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IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

IN RE: DOLLAR GENERAL

Master Docket No. 07MD1
(Consolidated Action)

Judge Thomas Brothers

_____/

COURTHOUSE NEWS SERVICE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO INTERVENE FOR LIMITED PURPOSE OF SEEKING ACCESS TO SEALED COURT RECORDS

Courthouse News Service ("CNS"), seeks leave to intervene in this case for the limited purpose of seeking access to sealed documents filed with the Court in the above-captioned action. CNS seeks access to the sealed court records pursuant to the Tennessee Constitution, the First Amendment and the common law rights of access to court records.

As detailed below, more than 90 documents were filed under seal with the Court based upon the parties' agreed-upon Stipulated Protective Order. (Doc. 17.) (the "Stipulated Protective Order")[1] The First Amendment, Tennessee Constitution, and the common law afford the public and members of the media, like CNS, a presumptive right of access to court records. The existence of a stipulated protective order entered into between litigants does not vitiate these rights. *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305-06 (6th Cir. 2016).[2] By filing documents with the Court under seal pursuant to the Stipulated Protective Order, the wrong legal standard was applied, and the parties violated the public's rights of access to those court records. The parties have not—and cannot—demonstrate that the heavy presumption in favor of public access to court records is overcome as to any of the sealed records.

[1] CNS's cites to the record in this case are to the document number on the Court's online docket.

[2] Pursuant to Local Rule §26.04(b), unpublished and cases from outside Tennessee's courts are attached as Composite Exhibit A.

FACTUAL BACKGROUND

The Class Action Lawsuit

In April 2007, the Court consolidated seven putative class action suits related to the acquisition of Dollar General Corporation ("Dollar General") by Kohlberg Kravis Roberts & Co. L.P., Buck Holdings, L.P. and Buck Acquisition Corp. (collectively "KKR"). (Doc. 387 at 1-2.) Along with Dollar General and KKR, there were numerous individual defendants to the suits, including current Georgia Senator David Perdue ("Senator Perdue"),[3] who was Chairman of the Board and Chief Executive Officer of Dollar General at the time of its sale to KKR (Doc. 3 at 3). The class consisted of "[a]ll persons (except defendants and their affiliates) who held Dollar General Corporation common stock at the time of the merger between Buck Holdings, L.P., Buck Acquisition Corp. and Dollar General Corporation[.]" (Doc. 334 at 1.)

After the Court denied Plaintiffs' motion for preliminary injunction, Plaintiffs filed an Amended Complaint, which is sealed, and the parties engaged in extensive discovery and motion practice. (Doc. 387 at 3-5.) The Amended Complaint included allegations that, among other things, "the Proxy provided misleading and incomplete disclosures regarding [Dollar General's] future growth potential" and that the Defendants, including Senator Perdue, breached their fiduciary duties by failing "to provide Dollar General shareholders with material information relating to the Acquisition and that the $22 per share price was unfair and inadequate consideration for shareholders' Dollar General Shares." (*Id*. at 4.) Discovery included 700,000 pages of documents and twenty-eight depositions. (*Id*.)

[3] https://www.perdue.senate.gov/about/david, last accessed on November 30, 2020; https://perduesenate.com/meet-david/, last accessed on November 30, 2020 (both noting that Senator Perdue was the former CEO of Dollar General).

After previously filing motions for judgment on the pleadings (Docs. 225, 227), Defendants filed their motion for summary judgment in October 2008 (Doc. 302) and the Court granted Plaintiffs' motion for class certification on November 4, 2008. (*Id.* at 5.) On the day the Defendants' summary judgment motions were to be heard, "the parties informed the Court that the settlement had been reached." (*Id*. at 5.) "On December 19, 2008, the Court granted Plaintiffs' Unopposed Motion for Preliminary Approval of the Settlement, and scheduled a final approval hearing for February 11, 2009." (*Id*.) On April 1, 2009, the Court entered an Agreed Findings of Fact and Conclusions of Law Approving Settlement. (Doc. 387.) On June 30, 2009, the Court entered an Order Approving Settlement and Granting Attorneys['] Fees. (Doc. 389). The common fund for settlement was $40 million. (Doc. 387 at 7; Doc. 389 at 1.)

The Stipulated Protective Order

On May 16, 2007, the Court entered a Stipulated Protective Order governing discovery. (Doc. 17.) The parties agreed to the Stipulated Protective Order "[t]o provide for the prompt, efficient and orderly production of documents and to preserve and maintain the confidentiality of certain documents and information to be produced in this litigation by the parties and/or by any non-party…" (*Id.* at 1.) With this purpose in mind, the parties agreed to entry of the Stipulated Protective Order and the Court found "good cause to enter this Order…." (*Id*.)

