for intervention as of right. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 [13 Med.L.Rptr. 1704] (Minn. 1986). Minn. R. Civ. P. 24.01 sets out a four part test for intervention of right. These elements are: (1) Timely application; (2) An interest relating to the property or transaction which is the subject of the action; (3) The applicant must be so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) The interest of the applicant are not already adequately represented by an existing party (Minn. R. Civ. P. 24.01). *Id.*

Following the analysis from *Schumacher*, both intervenors made their motions in a timely manner, prior to the first formal hearing. Their legally protected interest is found in the public's right to access under Rule 2 of the Supreme Court Rules of Public Access to Records of the Judicial Branch. Obviously intervenors' protected right would clearly be impaired or impeded if the court's records were sealed. Finally, in *Schumacher*, it was clear that the intervenors were not adequately represented because both parties opposed access to the record. *Id.* at 207–207. Here, only Defendant Maccabee opposes, however, this does not mean that Plaintiff has the same interest as intervenors. Only intervenors have the singular interest of the public's right to open access of the court records. Therefore intervention is granted for the limited purpose of challenging the motion to seal the files.

The second issue is Defendant Maccabee's Motion for protective order brought pursuant to Rule 26.03 of the Minn. R. Civ. Proc. For the issuance of such an order, movant must show "good cause . . . which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, . . ." Minn. R. Civ. Proc. 26.03. Under the common law a similar balancing test is used whereby the party seeking to deny access must assert a significantly strong interest in support of the motion to overcome the presumption of access. *Minneapolis Star & Tribune*, 392 N.W.2d at 202. Furthermore, Rule 2 of the Minnesota Rules of Public Access to Records of the Judicial Branch states a statutory presumption that court files are open to the public.

[2] Defendant Maccabee argues that she may suffer public humiliation and damage to her reputation should all discovery be made public. While this argument has some substance it would be overbroad to deny access to all records based on this assertion. This Court, in balancing Defendant's argument with the presumption in favor of access, and in light of the gross amounts of publicity already submitted to the public, finds only limited areas where Defendant's interest may outweigh the presumption of access. Therefore, discovery concerning the medical, financial and psychological records of the parties is temporarily protected until the trial. Any party, upon proper notice, may seek review of this order if some special issue arises during discovery. This order does not restrict any other discovery topics.

U.S. v. APONTE-VEGA

U.S. District Court
Southern District of New York

UNITED STATES OF AMERICA v. SAMUEL APONTE-VEGA, No. 91 Cr. 0595 (TPG), May 29, 1992

NEWSGATHERING

Forced disclosure of information—Disclosure of unpublished information—In criminal actions (§60.1005)

Criminal defendant is not entitled to disclosure of reporter's notes for newspaper article which concerned government's seizure of property allegedly used by defendant to facilitate narcotics deals and which stated that, "according to law enforcement sources, some of the DEA agents who handled the case are under investigation" by Justice Dept., since appropriate source for information about Justice Dept. investigation is Justice Dept., and since information contained in notes is thus available from alternative sources.

Newspaper reporter files motion to quash subpoena served in criminal prosecution.

Motion granted.

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EXHIBIT 2

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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Case Type: Other Civil

Court File No. MP 99-5258

Pamela Dean, by Willie Dean, her Guardian Ad Litem, and Willie Dean, individually,

Plaintiffs,

vs.

William J. Gall, M.D. and Twin Cities Anethesia Associates, P.A.,

Defendants.

ORDER GRANTING MOTION TO INTERVENE AND DENYING, IN PART, MOTION TO UNSEAL COURT RECORDS

The above-entitled matter came on for hearing before the Honorable Harry Seymour Crump, Judge of District Court, on November 1, 2000.

Faegre & Benson by John P. Borger appeared on behalf of the Star Tribune. Reid Rischmiller appeared on behalf of the Plaintiffs, James Roegge and Charles Gross appeared on behalf of the Defendants.

Based upon the arguments of counsel, records, filings and proceedings herein,

IT IS HEREBY ORDERED:

1. That Star Tribune be permitted to intervene as of right in the above-entitled action for the purposes set forth in its accompanying motions; and
2. That this Court's May 22, 2000, protective order be, in part, vacated. The settlement documents and transcripts are to remain sealed. The protective order on all other documents is to be vacated.

BY THE COURT:

Dated: November 17, 2000

The Honorable Harry Seymour Crump
Judge of District Court

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EXHIBIT 3

EX PARTE WESTON

Full Text of Opinion

South Carolina Family Court
Greenville County

EX PARTE: CHRIS WESTON, MULTIMEDIA PUBLISHING OF SOUTH CAROLINA INC., d/b/a THE GREENVILLE NEWS-PIEDMONT CO., STATE RECORD CO., INC., and COSMOS BROADCASTING CORP., Intervenors; IN RE: BRENDA MILES, Plaintiff v. JAMES M. MILES, Defendant, No. 91-DR-23-881, November 25, 1991

NEWSGATHERING

Access to records — Judicial — Civil — In general (§38.1505.01)

Restraints on access to information — Privacy (§50.15)

Sealing of family court record in divorce proceeding, pursuant to agreement between parties, is not warranted, since parties' agreement to seal record, without more, is insufficient basis for closure, since parties' assertion that record contains statements which have not been proven in court proceeding advances no compelling governmental interest and thus is insufficient to warrant closure, since potential embarrassment to parties caused by disclosure is not sufficient basis for closure, especially since one party is public official, and since parties' assertion that record contains material which might be harmful to their sons if disclosed is not sufficient basis to warrant sealing of records in their entirety.

Motions filed by news media organizations to unseal record in divorce proceeding.

Granted.

Carl F. Mueller and Wallace K. Lightsey, of Wyche, Burgess, Freeman & Parham, Greenville, S.C.; Jay Bender, of Baker, Barwick, Ravenel & Bender, Columbia, S.C., for news media organizations.

Robert M. Ariail, Greenville, for Brenda Miles.

Jefferson V. Smith, of Carter, Smith, Merriam, Tapp, Rogers and Traxler, Greer, S.C., for James M. Miles.

Johnson, J.:

This matter came for hearing before the Court on November 6, 1991, upon the motion of Chris Weston and Multimedia Publishing of South Carolina, Inc. d/b/a The Greenville News-Piedmont Company (hereinafter the "Greenville News") and a later motion of Cosmos Broadcasting Corp. and State-Record Co., Inc., to unseal the record in the abovecaptioned divorce proceeding initiated against James M. Miles, the Secretary of State of South Carolina. By Order dated September 26, 1991, this Court granted the intervenors' motions to intervene for this limited purpose.

The plaintiff, Brenda Miles, did not request that the record be sealed at the time that she filed her Complaint. Thus, the record was open at the inception of this action. Later, by consent of the parties incorporated into a bench order issued by the undersigned judge of the Court, the record was sealed.

The original order of closure did not contain specific findings of fact to support closure; not was the order itself made public. On June 12, 1991, these twin shortcomings were addressed in a Supplemental Order To Seal the Record, which stated that it was "issued to be made a part of the public record solely for the purposes of setting forth this Court's decision and its findings pertaining to sealing of the record." The supplemental order, which was issued by a second judge of this Court, went on to provide that it would "in no way, alter or amend this Court's Order to Seal the Record."

No public notice was given before the entry of either the original order sealing the record or the supplemental order. In neither case was the public or press provided an opportunity to appear before the Court to oppose the sealing of the record.

Mr. and Mrs. Miles have urged upon the Court the proposition that, because another judge of this Court issued the second Order of closure, only he can entertain the pending motions to unseal the record. They have not, however, presented to this Court any authority for that position. Moreover, because no prior notice was given to the press or public of either proceeding to close the record, the intervenors were not represented at those

proceedings. When both of the prior orders of closure were issued the Court did not have a party before it to advocate the position of the intervenors and did not have before it the additional proposition that a closure order could be sufficiently narrow to protect the children of the parties from disclosure about the children while simultaneously respecting the right of public access regarding the litigants themselves. Thus, with additional parties and a previously unconsidered proposition before the Court, the case is in a different posture, and this matter is properly before this judge for resolution. This judge has read the transcript of the hearing of June 6, 1991, and considered the reasons for closure advanced by the spouses both then and in the two subsequent proceedings. The Court now also has considered the positions of the intervenors.

The past two decades have witnessed a steady march by the courts of this country, led by the United States Supreme Court, toward greater recognition of public access to judicial proceedings and records. For example, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 1029 [1 Med.L.Rptr. 1819] (1975), the Supreme Court held that the state cannot impose liability on a person for accurately reporting the name of a rape victim taken from judicial records. In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 2613 [8 Med.L.Rptr. 1689] (1982), the Supreme Court ruled that the press cannot be excluded from the trial of defendants accused of committing sex crimes against minors in order to protect the privacy of the minor victims. *Press-Enterprise Co. v. Superior Court ("Press-Enterprise I")*, 464 U.S. 501, 104 819 [10 Med.L.Rptr. 1161] (1984), held that the public and press have a constitutional right of access to jury voir dire. Two years later, in *Press-Enterprise Co. v. Superior Court ("Press-Enterprise II")*, 478 U.S. 1, 106 2735 [13 Med.L.Rptr. 1001] (1986), the Court held that the right of access extends to preliminary hearings in criminal cases.

Within South Carolina, the advance toward increasing protection for access to judicial records and proceedings is reflected in decisions such as *Steinle v. Lollis*, 279 S.C. 375, 307 S.E.2d 230 [9 Med.L.Rptr. 2487] (1983) (*per curiam*); *Ex Parte Columbia Newspapers, Inc.*, 286 S.C. 116, 333 S.E.2d 337 (1985) (*per curiam*); *Button v. Morrison* (S.C. Sup. Ct. Sept. 15, 1987) (copy attached); and *Davis v. Jennings*, Op. No. 23404 (S.C. Sup. Ct. May 20, 1991). In *Steinle*, the South Carolina Supreme Court held that a trial court cannot exclude the public and press from a preliminary hearing in a criminal prosecution, without making specific findings on the record showing the need for closure. In *Columbia Newspapers*, the Court held that the right of public access to judicial proceedings extends to criminal actions against minors in Family Court. In *Button*, the state Supreme Court held that the public and press have the right to be heard in opposition to a motion to seal a Family Court civil record, and that any decision by the trial court to deny access be "supported by specific findings rather than conclusory statements." Finally, in *Davis*, the South Carolina Supreme Court reversed a circuit court order sealing the record in a civil case that had been settled among the initial litigants, holding that "[t]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." Slip op. at 3.

These cases and others like them do not represent a creation of rights previously unknown, but rather are an acknowledgement of principles deeply rooted in American jurisprudence and its ancestor, English common law. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 2814 [6 Med.L.Rptr. 1833] (1980), Chief Justice Burger explained that at the time of adoption of the Bill of Rights, access to judicial proceedings was both commonplace and proper:

> "The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials 'before as many of the people as chuse to attend' was regarded as one of 'the inestimable advantages of a free English constitution of government.' "

Id., 448 U.S. at 575, 100 S. Ct. at 2826 (plurality opinion of Burger, C.J.) (quoting 1 Journals 106, 107).

Although *Richmond Newspapers* involved a criminal proceeding, Chief Justice Burger did observe that "historically both civil and criminal trials have been presumptively open." *Id.*, 448 U.S. at 580 n.17, 100 at 2829 n.17. The historical rationale for openness applies equally to both kinds of action:

"Sir Edward Coke declared in the early Seventeenth century that the Statute of Marlborough of 1267 required court proceedings to be held in public: 'These words [*In curia Domini Regis*] are of great importance, for *all Causes* ought to be heard, ordered, and determined before the Judges of the King's Courts *openly* in the King's Courts, *whither all persons may resort* . . .' 2 E. Coke, Institutes of the laws of England 103 (6th ed. 1681) (emphasis added).

"Writing almost 150 years later, Sir Matthew Hale not only observed that evidence is given in both civil and criminal trials 'in the open Court and in the Presence of the Parties, their Attorneys, Council, and all By-standers, and before the Judge and Jury . . . .' M. Hale, *History of The Common Law of England,* 163 (C. Gray ed. 1971), he also offered an explanation for the public nature of civil and criminal trials:

> ['] . . . The Excellency of this open Course of Evidence to the Jury in Presence of the Judge, Jury, Parties and Council, and even of the adverse Witnesses, appears in these Particulars: *1st,* That it is openly; and not private before a Commissioner or Two, and a couple of Clerks, where oftentimes Witnesses will deliver that which they will be ashamed to testify publickly.[']

"*Id.* Hale served as authority for Williams Blackstone when he explained why trials generally were conducted in public:

> [']This open examination of witnesses *viva voce,* in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law, where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal.[']

"W. Blackstone, *Commentaries* 373. Thus, more recent commentators agree that 'one of the most conspicuous features of English justice, that *all* judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial.' E. Jencks, *The Book of English Law* 73–74 (6th ed. 1967) (emphasis added)."

Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1068–69 [10 Med.L.Rptr. 1777] (3d Cir. 1984) (emphasis in original).

In addition to its crucial role in discouraging perjury and bringing out the truth, public access to the courts and their records serves several fundamental constitutional interests. It promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system. It gives the public "assurance that the proceedings were conducted fairly to all concerned." *Richmond Newspapers, supra,* 448 U.S. at 569, 100 S. Ct. at 2823 (plurality opinion of Burger, C. J.). It serves as a check on corrupt practices by exposing the judicial process to public scrutiny. Finally, because lawyers, witnesses, and judges who participate in a proceeding know their conduct will be subject to public scrutiny — either at the time of the proceeding or later through disclosure of the records — they will be more conscientious in the performance of their roles.

What has emerged in the past two decades from this centuries-old tradition of openness is the enunciation of clear rules governing access to judicial records and proceedings. The foundation for these rules is primarily the First Amendment of the United States Constitution, and, in this state, Article I, Section 9 of the South Carolina Constitution, but also the common law and statutes such as federal and state freedom of information acts. The South Carolina Constitution should provide at least as much protection for the right of public access as is established by the cases, discussed below, arising under the First Amendment and the common law, because, unlike the somewhat vague language of the First Amendment and the common law, the South Carolina Constitution states specifically, "All Courts shall be public . . . . S.C. Const. art. I, sec. 9. The Court therefore concludes that this provision of the South Carolina Constitution is an independent basis for the standards listed below, in addition to but separate from the First Amendment and the common law.

It is helpful to an understanding of the applicable rules that they be listed.

1. Any request to close a proceeding or to seal a record must be decided at a public hearing and placed on the public docket of the court sufficiently in

advance of the hearing so as to afford the public and press a reasonable opportunity to contest the motion. *In re Knight Publishing Co.*, 743 F.2d 231, 234–35 [10 Med.L.Rptr. 2379] (4th Cir. 1984); *United States v. Criden*, 675 F.2d 550, 559 [8 Med.L.Rptr. 1297] (3d Cir. 1982). Any person who appears at the motion hearing to contest closure has a right to be heard on the issue. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25, 102 S. Ct. 2613, 2621 n.25 [8 Med.L.Rptr. 1689] (1982); *Button v. Morrison* (S.C. Sup. Ct. Sept. 15, 1987) (copy attached) [omitted].[1]

2. On any motion to close a record or proceeding, there is a strong presumption in favor of openness and public access. *See, e.g., Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 114, 118 [15 Med.L.Rptr. 1901] (Fla. 1988). Thus, the person opposing access bears the burden of proof. *Davis v. Jennings*, Op. No. 23404 (S.C. Sup. Ct. May 20, 1991); *accord, e.g., Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1071 [10 Med.L.Rptr. 1777] (3d Cir. 1984); *Barron*, *supra*, at 118.

3. To overcome the presumptive right of access, the party opposing access must prove that closure is necessary to protect a compelling governmental interest. *See, e.g., Press-Enterprise v. Superior Court ("Press-Enterprise I")*, 464 U.S. 501, 510, 104 S. Ct. 819, 824 [10 Med.L.Rptr. 1161] (1984); *Globe Newspaper*, *supra*, 457 U.S. at 606–07, 102 S. Ct. at 2620.

