Case No. #113296

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SUPREME COURT
STATE OF OKLAHOMA
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MICHAEL RICHIE
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

REUTERS AMERICA, LLC, a Delaware corporation,

Petitioner,

vs.

THE HONORABLE HOWARD R. HARALSON,

Respondent.

APPLICATION TO ASSUME ORIGINAL JURISDICTION, PETITION FOR EXTRAORDINARY WRIT, AND BRIEF IN SUPPORT

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Petitioner Reuters America, LLC d/b/a Reuters (hereinafter, "Reuters") respectfully requests this Court to assume original jurisdiction and to issue an extraordinary writ directing the Respondent, The Honorable Howard R. Haralson of the District Court of Oklahoma County, to immediately unseal the trial transcripts and all judicial records in the matter of Sue Ann Hamm v. Harold Hamm, Case No. FD-2012-2048.

INTRODUCTION

This case presents rare circumstances warranting the assumption of original jurisdiction to determine whether a district court judge has exceeded his judicial authority by cloaking a public civil action in near-total secrecy. The district judge has issued orders denying public access to trial transcripts and judicial records in a divorce proceeding that could change the shareholding structure of one of the most important publicly-traded companies in the U.S. oil industry. Much of the information withheld from the public is believed to center on competing explanations for how the company grew its market capitalization by more than $23 billion in just over two decades. Given the financial stakes, the public interest in the case and its potential outcomes, particularly among shareholders and those in the industry, is substantial and considered. The district judge has dismissed Reuters' efforts to exercise its constitutional, common law, and statutory rights to access trial transcripts and judicial records – and thereby has engaged in unauthorized use of judicial force and caused irreparable harm to Reuters. Indeed, the district judge continually promised, but ultimately refused, to reopen trial proceedings; he admitted not reading Reuters' Open Records request for trial transcripts and judicial records; he set a hearing on Reuters' motions to intervene and to open trial for three weeks after the close of trial; and he adjourned trial proceedings one day after Reuters' motions were filed. Because no

other remedy is adequate in these circumstances, Reuters petitions this Court for an extraordinary writ directing the district judge to immediately unseal the trial transcripts and judicial records.

APPLICATION AND PETITION

In support of its Application and Petition, Reuters states as follows:

1. This action is brought in the Supreme Court to arrest the improper and unauthorized exercise of judicial authority by Respondent in Case No. FD-2012-2048, Oklahoma County District Court (the "Hamm proceedings").

2. Apart from this Court, there is no court of competent jurisdiction that can grant Reuters the relief it seeks.

3. Original jurisdiction lies in this matter under the Court's superintending control over all inferior courts and to arrest the improper and unauthorized exercise of judicial authority by an inferior court.

4. Reuters seeks relief from the Court in the form of an extraordinary writ directing Respondent to immediately return to the public docket all trial transcripts and judicial records that have been improperly withheld from the public in violation of the First Amendment, the Oklahoma Constitution, common law rights of access, and the Oklahoma Open Records Act.

5. The facts entitling Reuters the relief it seeks are as follows:

a. **The Public Has a Legitimate and Considered Interest in Judicial Proceedings Concerning Continental Resources and Harold Hamm**

i. Reuters, the world's largest independent international news agency, reaches more than a billion people around the world every day. See **Exhibit A**, Affidavit of Joshua Schneyer in Support of Reuters' Motion to Open Trial and Unseal Trial Transcripts ("Schneyer Aff.") ¶ 3. It provides text, video and pictures to newspapers, television and cable networks, radio stations and websites for their further use and republication, and its content is also directly available through Reuters.com, affiliated websites and multiple online and mobile platforms. Id.

ii. As part of its coverage of the U.S. oil market, Reuters has published news articles about Harold Hamm, his business dealings and the company of which he is the founder, Chief Executive Officer and controlling shareholder, Continental Resources, Inc. ("Continental"). See, e.g., "Special Report: How Romney energy czar fuels business with politics," D. Sheppard, J. Schneyer, and A. Cohen, Sept. 20, 2012, http://www.reuters.com/article/2012/09/20/us-hamm-romney-profile-idUSBRE88J12L20120920 (Schneyer Aff. Ex. 1); "North Dakota oilman urges US crude exports to Europe," T. Gardner, March 26, 2014, http://www.reuters.com/article/2014/03/26/usa-oil-ban-idUSL1N0MN0TM20140326 (Schneyer Aff. Ex. 2); "Continental Resources books 2014 capex on costly well techniques," Reuters, Sept. 17, 2014, http://www.reuters.com/article/2014/09/17/continentalresources-forecast-idUSL1N0RI37320140917 (Schneyer Aff. Ex. 3).

