ORIGINAL

IN THE SUPREME COURT FOR THE STATE OF NEW MEXICO

No. _____

ALBUQUERQUE JOURNAL and NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT,

Petitioners,

v.

THE HONORABLE ALAN MALOTT, in his official capacity as District Judge for the Second Judicial District, Bernalillo County, New Mexico,

Respondent.

S-1-SC-36406

Second Judicial District
D-202-CV-2013-07676
Order of Hon. Alan Malott

EMERGENCY PETITION OF *ALBUQUERQUE JOURNAL* AND NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT FOR WRIT OF PROHIBITION OR SUPERINTENDING CONTROL

SUPREME COURT OF NEW MEXICO
FILED

APR 12 2017

Charles R. Peifer
Gregory P. Williams
J. Walker Boyd
PEIFER, HANSON & MULLINS, P.A.
Post Office Box 25245
Albuquerque, NM 87125-5245
Tel: 505-247-4800
Fax: 505-243-6458
Email: cpeifer@peiferlaw.com
gwilliams@peiferlaw.com
wboyd@peiferlaw.com
Attorneys for Petitioners

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INTRODUCTION

This matter involves an unconstitutional prior restraint of the free press, in violation of fundamental First Amendment principles. At the beginning of a trial in open court, Judge Alan Malott of the Second Judicial District Court ("Respondent") issued oral orders barring the media and any other persons in attendance, under threat of imprisonment, from disclosing or publishing certain information to be presented at trial. Courts up to and including the U.S. Supreme Court have long held that prior restraints of the media's right to publish information obtained in court bear a heavy presumption of unconstitutionality, as they unavoidably clash with two basic protections that the First Amendment provides: the right against prior restraints on speech and the right to report freely on events that transpire in an open courtroom. An open trial is not truly "open" if the media, the public's surrogate in the courtroom, is barred from publishing information presented at trial.

The information at issue is financial information, and Respondent issued his extraordinary *sua sponte* orders in an apparent attempt to protect some litigants and their family members from having the information made public. However, this perceived privacy interest comes nowhere near overcoming the First Amendment rights of the media to publish information disclosed in Court, and the orders are thus unconstitutional. As with any information that the media obtains, it may or

may not choose to publish it. But Respondent may not order a free press not to disclose this information without violating the First Amendment, and it is this unconstitutionality that compels this petition.

Petitioners *Albuquerque Journal* and the New Mexico Foundation for Open Government, in accordance with Rule 12-504 NMRA, asks this Court for an emergency writ compelling Respondent to vacate his unconstitutional oral orders barring attendees of an ongoing public trial, including Petitioners, from disclosing or publishing certain information presented at trial. As Respondent's order is preventing Petitioners from disclosing information about an ongoing trial, Petitioners' harm is continuing and irreparable. As a result, Petitioners request that the Court act on this request on an emergency basis under Rule 12-504(B)(3).

I. JURISDICTION OF THE COURT

The New Mexico Supreme Court is vested with "a superintending control over all inferior courts," and the "power to issue writs of mandamus, error, prohibition . . . and all other writs necessary or proper for the complete exercise of its jurisdiction and to determine the same." N.M. Const. Art. VI, § 3. Case law suggests that either a writ of prohibition or of superintending control is appropriate. Accordingly, Petitioners invoke this Court's jurisdiction under Article VI, Section 3 to issue both writs or either writ in the alternative.

This Court has previously held that the news media has standing to seek a writ of prohibition to "question the validity of an order impairing its ability to report the news, even though it is not a party to the litigation below." *State ex rel. New Mexico Press Ass'n v. Kaufman*, 1982-NMSC-060, ¶ 13, 98 N.M. 261. This Court in *Kaufman* issued a writ of prohibition reversing the trial court's "order restraining the Media of its freedom to handle its records" because there was insufficient evidence in the record that a restraint on the media was necessary to further a compelling state interest and to protect the rights of interested parties. Thus, the Court found that a writ of prohibition was an appropriate remedy because the district court lacked jurisdiction to restrain the media's coverage: in the Court's telling, the district court's order was not "a valid exercise of judicial power under any legal theory." *Id.* ¶ 38.