4. If it is necessary to limit access in order to protect a compelling governmental interest, the means utilized must be narrowly tailored; that is, there must be no less restrictive alternative that is equally effective in protecting the compelling governmental interest. *See, e.g., Globe Newspaper*, *supra*, 457 U.S. at 607–08, 102 S. Ct. at 2620–21; *Steinle v. Lollis*, 279 S.C. 375, 376, 307 S.E.2d 230, 231 [9 Med.L.Rptr. 2487] (1983) (*per curiam*). The trial court must exhaust all reasonable alternatives before denying access. *Press-Enterprise Co. v. Superior Court ("Press-Enterprise II")*, 478 U.S. 1, 14, 106 S. Ct. 2735, 2743 [13 Med.L.Rptr. 1001] (1986); *Press-Enterprise I*, *supra*, 464 U.S. at 511, 104 S. Ct. at 825. If none exists, the court must use the least restrictive closure necessary to accomplish its purpose. *Barron*, *supra*, at 118.

5. Any challenged restriction of access must be based upon specific findings of the trial court arising from competent evidence and stated in the record; conclusory statements are insufficient. *See, e.g., Press-Enterprise II*, *supra*, 478 U.S. at 13, 15, 106 S. Ct. at 2743; *Press- Enterprise I*, *supra*, 464 U.S. at 510, 104 S. Ct. 824; *Button v. Morrison*, *supra*; *South Carolina Press Association v. Meek*, 281 S.C. 52, 53, 314 S.E.2d 321, 322 [10 Med.L.Rptr. 1495] (1984).

Nowhere in the cases is there any blanket exclusion of any category of information from the rigorous standards required to justify denial of access. What the cases rather clearly contemplate is an exacting inquiry on a case-by-case basis, with the presumption always in favor of openness.

That the South Carolina Family Court is not exempt from a proper request for access is beyond doubt. The South Carolina Supreme Court effectively settled this issue in *Columbia Newspapers, supra,* and *Button v. Morrison, supra.* Both cases involved Family Court proceedings and records. The former case was a criminal proceeding. The latter, a paternity action, was civil.

Other states are in accord. For example, in *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 [15 Med.L.Rptr. 1901] (Fla. 1988), the Florida Supreme Court held that

> "parties seeking a dissolution of their marriage are not entitled to a private court proceeding just because they are required to utilize the judicial system. . . . We conclude that dissolution proceedings must be treated similar[ly] to other civil proceedings, and thus the presumption of openness applies."

Id. at 119. The court then went on to open the entire record over the objection of the defendant, a state senator, that disclosure would improperly reveal "medical reports regarding one party's

[1] A person who does not appear at the original motion hearing, but who later seeks to intervene to challenge the decision on the motion, must meet the four-part test set forth in *Davis v. Jennings,* Op. No. 23404 (S.C. Sup. Ct. May 20, 1991), to demonstrate that the motion to intervene is timely. The practical effect of that test is to restrict relitigation by different intervenors once the access issue has been decided by the court in a full and fair hearing upon the original motion.

physical condition[, which t]hat party asserted . . . to justify certain actions and conduct." *Id.* In doing so, the court explained that "medical reports and history are no longer protected when the medical condition becomes an integral part of the civil proceeding." *Id.*

Accordingly, the issue at hand is not whether Family Court matters, including those relating to divorce, are somehow different or special, but rather whether the standards relating to closure have been met by those seeking closure in the case before the Court.

Mr. and Mrs. Miles both assert that they wish to keep the court records sealed in order to protect their own interests. Mr. and Mrs. Miles also assert that they seek closure to protect the interests of their two sons. Their sons, however, are both beyond the age of majority. Moreover, they are not named parties in this proceeding, and they have not appeared before the Court, either personally or through counsel, to express their positions on the issue of public access to the record. The Court, consequently, is unaware of their personal positions on this issue. Although it is thus questionable whether Mr. and Mrs. Miles have standing to assert the interests of their sons, for purposes of this Order the Court will assume that they do. The Court will further assume that the sons would prefer that there be no disclosure regarding them. They are in a different position than the parties who elected to litigate or to engage in behavior affecting the marriage of the spouses. Despite their unity of goal, all of these persons are differently situated, and, accordingly, the Court will take into account their differences in its analysis of the facts and the law.

The various arguments advanced to support sealing of the record may be reduced to the following essentials:

1. The parties agreed to seal the record;
2. The record contains statements which have not been proved in a court proceeding;
3. The record contains matters about the parties which might be embarrassing to them if disclosed and which, consequently, they assert that it was necessary to seal in order to bring about a settlement; and
4. The record contains matters about the sons of the parties which might be harmful to them if disclosed.

For the reasons discussed below, the Court concludes that none of these reasons is sufficient to justify the wholesale sealing of the record in this case under the standards enunciated above. Each argument is addressed in turn.

Agreement of the Parties To Seal the Record

The agreement of parties to a legal proceeding to seal the record, without more, is insufficient for closure. Otherwise, the parties to litigation would have the power to extinguish legal rights of constitutional proportion existing in favor of the public and the press. This is not to say that such an agreement is wholly irrelevant to the inquiry. Such an agreement may be relevant, but only to the extent that it implicates or reflects an underlying state interest. The mere fact of an agreement among private parties, however, does not provide a proper basis for closure.

Statements Not Proved in a Court Proceeding

Mr. and Mrs. Miles seek to seal the court record in part because it contains statements which have not been proved in a court proceeding. As with the previous argument, this argument advances no compelling governmental interest and, therefore, is insufficient for closure.

Pleadings by their very nature contain statements which have not been proved. Yet pleadings in civil cases were presumptively open to public inspection. *See, e.g., Shenandoah Publishing House, Inc. v. Fanning*, 235 Va. 253, 368 S.E.2d 253, 256 (1988). Many contain allegations of wrongdoing, such as fraud, assault and battery, and driving under the influence, which are every inch the equal of claims made between spouses in divorce proceedings. Indictments and informations, which similarly contain allegations of criminal wrongdoing which have not been proved, are likewise presumptively open. *See, e.g., United States v. Smith*, 776 F.2d 1104, 1111–12 [12 Med.L.Rptr. 1345] (3d Cir. 1985).

Some measure of reliability is afforded by rule 11(a) of the South Carolina Rules of Civil Procedure, which provides that the attorney's or party's signature on a pleading "constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it . . . ." The greatest protection, however, lies in open access. As already noted, the notion that people tend to be more truthful when

their words — whether spoken or written — are subject to public scrutiny is the historical rationale for open access to judicial proceedings. "[Public access] plays an important part as a security for testimonial trustworthiness . . . ." 6 J. Wigmore, *Evidence* §1834, at 435 (J. Chadbourn rev. 1976).

The Miles' argument for sealing the record on this basis also extends to affidavits filed by them.[2] In making this argument, they go too far. Like the signature of an attorney on a pleading, the signature of a party upon an affidavit represents an affirmance that the matters stated are true upon the bases stated. Moreover, it is an affirmance *under oath*, with the attendant penalties for perjury if the affidavit contains a falsehood. Further, like pleadings, affidavits are not peculiar to the Family Court. They can appear in virtually all civil proceedings and, like pleadings and other materials filed with the court, are customarily available for public inspection once they have been filed. *See, e.g., Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 252–53 [15 Med.L.Rptr. 1437] (4th Cir. 1988).

To be sure, there is a compelling state interest related to pleadings and affidavits, but it is one that is served by openness rather than secrecy. Pleadings are the mechanism by which the parties invoke the intervention of the state and command its resources to resolve differences between them that they alone could not settle. There is a right in favor of the citizens of the state to know why such action and claim upon the public treasury is necessary. Beyond this, to the extent that matters in the court record, including pleadings and affidavits, serve as bases of decision, the citizenry has a right of access to those matters as well so that it can judge for itself the correctness and propriety of those decisions.

Matters Embarrassing to the Parties

In varying degrees, we are all less than perfect; and in varying degrees, we all wish our imperfections to remain unknown. This is true regardless of whether one might be a party to a Family Court proceeding, or, for that matter, another court proceeding which might reveal an imperfection. That is a natural and understandable human urge.

The law requires that, in the contest between that urge and the right of access, the focus be not simply upon the urge, but rather upon the effect, if any, that the urge might have upon a compelling governmental interest.

In this regard, Mr. and Mrs. Miles have sought to advance three alleged such interests, all related to resolution of their differences through means other than a full trial. They suggest that because their divorce is not final, reconciliation is still possible. They say that they entered into a settlement agreement with the expectation of secrecy. And they say that continued cooperation between them will be required in order to fulfill the terms of the settlement agreement. Their position is that access is antithetical to these interests.

Their argument misconceives the nature of the interest which they must demonstrate. It is not the parties' *individual* interest that is at issue. The interest at issue is at a higher level; it is a *state* interest that takes into account what is best for society as a whole. Examined in that light, the relevant interest is not served by secrecy. Indeed, secrecy is harmful to that interest. For example, while the state certainly has an interest in preserving marriage, it is a logical presumption that couples will struggle harder to resolve their marital problems if the file in a divorce action which they commence will be open to public inspection. Once in court, they may struggle harder to arrive at a lasting settlement, short of a full-blown trial, if they know that the trial record will be open. Beyond that, the incidence of acts which typically give rise to divorce may decrease if those contemplating such conduct know that their activities will be aired in a public record which their friends and enemies alike may examine.

Although the Court is not unmindful of the embarrassment that the application of the law may sometimes cause, and in appropriate circumstances is sympathetic to those experiencing such feelings, the Court recognizes that its allegiance must be to the law, especially when, as here, it is correctly oriented. Anyone involved in a court case is susceptible to

[2] In addition to the general argument addressed above, Mr. Miles also contends that he did not controvert allegedly false statements in his wife's affidavit, because of his expectation that the record would be sealed pursuant to the parties' settlement. This argument is considered in the next section.

suffering embarrassment and potential injury to reputation. Taking an oath to tell the truth can result in awkward questions and embarrassing answers. If potential embarrassment alone were sufficient reason to close courtrooms, secrecy would be the rule and openness the exception. Public embarrassment to a litigant, therefore, is not a sufficient reason to close courtrooms and seal judicial records. *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1974 [10 Med.L.Rptr. 1777] (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165, 1179 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). This is particularly so when, as here, the litigation involves matters which may be relevant to the fitness for office of a high government official. *See Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 [15 Med.L.Rptr. 1901] (Fla. 1988).

It is not the function of this Court to decide whether private behavior is a relevant consideration for the public in selecting public officials. Nor should this Court shield from public inspection documents filed with the Court which may reflect on the personal character of a public official. It is not the role of the judiciary to dictate what information the public may consider regarding its officials. It is the right of the public to consider such information and give weight to it as the citizenry deems appropriate.

Matters Harmful to the Parties' Sons

Mr. and Mrs. Miles have asserted that the record contains information or statements which might be harmful to their sons if disclosed. The Court must determine whether this potential harm implicates a compelling governmental interest which can be effectively protected only by sealing the record.

In analyzing this argument, the Court notes that the sons are beyond the age of majority. Thus, neither can be considered a ward of the State. The Court also notes that the sons have not made a separate appearance to request that the records of their parents' divorce action be sealed. Further, it must be noted that Mr. Miles, as the Secretary of State of South Carolina, is the third ranking constitutional officer of this state and, quite clearly, an elected public official. If embarrassment or emotional trauma to the child of such a high government official were a state interest of sufficient magnitude to override the constitutional right of access, the public could routinely be denied knowledge of vital information concerning government officials who become involved in litigation. Such a result would not only reverse the presumption of access, but also thwart one of the most important policies underlying the constitutional rights of free speech and press — promoting full and open discussion of all matters which may bear upon a public official's fitness for office.

Moreover, even if there were a compelling governmental interest relating to the children, the Miles must also prove that sealing the entire record is a narrowly tailored measure to protect that interest. The file in this action contains only a few statements which are *actually about the children*. Although it is possible that Mr. and Mrs. Miles' sons may be displeased or embarrassed over disclosures *concerning their parents*, that is insufficient to justify sealing the entire file: their expectations of privacy concerning not themselves but their parents is not an interest of such proportions as to be a compelling governmental interest that can override the First Amendment and the South Carolina constitutional rights of access. Thus, the Miles have failed to demonstrate why any state interest in protecting their sons from embarrassment could not be served effectively by the less restrictive alternative of redacting those statements which *specifically mention the children*. *See Press-Enterprise Co. v. Superior Court ("Press-Enterprise I")*, 464 U.S. 501, 513, 104 S. Ct. 819, 825–26 [10 Med.L.Rptr. 1161] (1984) (court should redact portions of transcript of jury voir dire which concern embarrassing private information about jurors rather than seal entire transcript). This method of protecting the privacy of the sons was not proposed to the Court prior to the issuance of the two closure orders in this case.

Since the sons were not represented when the record was sealed, the Court will not disclose information regarding them without allowing them the opportunity to be heard. However, no disclosure regarding them will be necessary unless an intervenor requests an additional hearing regarding access to information about these non-litigants.

* * *

In arriving at its decision, the Court has sought to bring dispassionate logic to rules of law which, though simple to

state, are not without difficulty in their application. The march of time changes us all. At the beginning of this century, divorce was uncommon. Now approximately half of all marriages do not endure. The result is that domestic relations courts, as they put an end to marriages, divide marital property, and determine who shall have custody of children, are undertaking a greater role than ever before in our society. For this reason, the files of the Family Court should not be subject to special shielding. The law of access to judicial records and proceedings, set forth above, must apply to this Court as it does to others.

NOW, THEREFORE, IT IS ORDERED, that:

(1) the seal upon the judicial records in this matter is hereby lifted, subject to prior redaction by the Court of statements specifically about the Miles' sons;

(2) if any intervenor is aggrieved by the redaction of statements regarding the sons, he shall notify the Court and opposing counsel of record within ten days from the receipt of written notice of entry of this order, and this Court shall conduct an evidentiary hearing to determine whether the redacted matters shall remain sealed;

(3) the evidentiary hearing, if required, shall be open to the Miles and their attorneys, the Miles' sons and their counsel, and counsel for the intervenors; otherwise the hearing shall be closed to avoid mooting the issue of openness with respect to the limited matters concerning the sons to be considered at that hearing;

(4) if no such notice is filed by an intervenor within ten days from the receipt of written notice of entry of this order, this order shall be deemed final on that issue as well as all other issues addressed in this order on the tenth day following the receipt of written notice of the entry of this order;

(5) Since an immediate lifting of the seal on the records in this case would effectively negate the original parties' right of appeal, the record shall remain sealed until forty days from the date of receipt of written notice of entry of this order. (This will allow the intervenors ten days to request a hearing if aggrieved by the redaction of information regarding the sons, and will allow thirty days beyond that for any party to file notice of appeal.)

AND IT IS SO ORDERED.

SILVER SCREEN MANAGEMENT SERVICES INC. v. FORBES INC.

New York Supreme Court
New York County

SILVER SCREEN MANAGEMENT SERVICES INC., SILVER SCREEN MANAGEMENT INC., SILVER SCREEN PARTNERS IV, L.P., and ROLAND W. BETTS, v. FORBES INC., MALCOLM FORBES, JR., LAURA JERESKI, and STEVE LAWRENCE, No. 07271/88, November 25, 1991

REGULATION OF MEDIA CONTENT

Defamation—Standard of liability—Gross irresponsibility (§11.3004)

Defamation—Privilege—Fair comment/opinion (§11.4502)

Financial magazine article which described financing of movie company's movies by plaintiff limited partnerships, and which concluded that investment in movie company's stock would be more profitable than investment in partnerships, is not defamatory, since article was researched and written using appropriate standards of information gathering and thus was not published with gross irresponsibility, and since article's financial criticism constitutes protected statements of opinion.

Libel action against magazine. On defendants' motion for summary judgment. Granted.

Paul R. Grand, of Morvillo, Abramovitz, Grand, Iason & Silberberg, New York, N.Y., for plaintiffs.

Tennyson Schad and Peter L. Skolnik, of Norwick & Shad, New York, for defendants.

Full Text of Opinion

Fingerhood, J.:

An article entitled "So you want to be in pictures," in Forbes Magazine, described the financing of Walt Disney Co.'s motion pictures by Silver Screen limited partnerships and concluded that

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Carver County, MN

EXHIBIT 4

Commission's failure to request certification below. For the reasons that follow, we now certify the question on our own motion.

First, the state law issues in this case may be determinative. We have found no controlling authority in the SJC's decisions, and "the course [the] state court[] would take" is *not* "reasonably clear." *Nieves* v. *University of Puerto Rico*, 7 F.3d 270, 275 (1st Cir. 1993) (quoting *Porter* v. *Nutter*, 913 F.2d 37, 41 n.4 (1st Cir. 1990)).