Paragraph 8 of the Stipulated Protective Order, entitled "Filing Under Seal," required the Clerk to seal all filings with the Court that a party or non-party "designated as Confidential Material." (*Id*. at 8.) "Confidential Material" is defined in the Stipulated Protective Order as "any document(s), tangible things, testimony, information, or other material(s) designates as Confidential Information or Highly Confidential Information pursuant to Paragraph 2 of this Order and any information contained therein." (*Id*. at 2.)

"Confidential Information" is defined as

> information that constitutes a trade secret or reveals confidential research, development, business, financial, or commercial information or personal information that implicates individual privacy interests such as personal financial, tax or employment information or personal identifying information such as home addresses or telephone numbers. Confidential information does not include information that has been disclosed in the public domain.

(*Id*. at 1.) "Highly Confidential Information" is defined as

> information that a party believes to be of such a highly sensitive nature, such as information that constitutes a trade secret or reveals confidential research, development, business, financial, or commercial information or personal information, that disclosure of such information may result in substantial harm to the producing party unless restricted as set forth in Paragraph 4 of the Protective Order. Highly Confidential Information does not include information that has been disclosed in the public domain.

(*Id*. at 1-2.)

While the Stipulated Protective Order provides a means for a party to challenge a party or non-party's designation of a document, including by filing a motion with the Court (*id.* at 7.), there is no provision for judicial review related the sealing of court records.

The Sealed Court Records

More than 90 documents appear to be under seal according to the online docket, and CNS seeks an order unsealing all of those records.[4] CNS also requests that the Court prioritize the unsealing of the documents identified below (the "Priority Court Records"), which include the operative pleadings and documents related to dispositive motions filed by the Defendants, including the depositions of Senator Perdue. The Priority Court Records are, as they appear on the Court's online docket:

[4] The docket entries for the court records that appear to be underseal are listed in Exhibit B. They include the documents that are specifically mentioned as being under seal and exhibits that do not specifically mention being under seal but that relate to affidavits and depositions that are under seal.

- Doc. 107 – Amended Complaint (Underseal/Consolidated/Class Action) of P;
- Doc. 109 – Answer (Underseal) of D to Class Action Complaint (Consolidated);
- Doc. 110 – Answer (Underseal) of D (Kohlberg/Buck);
- Doc. 111 – Answer (Underseal) of D (Dollar General);
- Doc. 241 – Response (Underseal Box-as Memo) of P in Opp to Motions Judgment on Pleadings;
- Doc. 290 – Deposition (Underseal) of David Perdue 6.04.07;
- Doc. 291 – Exhibit as "1-9" Copy (to Deposition - Perdue);
- Doc 292 – Deposition (Underseal) of David Perdue 8.25.08;
- Doc. 293 – Exhibit as "1-17" Copy (to Deposition – Perdue);
- Doc. 303 – Memorandum (Underseal) of D in Supp of MSJ (in Envelope);
- Doc. 304 – Statement (Underseal) of D of Undisputed Mat Facts (in Envelope);
- Doc. 335 – Memorandum (Underseal) of P in Opp to MSJ;
- Doc. 336 – Response (Underseal) of P to D Rule 56.03 Mat Facts (MSJ);
- Doc. 337 – Statement (Underseal) of P of Add Facts In Opp to D MSJ;
- Doc. 342 – Reply (Underseal) of D in Supp of MSJ;
- Doc. 343 – Response (Underseal) of D to P Stmt of Add Facts Re: MSJ.

ARGUMENT

I. CNS Has Standing to Intervene to Seek Unsealing of the Specified Court Records.

CNS is a legal news service that publishes a daily news website with a focus on politics and law. CNS also publishes daily reports on new civil actions and appellate rulings in both state and federal courts throughout the nation. Subscribers to the daily reports include law firms,

universities, corporations, governmental institutions, and a wide range of media including newspapers, television stations and cable news services.

Tennessee courts "have 'firmly established[d] the right of the public, including the media, to intervene in court proceedings for the purpose of attending the proceedings, or for the purpose of petitioning the Court to unseal documents and allow public inspection of them. *Kocher v. Bearden*, 546 S.W.3d 78, 84 (Tenn. Ct. App. 2017) (quoting *Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359, 362 (Tenn. Ct. Crim. App. 1998)). For example, in *Ballard v. Herzke*, the Tennessee Supreme Court held that "we agree with those federal and state courts in other jurisdictions which have routinely found that third parties, including media entities, should be allowed to intervene to seek modification of protective orders to obtain access to judicial proceedings or records." 924 S.W.2d 652, 657 (Tenn. 1996) (string cite omitted); *see also State v. Drake*, 701 S.W.2d 604, 608 (Tenn. 1985) ("Interested members of the public and the media may intervene and be heard in opposition to [a closure] motion."). Similarly, the Court of Criminal Appeals has explained that "because of the general public right of access to courts and their records, it is appropriate to allow media entities to intervene in court proceedings wherein the intervenors seek modification of a court order sealing judicial records from public inspection." *Knoxville News-Sentinel*, 982 S.W.2d at 362 (citing *Ballard*, 924 S.W.2d at 662). Accordingly, CNS has standing to intervene in this case for the purpose of seeking access to the sealed court records; its motion to intervene for that purpose should be granted.