In addition, or in the alternative, there is a basis for issuing a writ of superintending control to Respondent because Respondent's order is causing irreparable harm to Petitioners' rights under the United States and New Mexico Constitutions to free expression which cannot be adequately protected through the normal appellate process. "In contrast to the writ of prohibition, the writ of superintending control is not limited to the correction of jurisdictional errors." *Kerr v. Parsons*, 2016-NMSC-028, ¶ 16, (*citing Albuquerque Gas & Elec. Co. v. Curtis*, 1939-NMSC-024, ¶ 7, 43 N.M. 234). The writ of superintending control

permits this Court "to correct any specie of error," but is correspondingly limited by prudential and equitable rules permitting issuance of the writ in only exceptional circumstances where "the remedy by appeal seems wholly inadequate." Respondent's order also implicates core questions about the public's right to attend open civil proceedings and communicate those proceedings to other members of the public.

II. REAL PARTIES IN INTEREST

Petitioners are the *Albuquerque Journal*, a newspaper of general circulation which is published in Albuquerque, New Mexico, and circulated throughout the state of New Mexico, and the New Mexico Foundation for Open Government ("FOG"), a non-profit organization dedicated to issues of open government and protection of the First Amendment. Respondent is the Honorable Alan Malott, a judge in the Second Judicial District Court in New Mexico. Respondent is the presiding judge in the case in which the order underlying this petition was issued, *Kearney v. Abruzzo et al*, Second Judicial District Court, County of Bernalillo, No. D-202-CV-2013-07676.

III. GROUNDS FOR THE PETITION, INCLUDING FACTS AND LAW

A. STATEMENT OF FACTS

1. The Plaintiff below, Victor Kearney, the surviving partner of Mary Pat Abruzzo Kearney, filed suit in this matter for breach of fiduciary duty (and other related claims) against Defendants Louis and Benjamin Abruzzo. He alleged that Defendants breached their fiduciary duty to him as lifetime income beneficiary of certain trusts. Mr. Kearney and Louis and Benjamin Abruzzo are trustees of the late Mary Pat Abruzzo's testamentary trusts. Mr. Kearney is the lifetime income beneficiary of the trusts. The two surviving children of Richard Abruzzo, Mary Pat Abruzzo's late brother, are remainder beneficiaries of the trusts. *See* Final Pretrial Order dated June 25, 2015, attached as Ex. 1, at 4-6.

2. Much of Mary Pat Abruzzo's assets (and consequently most of the property held by the testamentary trusts) consists of shares in Alvarado Realty Company (known by the parties below and referred to in this petition as "ARCO"), "a multistate, closely held company that operates the Sandia Peak Tramway, the Sandia Peak Ski area, the Santa Fe Ski area, and . . . numerous real estate and commercial investments in New Mexico, Colorado, and Arizona." *See* Ex. 1, at 6.

3. Louis and Benjamin Abruzzo counterclaimed against Mr. Kearney, alleging that he had breached spendthrift provisions in the trust, "failed to follow

the requirements of the trusts for gaining access to Trust principal," and "breached his fiduciary duty to the remainder beneficiaries." *See* Ex. 1, at 3-4.

4. The only written orders on the district court's docket which appear to govern confidentiality are a confidentiality and protective order and an amended version of that order governing pretrial discovery. *See* Confidentiality and Protective Order dated July 6, 2014, attached as Ex. 2; Stipulated Amended Confidentiality Order dated November 13, 2014, attached as Ex. 3. Neither of these orders make any specific reference to ARCO, any trusts, or any specific financial information.

5. The case initially proceeded to a jury trial. Respondent entered a directed verdict in Defendants' favor on all of Plaintiff's claims. *See* Order on Defendants' Motion for Judgment as a Matter of Law and Final Judgment Dismissing Plaintiff's Claims with Prejudice dated September 8, 2015, attached as Ex. 4.