Second, significant concerns of federal-state comity have been raised here. Soon after the publication distribution guideline was adopted, the Commission requested that all newsracks be removed from Beacon Hill. The plaintiffs brought this action without having filed applications for certificates of appropriateness. Although there is no doubt that the applications would have been denied, the Massachusetts courts were deprived of an opportunity to review the decisions of the Commission for factual and legal sufficiency. Where, as here, the parties have bypassed a state procedure that would have permitted a state court to decide an issue of state law on which there is no controlling authority, certification of the issue serves our "concern to promote federal-state comity . . . ." *Fischer*, 857 F.2d at 7 n.2 (quoting *White* v. *Edgar*, 320 A.2d 668, 675 (Me. 1974)).

Third, the delays of certification will not prejudice the parties. The Commission itself, albeit belatedly, moved for certification. The plaintiffs' newsracks will not be disturbed unless there is a final judgment by this court reversing the judgment below. We therefore need not rush to decide a difficult First Amendment issue in order to prevent the chilling of protected speech.

Fourth, the state law issues in this case may have ramifications for other governmental entities that derive their rulemaking authority from similar statutory language. Home rule is a matter of peculiarly state and local concern. Where possible, state courts should rule in the first instance on the scope of local governmental authority.

Although we are rarely "receptive to . . . requests for certification newly asserted on appeal," *Nieves*, 7 F.3d at 278, in an appropriate case we may certify an issue of state law on our own motion. *See Maine Drilling and Blasting, Inc.* v. *Insurance Co. of North Am.*, No. 93-2230, slip op. at 6 (1st Cir. Aug. 29, 1994). We do so here.

A question certified to the Supreme Judicial Court of Massachusetts, with jurisdiction retained pending that determination.

CERTIFICATION

For the reasons discussed in *Globe Newspaper Co., et al.* v. *Beacon Hill Architectural Commission*, No. 94-1538, a question of Massachusetts law on which we are unable to find clear, controlling precedent in the decisions of the Supreme Judicial Court of Massachusetts may be determinative in this case. Accordingly, we certify the following question to the Supreme Judicial Court of Massachusetts pursuant to its Rule 1:03 —

> Did the Beacon Hill Architectural Commission have authority under 1955 Mass. Acts c. 616 (as amended) to adopt the "Street Furniture Guideline"?

We have stated and discussed the facts relevant to the question certified in *Globe Newspaper Co.* We, of course, welcome the advice or comment of the Supreme Judicial Court on any other question of Massachusetts law it deems material to this case.

The Clerk will transmit this question and our opinion in this case, along with copies of the briefs, exhibits, and appendix to the Supreme Judicial Court of Massachusetts.

FRIEDERICHS v. KINNEY & LANGE

Minnesota District Court
Fourth Judicial District
Hennepin County

NORMAN P. FRIEDERICHS v. KINNEY & LANGE, JO FAIRBAIRN, AND DAVID FAIRBAIRN; MINNEAPOLIS STAR TRIBUNE, Intervenor, No. CT 94-004038, August 22, 1994

NEWSGATHERING

1. Judicial review — In general (§66.01)

Newspaper can intervene in civil action in order to challenge Minnesota court order sealing file, since newspaper

has interest in ready access to otherwise-public documents held by court.

2. Access to records — Judicial — Civil — In general (§38.1505.01)

Sealing of court file in civil action brought against law firm, including that portion of complaint, since dismissed, alleging defendants' unethical conduct, is not warranted, since such records are subject to both common law and First Amendment right of access, and since defendants have failed to show compelling governmental interest warranting closure.

Newspaper moves to intervene in civil action in order to challenge order sealing court file.

Motion to intervene granted; file ordered unsealed.

Marshall H. Tanick, of Mansfield & Tanick, Minneapolis, Minn., for plaintiff.

Donald E. Horton, of Horton and Associates, Minneapolis, for defendants.

John P. Borger, of Faegre & Benson, Minneapolis, for intervenor.

Full Text of Opinion

Alton, J.:

This matter came on for hearing before the undersigned, Ann L. Alton, Judge of District Court, on May 24, 1994 upon defendants' motion to strike and/or dismiss Count XII of plaintiff's Complaint, plaintiff's motion to seek a Temporary Restraining Order, dissolve defendants' Temporary Restraining Order and expedite discovery, and the Star Tribune's motion to intervene and unseal the file.

Marshall Tanick appeared on behalf of the plaintiff.

Don Horton appeared on behalf of the defendants.

John Borger appeared on behalf of the Intervenor, the Minneapolis Star Tribune.

Based upon all the files, records and proceedings herein, and upon the arguments of counsel, this Court makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1) Plaintiff worked for defendant Kinney & Lange from July of 1990 until he was terminated in September of 1993.

2) The plaintiff commenced this action on March 16, 1994 when he served the defendants with a Summons and Complaint.

3) Plaintiff has asserted a number of claims against the defendants, including claims of breach of contract, tortious interference with a deferred compensation agreement, breach of fiduciary duty, breach of Minn. Stat. §302A.751, wrongful termination, interference with business, unfair employment practices, aiding and abetting an unfair employment practice, tortious interference with an insurance contract, unethical conduct, and interference with contractual relationships. All of the claims in the Complaint, with the exception of the claim of "unethical conduct," relate to either plaintiff's termination, or one of three separate agreements entered into during his employment with defendant Kinney & Lange. These agreements include a deferred compensation plan, a stock purchase agreement, and an insurance contract.

4) Count XII of the Complaint contains allegations that defendant Jo Fairbairn and defendant David Fairbairn committed acts which constitute unethical conduct. Defendants obtained a temporary restraining order to seal the file because of these allegations in Count XII.

CONCLUSIONS OF LAW
MOTION TO INTERVENE

1) When challenging a court's order sealing a civil file, a media representative or other person not a party to the original action may move to intervene as of right under Minn. R. Civ. P. 24.01. *Minneapolis Star & Tribune v. Schumacher*, 392 N.W.2d 197, 207 [13 Med.L.Rptr. 1704] (Minn. 1986).

2) "Rule 24.01 establishes a four part test that a non-party must meet before being allowed to intervene as of right." *Id.* at 207.

3) The non-party must show: 1) the motion to intervene was timely; 2) they have an interest in the action; 3) disposition of the court's action may impair or impede the party's ability to protect that interest; and 4) the non-party is not adequately represented by existing parties.

4) This Court finds the Star Tribune's motion was timely.

[1] 5) This Court finds the Star Tribune has an interest in this case and that

interest is identical to that of the public: ready access to otherwise public documents held by the courts.

6) This Court's order sealing the file has prevented the Star Tribune and the public from obtaining information about the issues.

7) This interest is not represented by any party in the lawsuit.

8) Therefore, the Star Tribune's motion to intervene for the limited purpose of unsealing the Court file shall be granted.

DISSOLUTION OF TEMPORARY RESTRAINING ORDERS

9) Under Rule 2 of the Supreme Court Rules of Public Access to Records of the Judicial Branch, the public and the media have a legally protected right of access to court files.

10) All court documents are presumptively open to public inspection or copying at all times. *See* Rule 2, Rules of Public Access to Records of the Judicial Branch. *See also Nixon v. Warner Communications, Inc.*, 435 U.S. 589 [3 Med.L.Rptr. 2074] (1977); *Schumacher, supra*, (common law right of access to civil court records).

11) "A trial is a public event. What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 [1 Med.L.Rptr. 1310] (1947).

12) This Court finds, partnership disputes are no different from many other, oftentimes highly personal, occasions in which individuals avail themselves of the courts.

13) In fact, partnership disputes usually are less disruptive than the emotional issues which can arise in divorce proceedings, yet even divorce proceedings are subject to the presumption of openness. *Lund v. Lund*, 20 Med. L. Rptr. 1775 (Minn. Ct. App. 1992); *Barron v. Florida Freedom Newspapers*, 531 So.2d 113, 119 [15 Med.L.Rptr. 1901] (Fla. 1988).

14) As the Minnesota Supreme Court held in *Schumacher*: "In order to overcome the presumption in favor of access, a party must show *strong countervailing reasons* why access should be restricted." *Supra*, at 205–206 (emphasis added).

[2] 15) Although this Court has dismissed Count XII, it has not made a determination as to the truth or falsity of the allegations. (See discussions below.) Defendants have not established that the allegations are scandalous or were brought merely to damage defendants' reputations. Therefore, this Court finds that defendants have not established a strong countervailing reason to restrict access to Count XII. Defendants do not assert nor does this Court find any reason to seal the remainder of the file.

16) In addition to the common law right of access, the United States Supreme Court has held repeatedly and emphatically that the public and news media possess a qualified right of access under the First Amendment of the Constitution to every stage of criminal proceedings, and to documents filed in connection with those proceedings. The Supreme Court has also indicated this right also applies to civil proceedings as well. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 [6 Med.L.Rptr. 1833] (1980).

17) The *Schumacher* court emphasized that its decision to restrict access to settlement documents and transcripts did not apply to other civil records. *Id.* at 203. Indeed, the court cited a number of federal circuit courts which have expressly recognized a constitutional right of access to civil court proceedings and documents. *See Id.* at 203, *citing Wilson v. American Motors Corp.*, 759 F.2d 1568 [11 Med.L.Rptr. 2008] (11th Cir. 1985); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 [10 Med.L.Rptr. 1593] (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

18) Therefore, this court finds that this constitutional right of access applies to civil court records as well.

19) The *Schumacher* court stated the constitutional standard as follows:

> In order to overcome the presumption in favor of access [to civil court records], a party must demonstrate that a *compelling governmental interest* exists and that the restriction on access is *narrowly tailored* to meet this governmental interest.

Id., at 203 (emphasis added).

20) The constitutional standard set forth in *Schumacher* applies in the present instance.

21) Historically, civil lawsuits between participants in a business enterprise by definition have involved the state as a third party and have been conducted in the public's courts.

22) Therefore, the parties must demonstrate a compelling governmental in-

terest justifying continuation of the seal, and an absence of alternatives to closure.

23) In *Schumacher*, the court noted that "simply because a party requests that access be restricted does not mean that the court may automatically do so. The court must make its own legal determination in each case." *Id.* at 206.

24) This Court finds that no compelling governmental interest exists.

25) Therefore, this court finds that the seal on this file shall be removed under both the common law right of access and the Fist Amendment constitutional right of access.

DECLARATORY JUDGMENT

26) The Minnesota Rules of Civil Procedure allow a defense of failure to state a claim upon which relief can be granted. Minn. R. Civ. Pro. 12.02. A court may dismiss a claim pursuant to a Rule 12 motion if the complaint fails to set forth a legally sufficient claim for relief. *Royal Realty Co. v. Levin*, 244 Minn. 288, 290, 69 N.W.2d 667, 670 (1955).

27) A motion to dismiss under Rule 12.02 for failure to state a claim upon which relief can be granted tests only the sufficiency of the pleadings. D. Herr & R. Haydock, 1 Minnesota Practice §12.9, at 260–61 (1985).

28) Moreover, on a motion for failure to state a claim for relief, the Court may not go outside the pleadings. *Northern States Power Co. v. Franklin*, 265 Minn. 391, 394–95, 122 N.W.2d 26, 28 (1963).

29) In deciding a motion to dismiss for failure to state a claim for relief, it is immaterial whether or not the plaintiff can prove the facts alleged. *Royal Realty* at 290. Rather, the function of a motion to dismiss for failure to state a claim is to test the law of the claim, not the facts which support it. *United States v. Marisol Inc.*, 725 F.Supp. 833, 836 (D.C. Pa. 1989). In fact, a pleading will only be dismissed if there are no possible facts that could be produced, consistent with the pleadings, to support the claim and would entitle plaintiff to the relief requested. *Northern States Power* at 395.

30) The *Marisol* court held that motions to strike are "often viewed with disfavor," however, they should be granted to prevent parties from spending unnecessary time and money "litigating issues which would not affect the outcome of the case." *Id.* at 836.

31) In the case at bar, the plaintiff alleges Count XII of his Complaint as a claim for "Unethical Conduct" and asserts relief under the Uniform Declaratory Judgments Act. The plaintiff asserts that he is entitled to a declaration that he is not legally liable or responsible for any potential liability the defendants may face for violations of law or rules of professional conduct.

32) The Uniform Declaratory Judgments Act allows the court, within its respective jurisdiction, to declare rights, status, and other legal relations of parties. Minn. Stat. §555.01.

33) Judgments issued under the Act declare the existence of rights in doubt or uncertainty, rather than create new rights. *Ketterer v. Independent School Dist., No. 1*, 248 Minn. 212, 27, 79 N.W.2d 428, 439 (1956).

34) The policy behind the Act is to allow parties to determine certain rights and liabilities pertaining to an *actual controversy* [between the parties] before it leads to repudiation of obligations, invasions of rights, and commissions of wrongs. *Culligan Soft Water Serv. Inc. v. Culligan Int'l. Co.*, 288 N.W.2d 213, 215–16 (Minn. 1979) (emphasis added).

35) The Act is directed at the "ripeness" of a dispute. *See McKee v. Likins*, 261 N.W.2d 566, 569–70 (Minn. 1977).

36) "[T]he question in each case is whether the facts alleged, under all of the circumstances, show that there is a substantial, [justiciable] controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Holiday Acres No. 3 v. Midwest Federal S & L*, 271 N.W.2d 445, 448 (Minn. 1978) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 279 273, 61 S.Ct. 510, 512, 85 L.Ed. 8256, 828–29 (1941).

37) There *must* be a justiciable controversy between the parties before the court has jurisdiction to render a declaratory judgment. *St. Paul Area of Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 587 (Minn. 1977); *Connor v. Township of Chanhassen*, 249 Minn. 205, 208 81 N.W.2d 789, 793 (1957).

38) Mere differences of opinion with respect to rights of parties do not constitute a "justiciable controversy." *Beatty v. Winona Housing & Redevelopment Auth.*, 277 Minn. 76, 83, 151 N.W.2d 584, 589 (Minn. 1967) (quoting *Seiz v. Citizens Pure Ice Co.*, 107 Minn. 177, 281, 290 N. 802, 804) (1940).

39) The plaintiff has asserted that he is entitled to a declaration that he is not legally liable or responsible for any of the defendants' alleged violations of law or rules of professional conduct. However, there are no charges of professional misconduct or violations of the law pending against any of the defendants in this case, and the plaintiff faces no liability for such alleged violations. Therefore, this Court finds there is no actual justiciable controversy between the parties regarding the alleged unethical conduct which would entitle the plaintiff to a declaratory judgment.

40) Secondly, this Court finds there is no urgency or necessity to warrant the issue of a declaratory judgment. *See Holiday Acres*, 271 N.W.2d at 448.

41) In effect, the plaintiff is seeking to obtain an advisory opinion from the court regarding his potential liability. However, courts refrain from giving advisory opinions in hypothetical situations. *Cass County v. United States*, 570 F.2d 737, 741 (8th Cir. 1978).

42) "[I]ssues which have no existence other than in the realm of future possibility are purely hypothetical and are not justiciable." *Beatty* at 85.

43) Courts have declined to determine future rights and will wait until the event giving rise to the rights has occurred. *Seiz* at 283.

44) Thus, judicial power under the Act does not extend to a determination of abstract questions. *Cass County* at 740. The *Cass* Court explained the reason to avoid premature cases is to prevent the Courts from making decisions which will have unknown ramifications in other situations.

45) The plaintiff has asserted that there exists a dispute as to his potential liability for the defendants' alleged violations of law and rules of professional conduct. However, since there are no such charges or allegations actually pending against the defendants, the plaintiff seeks purely hypothetical relief. The plaintiff has requested this Court to render a decision in the event that such an issue may arise between the parties in this case in the future. This Court finds it cannot render such a decision because it will have unknown ramifications in other situations.

46) The fact that the plaintiff believes he should not be held liable, should such an accusation actually arise against the defendants, does not remove his claim from the abstract. *See Beatty* at 83; *Holiday Acres* at 447.

47) In the case at bar, this Court finds the plaintiff's claim is abstract and does not meet the threshold requirement necessary to come within the purview of the Declaratory Judgment Act.

48) The plaintiff's request for a present determination of *potential* future liability does not entitle him to a declaratory judgment and he is not entitled to relief under the Declaratory Judgments Act.

49) This Court finds that the plaintiff has not alleged nor are there any facts which the plaintiff could produce that would entitle him to such relief. *See Royal Realty*, 69 N.W.2d at 270; *Marisol Inc.*, 725 F.Supp. at 836.