iii. The public interest in news and information about Mr. Hamm and Continental is compelling. Continental, a New York Stock Exchange-traded firm, is one of the most important companies in Oklahoma and the U.S. oil industry. Mr. Hamm, whose wealth is estimated at $20 billion, is among the most important U.S. industrialists and public business figures of his generation. Id. He has played a leading – if not the leading – role in the current U.S. energy boom and is widely credited for being among the first to use hydraulic fracturing, or fracking, and horizontal drilling to extract oil from the Bakken rock formation. He is believed to own more oil underground than any other American. Mitt Romney tapped Mr. Hamm as his senior energy advisor during the 2012 Presidential election. That same year, Mr. Hamm was declared one of the world's most influential people by *Time* magazine; the prior year, he was inducted into Oklahoma's Hall of Fame. He has played a growing role in Oklahoma and national politics, as a fundraiser and adviser, for example, having led the reelection campaign for Oklahoma's Attorney General last year. A leading spokesperson in Washington, D.C. for independent oil and gas companies behind the shale drilling boom, he has testified before Congress on several occasions. He funds trade and lobbying groups that lobby on matters of U.S. policy affecting the oil and gas sector, in Oklahoma and elsewhere. Schneyer Aff. ¶ 6.

iv. The public interest in the Hamm proceedings is no less compelling. The division of marital assets in this matter appears to implicate Mr. Hamm's shares in Continental, estimated to be worth $17 billion. If Mr. Hamm divests his shares to finance the settlement

of the marital estate, his percent ownership of Continental will be similarly diminished. Continental's shareholders, and indeed the U.S. oil industry, have an interest in knowing whether there may be a change in shareholder structure or ownership within the company. Schneyer Aff. ¶¶ 7-8 & Exs. 4-6.

v. Mr. Hamm's role at the helm of Continental is directly at issue in the Hamm proceedings. This Court is being asked to determine what portion of the more than $23 billion of growth in Continental's market capitalization during the Hamms' marriage is active marital capital subject to division between the parties. To that end, it has heard evidence about whether the company's growth is attributable to Mr. Hamm's personal leadership, accomplishments and business acumen, or whether other factors, such as market conditions, are the source. Continental and Mr. Hamm have told the story of his success, role in the U.S. energy boom and leadership of Continental in countless public forums in recent years, including in filings for investors and potential investors. Both parties are invoking the same narrative, relying on public statements on the company's website, its filings with the Securities Exchange Commission, and annual reports, to support or negate the notion that Continental's remarkable growth is owed to Mr. Hamm. Critically to Continental's shareholders, Mr. Hamm now says those prior representations contained errors. Schneyer Aff. ¶ 9.

vi. Continental's stake and influence in the Hamm proceedings is further demonstrated by the active role it has played in both motions practice and trial. Schneyer Aff. ¶¶ 10-11.

vii. The business-centered aspect of the Hamm proceedings, and hence the public interest, does not end with Continental. Many other businesses that are or were affiliated with Mr. Hamm have been called upon for evidence in this case. Schneyer Aff. ¶ 12.

b. **Respondent Improperly Sealed the Hamm Proceedings, Trial Transcripts, and Judicial Records Based on the Unspecified "Confidential and Proprietary Financial Information" of Continental**

i. Reuters' ability to report on the Hamm trial was considerably handicapped by the near-total closure of all hearings and access to public records. Nearly every substantive document filed in this proceeding has been withheld from the public. Over 260 filings in the underlying docket are identified as sealed. Another 15 filings are not so marked, but are not publicly available. Also, none of the transcripts identified in the docket – not even those pertaining to

proceedings that were held in open court – are available. Schneyer Aff. ¶ 14.

ii. A sealed May 18, 2012 protective order seals the entire court file. Id. ¶¶ 16-17. An October 23, 2012 protective and confidentiality order allows the sealing of court records with any non-public information about the parties' assets, business, liabilities and financial information, including information about Continental. Id. ¶¶ 16, 18. The docket does not reflect any records that suggest the Court made specific findings of fact as to the necessity for secrecy. Id. ¶¶ 16-17. Due to the scope of sealing in this case, Reuters is unable to determine whether there any such records or transcripts, or whether they are under seal.

iii. All but three days of the trial have been entirely closed to the public. Trial commenced on August 4, 2014 and concluded on October 9, 2014. Reuters was permitted to witness a portion of the proceedings during the first day excluding opening arguments, the second day and the morning session of the third day. From the close of the morning session on August 6 through the end of the trial, however, the proceedings were closed to the public. Schneyer Aff. ¶¶ 19-34; see also "Divorce trial of Continental CEO ends, with billions at stake," Reuters, Oct. 9, 2014, http://www.reuters.com/article/2014/10/09/us-hamm-divorce-trial-idUSKCN0HY2PO20141009.

iv. Respondent's stated rationale for closure has been a desire not to "destroy" Continental over a divorce proceeding and the need to protect unspecified "confidential financial information" or "confidential and proprietary information" of Continental. Schneyer Aff. ¶¶ 20, 24, 26. Respondent further explained that in his view, Continental is a large, important, publicly-traded Oklahoma company with thousands of shareholders, making it all the more important to protect its proprietary information by closing the hearings. Id. ¶ 24. Here again, due to an absence of publicly-available information, Reuters is unable to discern whether Respondent made particularized findings on the record to support closing the trial, or whether the public was given notice prior to closure. The docket does not appear to contain any entries to that effect. Id. ¶¶ 14-18.