6. On January 19, 2017, ARCO filed Non-Party Alvarado Realty Company's Motion to Seal Confidential Trial Exhibits ("Motion to Seal"), attached as Ex. 5. In its motion, ARCO avers that it had "produce[d] a prodigious amount of highly propriety information about the corporation" to Plaintiff in response to a subpoena, and marked its production confidential pursuant to the district court's stipulated protective orders. The motion states that "Plaintiff Victor Kearney

admitted at trial, apparently through stipulation, vast quantities of exhibits containing ARCO's proprietary information," including "hundreds of pages and numerous years of minutes of ARCO's board of directors and minutes from director meetings of subsidiaries," "financial reports for ARCO subsidiaries and consolidated financial reports for ARCO for numerous years," "tax returns of ARCO subsidiaries," and "a list of ARCO shareholders with their addresses." *See* Ex. 5 at 2-3. ARCO further alleged that Mr. Kearney had "breached this Court's Amended Protective Order" by causing a retained expert witness to "furnish[] ARCO's financial information to a mysterious Dubai entity which then presented a Letter of Intent to purchase ARCO's assets." *See* Ex. 5 at 3-4. The Motion to Seal alleges further violations of the protective order by Mr. Kearney. *See* Ex. 5. at 4-5. Finally, the Motion to Seal argued that ARCO's "legitimate business interests [as] a nonparty" outweighed the public's common law right of access to court files and that the other requirements of Rule 1-079 had been met. *Id.*

7. On March 23, 2017, Respondent entered an order granting ARCO's Motion to Seal. In its order, Respondent stated that "confidentiality is appropriate in this matter, [Respondent] finds that the privacy interests of ARCO and its shareholders in and to the specific personal and financial information concerning ARCO and its shareholders which have been entered in the prior trial, or which may be entered into evidence at the upcoming trial [on Defendants' amended

counterclaims], outweigh the public's general right to know the details of the Court's proceedings, and that sealing exhibits which contain such personal and/or financial information is the least restrictive means of balancing the individuals' privacy issues with the public's transparency concerns." *See* Order on Motion to Seal Trial Exhibits, attached as Ex. 6.

8. Following a motion for sanctions filed by Defendants, and a response by Plaintiff (both filed under seal), on April 7, 2017, Respondent entered a written order granting the Defendants' motion. In the order, Respondent found in part that Mr. Kearney had violated the district court's confidentiality orders by revealing confidential information to non-parties. *See* Order on Counterclaimants' Motion for Sanctions, attached as Ex. 7 at 4-5.

9. Trial commenced on Defendants' counterclaims against Mr. Kearney on April 10, 2017.

10. In the morning of the first day of proceedings, the Court held the following discussion with Pete Domenici, Jr., counsel for Mr. Kearney:

> **MR. DOMENICI**: I have one more issue. And I hate to do this. I very much apologize. But Mr. Rogers had requested a form of a stipulation as to how we handle confidential documents, and I wanted to -- I asked if we could make sure we clarify that early in the trial.
> **THE COURT**: Let me clarify that early in the trial. The next person who violates the confidentiality order is going to jail. Is that clear enough, Mr. Domenici?
> **MR. DOMENICI**: So I --
> **THE COURT**: I have had nothing but heartburn over this order. It was very simple.

MR. DOMENICI: I would like --
THE COURT: And I've already talked about it, so I'm not going to go back over it again. But you asked for a clarification. I don't know how to make myself more clear.
MR. DOMENICI: How does that affect sequestering of the audience, when discussion of information occurs, is what -- the issue I have.
THE COURT: I am not sealing this proceeding. I am sealing the exhibits. And so to a certain extent, some matters get disclosed because we have open trials. But that does not encompass what I consider to be the wholesale dissemination of documents that should not have been disseminated.
MR. DOMENICI: I understand.
THE COURT: Am I clear? Is there any other questions?
MR. DOMENICI: No, just a discussion of sequestration by the other party, and I --
THE COURT: I'm not sequestering this trial.
MR. DOMENICI: Thank you.

See Transcript of April 10, 2017 proceeding, attached as Ex. 8, at 28:25 – 30:5.

11. Shortly thereafter, the Court stated as follows:

THE COURT: Thank you.

All right. Before we get started, I want to speak for a moment to everyone in the audience. You heard me respond earlier to one of Mr. Domenici's questions, and I want to kind of take off from that this morning.