50) Thus, as a matter of law, the plaintiff's claim of "Unethical Conduct" in Count XII of his Complaint fails to state a claim upon which relief can be granted and should be dismissed.

PROFESSIONAL RESPONSIBILITY

51) While this Court has dismissed Count XII, it firmly believes the allegations contained in the Complaint are very serious. This Court recognizes that the plaintiff and defendants are all attorneys and therefore are *all* bound by the Rules of Professional Conduct. This Court asserts that if *any* of these attorneys know of any unethical conduct, that individual is *required* to report such conduct to the Board of Professional Responsibility. Rule 8.3 of the Minnesota Rules of Professional Conduct is very clear that this duty to report is *mandatory*.

ORDER

1) The Star Tribune's Motion to intervene for the limited purpose of moving to unseal the file is hereby granted.

2) The plaintiff's and Star Tribune's motions to dissolve the Temporary Restraining Order is hereby granted. This file shall be unsealed in its entirety.

3) Plaintiff's claim alleged in Count XII of this Complaint is hereby dismissed.

4) Discovery shall proceed pursuant to this Court's ruling from the bench and pursuant to this Courts Amended Scheduling Order.

5) Defendant's are hereby ordered to provide an accounting to plaintiff, and furnish plaintiff with a written statement

setting forth the reason(s) for his termination, pursuant to this Courts ruling from the bench.

HARTWIG v. NBC

U.S. District Court
Northern District of Ohio

EARL V. HARTWIG, et al., v. NATIONAL BROADCASTING CO., No. 1:92 CV 0063, July 18, 1994

REGULATION OF MEDIA CONTENT

Defamation—Related causes of action—Intentional infliction of emotional distress (§11.5803)

Immediate family members of Navy sailor killed in explosion on board ship can bring claim for intentional infliction of emotional distress against television network for broadcast allegedly reporting that sailor had purposefully caused explosion and implying that sailor was homosexual, but plaintiffs' failure to provide any proof of serious emotional distress suffered by them, or to provide any evidence of malicious intent by network, warrants summary judgment for network.

Action for intentional infliction of emotional distress against television network. On defendant's motion for summary judgment.

Granted.

John J. Lynch III, of Vandeveer Garzia, Birmingham, Mich., and Kreig J. Brusnahan, Cleveland, Ohio, for plaintiff.

Loretta Hagopian Garrison, David L. Marburger, and Louis A. Columbo, of Baker & Hostetler, Cleveland; Bruce W. Sanford, of Baker & Hostetler, Washington, D.C.; and Anne H. Egerton, National Broadcasting Co., Burbank, Calif., for defendant.

Full Text of Opinion

Wells, J.:

I. INTRODUCTION

In December, 1991, Plaintiffs Earl V. Hartwig, Evelyn S. Hartwig, Kathleen Hartwig Kubucina, and Cynthia Werthmuller filed suit against National Broadcasting Company ("NBC") in Cuyahoga County Common Pleas Court in Cleveland, Ohio. Plaintiffs are immediate family members of Clayton Hartwig, a Navy sailor killed in an explosion on the U.S.S. Iowa ("Iowa") on April 19, 1989.

Plaintiffs claim intentional infliction of emotional distress by NBC in news coverage of the Iowa explosion on May 24 and 25, and July 18, 1989 and a statement by NBC Pentagon Correspondent Fred Francis ("Francis") published in *USA Today* on October 22, 1991. Plaintiffs allege that NBC reported that Clayton Hartwig purposefully caused the Iowa explosion to commit suicide. They complain NBC implied Clayton Hartwig was homosexual.

Plaintiffs also claim NBC publicized the following false information: 1) a May 24, 1989, NBC report that the "Hartwig family" informed NBC news that Clayton Hartwig threatened suicide at age 17 when a relationship ended; 2) a July 18, 1989, NBC report that Clayton Hartwig's shipmate, David Smith, saw a bomb timer in Clayton Hartwig's locker; and, 3) an October 22, 1989, *USA Today* interview in which Francis stated that the United States Navy "still believes" Clayton Hartwig caused the Iowa explosion. Plaintiffs request $25,000 in compensatory and $10,000,000 in punitive damages from NBC.

NBC removed the case to the United States District Court for the Northern District of Ohio where the case was assigned to Judge Alvin I. Krenzler. Following Judge Krenzler's retirement, the case was supervised by Chief Judge Thomas D. Lambros. The case was transferred to the docket of Judge Lesley Brooks Wells in February, 1994.

In a September 28, 1992 Order (Docket No. 20), Judge Lambros denied NBC's Motion to Dismiss. Judge Lambros explained that issues raised in NBC's Motion to Dismiss would be more appropriately addressed in a summary judgment motion. In November, 1992, NBC filed a Motion for Summary Judgment with a number of attachments (Docket No. 22, 29, 24, and 25). Plaintiffs filed a response and a number of exhibits (Docket No. 30 and 31). A reply by NBC (Docket No. 34) followed.

The Court has considered the legal arguments, affidavits, and exhibits presented by both parties. As a matter of

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EXHIBIT 5

STATE OF MINNESOTA FILED DISTRICT COURT

COUNTY OF HENNEPIN DEC 27 PM 3:4 FOURTH JUDICIAL DISTRICT

General Mills, Inc.,

Plaintiff,

vs.

Grist Mill Co. and
Paul J. Whalen,

Defendants.

ORDER ON MOTION TO PROCEED IN CAMERA, TO INTERVENE AND TO MODIFY SEALING ORDER

File No. 93-21913

The above-entitled matter came before the undersigned Judge of District Court for hearing on several motions on December 1, 1994.

Plaintiff was represented by Alan G. Carlson, Esq. and Cole Fauver, Esq.; and by Marshall H. Tanick, Esq. and Daniel R. Kelly, Esq. on the motion to intervene.

Defendant Whalen was represented by Terry Quinn, Esq. and Michael Reynolds, Esq. for Brad A. Schreiber, Esq., and by Michael Whalen, Esq.

Cowles Media Company d/b/a Star & Tribune was represented by John P. Borger, Esq.

Defendant Grist Mill Co. was dismissed as a party on January 13, 1994.

Based upon the file, record, and proceedings herein, the Court finds as follows:

PROCEDURAL HISTORY

This matter was originally assigned to the Honorable Peter Lindberg, Judge of District Court. When Cowles Media d/b/a Minneapolis Star & Tribune ("Star Tribune") moved to intervene, Judge Lindberg found it necessary to recuse himself. The matter was then assigned to this Court on November 7, 1994.

This entire file is currently under seal per orders of Judge Lindberg dated December 29, 1993, March 3, 1994, June 13, 1994 and June 29, 1994.

At the time the case was assigned to this Court, numerous motions were pending:

1. Motions by both parties for summary judgment and a motion by Defendant Whalen to continue the hearing on Plaintiff's motion for summary judgment;

2. Plaintiff's motion to depose Defendant Whalen's experts;

3. Plaintiff's motion to extend discovery to December 16, 1994;

4. Plaintiff's motion to compel answers to interrogatories;

5. Defendant Whalen's motion to strike or quash the notice of depositions and subpoenas of the testimonial experts;

6. Star Tribune's motion to intervene and modify the sealing order;

7. Plaintiff's motion to hear the motion to intervene in camera.

8. Plaintiff's motion for leave to file its First Amended Reply, due to an inadvertent omission.

After a discussion in chambers, it became apparent that the complicated nature of the case and the change in judicial officer assignment necessitated an extension of the discovery deadline previously set for October 31, 1994 by Judge Lindberg.

The discovery deadline is, therefore, extended to March 1, 1995; the Court understands this is a date requested by, and mutually acceptable to, all parties.

With the discovery extension it is the Court's understanding that 1) Motions 2, 3, 4, and 5 listed above no longer need to be heard and 2) the summary judgment motions (#1) will be rescheduled.

The only issues remaining before the Court are #6, #7, and #8, respectively, the motion to intervene/modify the sealing order, the motion to proceed in camera, and the motion to amend.

FINDINGS OF FACT

I. Whether Plaintiff may file Plaintiff's First Amended Reply to plead to the allegations of paragraphs 49 through 58 of Defendant Whalen's Third Counterclaim.

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1. The Court finds that Plaintiff's failure to reply to Paragraphs 49-58 (of Defendant Whalen's Third Counterclaim) was inadvertence on the part of Plaintiff's counsel.

2. Defendant Whalen has shown no prejudice if Plaintiff is allowed to amend.

3. Therefore, Plaintiff's motion is GRANTED and it may file the First Amended Reply.

II. **Whether the motion to intervene should be held in camera.**

4. Plaintiff maintained that an in camera proceeding was necessary to protect its trade secrets. Intervenor Star Tribune argued that its motion to intervene did not require such protection. Defendant Whalen joined in the Star Tribune's argument.

5. The Court decided to proceed with caution and have a closed hearing on the motion to intervene, for the following reasons: A) the entire file had already been sealed by the previous judge assigned to this case; B) trade secrets were allegedly involved, and C) the Court wanted to be thoroughly acquainted with case issues.

6. The Court also finds there was no prejudice to any party if the motion were held in camera.

III. **Whether the Star Tribune may intervene as of right in accordance with Minn.R.Civ.P. 24.01.**

7. Per its Memorandum, the Star Tribune seeks intervention for the limited purpose of gaining access to the records in this matter, not to challenge any of the claims or defenses of the existing parties or to otherwise engage in the underlying dispute. As the Star Tribune points out, General Mills is one of the largest corporate businesses and employers in Minnesota and the public would have an understandable interest in any lawsuits in which it was involved.

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8. In a subsequent letter to the Court, filed December 16, 1994, the Star Tribune reiterated:

> "Recent events have heightened both the public interest and the urgency of access to the court file in this action....
>
> On December 14, General Mills announced plant to split its food and restaurant businesses....
>
> The present lawsuit, involving allegations of trade secrets and the activities of a former employee who participated in one of the company's key products, has obvious potential for being of enormous interest to shareholders, potential shareholders, and the general public....
>
> In arguing to total secrecy, less than two weeks before announcing this corporate restructuring, the company appears to have been engaged in deceptive game-playing not only with the public, but also with the court." (Letter from John P. Borger to the Court, dated December 14, 1994).

9. The Court takes judicial notice of the extensive media coverage given to the recent announcements of General Mills, and recognizes "front page" coverage, literally on the front page of the Star Tribune, as well as extensive front page coverage in the Business Section of the Star Tribune.

10. In a reply letter (dated December 21, 1994) to the Star Tribune's December 16, 1994 letter, General Mills counters that its:

> ...recent reorganization evidences that General Mills, as a responsible corporate citizen, is more than willing to furnish the public with information that is legitimately in the public domain. It ought not be "punished" for doing so by being divested of its actual (or even "alleged") trade secrets involved in this case.

The suggestion that this Court would divest a party of legitimate trade secrets as a "punishment" when the laws of this state clearly direct courts to protect trade secrets and alleged trade secrets, is not well-received by the Court. This Court has sworn to uphold the laws of this state and strives to apply them fairly to all parties who come before it.

11. Plaintiff General Mills claims that this is a trade secrets case and is suing Defendant for breach of contract, misappropriation of confidential documents, threatened misappropriation of trade secrets, and threatened breach of a confidentiality agreement. Plaintiff claims that some of its trade secrets are "inextricably interwoven" and "rife" among all the court papers. Plaintiff also argues that the issue of sealing the file has already been before Judge Lindberg three times and the issue should not be continuously re-litigated.

12. Defendant Whalen joins in the arguments of the Star Tribune and maintains this is not a case about trade secrets, but is an employment dispute between Plaintiff and Defendant Whalen. Defendant Whalen maintains that General Mills is trying to keep the lawsuit out of the public eye because it would bring to light its alleged mistreatment of Defendant Whalen. Defendant denies Plaintiff's allegations and has counterclaimed for intentional infliction of emotional distress and abuse of process.

13. The best method for challenging an order to seal a court file by the media is to move for intervention as of right. Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 207 (Minn. 1986)(hereinafter Schumacher).

14. Minn.R.Civ.P. 24.01 establishes a 4-part test that a non-party must meet before being allowed to intervene as of right;

> (1) a timely application for intervention;
>
> (2) an interest relating to the property or transaction which is the subject of the action;
>
> (3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and
>
> (4) a showing that the party is not adequately represented by the existing parties.

(1). Timeliness: Timeliness is based upon the particular circumstances involved. Id. The Complaint in this matter was filed December 29, 1993; the Court was informed that

this case file was originally sealed ex parte within hours of the Complaint being filed). In mid-September 1994, the Star Tribune news reporter who covers the local and national food industry, was making a routine scan of the court docket lists, and noticed a reference to the present lawsuit. The reporter immediately tried to obtain access to the file, but the file was sealed and counsel for the parties would provide no further information to the Star Tribune. The Star Tribune filed its motion to intervene on or about November 4, 1994. By attempting to intervene quickly upon learning the existence of this lawsuit, the Court finds that the Star Tribune has made a timely application for intervention.

(2). Interest: The Star Tribune maintains it possesses such an interest by virtue of its common law and constitutional right of access to records of the judiciary, citing Schumacher.

The Court finds the Star Tribune has in interest in this case and that interest is identical to that of the public, i.e. ready access to otherwise public documents held by the courts. The Star Tribune's legally protected interest is found in the public's right to access under Rule 2 of the Supreme Court Rules of Public access to Records for the Judicial Branch. Baloga v. Maccabee, 1992 WL 455440 (Minn.Dist.Ct.) (attached).

(3). Impairment of interest: The Star Tribune argues that the sealing order, by its very nature, impairs or impedes the interest of the public and the media in the "most burdensome manner." Obviously, with the entire file sealed, neither the public nor the media will know anything about a lawsuit involving a major corporation in this state. It is undisputed that a common law right to inspect and copy civil court records exists. Id. at 202. The right of inspection serves to produce an informed and enlightened public opinion. Id.

The Court finds that the interest of the Star Tribune is impaired and impeded if it is not allowed to intervene.

(4). Adequate representation: Plaintiff opposes intervention, therefore, it cannot represent the Star Tribune's

interest. Defendant Whalen does not oppose the Star Tribune's intervention, however, Defendant Whalen's interest in the lawsuit is not the same as the Star Tribune's. Only the intervenor has the singular interest of the public's right to open access of the court records. Baloga v. Maccabee, 1992 WL 455440 (Minn.Dist.Ct.).

The Court finds that neither Plaintiff or Defendant Whalen adequately represent the Star Tribune's interests in this case.

15. THEREFORE, the Court finds that intervenor, the Star Tribune, meets the test under Minn.R.Civ.P. 24.01, and its motion to intervene for the limited purpose of challenging the orders sealing the files is GRANTED.

IV. Whether the orders sealing the file should be lifted or modified.

16. This Court will zealously protect all of Plaintiff's trade secrets, in conformity with Minn. Stat. § 325C.01-.08 (the Uniform Trade Secrets Act).

17. Plaintiff wants access restricted in order to protect trade secrets it claims permeate the file.

18. Plaintiff claims, in its reply letter of December 21, 1994, that "Judge Lindberg has previously indicated [that] important trade secrets [are in] this file which are necessarily intertwined throughout the materials" and that trade secrets "have been determined to exist as a matter of law by Judge Lindberg [in his Memorandum Order of June 29, 1994]." This simply is not true. In none of Judge Lindberg's protective orders has he said trade secrets or alleged trade secrets are in the file. In his June 29, 1994 Order and Memorandum, Judge Lindberg only stated:

> Plaintiff has demonstrated to this Court that documents and information relating to the production of ["X"] cereal are trade secrets per Minn. Stat. § 325C., and that Defendant may have misappropriated them.

This Court has no trouble with the assertion that the method/formula for producing "X" cereal constitutes a trade secret,

however, that does not mean the production information is in the file.

19. The Plaintiff's right of protection under the Uniform Trade Secrets Act must be balanced with the rights of the Intervenor. Because of that balancing of interests, this Court must review the prior orders of Judge Lindberg sealing the entire file in this case; those ordered were issued December 29, 1993, March 3, 1994, June 13, 1994 and June 29, 1994.

20. Under Rule 2 of the Supreme Court Rules of Public Access to Records of the Judicial Branch, the public and the media have a legally protected right of access to court files.

21. All court documents are presumptively open to public inspection or copying at all times. See, Rule 2, Rules of Public access to Records of the Judicial Branch. See also Nixon v. Warner Communications, Inc., 435 U.S. 589 (1977); Schumacher, supra (common law right of access to civil court records).