c. **Respondent Denied Reuters' Repeated Efforts to Observe the Trial, Notwithstanding Frequent Assurances that the Proceedings would be Reopened**

i. In anticipation of the trial, on July 21, 2014, a Reuters reporter telephoned Respondent's chambers and spoke to the bailiff, who conveyed that, to the best of her knowledge, Respondent intended to conduct the trial in open court. Schneyer Aff. ¶ 19.

ii. Respondent knew of Reuters' interest in the proceedings but Reuters did not receive prior notice of any sealing order proceedings in the case. Schneyer Aff. ¶¶ 19-25.

iii. On the morning of August 4, 2014, the first day of trial, the Reuters reporter was allowed into the courtroom, but was then asked to leave prior to the beginning of opening statements. Respondent advised that the bailiff would contact interested persons when the trial was reopened. The reporter left his contact information with the bailiff, requesting to be notified by telephone any time the court would be open to the public during the trial. The bailiff agreed. Schneyer Aff. ¶ 20.

iv. The reporter did not receive a call from the bailiff, but when he returned to the courtroom later in the day on August 4, he discovered that the proceedings had been reopened. He attended the trial for the remainder of the day. He also attended on August 5 and during the morning session of August 6. Schneyer Aff. ¶¶ 21-23.

v. During the afternoon session on August 6, 2014, the Reuters reporter attempted to observe the proceedings but Respondent sealed the courtroom, stating that the proceedings would involve the discussion of "confidential information." Schneyer Aff. ¶ 23.

vi. On August 7, 2014, the Reuters reporter attempted to observe the proceedings Respondent again closed the courtroom, citing confidential financial information of Continental. Schneyer Aff. ¶ 24.

vii. On August 7, 2014, the Reuters reporter spoke to Respondent and requested all court orders or transcripts of hearings that explain why he closed the trial. Respondent stated that he was unable to provide documentation but did not specify whether such documentation existed or whether it was unavailable to the public. However, Respondent acknowledged that he has a responsibility to "seek a

balance" and open the courtroom when possible. Schneyer Aff. ¶ 24.

viii. On August 11 and 12, 2014, a second Reuters reporter attempted to attend the trial. Respondent advised that the proceedings were closed, citing the proprietary and confidential financial information of Continental, and promised to inform Reuters when hearings were reopened. Schneyer Aff. ¶ 26.

ix. On August 14 and 27 as well as September 3, 19 and 23, Reuters contacted Respondent's chambers or attempted to attend the trial, but was told the proceedings were sealed until further notice. Schneyer Aff. ¶¶ 27-31.

x. In sum, Reuters was shut out of virtually every session of the nearly 10-week trial despite assurances that the proceedings would be reopened to the press and public. Indeed, from August 6 through the close of the trial on October 9, Respondent did not allow any Reuters reporter to attend the Hamm proceedings.

d. **Respondent Ignored Reuters' Records Request pursuant to the Oklahoma Open Records Act**

i. Having been repeatedly refused entry to the on-going proceedings, on August 27, 2014, Reuters filed a public records request under the Oklahoma Open Records Act, Okla Stat. tit. 51, § 24A.1-29, for records related to the Hamm proceedings. Schneyer Aff. ¶ 28 & Exs. 11-12.

ii. The Reuters' Open Records request seeks "all public records" related to the underlying Hamm proceeding (hereinafter, the "judicial records"), including but not limited to: court orders and transcripts addressing what information is to be kept confidential and why; court orders and transcripts addressing the district court's rationale for sealing the courtroom from the public; trial transcripts; marital balance sheets; separate property balance sheets; and records being withheld although the district court determined they are not to be sealed. Schneyer Aff. ¶ 28.

iii. Reuters inquired with Respondent's chambers on September 3, 9, 10, and 19 regarding the Open Records request, but received no substantive response. Schneyer Aff. ¶ 29.

iv. On September 19, 2014, Respondent told a Reuters reporter that he had yet to review the Open Records request. Schneyer Aff. ¶ 29.

v. As of the date of this Application and Petition, almost seven weeks later, Reuters has not received a response to its Open Records request, and no hearing on the request has been set.

vi. Respondent has, in effect, denied Reuters' Open Records request.

e. **Respondent Disregarded Reuters' Motion to Intervene, Motion to Open Trial and Unseal Trial Transcripts, and Request for an Expedited Hearing**

i. With the trial continuing in secret, on the morning of October 8, 2014, Reuters sought to intervene in the Hamm proceeding to request that the trial be opened and that all trial transcripts be unsealed. See **Exhibit B** (Motion for Leave to Intervene to Move to Open Trial and Unseal Trial Transcripts, "Motion to Intervene"); **Attachment to Exhibit B** (Motion to Open Trial and Unseal Trial Transcripts, "Motion to Open").

ii. Reuters' Motion to Intervene requested that Respondent hold an expedited hearing to adjudicate both its request to intervene and its request to open the trial proceedings, citing the need for immediate relief. Motion to Intervene, at 1.

iii. Respondent did not recess the Hamm proceedings on October 8 to address Reuters' Motion to Intervene, but continued the trial behind closed doors. See Docket in Case No. FD-2012-2048, Oklahoma County District Court, at October 8, 2014.