There are numerous issues of specific financial information that are going to come up in this trial, as they did in the first part of the trial two years -- almost three ago -- that have been ordered to be kept confidential. And so I want to make sure you all understand: Any financial information concerning ARCO or the Mary Pat Abruzzo Kearney trust are confidential facts.

If I find out that any of you have leaked any of the information you see and are hear [sic]as a member of the audience, I will bring criminal contempt charges against you. That will mean a trip out to the MDC. For those of you who have been there, you know it's unpleasant. For those of you who have not been there, I suggest you

avoid the experience. I cannot say it more strenuously. Everything about the operations and the financials of ARCO and the trust are to be kept within these four walls. I'm going to take an unusual step.

Does anyone in the audience have a question about my little lecture on confidentiality? All right. Let the record show that nobody did.

Thank you, all.

See Ex. 8, at 42:21 – 43:21.

12. Later that morning, after hearing about the above discussion, counsel for the *Albuquerque Journal*, Gregory P. Williams, arrived at the proceeding. Respondent permitted counsel to address the issue, as follows:

THE COURT: Okay. Let's do this. First of all, for those who were not present at the outset of evidence, I want to repeat my admonition. The financial information concerning ARCO and the Mary P. Abruzzo Kearney trust has been ruled to be confidential, is not to leave this room.

I made it very clear at the outset that if I was to find that anyone else has violated my confidentiality order, because I note through especially recent developments, the Court is quite convinced that has occurred. Whoever violates my confidentiality order further will spend time at the Metropolitan Detention Center under a contempt charge.

Once again, is there anyone who does not understand that any financial information as to either entity is to stay in this room? If you don't understand what I just said, raise your hand.

Counsel, what don't you understand about my statement?

First of all, please identify.

MR. WILLIAMS: Certainly, Your Honor. May I step forward? Just so you can hear me.

THE COURT: I can hear you. Tell me -- tell me what you didn't understand what about what I think was a really clear directive.

MR. WILLIAMS: Sure. My name is Greg Williams, Your Honor, for the record, from Peifer, Hanson & Mullins, and I'm here representing the *Albuquerque Journal*.

THE COURT: Uh-huh.

MR. WILLIAMS: The *Albuquerque Journal* does have a representative here in the courtroom today. And it was not clear to me whether the Court's admonition was any way restricting the ability of the press to report or broadcast on matters being heard here in open court. I didn't understand that to be your admonition, but I wanted to make –

THE COURT: The admonition, Mr. Williams, was, both earlier and just now, specifically as to financial information regarding either entity. I have not sealed this trial. I am trying to seek a balance between those two interests.

So the reporter is free to report about the trial. The reporter is not free to share the details of any financial transactions related to either entity. Am I sufficiently clear at this time?

MR. WILLIAMS: Our position, Your Honor, would be that that would probably constitute an unconstitutional prior restraint --

THE COURT: Get a writ, sir. My order stands.

MR. WILLIAMS: All right. Would it be – would the Court prefer us to -- I don't want to interrupt your proceedings or anything. Would we be given the opportunity, either during a break or at some point today, to present our position further on this?

THE COURT: I will give you the opportunity to present your position further on this at the conclusion of today's session, but I'm going to tell you right now, I'm not changing my mind. I'm not being facetious when I tell you: Get a writ. I have the discretion to seal portions of certain cases. It's been the rule of this case for years now that the specific financial information is not to be released publicly. That will not change.

MR. WILLIAMS: Thank you. And just so I'm clear, to the extent that we may seek review, the specific information that you're asking not to be -- ordering not to be disclosed is financial information that relates to the ARCO trusts and the Abruzzo Kearney trusts? I'm not familiar with the terminology of --

THE COURT: Okay. Let me say it again. Alvarado Realty, also known as ARCO, no financial information shall be released. Mary P. Kearney Abruzzo -- excuse me -- Abruzzo Kearney trusts, A, B, and C, if I'm remembering right, are also protected; no financial information about those trusts shall be made public.

Is that clear?

MR. WILLIAMS: It is, Your Honor. Thank you.

See Ex. 8, at 125:7 – 128:4.

13. That afternoon, Petitioner *Albuquerque Journal* filed its Non-Party *Albuquerque Journal*'s Motion to Lift Court's Oral Order Restraining it From Publishing or Reporting Information Presented in Open Court, attached as Ex. 9.