22. A trial is a public event. What transpires in the court room is public property. Craig v. Harney, 331 U.S. 367, 374 (1947).

23. In order to overcome the presumption in favor of access, a party must show strong countervailing reasons why access should be restricted. Schumacher, supra, at 205-206.

24. In addition to the common law right of access, the United States Supreme Court has held repeatedly and emphatically that the public and news media possess a qualified right of access under the First Amendment of the Constitution to every stage of criminal proceedings, and to documents filed in connection with those proceedings. The Supreme Court has also indicated this right applies to civil proceedings as well. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

25. The Schumacher court emphasized that its decision to restrict access to settlement documents and transcripts did not apply to other civil records. Id. at 203. Indeed, the court cited a number of federal circuit courts which have expressly recognized a constitutional right of access to civil court proceedings and

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documents. Id. at 203, citing Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985); In re Continental Illinois Securities Litigation, 732 f.2d 1302 (7th Cir. 1984); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984).

26. Therefore, this court finds that this constitutional right of access applies to the civil court records at issue in this case as well.

27. The Schumacher court stated the constitutional standard as follows:

> In order to overcome the presumption in favor of access [to civil court records], a party must demonstrate that a compelling governmental interest exists and that the restriction on access is narrowly tailored to meet this governmental interest.

Id., at 203 [emphasis added].

28. The constitutional standard set forth in Schumacher applies in the present instance.

29. Minnesota Statute Chapter 325C demonstrates a governmental interest in protecting trade secrets. Therefore, the Plaintiff, who is relying on Chapter 325C, must demonstrate a compelling governmental interest justifying continuation of the present sealing order and an absence of alternatives to closure.

30. The Court understands that Plaintiff has alleged trade secrets are involved in this case. "Trade secrets" are defined in Minn. Stat. § 325C.01, subd. 5:

> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process [emphasis by Court], that:
>
> (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
>
> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

31. Minn. Stat. § 325C.05 requires a Court to preserve the secrecy of all alleged "trade secrets" by "reasonable means."

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32. That protection, however, may not continue if a trade secret "has ceased to exist." See Minn. Stat. § 325C.02.

33. The Court inquired of Plaintiff exactly which trade secrets are involved in this case and where they are located in the court documents. As the Court understands it, Plaintiff is claiming, inter alia, that the very existence of this litigation and all the underlying issues therein are trade secrets.

34. The Court finds these contentions, on their face, are overbroad and do not come under the definition of "trade secret" in Minn. Stat. § 325C.01, subd. 5.

35. The Plaintiff has not adequately demonstrated that sealing the entire file is the only alternative, nor has Plaintiff shown that trade secrets are "inextricably interwoven" and "rife" among the court documents already filed.

36. To the contrary, after a preliminary reading of every document in the file, it does not appear to the Court that the following documents, on their face, contain "trade secrets" as defined in Chapter 325C:

A. Certificate of Representation 12-29-93
B. Summons and Complaint 12-29-93
C. Motion for Temporary Injunction 12-29-93
D. Motion for a TRO 12-29-93
E. Notice of Taking of Deposition of Grist Mill 12-29-93
F. Notice of Taking of Depositions of P. Whalen 12-29-93
G. Application to Expedite Discovery 12-29-93
H. Protective Order 12-29-93
I. Order to Enter Protective Order 12-29-93
J. Application for Protective Order 12-29-93
K. Non-destruct Order 12-29-93
L. Application to Seal 12-29-93
M. Order Sealing Record 12-29-93
N. Affidavit of Alan G. Carlson 12-29-93
O. Notice of Judicial Officer Assignment 12-29-93
P. Motion to Modify 12-30-93
Q. Notice of Appearance of Counsel 1-6-94
R. Dismissal of Grist Mill 1-13-94
S. Withdrawal of Motion for Temp. Injunction 1-13-94
T. Amended Complaint 1-13-94
U. Answer & Counterclaim of Deft. 1-12-94
V. Notice of Association of Counsel 1-14-94
W. P. Whalen Affidavit 1-17-94

X. Demand for Change of Venue 1-17-94
Y. Suppl. Aff. of P. Whalen 1-27-94
Z. Answer & Counterclaim to Amended Complaint 1-27-94
AA. Notice of Association of Counsel 2-7-94
BB. Plaintiff's Reply 2-10-94
CC. Deft. Reply as to Venue 2-21-94
DD. Sealing Order 3-3-94
EE. Scheduling Order 4-20-94
FF. P. Whalen Aff. 5-5-94
GG. Motion to Grant Relief 5-5-94
HH. Deft. Brief in Support of Motion to Modify ex parte Protective Order (maybe excluding the Aff. of T. Whalen and copy of Deft.'s answers to the 2nd set of Interrogatories, or portions thereof) 5-13-94
II. Aff. of Maxwell 5-12-94
JJ. Modified Sealing Order 6-13-94
KK. Joint Motion to Modify Sealing Order 5-25-94
LL. [Sealing] Order 6-29-94
MM. Plaintiff Memo in Support of Opposition to deft.'s motion to modify protective order (maybe excluding Affs. of Logan, Lewandowski, Pulvermacher or portions thereof)
NN. Agreement & Stipulation 9-13-94
OO. Stipulation & Agreement 9-16-94
PP. Order (as to mediation) 9-14-94
QQ. Memo in Support of Deft.'s Motion for Summary Judgment 10-11-94
RR. Pltf. Memo to quash deposition of Atwater
SS. Memo in Support of Pltf.'s motion to depose Whalen's designated experts (maybe excluding Exhibit 5 or portions thereof) 10-20-94
TT. Memo in Support of Pltf.'s motion to amend modified scheduling order 10-26-94
UU. Pltf.'s Supplemental Memo 10-26-94
VV. Pltf.'s Memo opposing Deft.'s motion for summary judgment 10-31-94
WW. Pltf.'s Memo in Opposition to Deft.'s motion to strike/quash 10-31-94
XX. Memo in Support of motion to intervene/modify protective order 10-17-94
YY. Deft. brief in support of motion to strike/quash 10-19-94
ZZ. Deft. response to Pltf.'s motion to Compel 11-2-94
AAA. Memo opposing motion to depose Deft.'s experts 11-2-94
BBB. Deft.'s brief in opposition to Pltf.'s motion to amend scheduling order and end discovery 11-2-94
CCC. Pltf. memo in opposition to motion to intervene and unseal 11-2-94
DDD. Notice of motion and motion to hold intervenor motion in camera 11-4-94
EEE. Reply memo of Star Tribune 11-4-94

FFF. Judicial Officer Reassignment 11-7-94
GGG. Pltf. reply memo re. discovery issues 11-7-94
HHH. Amended motion to intervene 11-17-94
III. Pltf. memo in support of motion for leave to amend 11-17-94
JJJ. Pltf. memo of law to conduct in camera hearing 11-22-94
KKK. Star Tribune memo opposing Pltf.'s motion for closed hearing 11-30-94

The above-list of documents represents the overwhelming majority of documents filed thus far. The Court is not ruling that the named documents contain no trade secrets, but will leave a final ruling open to litigation in accordance with this Order.

ORDER

1. All discovery in this case shall be concluded by March 1, 1995;

2. Because of the Court's Order No. 1 above, the Court will not decide Motions 2, 3, 4, and 5 listed in the Procedural History Section above;

3. The Parties have agreed to withdraw and resubmit their Motions for Summary Judgment, upon conclusion of discovery (now scheduled to be completed by March 1, 1995). Therefore, the Court will not decide Motion 1 listed in the Procedural History Section above (motions for summary judgment);

4. The Parties are instructed to resubmit any of the above motions at a date and time to be determined by the parties;

5. Plaintiff's Motion To File Its First Amended Reply is GRANTED;

6. Plaintiff's Motion, that the hearing on Intervenor Star Tribune's Motion To Intervene be held in camera, is GRANTED;

7. Intervenor Star Tribune's Motion To Intervene is GRANTED;

8. Intervenor Star Tribune's Motion To Vacate prior protective Orders insofar as they sealed the entire file in this case (Orders dated December 29, 1993, March 3, 1994, June 13, 1994 and June 29, 1994) is GRANTED; provided, however, if any party seeks renewed protective measures as to documents already filed;

a). that party shall immediately (within 48 hours of receipt of this Order) apply to this Court for a stay of this Order; within 14 days of the grant of a stay of this Order, the party seeking renewed protective measures shall designate and file under seal with the Court those documents meriting protection (see Number 9 of this Order for the procedure to be followed);

b). any party opposing another party's proposed protective measures shall file and serve responsive papers within 7 days from the date of service of the moving papers described in (a) above;

c). **THE FILE SHALL REMAIN SEALED** during the pendency of the stay, until such time as the Court rules upon the specific trade secret issues;

9. Should any party apply to this Court for renewed closure under Order 8 above, that party shall a) define with specifity the trade secret warranting protection, b) the exact location of the alleged trade secret in the filed documents, c) the legal support for asserting protection, d) the nature of the protection sought, giving due consideration to the least restrictive method of protection [to save space, the underlying documents need not be re-filed with the Court; simply identify (by title and filing date) what court documents are involved, the trade secret involved, the location of the trade secret, and a cite to supporting authority];

10. This Order is not sealed, since it does not contain any trade secrets, as defined above.

IT IS SO ORDERED.

BY THE COURT:

Dated: December 27, 1994

Marilyn J. Justman
Judge of District Court

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EXHIBIT 6

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
FAMILY COURT DIVISION

Dennis Hecker,
Petitioner,

vs.

Sandra Hecker,
Respondent.

ORDER

Court File No. 27-FA-98805

The above-captioned matter came before the Honorable Jay M. Quam, Judge of District Court, on the Star Tribune Media LLC's ("Star Tribune") Motion to Intervene for Limited Purpose of Asserting Rights of Public Access. The matter was submitted to the Court on the written submissions of the parties only. John Borger, Esq., appeared on behalf of the Star Tribune. Alan Eidsness, Esq., appeared on behalf of an interested party (the "Benefactor"). Based upon all files, records and proceedings herein, the Court makes the following:

ORDER:

1. The Star Tribune's Motion to Intervene for Limited Purpose of Asserting Rights of Public Access is Granted.

2. Mr. Hecker shall disclose the identity of the Benefactor to the Court by sworn affidavit. This disclosure shall occur no later than July 23, 2010.

3. The attached memorandum is incorporated herein.

Dated: July 14, 2010

BY THE COURT:

Jay M. Quam
Judge of District Court

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I. FACTUAL BACKGROUND

a. The Court's January 2010, finding of Mr. Hecker in Contempt.

On January 7, 2010, Petitioner Dennis Hecker ("Mr. Hecker") was found in constructive civil contempt of court for liquidating the parties' Pershing 401(k), which was in violation of the restraining provisions of Minn. Stat. § 519.091. Mr. Hecker was sentenced to ninety days in the Hennepin County Adult Correctional Facility. The imposition of the sanction was stayed on the condition that Mr. Hecker reimburses the full amount of the Pershing 401(k) by February 22, 2010. On February 22, 2010, Mr. Hecker indicated that he had obtained the full amount of the Pershing 401(k), $125,155.74 ("Pershing Amount"), and would refund it to the Pershing 401(k). As a result, the Court's finding of Mr. Hecker in contempt of Court was lifted.

On February 23, 2010, Mr. Hecker notified the Court that he had attempted to refund the Pershing Amount, but was informed by Transamerica Financial Advisors that his account was closed and that they were unwilling to open a new account for him. On February 26, 2010, the Court ordered that Mr. Hecker instead pay the Pershing Amount into Court.

b. The Court's March 2010, Finding of Mr. Hecker in Contempt.

On March 16, 2010, Mr. Hecker was again found in civil contempt of court for his failure to pay spousal maintenance to Ms. Hecker and failure to make payments towards the court-ordered life insurance policy. As a consequence, Mr. Hecker was sentenced to serve up to 90 days in the Hennepin County Adult Correctional Facility. Execution of this sentence was stayed upon Mr. Hecker's compliance with the following conditions (the "Purge Conditions"), which included, 1) disclosure of all funds Mr. Hecker has and has had available to him, expenses he has incurred, assets of any kind that he has received, assets of any kind that he has transferred, and payments of

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any kind that he has made, with respect to financial activity from December 1, 2009, through March 23, 2010; 2) disclosure of the source of the Pershing Amount, which was used to pay back the Pershing account liquidation in the Tamitha Hecker v. Dennis Hecker case, 27-FA-08-2731; and 3) continued payment of spousal maintenance, payment of insurance premiums in order to maintain the court-ordered life insurance policy, and settlement of any outstanding arrearages in spousal maintenance and in premiums towards the life insurance, pursuant to prior orders of this Court.

One of the conditions included in the Purge Conditions was the requirement that Mr. Hecker disclose the source of the Pershing Amount used to pay back the Pershing account liquidation in the Tamitha Hecker v. Dennis Hecker case, 27-FA-08-2731 (the "Pershing Condition"). The basis for the Pershing Condition arises from Mr. Hecker's earlier unilateral liquidation of his Pershing 401(k). That unilateral liquidation resulted in this Court's January 7, 2010, Order which found Mr. Hecker in contempt of Court and ordered a stayed sentence of 90 days. Significantly, in that Order, the Court found that Mr. Hecker had not fully accounted for the ultimate disposition of the funds, but stated that "in light of the fact that he is current on his maintenance obligation and that he is to pay the Pershing money back, however, no additional action needs to be taken at this time." Despite the reprieve from the conditional confinement, Mr. Hecker again failed to stay current on his obligations. This resulted in the subsequent March 16 contempt order and finding that Mr. Hecker's financial picture would once again be front and center before the Court.

On March 30, 2010, the Court lifted the stay of execution and committed Mr. Hecker to the confinement of the Hennepin County Adult Correctional Facility for a sentence of up to 90 days. Mr. Hecker's confinement was conditioned upon his compliance with all of the Purge Conditions.

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c. **The Benefactor and Star Tribune's Requests Concerning the Disclosure of the Identity of the Benefactor.**

On March 25, 2010, the Court received correspondence from attorney Alan Eidsness ("Mr. Eidsness") concerning the Pershing Condition. Mr. Eidsness represents the donor (the "Benefactor") of the Pershing Amount and explained that although the Benefactor respects the need for full financial disclosure, he/she beseeches the Court to allow him/her the opportunity to maintain his/her privacy. Mr. Eidsness asked the Court to allow him the opportunity to demonstrate that there is a countervailing interest that supports the public's denial of access to information concerning the Benefactor's identity.

On March 31, 2010, the Court issued an order (the "Benefactor Order") modifying the Purge Conditions so that Mr. Hecker was no longer required to disclose the Benefactor. The Benefactor Order, however, required Mr. Eidsness to submit a memorandum of law to the Court in support of the Benefactor's request for anonymity. All interested parties were given the opportunity to submit briefs to the Court in response to the Benefactor's submissions. The Star Tribune was the only party that submitted a response to the Court. In its submission, the Star Tribune moved the Court to Intervene for Limited Purpose of Asserting Rights of Public Access, as well to seek full disclosure of the identity of the Benefactor.

d. **The Star Tribune's April 24, 2010, Article Identifying the Benefactor.**

On April 24, 2010, the Star Tribune published an article (the "April 24 Article") by Dee DePass entitled "Denny Hecker's $125,000 donor identified as Nita Singh Johnson." DePass explained that Nita Singh Johnson ("Ms. Singh Johnson") gave Mr. Hecker the Pershing Amount in order to keep him from going to jail. DePass also remarked that U.S. Bankruptcy Judge Robert Kressel gave the bankruptcy trustee permission to question Ms. Singh Johnson about an undisclosed amount she gave Mr. Hecker after he filed for bankruptcy. Finally, the April 24 Article described

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that according to Respondent Tamitha Hecker's attorney, the identity of the Benefactor is widely known.

The Star Tribune's April 24 Article was not the first article concerning Mr. and Mrs. Hecker's ongoing divorce. The Star Tribune's coverage of the Heckers has been prolific and substantial.

II. ANALYSIS

There are two matters presently before the Court. The first relates to whether the Star Tribune should be allowed to intervene under Minn. R. Civ. P. 24 as an interested party. The second relates to whether the Court should require Mr. Hecker to disclose the identity of the Benefactor.

a. The Star Tribune is An Interested Party for the Limited Purpose of Asserting Rights of Public Access.