iv. Respondent did not recess the Hamm proceedings on October 9 to address Reuters' Motion to Intervene, but continued the trial behind closed doors. See Docket in Case No. FD-2012-2048, Oklahoma County District Court, at October 9, 2014.

v. Undersigned counsel contacted Respondent's chambers in the afternoon of October 9, 2014, and was told that no hearing could be held before October 30, 2014 due to the 21-day rule. Reuters' request for expedited consideration of the motions was, in effect, denied.

vi. On the afternoon of October 9, 2014, the docket was updated to reflect that the trial was concluded that afternoon. See Docket in Case No. FD-2012-2048, Oklahoma County District Court, at October 9, 2014.

f. **Respondent Has Caused Irreparable Harm to Reuters' Constitutional, Common Law, and Statutory Access Rights**

i. Respondent has barred Reuters and the public from a civil trial that directly concerns one of the most significant, publicly-traded companies in the U.S. oil market, the leadership role, achievements and stake of its founder and majority owner, and one of the wealthiest, most influential and politically active businesspersons in the country. He has done so on the unfounded and speculative premise that allowing the public into the trial will expose "confidential and proprietary information" and "destroy" a publicly-traded company.

ii. Each day that the Respondent has withheld access to the Hamm proceedings and records, he has irreparably harmed Reuters' constitutional, common law, and statutory rights to obtain and disseminate information in the public interest, in particular, information about matters transpiring in a public courtroom.

6. Reuters' legal arguments and authorities in support of this application and petition are included below; an appendix of exhibits is being submitted simultaneously herewith.

7. Because Respondent's enforcement of the sealing orders continues to irreparably harm Reuters' rights each and every day that these orders remain in effect, this Court should therefore direct Respondent to release the trial transcripts and judicial records without further delay.

BRIEF IN SUPPORT OF APPLICATION AND PETITION

I. This Court has Original Jurisdiction

This Court has original jurisdiction to exercise "a general superintending control over all inferior courts." Okla. Const. Art. VII, § 4. In exercising jurisdiction, the Court may issue an extraordinary writ "to arrest unauthorized or excessive use of judicial force." Gaylord Entertainment Co. v. Thompson, 1998 OK 30, ¶ 6, 958 P.2d 128, 136; see also Scott v. Peterson,

2005 OK 84 ¶ 12, 126 P.3d 1232, 1236 (Supreme Court may issue extraordinary writs when district court exceeds its authority or issues order constituting an abuse of discretion).

As set out below, Respondent's repeated refusal to return to the public docket all trial transcripts and judicial records violates the First Amendment, the Oklahoma Constitution, the common law access right, and the Oklahoma Open Records Act. This refusal exceeds Respondent's judicial authority and warrants the exercise of jurisdiction by this Court to issue the requested extraordinary writ.

II. Respondent's Refusal to Unseal Trial Transcripts and Judicial Records Constitutes an Unauthorized Use of Judicial Force Necessitating Extraordinary Relief

This Court has observed the regularity with which "[c]ases involving the public interest have been subject to the extra-ordinary relief proffered by writs of mandamus or prohibition." World Pub. Co. v. White, 2001 OK 48 ¶ 1 n.5, 32 P.3d 835, 838 (citing Gaylord Entertainment Co. v. Thompson, 1998 OK 30, ¶ 6, 958 P.2d 128; Keltch v. Alfalfa County Election Bd., 1987 OK 8, ¶ 1, 737 P.2d 908; Garner v. City of Tulsa, 1982 OK 104, ¶ 30, 651 P.2d 1325; Carpet City, Inc. v. Stillwater Municipal Hosp. Auth., 1975 OK 75, ¶ 28, 536 P.2d 335. There can be little doubt as to the substantial and considered public interest in the judicial records and trial transcripts, which reflect the way in which the Continental Resources CEO explains his role in the company's growth over the past two decades and lay the factual predicate for whether the Hamms' divorce will or will not lead to a change in the shareholding structure of the company.

The general rule for a writ of mandamus to issue is that (1) the party seeking the writ must have a clear legal right to the relief sought; (2) the respondent must have a plain legal duty in which the exercise of discretion is not implicated; and (3) the situation offers no adequate remedy in the ordinary course of the law. Oklahoma Gas & Electric v. District Court, 1989 OK

158, ¶ 8, 784 P.2d 61; see also Colclazier v. State ex rel. Oklahoma Indigent Def. Sys. Bd., 1997 OK 161, ¶ 6, 951 P.2d 622, 624.

Here, all three elements are satisfied. Reuters has a clear legal right of access to the trial transcripts and judicial records, a right based in the First Amendment, the Oklahoma Constitution, federal common law, and the Oklahoma Open Records Act; Respondent has a legal duty to uphold the law, the exercise of which duty is not discretionary; and Reuters has no adequate remedy in this matter.

