STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

DENISE R. KETCHMARK,

Plaintiff,

v.

Case No. 12-305642-DP
Hon. Cheryl A. Matthews

ARCHIE L. HAYMAN,

Defendant.

OPPOSITION BY NON-PARTIES MLIVE MEDIA GROUP, THE FLINT JOURNAL AND E.W. SCRIPPS, INC. (d/b/a WXYZ-TV) TO MOTION TO SEAL FILE PURSUANT TO MCR 8.119(F)

Pursuant to MCR 8.119(F) and the First Amendment to the United States Constitution, non-parties MLive Media Group ("MLive"), The Flint Journal ("Flint Journal") and E. W. Scripps, Inc., d/b/a WXYZ-TV ("WXYZ-TV") oppose Defendant's Motion to Seal File as follows:

1. MLive, an online news service operating throughout the State of Michigan, and the Flint Journal, the newspaper of general circulation in Genesee County, have been reporting on this litigation, as it involves matters of significant public interest.

2. WXYZ-TV operates Channel 7, a television station that covers Southeastern Michigan. Channel 7 has been following this litigation and wishes to report on it to the public, as it is a matter of significant public interest.

3. MCR 8.119(F)(6) provides that any member of the public has standing to and may appear to oppose the proposed entry of an order sealing court records. Further, MCR 8.119(F)(3) provides that, "[t]he court must provide any interested person the opportunity to be heard concerning the sealing of the records." Thus, MLive, the Flint Journal and WXYZ-TV have standing and the right to be heard on this matter.

4. MCR 8.119(F)(1)(b) provides that a file may not be sealed unless the court makes specific finding of "good cause," including specific findings that there is no less restrictive option to protect the specific interest claimed to be the basis for sealing the file. Additionally, MCR 8.119(2)(b) provides that in making a determination of good cause, the court is to consider "the interest of the public."

5. Sealing court records is considered such a serious action that any court that seals a court file must report that action to the Michigan Supreme Court. MCR 8.119(7).

6. Additionally, the United States Supreme Court and other federal courts have repeatedly held that sealing court records is presumptively unconstitutional under the First Amendment and that any person seeking to do so faces significant First Amendment hurdles.

7. This action involves serious charges filed in a public court by a practicing attorney. These are extremely serious matters and the public is entitled to knowledge of such important matters involving elected public officials, and particularly sitting judges. Moreover, the public is entitled to transparency in the court system and its handling of cases before any court of this state. This is particularly important and compelling when one of the parties in the case is a sitting judge.

8. Additionally, this litigation has been the subject of reporting, and sealing the file would be pointless at this stage.

A supporting brief is filed herewith.

WHEREFORE, MLive, the Flint Journal and WXYZ-TV respectfully request the opportunity to be heard and for the Court to deny Defendant's Motion to Seal File.

Dated: October 2, 2012

Respectfully submitted,

/s/James E. Stewart
James Stewart (P23254)
James.Stewart@tklaw.com
Thompson & Knight LLP
39533 Woodward Ave., Ste. 320
Bloomfield Hills, MI 48304
Tel.: (248) 258-7900

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2012, I served the foregoing papers via facsimile on the following:

Denise R. Ketchmark	F. Jack Belzer (P23306)
12257 Dollar Lake Drive	3153 W. Hill Road
Fenton, MI 48430	Flint, MI 48507
Tel.: 810-516-4489	Tel.: 810-234-3300
Fax: 810-232-1016	Fax: 810-234-3399
In Pro Per Plaintiff	**Attorney for Defendant**

_____
Erin Robinson

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

DENISE R. KETCHMARK,

Plaintiff,

v.

Case No. 12-305642-DP
Hon. Cheryl A. Matthews

ARCHIE L. HAYMAN,

Defendant.

BRIEF IN SUPPORT OF OPPOSITION BY NON-PARTIES MLIVE MEDIA GROUP, THE FLINT JOURNAL AND E.W. SCRIPPS, INC. (d/b/a WXYZ-TV) TO MOTION TO SEAL FILE PURSUANT TO MCR 8.119(F)

Non-parties MLive Media Group ("MLive"), The Flint Journal ("Flint Journal") and E. W. Scripps, Inc., d/b/a WXYZ-TV ("WXYZ-TV") oppose respectfully submit this memorandum in support of their Opposition to Motion to Seal File.

As set forth in the Motion, the Michigan Court Rules at MCR 8.119(F) establish that sealed court files are to be the exception and that court files may only be sealed from the public in extreme situations. Moreover, the United States Supreme Court and other federal courts have repeatedly emphasized that sealing court records, or for that matter, denying the public access to court records and court proceedings, is constitutionally suspect under the First Amendment.

It is difficult to imagine a case that would require greater transparency, but which Defendant seeks to litigate in secret.

This First Amendment law, as laid down by the Supreme Court, does not justify suppression of the public's justifiable interest in this litigation and in the public official and practicing attorney who are enmeshed in it, and are parties.

Suppression to protect reputations is specifically not justified. The common law and constitutional grounds supporting the public's right of access to judicial records were emphasized in *Brown & Williamson Tobacco Corp v Federal Trade Commission*, 710 F2d 1165, 1177-1181 (CA 6, 1983), *cert denied*, 465 US 110 (1984). In *Brown & Williamson*, the Sixth Circuit, based on the First Amendment and common law, vacated a suppression order that the district court had entered with respect to the administrative record and other documents flied by the Federal Trade Commission. The court stated:

> Throughout our history, the open courtroom has been a fundamental feature of the American judicial system. Basic principles have emerged to guide judicial discretion respecting public access to judicial proceedings. These principles apply as well to the determination of whether to permit access to information contained in court documents because court records often provide important, sometimes the only bases or explanations for a court's decision.