Minnesota's Courts have held that where a media representative or other non-party person seeks to challenge a protective order in a civil case, that person may move to intervene as of right under Minn. R. Civ. P. 24.01. *Minneapolis Star & Tribune v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986). Rule 24 of the Minnesota Rules of Civil Procedure provides:

> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Minn. R. Civ. P. 24.01.

In the Court's Order of March 31, 2010, the Court expressly allowed for interested parties, including media representatives, to respond to the Benefactor's request for confidentiality. In so doing, the Court's Order specifically found that the media was, for the limited purpose of objecting

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to the Benefactor's request, an interested party under Minn. R. Civ. P. 24.01. As such, the Star Tribune's Motion to Intervene to Assert its Interest in Public Access is granted.

b. **The Identity of the Benefactor is not Subject to any Confidential Protective Order and Mr. Hecker Shall Disclose the Benefactor's Identity to the Court.**

The Benefactor beseeches this Court to allow his/her identity to remain confidential. The Star Tribune vigorously objects, asserting that public access to Court records and proceedings is a pillar of the judicial function and that an informed public is seminal to a functioning democracy. The Court agrees with the Star Tribune and finds that the arguments in favor of the Benefactor's request for confidentiality do not outweigh the public's interest in access to the Court's records. Furthermore, it appears that the Star Tribune's April 24 Article has, assuming it is accurate, made the Benefactor's request moot.

There is a historic right under the common law to inspect and copy civil court records. *Schumacher*, 392 N.W.2d at 202. This right to inspect records is well recognized across the United States. *Id.* The common law right to inspect creates a presumption in favor of access. *Star Tribune v. Minnesota Twins Partnership*, 659 N.W.2d 287, 295 (Minn. Ct. App. 2003). Nonetheless, the right to access court documents is not absolute, and "access may be denied where the interests favoring the right of access are outweighed by the countervailing interests supporting the denial of access." *Id.*

A presumption in favor of access to court records also exists under the First Amendment of the United States' Constitution. *Schumacher,* 392 N.W.2d at 203. If a Court finds that there is a constitutional right, "in order to overcome the presumption in favor of access, a party must demonstrate that a compelling governmental interest exists and that the restriction on access is narrowly tailored to meet this governmental interest." *Id.* To ascertain whether the constitutional

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standard is applicable, a court must first consider whether the documents sought have historically been open to the public. *Minnesota Twins*, 659 N.W.2d at 296-97.

In this matter, the Benefactor argues that the his/her identity should remain confidential because such information is civil discovery, to which the common-law and constitutional presumption of access do not attach. The identity of the Benefactor is relevant in this matter in three significant ways: first, because it relates to Mr. Hecker's ability to provide complete financial information, which is required by the Court in order to make a determination on Ms. Hecker's spousal maintenance, child support, child care, and medical/dental requests; second, under Minn. Stat. § 518.58, "if the court finds that a party to a marriage, without consent of the other party, has in contemplation of commencing, or during the pendency of, the current dissolution…transferred…or disposed of marital assets…the court shall compensate the other party by placing both parties in the same position that they would have been in had the transfer…not occurred." Minn. Stat. § 518.58; and third, it is required as part of the Purge Conditions. Although these matters, in other cases, might be resolved through pre-trial civil discovery or stipulation between the parties, the identity of the Benefactor, the source of the Pershing Funds, and verification regarding the Pershing funds, are before the Court because of Mr. Hecker's unacceptable behavior. On multiple occasions the Court has specifically ordered Mr. Hecker to provide complete financial disclosures. Only after Mr. Hecker was committed to the Hennepin County Adult Correctional Facility did Mr. Hecker produce to the Court a satisfactory compilation of his financial disclosures. In sum, the identity of the Benefactor is no longer a matter for pre-trial discovery.

The next issue before the Court thus becomes whether the common-law presumption in favor of access to Court records is outweighed by the Benefactor's countervailing interests in supporting denial of access. Given that the identity of the Benefactor is squarely before the Court

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because of Mr. Hecker's contempt proceedings, and the Court's need for complete financial disclosure by Mr. Hecker in connection with an appropriate determination of spousal maintenance, child support, and property division, the Court cannot find that the Benefactor has overcome the long-standing common law presumption in favor of access. *Contra Schumacher*, 392 N.W.2d at 202 (finding that settlement documents or transcripts are historically private and should not be subject to private scrutiny); *and Minnesota Twins*, 659 N.W.2d at 296-97 (finding that pre-trial discovery that is not filed is generally not deemed a part of the judicial record). Likewise, because this information has historically been open to the public—unlike settlement information or pre-trial discovery—a constitutional standard is not applicable. Moreover, even if one did apply, the Benefactor has not demonstrated a compelling governmental interest exists and that the restriction on access is narrowly tailored to meet this governmental interest. In balancing the longstanding public interest in favor of access to court records, with the Benefactor's claim that his/her identity is merely pre-trial discovery, the Court finds that the Benefactor's identity should be made available to the public.

The Benefactor suggests that Mr. Hecker's poor conduct should not work to Benefactor's detriment by operating as a waiver of his/her privacy interest. Although the Court is sympathetic to the Benefactor's claim, it is unavailing. The Benefactor gave the money to Mr. Hecker at the last possible moment before his contempt of court review hearing. Given the prolific media coverage of the Hecker divorce prior to the date the Benefactor gave Mr. Hecker the money, on top of the impressive and sizable nature of the gift, it is unreasonable to imagine that the Benefactor had any expectation of privacy.

Finally, the Court notes that it appears this Order may be moot. The Star Tribune's April 24 Article vitrually identifies Ms. Singh Johnson as the Benefactor. Although Ms. Singh

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Johnson neither confirmed nor denied that she was the Benefactor, the fact that her identity has already been linked as the Benefactor even further reduces the likelihood that there will be any further prejudice to this information being disclosed to the public as a result of this Order.

III. CONCLUSION

The Benefactor moves this Court to allow his/her identity, the source of the Pershing Amount, and all other information related to the Benefactor's gift of the Pershing Amount to remain confidential and subject to a protective order. The Star Tribune instead seeks to have the Benefactor's identity to be made public, consistent with the presumptive right of access to court fillies and proceedings. The Benefactor's identity, as well as all other information related to the Benefactor's gift of the Pershing Amount, is information needed by the Court for determining maintenance obligations, child support obligations, proper division of assets, and as a requirement to the Court's purge conditions. In balancing the longstanding presumption of public access to court records, with the Benefactor's claim that his/her identity is merely pre-trial discovery and should not be revealed, the Court finds that the Benefactor's identity and all other information related to the Benefactor's gift of the Pershing Amount, should be made available to the public.

JULY 14, 2010

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EXHIBIT 7

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
FAMILY COURT DIVISION

In Re the Marriage of

James N. Fry,

Petitioner,

and

Cathryn J. Fry,

Respondent.

Court File No. 27-FA-296122

ORDER AND MEMORANDUM RE UNSEALING OF FILE

The above-entitled matter came on before the Honorable Ivy S. Bernhardson, Judge of District Court, for hearing, on September 21, 2011.

There were no appearances by or on behalf of Petitioner or Respondent. Petitioner's counsel filed a written response opposing Intervenor's motion.

Leita Walker, Esq., Faegre & Benson LLP, appeared for Intervenor Star Tribune Media Company LLC.

Based upon the evidence adduced, the arguments of counsel and all of the files, records, and proceedings herein, the Court makes the following

ORDER

1. The motion to intervene by Star Tribune Media Company LLC for the sole purpose of asserting the public and press right to access court records and proceedings in this case is ***granted.***

2. This Order shall not be filed under seal and shall be accessible to the public.

3. The motion of Star Tribune Media Company LLC for public access to the records filed with the Court in this matter is ***granted,*** effective as described below, except for (a) the portion of any filed document that is considered confidential in accordance with Minn. Gen. R. Prac. 11.02, which includes the Confidential Information Form, and which shall also include the restricted identifiers on each financial source document filed with the Court; (b) the portion of any document naming the parties' children, and including, but not limited to, discussion of the children in the context of custody and parenting time issues; and (c) the portion of any document disclosing or discussing any medical, diagnostic or therapeutic record or treatment entitled to privacy protection under federal or state law.

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4. This Court has prepared a version of the entire court file in this case with the portions to remain confidential (as described above) in a redacted form, and that version of the court file shall be unsealed, effective November 15, 2011.[1] If the Court Administrator has any questions about this Order, or which version is to be made publicly available, they should contact the Court's clerk at 612-348-7759.

5. The Court's memorandum below is incorporated herein.

BY THE COURT:

Dated: October 18, 2011

Ivy S. Bernhardson
Judge of District Court

[1] The Court is delaying the unsealing to permit parties time to file an appeal. If the unsealing of the file was immediately effective, the public would have access to the file before either party had a chance to file a notice of appeal. While the Court is confident in its decision, it recognizes that immediate public access to the file would practically render an appeal moot and it wishes to preserve the parties' right to appeal.

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Memorandum-Court File No. 27-FA-296122

Motion to Intervene

The Court addresses first the motion of Star Tribune Media Company LLC ("Star Tribune") to intervene in this case, which has been largely inactive since the parties concluded the dissolution of their marriage through a stipulated Judgment and Decree entered on February 17, 2006.

The Star Tribune is moving to intervene as a matter of right for limited purposes under Minn. R. Civ. Proc. 24.01: "Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The guiding case in this arena is Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1986). First, the application must be timely. "The timeliness of the application to intervene...will be based upon the particular circumstances involved and such factors as how far the suit has progressed, the reason for any delay in seeking intervention, and any prejudice to the existing parties because of a delay." Schumacher, at p. 207. As previously stated, the parties' divorce has long been concluded. No prejudice by the mere "delay" in bringing this motion has been raised by either party. The Star Tribune's motion to intervene cannot impede the parties' efforts to conclude a painful process, one that most people wish could be private and quiet; the divorce is done.

Second, the proposed intervenor must have an interest relating to the property or transaction which is the subject of the action. This interest must be a legally protected one which can be found in the public's right to access under Rule 2 of the Supreme Court's Rules of Public Access to Records of the Judicial Branch. The Star Tribune carries the banner of the public's right to know and its desire to gather information on a newsworthy matter: the continuing saga of Tom Petters, his companies and the related fallout. Mr. Fry, Petitioner in this case, was indicted by a federal grand jury in July 2011 for securities and wire fraud in connection with the Petters' debacle. The marital dissolution proceedings in this court file occurred in the time period during which the events relating to the pending federal case against Mr. Fry occurred. This interest factor is thus also met.

Third, the proposed intervenor must demonstrate circumstances that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest. Without intervention by the Star Tribune or another media member, the court file would remain sealed which would impair any ability to gather potentially newsworthy information.

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And fourth, the proposed intervenor must demonstrate that they are not adequately represented by the existing parties. Mr. Fry's counsel objected to the unsealing. Clearly, the existing parties have no reason to pursue unsealing; their interests are completely disparate.

Star Tribune satisfies all of the criteria set forth in Minn. R. Civ. Proc. 24.01, and on that basis the Court has granted its motion to intervene as of right for the purpose of unsealing the file.

Motion to Unseal

The Schumacher case stands for the proposition that in Minnesota there is a common law right to inspect and copy civil court records. Id at 202.

However, this right is not absolute. "When a party seeks to restrict access, the court must perform a balancing test, weighing the interests favoring access along with the presumption in favor of access, against those asserted for restricting access." Schumacher, 392 N.W.2d at 205. Divorce proceedings are not exempt from the presumption of access. See, e.g., Lund v. Lund, 20 Media L. Rep. 1775 (Minn. App. 1992). Clearly the circumstances of that case are inapposite to this case and the analysis this Court must undertake. But the general premise applies, and the Court now turns to the specific concerns raised by Mr. Fry.

On September 7, 2005, the Court[1] entered the stipulation of the parties to seal the court file. That Order also stated that it "shall continue after the conclusion of this action unless modified by further Order of this Court." *Id.*

The order to seal this court file was based on the parties' stipulation that

(i) one of the assets of the parties is the Fry Family Limited Partnership;
(ii) Petitioner (Mr. Fry) and the parties' two minor children are the partners of the Fry Family Limited Partnership;
(iii) the Fry Family Partnership has several subsidiaries within the Limited Partnership;
(iv) Petitioner's sole source of income is generated by entities within the Fry Family Limited Partnership, and respondent is unemployed;
(v) many of the transactions that occur within the Partnership are with private individuals who wish to remain unidentified to the public and who wish that their business dealings with the partnership remain confidential;

[1] On September 7, 2005, this case was assigned to Referee Reding, now Judge Reding. In accordance with Family Court administrative policy, this file was assigned to the undersigned as a post-decree matter.

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(vi) if the private individuals became aware that their names and/or information were available to the public with regard to their business transactions with the Partnership, they may cease doing business with the Partnership thereby causing a devastating setback to the Partnership's income producing ability thereby affecting petitioner's income producing ability; and

(vii) the parties agreed that to protect the interests of the Fry Family Limited Partnership, petitioner's income earning ability and their children's identities the entire Court File be sealed.

It is this Court's task to determine whether, on these bases, or on any other applicable basis, any portion of the Court file should remain sealed, given the presumption of access.

The Court undertook an in-camera inspection of the entire Court file prior to issuing this Order for purposes of viewing its actual contents through the lens of the bases stated by the parties as to why sealing was appropriate.

The Court recognizes that our citizens have a right to privacy. Griswold v. Connecticut, 361 U.S. 479 (1965); State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987) ("[T]here does exist a right of privacy guaranteed under and protected by the Minnesota Bill of Rights.") The children of the parties to this matter had no control over the fact that their parents wanted to divorce, and they are not the named parties in the file. At the hearing the Star Tribune's counsel evidenced no interest in the child-related portions of the file. The Court has thus redacted the names of the parties' children and certain other material that discusses or refers to the children's personal lives. In addition, the Court finds a constitutional and statute-based zone of privacy for any medical, psychological or other similar records of the parties and has redacted those records, to the limited extent that material was found in the Court file. See, e.g., Health Insurance Portability and Accountability Act of 1996, 45 CFR Parts 160 and 164; Minnesota Health Records Act, Minn. Stat. Sections 144.291 to 144.298; Price v. Shepard, 239 N.W. 2d 905, 910 (Minn. 1976).

Interests which have weighed in favor of restricting access to court files also includes where they may be used for "improper purposes." Schumacher, 392 N.W.2d at 202. The parties' stipulation in this file appears to address these concerns based on the nature of the livelihood of Petitioner. Denial of public access has been deemed appropriate if allowing access to financial records could result in "thefts, exploitation, trespass and physical injury." See Schumacher, 392 N.W.2d at 200; see also Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984).

It is for that very reason that our court rules provide a pathway for, in some cases, confidential treatment of sensitive financial documents and, at a minimum, complete confidentiality of "restricted identifiers" (meaning the social security number, employer identification number and financial account number of a party or other person). See Rule 11, Minn. Gen. R. Prac. However, Rule 11.05(c) states that: "The court shall allow access to Sealed Financial Source

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Documents, or relevant portions of the documents, if the court finds that the public interest in granting access or the personal interest of the person seeking access outweighs the privacy interests of the parties or dependent children. In granting access the Court may impose conditions necessary to balance the interests consistent with this rule." The Advisory Committee Comment to this Rule cites to the Schumacher case. Financial source documents are defined in Rule 11.01 (b) as income tax returns, W-2 forms and schedules, wage stubs, credit card statements, financial institution statements, check registers, and other financial information deemed financial source documents by court order. The Court finds no basis to disclose the restricted identifiers, if any, in this Court File and those items were redacted where found. The Confidential Information Form is per se not accessible to the public according to Rule 11, Minn. Gen. R. Prac. The public includes the Star Tribune.

As to the matter of financial source documents, or other information about the Fry Family Limited Partnership referenced by the parties in their stipulation, the Court could not find one instance of a disclosure of the name of any private investor in the Fry Family Limited Partnership or any of its holdings, or any other financial information which at this date, over five years after the entry of the dissolution decree, could be misused if made public, except as described above with respect to the restricted identifiers. Except for the restricted identifiers, the financial information, which arguably may have been sensitive and entitled to confidential treatment at one time, that is in the Court file, is now "stale". It is not now usable in a way which could reasonably be considered to cause damage to the future financial wellbeing of the parties, or put them at risk of exploitation, theft or physical injury.