Reuters' right to access the trial transcripts and judicial records remains urgent, even though the trial has concluded. Having been shut out of the proceedings – despite repeated assurances to that the trial would be reopened – the public has been denied almost all information about the trial, including its fairness and legitimacy. Every day that Petitioner continues to withhold this information constitutes a unique and additional deprivation of the fundamental right to know what transpired in a public courtroom concerning a publicly-traded company.

A. Respondent's Sealing Orders Cannot Withstand Scrutiny under the First Amendment, Oklahoma Constitution or Common Law

1. Reuters' constitutional and common law right to access the records

"One of the strongest pillars of our system of justice in the United States is the presumption that all judicial proceedings are open to the public whom the judiciary serves." Dhiab v. Obama, Case No. 05-1357 (D.D.C., Oct. 2, 2014) (emphasis in original) (denying government request to seal evidentiary hearings in a civil action by a Guantanamo Bay detainee; the fact that the record includes classified information is insufficient to warrant total closure) (copy of decision attached to Reuters' Motion to Open).

The First Amendment and common law access rights to criminal proceedings and records, see Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569-70 (1980); Globe

Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982), apply with equal force to civil proceedings, imposing a presumption that these proceedings will be open. See New York Civil Liberties Union v. New York City Transit Auth., 684 F.3d 286, 298 (2d Cir. 2012); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253-54 (4th Cir. 1988); In re Continental Ill. Secs. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070-71 (3d Cir. 1984); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); In re Iowa Freedom of Info. Council, 724 F.2d 658, 661 (8th Cir.1983); Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983); see also Collier v. Reese, 2009 OK 86, ¶ 4, 223 P.3d 966, 979 (Opala, J., concurring) (citing Publicker, 733 F.2d at 1070 (the "First Amendment embraces a right of access to civil trials to ensure that this constitutionally protected discussion of governmental affairs is an informed one"); Journal Pub. Co. v. Mechem, 801 F.2d 1233, 1236 (10th Cir. 1986) (the "court may impose a prior restraint on the gathering of news about one of its trials only if the restraint is necessitated by a compelling governmental interest" and "these requirements apply for criminal trials as well as civil trials") (citing Globe Newspaper Co., 457 U.S. at 606-07)). These access rights are also guaranteed by the Oklahoma Constitution. See Okla. Const. art. 2 §§ 6 ("The courts of justice of the State shall be open to every person") & 22 ("no law shall be passed to restrain or abridge the liberty of speech or of the press").

Divorce proceedings are no different. Here, too, the public has constitutional and common law rights of access to records and proceedings. See, e.g., Copeland v. Copeland, 966 So. 2d 1040, 1045 (La. 2007) (noting that no statute exempts court proceedings from the open courts or public records provisions); Burkle v. Burkle, 135 Cal. App. 4th 1045, 37 Cal. Rptr. 3d 805 (2006), as modified (Feb. 1, 2006) (First Amendment right of access to civil court

proceedings is equally applicable in marital dissolution proceedings, which are, therefore, presumptively open); Associated Press v. State, 153 N.H. 120, 133, 888 A.2d 1236 (2005) (constitutional and common law rights of access apply to domestic relations proceedings); Petition of Keene Sentinel, 136 N.H. 121, 126, 612 A.2d 911, 914 (1992) (same).

In any context, openness serves government interests of the highest order. It ensures that proper procedures are followed, creates incentives for all participants to perform well, discourages perjury and encourages those with information to come forward. Richmond Newspapers, 448 U.S. at 569-70. It inhibits misconduct and bias and provides "'an effective restraint on possible abuse of judicial power.'" Id. at 592 (Brennan, J., concurring) (citation omitted); see also Globe Newspapers, 457 U.S. at 606 (the constitutional right of access permits the public to "serve as a check on the judicial process," which "enhances the quality and safeguards the integrity of the fact finding process"); United States v. Aref, 533 F.3d 72, 83 (2d Cir. 2008) ("[t]ransparency is pivotal to public perception of the judiciary's legitimacy and independence").

Indeed, court proceedings and records are presumptively open because secrecy is anathema to public confidence in the judicial process. See Richmond Newspapers, 448 U.S. at 572 ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing"); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984) ("Press Enterprise I") ("The value of openness lies in the fact that people not actually attending trials [and other proceedings] can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known"); Gannett Co. v. DePasquale, 443 U.S. 368, 429 (1979) ("Secret hearings—though they

be scrupulously fair in reality—are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view") (Blackmun, J., concurring in part and dissenting in part) (citation omitted); see also Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) ("[s]ecrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges"); Brown & Williamson, 710 F.2d at 1179 ("In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption").