14. At the end of the day's proceedings, Respondent again heard argument from counsel for Petitioner *Albuquerque Journal*. *See* Ex. 8, at 251:5 – 268-8.

15. During that portion of the argument, counsel for Petitioner *Albuquerque Journal* noted that he had not been able to locate any written order stating that information regarding ARCO or the Mary Pat Kearney Abruzzo trust would be sealed, and asked the Court whether, other than the Court's oral description of the information that was not to be disclosed, whether there was any particular document that Petitioner *Albuquerque Journal* could look at for guidance as to exactly what could not be disclosed. *See* Ex. 8, at 257:3-7. Respondent stated that "I'm going to have to say, I don't think so, no one document that I am aware of." *See* Ex. 8, at 257:8-9. At another point during this discussion, Respondent stated as follows:

> There were also rulings at the first phase of the trial, which took place in June of '15. And there has been, as I'm sure you understand, a culture that has developed as more information has become available. And so the Court has been very clear, and I think I was very clear this morning, on what was encompassed within my

> confidentiality order, both as it came up as early as 2014, and as the case has progressed all the way through.
>
> So that's the best answer I'm going to be able to give you at this time.

See Ex. 8, at 252:22 – 253:6.

16. Later during this discussion, Respondent gave the following new description of the information which was not to be disclosed:

> And just to be clear for you, as I indicated to people when we started this morning and repeated when you joined us, the Court's restriction is on the dissemination publicly of and beyond this courtroom of any specific financial transactions or information concerning ARCO, which is Alvarado Realty; alternate terms, the Mary Pat -- Mary Pat Kearney Abruzzo -- or Abruzzo Kearney, excuse me, trusts; or the specific information.
>
> Because this came up later during the development of the case as to any of ARCO's shareholders. So no personal identifiers or similar information. Those are the only three areas the Court has addressed. Is that more clear?

See Ex. 8, at 253:16 – 254:2.

17. When asked if there was any specific evidence or statements from the first day of the trial on Defendants' counterclaims, Respondent initially stated that only testimony about a transaction involving Wells Fargo fell within the scope of its order. *See* Ex. 8, at 254:8-12; 254:22 – 255:4. However, following a colloquy with counsel for the real parties in interest below, Respondent identified a number of additional topics that could not be disseminated:

a. Testimony about the "specific valuation" and other financial information associated with the valuation of the trusts (*see* Ex. 8, at 260:11-17; 265:22 – 266:1);

b. Mr. Kearney's testimony about "the price of ARCO shares" and "a proposed buyout" of those shares (*see* Ex. 8, at 261:14-18; 265:22 – 266:1); and

c. Testimony about "how long it might take [for Mr. Kearney] to pay a tax bill, which was a very large number[,]" and "witness testimony about those similar issues" (*see* Ex. 8, at 262:10-13; 266:3-9).

18. Respondent thus denied Petitioner *Albuquerque Journal*'s motion to lift its prior order. *See* Ex. 8, at 264:2-3; 264:22 – 265:2; *see also* handwritten Order dated April 11, 2017, attached as Ex. 10, stating "IT IS ORDERED the Motion is denied. The non-dissemination Order reflects the development and occurrences in this case as well as a balancing of the public's right to know and the privacy rights of private citizens, including minors, seeking to use the auspices of the Court."

B. ARGUMENT

1. Prior Restraints on a Newspaper's Ability to Publish Information Are Presumptively Unconstitutional.

The First Amendment to the U.S. Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press...." Article III, Sec. 17 of our state constitution echoes that basic American principle, guaranteeing that "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The First Amendment applies to judicial orders such as the order issued by Respondent in the instant case. *See Alexander v. United States,* 509 U.S. 544, 550 (1993); *see also Oklahoma Pub. Co. v. District Court in and for Oklahoma County,* 430 U.S. 308, 308-09 (1977).