710 F.2d at 1177. These principles apply to civil as well as criminal cases. *Id.* at 1179.

In *Brown* & *Williamson*, the Sixth Circuit noted that there are two types of exceptions to the strong presumption in favor of openness: (1) '"those based on the need to keep order and dignity in the courtroom," and (2) "those which center on the content of the information to be disclosed to the public." *Id.* As to the second category, the court found that "[s]imply 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." *Id.*, emphasis added. Citing *Joy v North*, 692 F.2d 880, 894 (CA 2, 1982), *cert denied*, 460 US 1051 (1983), the court noted that while there is a natural desire on the part of parties to shield prejudicial information contained in judicial records from competitors and the public, this desire "cannot be accommodated by courts without seriously undermining the tradition of an open judicial system." *Id.* at 1180.

It is well established in MCR 8.119(F) that the press and public have always had a common law right of access to judicial proceedings and records. Over the last quarter century, the United States Supreme Court has recognized that openness in courtroom proceedings and records of all kinds is also a requirement of the United States Constitution. *See*, *Press-Enterprise Co v Superior Court Judge*, 478 us 1 (1986).

Although United States Supreme Court cases have recognized that there can be truly exceptional circumstances which may permit very narrowly tailored exceptions to the rule of unrestricted access to court proceedings and records, a rigorous test must first be met. In brief, before ordering closure, a trial court must find the need for closure to be "compelling," "overriding," and "essential to preserve higher values," that "alternatives to closure will not protect adequately," and that "closure will be effective in protecting against the perceived harm." The reasons supporting closure must be articulated on the record in "findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise Co v Superior Court*, 464 US 501, 510 (1984) ("Press-Enterprise I").

In additional to the requirements of MCR 8.119(F), the Constitution also requires that representatives of the press and general public be given an opportunity to be heard on the question of their exclusion. *Globe Newspaper Co v Superior Court*, 457 US 596,609 n 25 (1982).

In *Press-Enterprise Co v Superior Court*, 478 US 1 (1986) ("Press-Enterprise II"), the United States Supreme Court held that the First Amendment right of public access attaches to pretrial proceedings, as well as trials. The right of access to judicial documents is also protected by the First Amendment. "[M]aterials on which the court relies in determining the litigants' substantive rights are judicial records, subject to the right of public access." *Smith v US District Court*, 19 Med L Rptr 2025, 2027 (CA 7, 1992).

Before public access to these court records can continue to be limited, the parties seeking suppression here and the court agreeing to it must prove:

(1) A compelling interest will be irreparably harmed by open records;

(2) No alternatives to closure are reasonably available to preserve that interest; and

(3) That closure will be effective in accomplishing its intended purpose.

This stringent test was not, nor can it now be satisfied in this case. Only in the most extraordinary circumstances may courts shut out the press and public. “Closed proceedings, although not absolutely precluded, must be rare.” *Press-Enterprise I*, 464 US at 509.

Because of this strong presumption against barring the press and public from judicial proceedings and records, a party’s justification for closure '”must be a weighty one.” *Globe Newspapers v Superior Court*, 457 US at 596, 606 (1982). The need for closure must be demonstrably “compelling,” *id.*, “overriding,” and “essential to preserve higher values.” *Press-Enterprise I*, 464 US at 510, quoted in *Press-Enterprise II*, 478 US at 9. Any measures to accommodate that need must be "narrowly tailored." 456 US at 607; quoted in *Press-Enterprise I*, 464 US at 510; *Press-Enterprise II*, 478 US at 9. The burden of proof rests squarely on the proponent of closure. *United States v Brooklier*, 685 F2d 1162, 1169 (CA 9, 1982); *United States v Chagra*, 701 F2d 354, 365 (CA 5, 1983); *Associated Press v United States District Court*, 705 F2d 1143, 1145 (CA 9, 1983). Specifically, the proponent of closure must establish with empirical support: (a) “a substantial probability that irreparable damage to [a compelling interest] will result from conducting the proceeding in public”; (b) “a substantial probability that alternatives to closure will not protect adequately” that interest; and (c) “a substantial probability that closure will be effective in protecting against the perceived harm.” *United States v*

Brooklier, 685 F2d at 1167 (quoting *Gannett Co v DePasquale*, 443 US 368, 440-42 (1979) (Blackmun, J., concurring in part, dissenting in part)); *Press-Enterprise II*, 478 US at 13-14.

In addition, there are two procedural prerequisites to closure: (1) "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion,'" *Globe*, 457 US at 609 n 25 (citation omitted) and (2) the reasons supporting closure must be articulated on the record in "findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 US at 510.

Accordingly, pursuant to the First Amendment and to MCR 8.119(F), MLive, the Flint Journal and WXYZ-TV respectfully request the opportunity to be heard and for the Court to deny Defendant's Motion to Seal File.

Dated: October 2, 2012

Respectfully submitted,

/s/James E. Stewart
James E. Stewart (P23254)
James.Stewart@tklaw.com
Thompson & Knight LLP
39533 Woodward Ave., Ste. 320
Bloomfield Hills, MI 48304
Tel.: (248) 258-7900

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2012, I served the foregoing papers via facsimile on the following:

Denise R. Ketchmark	F. Jack Belzer (P23306)
12257 Dollar Lake Drive	3153 W. Hill Road
Fenton, MI 48430	Flint, MI 48507
Tel.: 810-516-4489	Tel.: 810-234-3300
Fax: 810-232-1016	Fax: 810-234-3399
In Pro Per Plaintiff	**Attorney for Defendant**

_____

Erin Robinson