II. The Court Should Unseal the Sealed Courts Records Under Both the Constitutional and Common Law Rights of Access.

"The Tennessee Supreme Court has recognized a qualified right of the public, founded in the common law and the First Amendment to the United States Constitution to attend judicial proceedings and to examine the documents generated in those proceedings." *Knoxville News-*

Sentinel, 982 S.W.2d at 362 (citing *Ballard*, 924 S.W.2d at 661; *Kocher*, 546 S.W.3d at 85 (Tenn. Ct. App. 2017) (same); *see also In re NHC-Nashville Fire Litig.*, 293 S.W.3d 547, 561 (Tenn. Ct. App. 2008) (Kirby, J.) (quoting *Ballard*, 924 S.W.2d at 661) ("[T]he First Amendment to the Constitution presumes that there is a right of access to proceedings and documents which have 'historically been open to the public' and which disclosure would serve a significant role in the functioning of the process."). "Article I, Sec. 19 of the Constitution of Tennessee presumably extends a similar qualified right to the public."[5] *Knoxville News-Sentinel*, 982 S.W.2d at 363 n. 3. Article I, Sec. 17 of the Tennessee Constitution, which states "[t]hat all courts shall be open…", also provides a basis for access to judicial records. *Kocher*, 546 S.W.3d at 85; *Autin v. Goetz*, 524 S.W.3d 617, 629 (Tenn. Ct. App. 2017).

"Throughout our history, the open courtroom has been a fundamental feature of the American judicial system." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983). And, as Justice Kirby explained when she was on the Court of Appeals: "[t]he openness of judicial proceedings extends to judicial records." *In re NHC-Nashville Fire Litig.*, 293 S.W.3d at 560 (citing *Knoxville News-Sentinel*, 982 S.W.2d at 362-63) (Kirby, J.); *see also Brown & Williamson*, 710 F.2d at 1177 (explaining that First Amendment right of access to courts extends to court records "because court records often provide important, sometimes the only, bases or explanations for a court's decision").

"In order to main public confidence in our judicial system it is important that litigation remain open and accessible to the public absent a valid reason for keeping information from the public eye." *Warwick v. Jenkins, Habenicht & Woods, PLLC*, No. E2012-00514-COA-R3-CV, 2013 WL 1788532, at *1 n.1 (Tenn. Ct. App. Apr. 25, 2013). "'The public's right of access [to

[5] Article 1, Section 19 provides in part "[t]hat the printing presses shall be free to every person to examine the proceedings … of any branch or officer of the government, and no law shall ever be made to restraint the right thereof."

court records] provides public scrutiny over the court system which serves to (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding.'" *In re NHC-Nashville Fire Litig.*, 293 S.W.3d at 561 (quoting *Ballard*, 924 S.W.2d at 661).

Pursuant to these constitutional and common law rights of access, "judicial records are … presumptively open." *Autin*, 524 S.W.3d at 629 (citations omitted); *see also Kocher*, 546 S.W.3d at 85 (quoting *Baugh v. United Parcel Serv., Inc.*, No. M2012-00197-COA-R3-CV, 2012 WL 6697384, at *6 (Tenn. Ct. App. Dec. 21, 2012) ("'The rule that judicial proceedings, including judicial records, are presumptively open is well established in the Constitution of Tennessee and case law.'"). This presumption of openness applies with even more force when the documents are "filed in connection with a dispositive motion." *In re NHC-Nashville Fire Litigation*, 293 S.W. 3d at 571.

Under the constitutional rights of access, to overcome the presumption of openness "the party seeking [closure] must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Drake*, 701 S.W.2d at 607-08 (quoting *Waller v. Georgia*, 467 U.S. 39, 48 (1984)). Under the common law right of access, the Court should balance "the interests advanced by the parties in light of the public interest and the duty of the courts." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 602 (1978).

Under either standard, much more is needed to justify the wholesale sealing of records filed with the Court than an agreement of the parties, a general finding of good cause, and an assertion that the sealed court records contain information that a party or non-party designated as

either Confidential or Highly Confidential. Because the sealed court records were filed pursuant to a Stipulated Protective Order, the correct legal standards were not applied, and the parties did not proffer any basis for its sealing requests such that the Court could find that the parties had overcome the presumption of openness. As such, CNS requests that the Court unseal the sealed court records.