Respondent's order, forbidding Petitioners in advance from disclosing or publishing certain information discussed at trial, is unquestionably a prior restraint. The term 'prior restraint' is used "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander*, 509 U.S. at 550 (citing M. Nimmer, *Nimmer on Freedom of Speech* § 4.03, p. 4–14 (1984)). The U.S. Supreme Court long ago made clear that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Cheyenne*

Newspapers, Inc. v. First Judicial Dist. Court, 358 P.3d 493, 495-96 (Wyo. 2015) (citing *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976)). As set forth by the U.S. Supreme Court,

> [t]he damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct. A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Nebraska Press Ass'n, 427 U.S. at 559–60 (internal citations and quotations omitted). There is a "heavy presumption against [the] constitutional validity" of a prior restraint. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). The presumption can be overcome "only in 'exceptional cases.'" *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (quoting *Near v. Minnesota*, 283 U.S. 697, 716 (1931)). Where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to "a state interest of the highest order." *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (quoting *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103

(1979)). "Indeed, the Supreme Court has described the elimination of prior restraints as the "'chief purpose'" of the First Amendment. *United States v. Quattrone,* 402 F.3d 304, 308 (2d Cir. 2005) (quoting *Gannett Co. v. DePasquale,* 443 U.S. 368, 393 n. 25 (1979)); *see also Nebraska Press,* 427 U.S. at 557 ("The main purpose of the First Amendment is to prevent all such previous restraints upon publications as had been practiced by other governments." (internal quotation marks and citation omitted)).

2. Prior Restraints Are Especially Dubious When They Bar Publication of Information Disclosed in Court.

Prior restraints against disclosure of information discussed in open court are especially constitutionally suspect. "[A] judicial order prohibiting the publication of information disclosed in a public judicial proceeding unavoidably clashes with two basic protections that the First Amendment provides[:] the right against prior restraints on speech and the right to report freely on events that transpire in an open courtroom." *Cheyenne Newspapers*, 358 P.3d at 495–96 (citing *Quattrone,* 402 F.3d at 308). Where, as here, the class of speech "otherwise receives First Amendment protection … courts subject prior restraints on speech or publication to exacting review." *Quattrone,* 402 F.3d at 310. As noted by the U.S. Supreme Court in *Craig v. Harney*:

> A trial is a public event. What transpires in the court room is public property.... Those who see and hear what transpired can report it with impunity. 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.

331 U.S. 367, 374 (1947). Similarly, in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 496 (1975), a case in which the media had published the name of a 17-year-old rape victim after learning her name through an inspection of documents made available in the courtroom, the Court held that "[a]t the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." Generally, orders proscribing publication of matters transpiring in open court are constitutionally infirm, absent some compelling justification. *Nebraska Press Assn.* 427 U.S. at 556.

3. Respondent Has Not Established That the Business Interests at Issue Are Sufficient to Overcome the Heavy Presumption of Unconstitutionality.

At no point during the April 10 court proceeding did Respondent clearly articulate the interest he was seeking to serve in entering the prior restraint. The closest Respondent came to articulating this interest was when Respondent stated as follows:

> [W]hile the issues for a sealing order are separate from an order such as mine that is—restrains dissemination during trial, some of the same considerations, I believe, apply; and those are a balancing of the public's right to know with the rights of privacy. We live in a society that seems to lose the right of privacy every five minutes. That is not

> necessary for the public to be reasonably informed of what's going on in this case."

See Ex. 8, at 264:14-21. Other than this statement, the best evidence of Respondent's intent can perhaps be found in a prior order granting a motion to seal records pursuant to Rule 1-079 NMRA. In that order, dated March 23, 2017, Respondent stated that

> [C]onfidentiality is appropriate in this matter, the Court finds that the privacy interests of ARCO and its shareholders in and to the specific personal and financial information concerning ARCO and its shareholders which have been entered in the prior trial, or which may be entered into evidence at the upcoming trial [on Defendants' amended counterclaims], outweigh the public's general right to know the details of the Court's proceedings, and that sealing exhibits which contain such personal and/or financial information is the least restrictive means of balancing the individuals' privacy issues with the public's transparency concerns."

See Ex. 6.