The parties to this matter also agreed to a Stipulation for a Protective Order which was entered as a Court Order by then Referee (now Judge) Reding on May 17, 2005. This protective order separately addresses documents produced, handled or filed during discovery proceedings in the divorce litigation "relating to the Fry Family Limited Partnership and any other asset or issue which the parties or party designates as subject to this Order." Pursuant to this Order, protection is generally to be invoked by stamping the documents with such words as "Confidential-Subject to Protective Order". The Order provides that any such documents filed with the Court would be maintained in sealed envelopes. The Order also contains a procedure by which a neutral escrow agent would hold an entire set of the confidential information for a period of six years from the final judgment, and then return the documents to petitioner. The Order concludes "[t]he obligations of this Stipulation and Protective Order shall continue after the conclusion of this action unless modified by further Order of this Court."

The court file contains a limited number of pages which are stamped "Personal Confidential" or "Confidential Subject to Protective Order". These documents include December 31, 2004 balance sheets of various entities that are described in the court file, but there is no disclosure of any investor name, or any other identifying information which could reasonably compromise Petitioner's fiduciary duty to any private investor, or provide personal financial information which could be construed now to injure either party to the proceeding. Thus the Court has not

further redacted these documents, beyond the redaction of any restricted identifiers that were found on such documents.

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EXHIBIT 8

LUTZ v. LUTZ

Michigan Circuit Court
Washtenaw County

ROBERT A. LUTZ v. HEIDE M. LUTZ, No. 90-42992-DO, November 12, 1992, November 20, 1992, and November 23, 1992

NEWSGATHERING

1. Access to records—Judicial—Civil—In general (§38.1505.01)

Restraints on access to information—Privacy (§50.15)

Newspaper's motion to vacate order suppressing file in divorce action involving automobile corporation president is granted, despite parties' assertion that closure of file is warranted in order to protect their privacy and in order to protect against disclosure of confidential corporate information, since parties' privacy interests do not outweigh public's right of access, absent any showing that records would be used only for "spiteful" or other illegitimate purposes, and since confidential corporate information can be protected through means other than suppressing entire court file.

REGULATION OF MEDIA CONTENT

2. Prior restraints—Privacy restraints (§5.20)

NEWSGATHERING

Access to records—Judicial—Civil—In general (§38.1505.01)

Restraints on access to information—Privacy (§50.15)

Newspaper which successfully moved to vacate order suppressing entire file in divorce litigation cannot be prohibited from disclosing information contained in parties' subsequent motion for protective order, which was served upon newspaper pursuant to court order, since parties were not required by court to describe within such motion information sought to be protected, but could instead have listed specific documents and reasons supporting non-disclosure, and documents would then have been reviewed in camera.

Newspaper filed motion in divorce action, involving president of Chrysler Corp., to vacate order suppressing file.

Motion to vacate granted; parties' subsequent motion to prohibit newspaper from publishing article based on information containing in their motion for protective order denied.

Herschel P. Fink, of Honigman Miller Schwartz and Cohn, Detroit, for newspaper.

Margaret J. Nichols, of Harris, Guenzel, Meier & Nichols, Ann Arbor, Mich., and John B. Schaefer, of Williams, Schaefer, Ruby & Williams, Birmingham, Mich., for plaintiff.

David Williams Potts and Anne Cole Pierce, of Carson Fischer and Potts, Birmingham, for defendant.

Full Text of Opinion

Wilder, J.:

November 12, 1992

This matter is before the Court on the motion of Detroit Free Press, Inc. ("Free Press") to vacate the order suppressing the file in the instant case from public access. The Free Press challenges the suppression order under MCR 8.116 (D), which permits any person to challenge an existing or proposed order which would impose a "limitation on the access of the public to court proceedings or records of those proceedings that are otherwise public . . ." The Court having held several hearings on this motion, having reviewed the briefs and arguments submitted by the movant and the parties to this action, and being otherwise fully advised, the Court grants the motion of the Free Press in part for the reasons stated hereafter.

As noted by the 6th Circuit Court of Appeals in *Brown & Williamson Tobacco Corp v. FTC*, 710 F2d 1165 (CA 6, 1983), the open courtroom has been a fundamental feature of the American judicial system, with certain basic principles having emerged to govern the exercise of judicial discretion in limiting public access to judicial proceedings or court documents. These principles recognize that historically public trials have played an important role as outlets for "community concern, hostility, and emotions," *Richmond Newspapers, Inc. v. Virginia*, 448 US 555 [6 Med.L.Rptr. 1833]

(1980), that public access provides a check on the courts and an accountable judiciary, id. at 592, and that open trials promote "true and accurate fact finding." id. at 596. Both civil and criminal trials, from an historical perspective, have been presumptively open to the public, and this presumption of openness also extends to permit the public to inspect and copy judicial documents and files. *Nixon v. Warner Communications, Inc.*, 435 US 589 [3 Med.L.Rptr. 2074] (1978).

The presumption of access to all court proceedings and judicial documents in Michigan courts has statutory support beyond the historical and constitutional basis cited above. MCL 600.1420 requires the sittings of every court in the State of Michigan to be public, absent a finding that good cause exists to restrict public access.

The presumption of access to court proceedings and documents, as the very term "presumption" implies, is not absolute. This Court must consider whether there are competing interests to those of the public's right of access which justify a limitation of access. Trial courts have always been afforded the power to seal their records when interests of privacy outweigh the public's right to know. *Brown & Williamson Tobacco Corp*, supra, at 1179; *In re The Knoxville News-Sentinel Co*, 723 F2d 470 [10 Med.L.Rptr. 1081] (CA 6, 1983). "For example, the common law right of inspection has bowed before the power of a court to insure that its records are not used to gratify private spite or promote public scandal through the publication of the painful and sometimes disgusting details of a divorce case. Similarly, courts have refused to permit their files to serve . . . as sources of business information that might harm a litigant's competitive standing." *In re Knoxville News-Sentinel Co, supra.* Courts have also been cognizant of content-based exceptions to the public's right of access to court proceedings and documents where the privacy rights of third parties, or the protection of trade secrets, is involved.

In the instant case, the parties to this action have opposed the motion to vacate the suppression order on two grounds. First, the parties have argued that because they are highly visible as a couple, and because the Plaintiff is an officer of a major automobile corporation, the only public interest that could pertain to this case is a voyeuristic interest in the parties' personal and financial matters. The parties contend that this Court should protect against "the invasion of what little privacy these parties enjoy." Second, the parties have argued that suppression is necessary to protect against the disclosure of highly confidential, insider corporate information of Chrysler Corporation which could significantly impact Chrysler Corporation's financial interests and the marketplace.

[1] Simply arguing or showing that the privacy of the parties will be disrupted, however, is not sufficient to justify suppression of court records. While the Court is sympathetic to the parties' desire for privacy, private matters that come for resolution in judicial proceedings must be conducted and resolved in the public forum, both to maintain the public confidence in the legal system and to avoid the undermining of the tradition of an open judicial system. *Brown & Williamson Tobacco Corp.* at 1178, 1180. Absent a particularized showing that the court records in this case would not further the presumptive interest in accessible court records but would only be used for "spiteful" or "scandalous" or similar illegitimate purposes, this Court finds that the privacy interests involved herein do not outweigh the public's right to access of the court records in this case.

The fact that highly confidential, insider corporate information might be disclosed during the course of the proceedings also does not justify the suppression of the entire court file in this action, in view of the fact that other less extreme measures are available to protect what would undoubtedly be important interests of the parties and Chrysler Corporation. Trial courts have the discretion to grant limited protective orders designed to deny public access to particularized records or proceedings, where such orders are necessary to protect very particularized interests of the participants or third parties that outweigh the public interest in the information. *Brown & Williamson Tobacco Corp.* at 1179.

Based on the record before the Court at this time, the motion to vacate the May 8, 1991 order suppressing the file in this case is granted. In granting the motion to vacate the suppression order, this Court is mindful of the fact that the Plaintiff in this case specifically sought an order suppressing this file, and that the parties may have relied upon the fact of the suppression order in the course of preparing this case for trial. *See, In re Continental Illinois Securities Litigation*, 732 F2d 1302, 1312, n.16 [10 Med.L.Rptr.

1593] (CA 7, 1984). The Court is also mindful of the fact that the parties have asserted the existence of privacy interests which they contend outweigh the presumptive right of public access. For these reasons, this order vacating the previously entered suppression order is stayed until Tuesday, November 17, 1992, at 12:00 noon, to enable the parties to review the court records and seek any appropriate protective orders relating to specific documents contained in the court file. Any motion(s) for protective order which are filed with the Court must also be personally served on counsel for the Free Press on or before Tuesday, November 17, 1992, at 12:00 noon. This Court will hear argument and rule on any such motion(s) filed as soon as possible within the 48 hours after the filing of the motion(s). Until the Court has ruled on the motion(s) for protective order, the stay of this order vacating the previous suppression order will remain in effect as to those documents for which the parties seek a protective order.

It is so ordered.

November 20, 1992

On November 12, 1992 this Court granted the motion of Detroit Free Press, Inc. ("Free Press") to vacate an order which suppressed the file in the instant case from public examination. The order vacating the previously issued suppression order also was stayed to permit the parties in this case to seek a protective order which would continue under seal from public view specific documents, in order to protect very particularized interests of the parties or of third parties, where those interests outweigh the public interest in the information. The order vacating the suppression order specified that the motion for protective order was required to be personally served upon counsel for the Free Press, and also specified that while the stay expired on Tuesday, November 17, 1992 at 12:00 noon, the stay would remain in effect "as to those documents for which the parties seek a protective order."

On November 17, 1992 the parties filed their joint motion for protective order which seeks protection from disclosure of most of the documents contained in the previously suppressed file, contending that the documents are primarily pretrial discovery matters to which there is no right of public access, and further contending that the documents were filed in express reliance on the order which suppressed the file from public view. The parties contend that the documents currently in the file would not have been filed without a specific protective order sealing the documents from public view, in the absence of the suppression order which existed at the time the documents were filed. In support of their motion, the parties described within the motion in some detail the contents of documents they seek to have protected from public disclosure. The parties requested within the text of their motion that the motion itself be protected from disclosure along with the other documents the parties desired to remain under seal.

As described in a telephone conference held with the Court and all parties, and as further described in subsequent filings by the parties and the Free Press, Mr. Hershel Fink, counsel for the Free Press, sent a fax copy of the parties' motion directly to his client before reading the motion and before knowing that the parties had requested that this Court seal the motion along with other documents contained in the court file. Mr. Fink has disclosed that the Free Press has prepared a story for publication based on the information contained in the motion. The parties contend that the disclosure of the motion to the Free Press by Mr. Fink is in violation of the November 12 order of this Court which stated in part that "the previous suppression order will remain in effect as to those documents for which the parties seek a protective order," and that the publication by the Free Press of any information contained in the motion would be an equally clear and more egregious violation of the November 12 order, for which there would be an inadequate or no remedy. The parties seek an order from this Court which would preclude the Free Press from publishing any story which reveals the information contained in the parties' motion, and which would further require the Free Press to return all copies of the motion to the possession of Mr. Fink.

The Court finds that the disclosure of the contents of the motion to the Free Press by Mr. Fink is not a violation of the November 12, 1992 order of this Court. The order does not expressly state that the motion would be a suppressed document not to be disclosed to the Free Press, and in fact MCR 8.116(D) strongly suggests that any such motion seeking to limit the access of the public to otherwise public documents must be a

matter of public record, to give any real meaning to the right to challenge any such request. Furthermore, the November 12 order does not require that the parties describe within their motion the *information* which they sought to be protected, but only the specific documents and the *reasons* supporting their nondisclosure. If such a requirement had been present, the parties' contention that Mr. Fink violated an order of this Court might be more persuasive. Such a requirement might also have justified the extraordinary step of further requiring that Mr. Fink not share with the Free Press pleadings filed by the parties to which he would have to respond on behalf of his client.

[2] The Court further finds that it has no authority to order the Free Press not to disseminate information that it received from its attorney, when the receipt of that information from Mr. Fink was not in violation of any order of this Court. In *In re King World Productions, Inc.*, 898 F2d 56 [17 Med.L.Rptr. 1531] (CA 6 1990), the 6th Circuit stated that "[n]o matter how inappropriate the acquisition, or its correctness, the right to disseminate . . . information is what the Constitution is intended to protect." While the parties have identified privacy and other interests to be impacted upon the dissemination of information contained in the motion, the parties have not demonstrated an irreparable harm or injury that would justify a prior restraint of the first amendment freedoms of the Free Press to publish information properly obtained.

It is so ordered.

November 23, 1992

The Court heard argument on the afternoon of Friday, November 20, 1992 on the issue of whether this Court should issue a temporary restraining order which would prohibit Detroit Free Press, Inc. ("Free Press") from publishing any information which came into its knowledge or possession by virtue of the parties' motion for protective order filed November 17, 1992. The Court denied the request for injunctive relief for the reasons stated on the record at that time, but wishes to add these observations to the record.

The parties urged that the precedent in *Seattle Times v Rhinehart*, 467 US 20 [10 Med.L.Rptr. 1705] (1984), is controlling in the instant case, and asserted that because the Free Press obtained information that is currently under seal only because this Court required the parties' motion for protective order to be served on the Free Press, a miscarriage of justice occurs from the Court's refusal to restrict the usage of this information. Had the Court ordered the parties to disclose to the Free Press the information which the parties seek to protect, the Court would agree that a restriction on the use of the information would be appropriate.

As noted in this Court's written opinion and order of November 20, 1992 on this same issue, however, this Court *did not* order the disclosure of *information* to the Free Press, but only ordered the parties to serve the Free Press with a copy of their motion for protective order. The motion for protective order was only required to identify the specific *documents* the parties sought to protect from public view; it was not required to include a discussion of the information within the documents. These facts distinguish the instant case from *Seattle Times*, where the trial court ordered that the Seattle Times would be permitted to have access to sensitive information because it was a litigant entitled to the information during the course of the discovery process. At the same time it ordered the information disclosed to the Seattle Times, the trial court also restricted the use of the information until further order of the court. Such was the quid pro quo for the very release of the information.

No such quid pro quo was stated or implied, however, in the November 12, 1992 order at issue here because the parties were not required to disclose *any* information in their motion for protective order in order to keep documents under seal pending the ruling of this Court. Rather, because the very issue before the Court was and is whether the Free Press and the public at large has any right of access to the information in question, the November 12 order clearly contemplates the conducting of an in camera review of those documents identified by the parties. Such an in camera review would have protected from public disclosure any information which the parties desired to be sealed until after any ruling authorizing such disclosure was entered by the Court.

The Court cannot know why the parties described in such detail the information they desired to remain under seal, in view of the fact that the Court had this information available for its review in

camera. It is clear, however, that no such disclosure was *required* by this Court's November 12, 1992 order. Because the Court did not require the disclosure of this information to the Free Press, the November 12 order of this Court cannot serve to restrict the use of this information by the Free Press, now that it is in its possession. *In re King World Productions, Inc.*, 898 F2d 56 [17 Med.L.Rptr. 1531] (CA 6 1990). It is for these reasons the Court finds it has no authority to enjoin the Free Press from publishing any information it obtained from the parties motion for protective order, and why the Court believes such an injunction would be an unconstitutional prior restraint.

BECHER v. TROY PUBLISHING CO. INC.

New York Supreme Court
Appellate Division
Third Department

ROBERT A. BECHER v. TROY PUBLISHING CO. INC., No. 65631, November 5, 1992

REGULATION OF MEDIA CONTENT

1. Defamation—Defamatory content—Headlines (§11.0507)

Defamation—Privilege—Judicial proceedings (§11.4503)

Newspaper articles reporting on criminal prosecution of six defendants, including plaintiff attorney, charged with procurement of false recantation statements, are absolutely privileged under New York Civil Rights Law Section 74 as fair and true report of judicial proceeding, even though articles' headlines referred to "bribery case" and "bribery defendants" and plaintiff was not indicted on felony bribery charges but on misdemeanor charge of making apparently false sworn statement, since body of each article correctly described charges against plaintiff, and since other defendants were charged with bribery.

2. Defamation—Privilege—Judicial proceedings (§11.4503)

Newspaper articles which reported that indictment had charged "two Troy attorneys and four others" with "bribing a reported rape victim," are privileged under New York Civil Rights Law Section 74 as fair and true report of judicial proceeding, even though plaintiff attorney was not indicted on felony bribery charges but on misdemeanor charge of making apparently false sworn statement, since articles, when they specifically identified plaintiff, accurately described charges against him, and since articles accurately and specifically identified defendants who were charged with bribery.