Before restricting the constitutional and common law right of access to judicial proceedings or records, a court must make detailed findings of fact on the record as to whether protection of the compelling government interest makes closure essential. Globe Newspaper Co., 457 U.S. at 607-09 & n. 20. **The court's factual findings must establish all four of the following factors:**

(1) **A substantial probability of prejudice to a compelling governmental interest**. See Richmond Newspapers, 448 U.S. at 581; Press-Enterprise I, 464 U.S. at 510 (a denial of access is permissible only when "essential to preserve higher values"); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13-14 (1986) ("Press-Enterprise II"); *id.* at 14-15 (holding that a "reasonable likelihood" standard is not sufficiently protective of the access right, but a "substantial probability" standard must be applied); Journal Pub. Co., 801 F.2d at 1236 ("A court may impose a prior restraint on the gathering of news about one of its trials only if the restraint is necessitated by a compelling governmental interest") (citing Globe Newspaper Co., 457 U.S. at 606-07));

(2) **There are no alternatives to denial of access that can protect the compelling interest at issue.** See Journal Pub. Co., 801 F.2d at 1236 ("the court must consider any reasonable alternatives to that restraint which have a lesser impact on first amendment rights"); Publicker, 733 F.2d at 1071 (there can be no less restrictive way to serve the compelling interest) (citing Globe Newspaper Co., 457 U.S. at 606-07); Brown & Williamson, 710 F.2d at 1179. See also Shadid v. Hammond, 2013 OK 103, ¶ 5, 315 P.3d 1008, 1009 (district courts should not

"block access to public records unless it is absolutely 'necessary in the interests of justice.' Public records should remain public except in the most compelling of circumstances") (Taylor, J., concurring);

(3) The limitation on access is narrowly tailored to protect the compelling interest at issue. Journal Pub. Co., 801 F.2d at 1236; see also Press-Enterprise II, 478 U.S. at 13-14; Shelton v. Tucker, 364 U.S. 479, 488 (1960); Washington Post v. Robinson, 935 F.2d 282, 287 (D.C. Cir. 1991); Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 124 (2d Cir. 2006); and

(4) The proposed limitation on access will protect the threatened interest. See Press-Enterprise II, 478 U.S. at 14 (the party seeking secrecy must demonstrate "that closure would prevent" the harm sought to be avoided); In re The Herald Co., 734 F.2d at 101 (closure impermissible if "the information sought to be kept confidential has already been given sufficient public exposure"); see also Journal Pub. Co., 801 F.2d a 1236 ("If a court order burdens constitutional rights and the action proscribed by the order presents no clear and imminent danger to the administration of justice, the order is constitutionally impermissible").

Additionally, prior to making these findings, the court must provide "representatives of the press and general public . . . an opportunity to be heard on the question of exclusion" and to state on the record why the trial should remain subject to public scrutiny. Globe Newspaper Co., 457 U.S. at 607-09 & n. 20; DePasquale, 443 U.S. at 401 (Powell, J., concurring); see also In re Associated Press, 162 F. 3d 503, 508 (7th Cir. 1998); In re Knight Publ'g Co., 743 F.2d 231, 234 (4th Cir. 1984); accord Shadid, 2013 OK 103, ¶ 14, 315 P.3d at 1014 (referring to intervention by a newspaper as the proper procedural mechanism to contest sealing, noting that the "Due Process Clauses of both the State and Federal Constitutions require this procedure") (emphasis in original) (Edmondson, J., concurring in part and dissenting in part).

Here, Respondent failed to comply with either obligation. There is nothing to suggest that Respondent made any detailed findings of fact before sealing judicial records, closing the trial, and withholding all trial transcripts. When asked for documents explaining the basis for closing the trial, Respondent said he was unable to provide any, Schneyer Aff. at ¶ 24, and the

underlying docket does not reflect any specific findings by the Respondent to that effect, id. ¶¶ 16-18.

Moreover, there is no evidence that the Court provided an opportunity for the public to be heard prior to ordering closure. Indeed, it disregarded Reuters' request to intervene and to hold a hearing at which Reuters would have been able to state on the record the public interest in the proceedings, judicial records, and trial transcripts. See Shadid, 2013 OK 103, ¶ 14, 315 P.3d at 1014.

Those critical failures alone establish that Respondent's sealing orders constitute an unauthorized exercise of judicial authority. However, even if this Court were to conduct its own analysis, the outcome would be no different, as the lack of access to the trial transcripts and judicial records cannot withstand the four-part test set forth above. In fact, there is no evidence that any single one of the requisite elements – let alone all four of them – is met here.

2. Disclosing "Confidential and Propriety Information" of Continental Does Not Establish a Compelling Governmental Interest

A desire not to "destroy" nonparty Continental by revealing any of its "confidential financial or proprietary information," and the generalized observation that it is a large, important, publicly-traded Oklahoma company with thousands of shareholders, see Schneyer Aff. at ¶ 24, fall far short of a compelling government interest. These justifications are considerably too nebulous to warrant closure. The lack of specificity, standing alone, entitles Reuters access to the judicial records and trial transcripts. See Press–Enterprise I, 478 U.S. at 15 ("The First Amendment right of access cannot be overcome by [a] conclusory assertion").

Avoiding harm to Continental is not enough under the law. See Brown & Williamson, 710 F.2d at 1179-80 ("Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public

access to court proceedings and records") (citing Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982) (lifting a seal on an internal bank report that contained a candid review of internal business operations; "a naked conclusory statement that publication of the Report will injure the bank in the industry and local community falls woefully short of the kind of showing which raises even an arguable issue as to whether it may be kept under seal")).