Petitioners are not seeking to overturn the written confidentiality and sealing orders entered by Respondent below. But by apparently trying to extend those orders to third parties (Petitioners and other members of the public), and expanding the scope of their terms to include information presented at trial, Respondent has impermissibly restrained Petitioners' ability to report on a public trial, essentially punishing Petitioners for other individuals' breaches of Respondent's confidentiality and sealing orders. Respondent's order is nothing short of an "extraordinary measure [that] punish[es] truthful publication in the name of

privacy." *The Florida Star* 491 U.S. at 540. Whatever privacy concerns the litigants and others may have, if any, regarding financial considerations, are clearly outweighed by Petitioners' First Amendment rights. "Where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only **when narrowly tailored to a state interest of the highest order.**" *Id.* at 541 (emphasis added); *see also Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) ("A prior restraint on pure speech can be justified only if the speech to be forbidden threatens a constitutional value even more precious than the First Amendment).

Protection of particular financial information of litigants and related third parties certainly does not rise to the level of "a state interest of the highest order." This is particularly evident when reviewing other cases which have found that privacy interests much more compelling than those at issue here are not sufficient to justify restraint of the media's right to publish information obtained in court. *See, e.g., Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975) (finding unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape-murder victim which the station had obtained from courthouse records; *Oklahoma Publishing Co. v. District Court in and for Oklahoma County,* 430 U.S. 308 (1977) (finding unconstitutional a state court's pretrial order enjoining the media from publishing the name or photograph of an

11-year-old boy in connection with a juvenile proceeding involving that child which reporters had attended); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (finding unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender).

The litigants to this case and related third parties may well have some right to keep their financial information private. But that right does not outweigh the First Amendment rights that our national and state constitutions guarantee to the media. There is simply insufficient information in the record supporting Respondent's determination that the privacy rights of the litigants and related third parties in their financial information overcome the presumption of constitutional invalidity of Respondent's order. It appears that Respondent's order was the result of his frustration over prior "leaks" of sealed information, which was of sufficient concern to Respondent to enter a separate order sanctioning Plaintiff. However, that issue is separate from the ability of Respondent to enter an order barring Petitioners from lawfully reporting on the testimony and information given in open court. Whether a party bound by a stipulated confidentiality order breached that order is not relevant here: the only issue in this case is whether Respondent may permissibly seek to mitigate the effects of a party's breach by ordering Petitioners

to limit their reporting of a public trial. Respondent's orders do not pass constitutional muster; therefore, they must be vacated.

Finally, Respondent's orders are of such vagueness that Petitioners cannot reasonably be expected to follow them. It should be noted that the vagueness, even if cured, would not allow the orders to pass constitutional muster, as the restraint itself violates the First Amendment. But the vagueness presents an additional problem, as the orders do not give Petitioners fair notice of what may or may not be reported. This is exemplified by how his oral orders changed over the course of the day. Respondent's first pronouncement of his order barred disclosure of "financial information concerning ARCO or the Mary Pat Abruzzo Kearney trust." *See* Fact No. 11, *supra*. Mid-morning, Respondent described the protected information as "Alvarado Realty, also known as ARCO, no financial information shall be released. Mary P. Kearney Abruzzo -- excuse me -- Abruzzo Kearney trusts, A, B, and C, if I'm remembering right, are also protected; no financial information about those trusts shall be made public." *See* Fact No. 12, *supra*. At the end of the day, Respondent restated the first descriptions and added a third category, as follows:

> any specific financial transactions or information concerning ARCO, which is Alvarado Realty; alternate terms, the Mary Pat -- Mary Pat Kearney Abruzzo -- or Abruzzo Kearney, excuse me, trusts; or the specific information.

> Because this came up later during the development of the case as to any of ARCO's shareholders. So no personal identifiers or similar information.

See Fact No. 16, supra.

Even after three attempts at defining the protected information had been made, the categories remained unclear even to counsel involved in the case. When asked whether any information had been presented that day that could not be disclosed by Petitioners, Respondent had to ask each counsel his or her opinion on the matter. And each of the four attorneys queried gave a different answer to the question. *See* Ex. 8, at 254:3-256:12; 259:5-263-25; 265:10-267:24. When the orders regarding protected information are so imprecise that even counsel for the parties, who have a much greater familiarity with the information in question, cannot agree on what information fits within the scope of the order, it is unreasonable for Petitioners to be expected to comply.