3. Defamation—Defamatory content—Headlines (§11.0507)

Article which was headlined, "Attorney Hard To Find," and which concerned difficulty encountered by sheriff's department in serving plaintiff attorney with summons, is not defamatory, even though it was placed next to another article concerning unrelated indictment handed down against attorney and others, since article itself was accurate statement of facts, and since headline thus was fair indicator of true report.

Libel action against newspaper. From decision of the New York Supreme Court, Albany County, denying newspaper's motion for summary judgment, newspaper appeals.

Reversed.

Peter Danziger, of O'Connell and Aronowitz, Albany, N.Y., for appellant.

Brian Donohue, of Frost & Donohue, Troy, N.Y., for respondent.

Full Text of Opinion

Before Yesawich, Jr., J.P., Levine, Crew, III, Mahoney, and Harvey, JJ.

Levine, J.:

Appeal from that part of an order of the Supreme Court (Conway, J.), entered July 12, 1991 in Albany County, which denied defendant's motion for summary judgment dismissing the complaint.

This libel action arose out of the reportage, in defendant's newspaper, of judicial proceedings concerning an indict-

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EXHIBIT 9

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

CASE TYPE: CONTRACT

BRIAN L. WILLIAMS,

Plaintiff,

v.

HEINS MILLS & OLSON, P.L.C., SAMUEL D. HEINS, STACEY L. MILLS and VINCENT J. ESADES,

Defendants.

Court File No. 27-CV-07-6495
Honorable Denise D. Reilly

ORDER ON STAR TRIBUNE'S MOTION TO INTERVENE AND DEFENDANT'S MOTION TO CLOSE TRIAL

The above-entitled matter came on for hearing on March 11, 2008, before the Honorable Denise D. Reilly, Judge of the District Court, on Star Tribune's Motion to Intervene for Limited Purpose of Seeking Public Access to Court Files and Proceedings and Defendants' Motion to Close Trial. Attorneys William Z. Pentelovitch and Paul B. Civello appeared for and on behalf of Defendant Heins Mills & Olson, P.L.C.; Attorney Lewis A. Remele appeared for and on behalf of the Individual Defendants; Attorneys Vincent D. Louwagie and Mark D. Wisser appeared for and on behalf of Plaintiff Brian Williams; and Attorneys John P. Borger and Leita Walker appeared for and on behalf of Star Tribune. The Court having heard and read the arguments of counsel, and based upon the files, records, and proceedings herein, makes the following **ORDER**:

1. Star Tribune's Motion to Intervene for Limited Purpose of Seeking Public Access to Court Files and Proceedings is **GRANTED.**
2. The Court will maintain all court files pending determination of the right of public and press access.
3. Defendant's Motion to Close Trial is **DENIED.**
4. The parties must submit argument regarding the sealing of specific documents to the Court by **April 11, 2008.** Responses will be due **April 18, 2008.**

5. The Court's Memorandum, filed herewith, is incorporated herein.

Dated: March 24, 2008

BY THE COURT:

The Honorable Denise D. Reilly
Judge of District Court

Refer Questions To:
Melissa Weiner, Law Clerk, (612) 348-9809
cc: Counsel of Record

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MEMORANDUM

I. Procedural Posture

On February 18, 2008, Star Tribune filed a Motion to Intervene for Limited Purpose of Seeking Public Access to Court Files and Proceedings. Specifically, Star Tribune seeks an Order from this Court allowing it to intervene for limited purposes in accordance with Minn. R. Civ. P. 24.01, an Order granting public and press access to the court files and proceedings in this case, and an Order maintaining all court files pending determination of the right of public and press access. Plaintiff supports Star Tribune's Motion to Intervene, however, takes no position on Star Tribune's efforts to unseal documents previously filed with the Court. Defendants wholly oppose Star Tribune's Motion and, further, request that the Court close portions of the trial.

II. Standard For Intervention As Of Right

Star Tribune seeks to intervene in this case pursuant to Minn. R. Civ. P. 24.01, which allows anyone upon timely application to,

> intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Accordingly, to intervene as of right under Rule 24.01, a non-party must meet the following four-prong test: (1) a timely application for intervention; (2) an interest relating to the property or transaction which is the subject of the action; (3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and (4) a showing that the party is not adequately represented by the existing parties. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986). If a potential intervenor meets the Rule 24.01 test, "the trial court should grant the motion to

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intervene for the limited purpose of challenging the trial court's order sealing court files." *Id.* at 208.

Star Tribune satisfied the first prong of the above test as it made a timely application for intervention when it asserted its interest in public access within days of learning that certain documents in the record had been sealed under a stipulated protective order and of the possibility of a closed trial.

A. The Star Tribune and the Public Have A Protected Interest In Access To The Records and Proceedings In This Case

The second prong of the four-part test outlined in *Schumacher* requires Star Tribune to identify a legally protected interest under Rule 24.01. *Id.* Once the legally protected interest is identified, "the party seeking access must then demonstrate that this interest relates to the property or transaction involved in the underlying action." *Id.*

1. Star Tribune has a legally protected interest in access to the court files and proceedings in this case

Under Rule 2 of the Supreme Court Rules of Public Access to Records of the Judicial Branch, the public and the media have a legally protected right of access to court files, because "[r]ecords of all courts and court administrators in the state of Minnesota are presumed to be open to any member of the public for inspection or copying at all times during the regular office hours of the custodian of the records." Further yet, the Minnesota Rules of Civil Procedure and case law demonstrate there is a longstanding presumption of access to court files and proceedings. Minn. R. Civ. P. 43.01 ("In all trials the testimony of witnesses shall be taken orally in open court . . .") & 77.02 ("All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom.") The United States Supreme Court has described a trial as a "public event." *Craig v. Harney*, 331 U.S. 367, 374 (1947). "What

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transpires in the court room is public property . . . There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Id.*

The longstanding presumption of openness applies to this dispute just as it has in many other disputes regarding sensitive issues in which the parties have availed themselves of the court system. *See Friedrichs v. Kinney & Lange*, 22 Media L. Rep. 2530, 2532 (Minn. Dist. Ct., Hennepin County 1994) (noting that partnership disputes are no different from many other, oftentimes highly personal, disputes in which individuals avail themselves of the courts).[1] Generally, the public and members of the press (such as Star Tribune) have a legally protected interest in public access to judicial records and proceedings. However, Defendants assert that Star Tribune is unable to demonstrate that this interest relates to the property or transaction involved in the underlying action because it involves a "private" dispute between the parties and not a matter of "public" concern. The Court disagrees that the right of access turns on such a distinction.

2. Star Tribune's legally protected interest is sufficiently related to the property involved in the underlying action

Once a legally protected interest is established, Star Tribune must demonstrate that the interest is related to the property or transaction involved in the underlying action. *See Schumacher*, 392 N.W.2d at 207. The Court in *Schumacher* relied upon the Wisconsin Supreme Court's reasoning in *Bilder v. Township of Delavan*, for an explanation on the necessary relation

[1] The Court notes that the parties in this case made the decision to avail themselves of the presumptively public state court system to resolve their dispute, rather than choosing private arbitration or mediation. It is not uncommon for details of law-firm relationships, client relationships, and internal business affairs to be made public as a consequence of litigation. *See In Re Disciplinary Action Against Wyant*, 533 N.W.2d 397 (Minn. 1995); *Barna, Guzy & Steffen, Ltd. v. Beens*, 541 N.W.2d 354 (Minn. Ct. App. 1995); *Olsten v. Anderson*, No. C3-92-77, 1992 WL 213464 (Minn. Ct. App. Sept. 3, 1992); *Flynn v. Flynn*, 402 N.W.2d 111 (Minn. Ct. App. 1987).

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between the legally protected interest and the property involved in the underlying action. 334 N.W.2d 252 (Wis. 1983). The *Bilder* Court specifically explained,

> We agree with the broader, pragmatic approach to intervention as of right. In deciding whether to allow a party to intervene as a matter of right, the court should view the interest sufficient to allow the intervention practically rather than technically . . . The court measures the sufficiency of the interest by focusing on the facts and circumstances of the particular case before it as well as the stated interest in intervention and analyzes these factors against the policies underlying the intervention statute.

Id. at 548. Defendants argue that a general interest in gathering news is not sufficient to meet the "pragmatic approach" identified in *Bilder*, and relied upon in *Schumacher*. The Court agrees with Star Tribune in that Defendants have misinterpreted this "broader, pragmatic approach" discussed. This analysis actually expands rather than restricts the ability to intervene in ongoing litigation.

Defendants urge the Court to conclude that Star Tribune's interests, in newsgathering generally and in gathering news about a private dispute specifically, are insufficient to meet the second prong of the *Schumacher* test. However, in essence, Defendants are attempting to shift the burden to Star Tribune to justify why it needs access to information it has not yet seen. This entirely undermines the essence of the presumption of openness in our courts. Star Tribune's interest in intervention is the same as the public: access to otherwise public documents held by the court. *See Friederichs v. Kinney & Lange*, 22 Media L. Rep. 2530, 2531-32 (Minn. Dist. Ct., Hennepin County 1994).

B. Star Tribune's Legally Protected Interest Would Be Impaired or Impeded If It Is Unable to Intervene In This Action

The third prong of the *Schumacher* test requires the potential intervenor to show, as a practical matter, "the disposition of the action may impair or impede the party's ability to protect its stated interest." *Schumacher*, 392 N.W.2d at 207. The Court emphasized that this issue

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should be "viewed from a practical standpoint rather than one based on strict legal criteria." *Id.* Practically speaking, when the Court sealed large portions of the evidentiary record in this case, it prevented Star Tribune and the public from exercising their right of access to court files. Absent intervention by Star Tribune (or other members of the public or press), the public's access to court documents could be impaired.

C. Star Tribune's Interests Are Not Adequately Represented By The Existing Parties

The final prong of the *Schumacher* test is that "the potential intervenor's interest must not be adequately represented by the existing parties." *Schumacher*, 392 N.W.2d at 207-08. Plaintiff agrees and joins Star Tribune's arguments regarding conducting the trial in an open and public manner. However, simply because Plaintiff agrees that there should be an open trial does not mean that he is adequately representing Star Tribune's interests in access. Further, Defendants do not argue that Plaintiff has failed to meet this final prong of the *Schumacher* test.

The Court holds that Star Tribune has met the requirements of Rule 24.01; therefore, Star Tribune's Motion to Intervene to seek access to court files and proceedings is granted. However, the Court's holding on the question of intervention does not constitute a determination on the scope of Star Tribune's right of access to court files and proceedings. The Court must weigh Star Tribune's interest in access against Defendants' interests in keeping the record sealed and parts of the trial closed.

III. Star Tribune's Interest In Favor Of Access To Court Files and Proceedings Outweighs Defendants' Interest In Keeping The Record Sealed And The Court Proceedings Closed

At this point, the Court must decide whether the constitutional standard or common-law balancing test applies when determining the scope of Star Tribune's right of access to civil court files and proceedings in this case. Several jurisdictions have recognized a constitutional right of

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access to civil court files and records. *Schumacher*, 392 N.W.2d at 203. A "strong" presumption in favor of access exists under the First Amendment. *Id.* Under the constitutional test, "the presumption, along with any other interests asserted in favor of access, [is] balanced against those interests asserted for denying access." *Id.* To overcome the presumption in favor of access, "a party must demonstrate that a compelling governmental interest exists and that the restriction on access is narrowly tailored to meet this governmental interest." *Id.*

In contrast, other jurisdictions do not find a constitutional right of access, but they nonetheless recognize a common-law right of access to court records and proceedings. Similar to the constitutional test, when applying the common-law balancing test, the court balances the competing interests of public access and private confidentiality. *Schumacher*, 392 N.W.2d at 202. The court's determination is within its sound discretion:

> The trial court is in the best position to weigh fairly the competing needs and interests of the parties . . . the right of access is therefore best left to the sound discretion of the trial court, 'a discretion to be exercised in light of the relevant facts and circumstances of the particular case.'

Id. at 206 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) and quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1977)).

Under the common law, it is undisputed that there is a right to inspect and copy civil court records. *Schumacher*, 392 N.W.2d. at 202. "The right to inspect and copy records is considered 'fundamental to a democratic state.'" *Id.* (quoting *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976)). "The common law right of access, however, is not absolute . . . 'every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.'" *Schumacher*, 392 N.W.2d at 202 (quoting *Nixon*, 435 U.S. at 598). Under this rubric, the court determines the scope of access by balancing the interests supporting access, "including the presumption in favor

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of access . . . against the interests asserted for denying access." *Schumacher*, 392 N.W.2d at 203. The presumption of access will only be overcome by a "sufficiently strong interest." *Id.* at 202. The party seeking to restrict access must show "strong countervailing reasons" to do so. *Id.* at 205-06.

Star Tribune concedes that Minnesota has not conclusively adopted the constitutional standard in determining the scope of access. The Minnesota Supreme Court in *Schumacher* noted that, with regard to civil files, "only a few courts have elevated [the common law standard of access] to a constitutional standard." *Id.* at 203. The *Schumacher* Court then declined to adopt the constitutional standard. *Id.* at 209. To date, neither the Supreme Court nor the Court of Appeals has held that there is a constitutional right of access to civil court files or proceedings in Minnesota.

The closest the Supreme Court has come to adopting the constitutional standard was in *In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 755 (Minn. 2005), when it stated, "[C]ourt proceedings and documents enjoy a 'presumption of openness' that generally may be overcome only by showing that a party's constitutional rights would be at risk if the proceeding or document is made public." However, the Court believes that the common-law balancing test is more in line with the spirit of the Rule 2 of the Rules of Public Access to Records of the Judicial Branch. The Court is not willing to adopt the constitutional standard for this matter and instead analyzes Star Tribune's right of access under the common-law balancing test.

Defendants argue that the Court has already applied the common-law balancing test to the materials currently under seal. However, the parties stipulated to nearly all of the filings under seal, and, thus, the Court did not need to engage in balancing the interests in those early stages of litigation as it does now. Furthermore, even if the Court decided to seal records early in

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the course of litigation, the Court is not precluded from revisiting this issue as the case moves to trial. As the Court in *GlaxoSmithKline* noted, "documents produced as discovery are not presumed to be public and . . . district courts have broad discretion to issue protective orders . . .." 699 N.W.2d at 755. Indeed, the public interest in access becomes heightened as litigation moves from discovery to dispositive motions and trial. "[L]ater in litigation, the privacy interest surrounding pretrial discovery is more likely to yield to the common law presumption of access." *In re GlaxoSmithKline PLC*, 732 N.W.2d 257, 272 (Minn. 2007).

A district court judge presiding over a civil action should "weigh 'policies in favor of openness against the interests of the litigant in sealing the record.'" *In re GlaxoSmithKline PLC*, 699 N.W.2d at 755 (quoting *In re Rahr Malting Co.*, 632 N.W.2d 572, 576 (Minn. 2001)). Defendants assert that the documents currently under seal are those which are routinely recognized as confidential. They further argue these documents, containing information such as HMO's business operations, including the firm's proprietary financial information such as its accounts receivable, indebtedness, and method of allocating and distributing firm net income must be kept confidential. The Court finds that the specific public interest in this case together with the strong presumption of openness outweighs Defendants' privacy concerns generally. However, the Court does not hold at this time that all of the previously sealed documents are to be unsealed. At the hearing on this matter, the Court agreed to provide the parties with the opportunity to request that specific documents remain under seal. The Court shall enter a subsequent order detailing which documents, if any, shall remain under seal.

IV. In Accordance With The Longstanding Presumption Of Openness, The Trial In This Matter Will Be Open

Finally, Defendants urge the Court to close the courtroom for the portions of the trial they believe will expose confidential information. However, as articulated above, there is a strong

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presumption of access to court documents and proceedings. *See Schumacher*, 392 N.W.2d at 202. That presumption may only be overcome by a sufficiently strong interest. *Id.* Further, the party seeking to restrict access must show "strong countervailing reasons" to do so. *Id.* at 205-06. As stated above, the Court must apply the common-law balancing test to determine whose interests should prevail. *Id.* at 202. For the reasons provided above, the Court finds that the public interest in access to trial proceedings outweighs Defendants' interests in keeping the courtroom closed. However, the Court reserves the right to revisit this ruling to the extent that there is testimony at trial regarding documents that remain sealed at the time of trial. Nonetheless, the Court questions the ability of either party to make a showing sufficient to justify closing the courtroom for any portion of the trial.