The mere invocation of nonspecific "confidential financial information" is also insufficient. These are not magic words. Just because information is "confidential" or "financial" does not mean that it rises to the level of a protectable trade secret. Instead, a far more particularized evidentiary showing is required. See Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304 (11th Cir. 2001) (a party's reliance on "trade secret" status was insufficient to seal court records without a more specific showing; related findings of fact must be sufficiently detailed to permit appellate review); Publicker, 733 F.2d at 1071 (party seeking closure of a hearing to protect confidential commercial information, such as a trade secret, must make a specific showing that disclosure would work a clearly defined and serious injury). Even in the context of protective orders, courts disallow parties from sealing records based on nothing more than a representation that the information is "confidential" or "proprietary." See Gulf Oil Co. v. Bernard, 452 U.S. 89, 102 n. 16 (1981) (party moving for a protective order must make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements"); Reed v. Bennett, 193 F.R.D. 689, 691 (D. Kan. 2000) (rejecting a proposed protective order because it "would protect any document defendant 'reasonably contends contain proprietary and confidential information'"); see also Official Court Rules of the Seventh Judicial and Twenty-Sixth Administrative Districts, Comprised of Oklahoma and Canadian Counties, Rule 10.1(C) ("Protective orders that attempt to generally

authorize the filing under seal of any document or category of documents that the parties claim to be confidential or trade secrets will not satisfy this rule").

Whether information is legitimately a "trade secret" depends on: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and to competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Amoco Production Co. v. Lindley, 1980 OK 6, 609 P.2d 733, 734 (adopting the six factors from the Restatement of Torts, § 757, Comment b (1939)). The record in the underlying action does not appear to contain any findings of fact that speak to the foregoing factors.

To the contrary, the notion that all information about Continental in the underlying case is a closely-guarded secret belies common sense. Continental is a publicly-traded company. Schneyer Aff. ¶ 6. It reports to the Securities Exchange Commission and its investors, and discloses a wide range of information about its achievements and operations. Id. ¶ 9. Moreover, the discussion of it in this case is very likely to refer to past, publicly-touted events to which it attributes its remarkable growth, rather than future business plans of any kind.

There is, therefore, no fact in the record sufficient to establish that allowing public access to the trial is substantially likely to prejudice a compelling government interest. Standing alone, the absence of that critical showing renders the total closure of trial unconstitutional and violative of the common law right of access.

3. Near-Total Secrecy Fails to Meet the Remaining Requirements to Restrict Access

Near-total sealing of trial transcripts and judicial records fares no better, however, when examined in light of the remaining three factors that must be present to overcome the presumption of openness.

Most egregiously, shutting out the public from trial, including by entirely sealing every trial transcript, is not narrowly tailored. The Hamm proceedings concern the dissolution of a marital estate. The parties are presenting evidence and testimony to the trial court that have nothing at all to do with Continental. Even as to information about Continental, however, not all information about the company can be properly categorized as a "trade secret" – even if one were to assume that a portion of it can.

Indeed, as far as Reuters is aware, much of the evidence regarding Mr. Hamm's contribution to Continental's growth during the marriage consists of otherwise publicly available information, including public statements posted on the company's website, its annual reports, and its filings with the Securities Exchange Commission. See Schneyer Aff. ¶¶ 8-9. From this perspective, total closure is both overbroad and ineffective as to information that is already available to the public.

Finally, there are alternatives to closure. It is inconceivable that information about Continental properly classified as a trade secret, to the extent there is any, has so permeated the proceedings and filings that no portion of the transcripts can be open to the public. Even in the face of considerably more sensitive information than a publicly-traded company's purported trade secrets, courts regularly structure proceedings to maximize openness. See, e.g., Dhiab, Case No. 05-1357, at *2 (denying Government's motion to seal a preliminary injunction hearing on force-feeding Guantanamo Bay detainee; while classified national security information will

be presented, "the hearing can be bifurcated into open and closed sessions to accommodate the Government's concerns") (copy of decision attached to Reuters' Motion to Open); United States v. Yazzie, 743 F.3d 1278, 1289 (9th Cir. 2014) (finding closure narrowly tailored because the court "closed the courtroom only when the child victims took the stand" and "all other portions of the trial . . . were public"); United States v. Moussaoui, 65 F. App'x 881, 890 (4th Cir. 2003) (ordering bifurcated appellate oral argument and requiring release of redacted transcript of sealed portion "as soon as is practicable"); United States v. Grunden, 2 M.J. 116, 123-24 (C.M.A. 1977) ("bifurcated presentation of a given witness' [classified and unclassified] testimony is the most satisfactory resolution of the competing needs for secrecy by the government, and for a public trial"); Denver Post Corp. v. United States, 2005 WL 6519929 (A.C.C.A. Feb. 23, 2005) ("an appropriate bifurcated process must be employed to ensure that public access is protected" while also protecting classified information).

The near-total denial of access to judicial records and trial transcripts is wildly overbroad – and legally impermissible.

B. Respondent's Sealing of Trial Transcripts and Judicial Records Also Violates the Oklahoma Open Records Act

Reuters requested trial transcripts and judicial records in its August 27, 2014 Open Records request, a request which Respondent has effectively denied. To this day, Respondent has neither responded to the request nor set a hearing on the request. Schneyer Aff. ¶¶ 28-29 & Ex. 11.