C. CONCLUSION

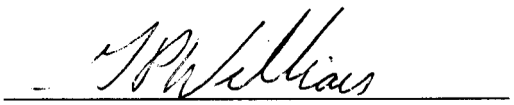
Respondent's oral orders, given in open Court on April 10, 2017, constitute unlawful prior restraints of Petitioners' First Amendment rights of freedom of speech and freedom of the press. As such, this Court should enter a writ compelling Respondent to vacate such orders.

IV. RELIEF SOUGHT

Petitioners respectfully request this Court to enter either a writ of prohibition or of superintending control compelling Respondent to vacate the oral orders, given in open Court on April 10, 2017, restricting Petitioners' ability to disclose or publish information set forth in open court. Because the trial remains ongoing, Petitioners request that the Court act on this request on an emergency basis, in accordance with Rule 12-504(B)(3). If this Court is unable to address the petition before the end of the trial, Petitioners asks that the writ still be issued. First, the issue will not be moot, as the oral orders prohibiting disclosure of information in Petitioners' possession will still be in place. Furthermore, even if the issue were moot, the Court should issue the writ and a written opinion, following *State ex rel. New Mexico Press Ass'n v. Kaufman*, 1982-NMSC-060, ¶ 23, 98 N.M. 261 (where the issues involved are of substantial public interest and are capable of repetition yet evading appellate review, this Court will decide the questions … [t]he same important questions of media access will surely be raised again without there being an opportunity for a decision on appeal").

Respectfully submitted,

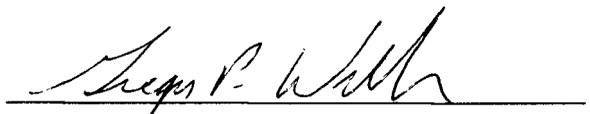
PEIFER, HANSON & MULLINS, PA

By: 

Charles R. Peifer
Gregory P. Williams
J. Walker Boyd
Post Office Box 25245
Albuquerque, NM 87125-5245
Tel: 505-247-4800
Email: cpeifer@peiferlaw.com
gwilliams@peiferlaw.com
wboyd@peiferlaw.com
Attorneys for Petitioners

VERIFICATION

I, Gregory P. Williams, being first duly sworn upon oath, depose and say: I represent the Petitioners in the foregoing Writ and all matters and allegations contained therein are true to the best of my knowledge and belief, except as to those matters alleged upon information and belief, and as to those matters, believe them to be true.



Gregory P. Williams

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(A), (F) and (G), Petitioners' counsel states that the total word count contained in the body of the brief is 5893 words, Times New Roman, 14 point font, as determined by Microsoft Office Word 2007.

PEIFER, HANSON & MULLINS, P.A.

By: 

Gregory P. Williams

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2017 a true and correct copy of the Emergency Petition of *Albuquerque Journal* and New Mexico Foundation for Open Government for Writ of Prohibition or Superintending Control was hand delivered to the Respondent and emailed to the parties in the case below as listed below:

Hon. Alan Malott
Second Judicial District Courthouse
400 Lomas NW
Albuquerque, NM 87102
Respondent

Parties in Case Below

Peter V. Domenici, Jr.
Lorraine Hollingsworth
Domenici Law Firm
320 Gold Avenue SW, Suite 1000
Albuquerque, NM 87102
pdomenici@domenicilaw.com
lhollingsworth@domenicilaw.com
Attorneys for Plaintiff (in Dist. Ct.)

Mary T. Torres
Law Offices of Mary T. Torres
201 Third Street NW, Suite 500
Albuquerque, NM 87102
mtt@marytorreslaw.com
Attorneys for Third-Party Counter-Claimants (in Dist. Ct.)

Patrick J. Rogers
Patrick J. Rogers, LLC
20 First Plaza Center NW, Suite 725
Albuquerque, NM 87102
patrogers@patrogerslaw.com
and
Angelo J. Artuso
Law Office of Angelo J. Artuso
Post Office Box 51763
Albuquerque, NM 87181-1763
angelo.artuso@brytewerks.com
Attorneys for Defendants (in Dist. Ct.)

PEIFER, HANSON & MULLINS, P.A.

By: _____
Gregory P. Williams