The Open Records Act establishes Reuters' right to inspect these transcripts and records. See 51 Okla Stat. tit. 2011 §§ 24A.1-24A.29. Under the Act, Court records "are public records and available for public access," absent "a specific finding that sealing the public record is 'necessary in the interests of justice to remove the material from the public record.'" Shadid v.

Hammond, 2013 OK 103, ¶ 3, 315 P.3d 1009 (Okla. 2013) (Taylor, J., concurring) (citing 51 Okla Stat. tit. § 24A.29). Reuters has been unable to find any specific finding to that effect in the instant lower court record. Schneyer Aff. ¶¶ 14-18.[1]

C. Reuters Lacks Any Adequate Remedy in the Ordinary Course

An order is "the functional equivalent of an injunction when it sealed records, prohibited dissemination of information, and enjoined filings." See Shadid, 2013 OK ¶ 8, 315 P.3d at 1012; Collier v. Reese, 2009 OK 86, ¶ 11, 223 P.3d 966, 971-72. Respondent's orders have had the practical effect of an injunction, and every day that this injunction remains in place causes further irreparable harm to the constitutional, common law, and statutory rights of Reuters and the public to access judicial records and trial transcripts. See Nebraska Press Ass'n v. Stuart, 423 U.S. 1327, 1327 (1975) (Where "a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable"); Lugosch, 435 F.3d at 126-27 ("loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); In re Associated Press, 162 F.3d at 506

[1] Even the Oklahoma County Local Rules demand specific and descriptive findings of fact. Local Rule 10.1(C) provides: "Subject to the limitations set out in 12 Okla Stat. tit. 2011, § 3226C(2) and 51 Okla Stat. tit. 2011, § 24A.29, the Court may order that any document (or portion thereof) be filed under seal without redaction. The Court may later unseal the filing or order the person who made the filing to file a redacted version for the public record. Any request to file a document (or portion thereof) under seal shall be made by motion and shall show strict compliance with §§ 3226C(2) & 24A.29. Protective orders that attempt to generally authorize the filing under seal of any document or category of documents that the parties claim to be confidential or trade secrets will not satisfy this rule. Any Court order that authorizes a document to be filed under seal shall specifically describe and identify the document or category of documents to be filed under seal." There is also no suggestion in the underlying docket that the sealing of the trial transcripts or judicial records complied with this rule.

("the values that animate the presumption in favor of access require as a 'necessary corollary' that, once access is found to be appropriate, access ought to be 'immediate and contemporaneous'"); Hirschkop v. Snead, 594 F.2d 356, 373 (4th Cir.1979) ("the first amendment protects not only the content of speech but also its timeliness").

Requiring that Reuters pursue ordinary appellate review or an action under the Open Records Act would further eviscerate the legal rights already trampled by Respondent. As this Court has recognized in other access proceedings, the "time usually necessary for an appeal would result in mooting the public's claim of its right to access" the records at issue. See Shadid, 2013 OK ¶ 8, 315 P.3d at 1012; see also World Pub. Co. v. White, 2001 OK 48 ¶¶ 1, 4, 32 P.3d 835, 839, 840 (issuing writ of mandamus and ordering district judge to release records even though the trial court stated the records "would be released if a compelling reason for the disclosure was revealed," but had not yet done so); accord Thomas v. Hampton, 1978 OK 114, 583 P.2d 506 (this Court appropriately assumed original jurisdiction and modified injunction when "shortness of time" meant ordinary appellate review would offer inadequate remedy).

Moreover, Reuters cannot expect to obtain timely relief from Respondent, who is responsible for the near-blanket sealing of all records, who continues to sit on Reuters' Open Records request, and who took no immediate action in response to Reuters' motion to intervene and to open, instead allowing the trial to conclude before taking up a motion raising the continuing denial of constitutional, common law, and statutory rights. On this record, there is no reason to believe that Reuters can receive a fair or speedy adjudication of access rights before the district court.

* * * * *

The right to know about events transpiring in public courthouses under the supervision of public officials is protected by the U.S. Constitution, the Oklahoma Constitution, common law, and state statute. If this right is to have any meaning, it must be immediately enforceable. Petitioner's exercise of judicial authority to the contrary is improper and unauthorized, necessitating expedited action by this Court to uphold the law, end the unjustified secrecy, and reopen the courthouse doors to the press and public.

WHEREFORE, Reuters respectfully requests that this Court grant its application, assume original jurisdiction of this matter, and issue an extraordinary writ to Respondent, directing him to release the trial transcripts and judicial records to Reuters without further delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 14th, 2014, a copy of this document was mailed & emailed to:

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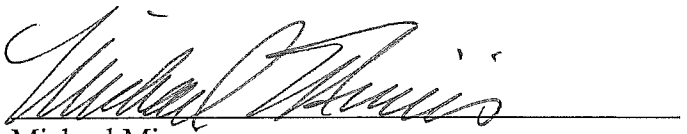

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