A. *Drake* Provides the Proper Standard to Apply for the Constitutional Rights of Access to Court Records.

While the Court in this case, by way of entering the Stipulated Protective Order, found "good cause" to justify limiting disclosure of documents merely exchanged between the parties in discovery that were designated by a party or non-party as either Confidential or Highly Confidential, (Doc. 17 at 8), this is not the correct standard for deciding whether documents filed with the Court should be sealed under the constitutional rights of access. Instead, the much more stringent standard from the Tennessee Supreme Court's decision in *Drake* is the applicable standard when evaluating whether an overriding interest exists sufficient to overcome the constitutional rights of access to court records.

In *Drake*, the trial court ordered that "all pre-trial proceedings be closed" and that "all motions, orders and transcripts be sealed by the clerk." 701 S.W.2d at 606. It further "prohibited court personnel, lawyers, witnesses, etc., from communicating information to the public or media." *Id*. A group of media entities petitioned for intervention at the trial court and, later, for appellate review of this broad closure order. *Id.* at 606-07.

Upon review, the Tennessee Supreme Court articulated the "principles that must be applied in Tennessee when closure or other restrictive order is sought." *Id.* at 608. To overcome the constitutional "presumption of openness," a party seeking a restrictive order "must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than

necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 607-08 (quoting *Waller v. Georgia*, 467 U.S. 39, 48 (1984)).

Here, the Court did not apply the standard in *Drake* to the question of whether to seal any of the more than 90 court records sealed in this matter. Instead, only the lesser "good cause" standard applicable to the entry of a protective order was applied; while appropriate when dealing with raw, unfiled discovery materials, that "good cause" standard is not applicable when deciding if a court record should be sealed.

B. The Sixth Circuit's Decision in *Shane Group* Illustrates How the Court Should Apply the *Drake* Standard to the Sealed Court Records.

In 2016, the Sixth Circuit decided an analogous case involving access to sealed court records in a class action lawsuit, *Shane Group., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Cir. 2016), that should guide this Court in determining whether continued sealing of the sealed court records is justified. In that case, the Sixth Circuit found that the district court erred when it sealed court records using a "good cause" standard instead of the more stringent standard required to overcome the strong presumption in favor of openness, which is identical to the one found in *Drake*.

In *Shane Group*, the district court "at the parties' behest, [] sealed from public view most of the court filings and exhibits that underlay the proposed settlement in [that] case." *Id*. at 304-05. Specifically, the district court sealed, among other things, the amended complaint, the motion for class certification filings, the defendant's response to the motion for class certification, and a motion to strike an expert's report and testimony as well as 194 exhibits to those court filings. *Id*. at 306. The Sixth Circuit explained that with the significant sealing and redaction of filings in the case "both the general public and the class were able to access only

fragmentary information about the conduct giving rise to this litigation, and next to nothing about the bases of the settlement itself." *Id.*

The justification for sealing court records in *Shane Group* was limited. For example, the plaintiff argued in its motion to seal its brief in support of the class certification motion that "[t]he Class Certification Brief includes quotations, information, and references to multiple depositions and documents designated as confidential by [the defendant] or the third party entity that produced the document or deposition." *Id*. at 306. The district court echoed this argument in its order sealing the brief and added "a reference to 'good cause' shown." *Id.* And the defendant, like the parties in this case, "did not even bother to seek permission from the court before filing its response under seal." *Id*. at 307. The Sixth Circuit concluded this was patently insufficient to justify sealing the court records at issue.

As the appellate court explained, "there is a stark difference between so-called 'protective orders' entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26, on the one hand, and orders to seal court records on the other." *Id.* at 305. While good cause is sufficient when a protective order is entered related to discovery between the parties, "'[a]t the adjudication stage, however, very different considerations apply.'" *Id.* (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)). "The line between these two stages, discovery and adjudicative, is crossed when the parties place material in the court record." *Id.* "Unlike information merely exchanged between the parties, '[t]he public has a strong interest in obtaining the information contained in the court record.'" *Id.* (quoting *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983)).

Given this strong interest, the court held that, as under Tennessee law, there is "a 'strong presumption in favor of openness' as to court records." *Id.* (quoting *Brown & Williamson*, 710

F.2d at 1179). And, just like the court in *Drake*, the *Shane Group* court explained that "'[o]nly the most compelling reasons can justify non-disclosure of judicial records,'" *id.* (quoting *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983)), "[a]nd even where a party can show a compelling reason why certain documents or portions thereof should be sealed, the seal itself must be narrowly tailored to serve that reason," *id.* (citing *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 509-11 (1984)). "The proponent of sealing therefore must 'analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations.'" *Id*. at 305-06 (quoting *Baxter*, 297 F.3d at 548).

The court also noted that "the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption." *Id.* at 305 (citing *Brown & Williamson*, 710 F.2d at 1179). "For example, in class actions—where by definition 'some members of the public are also parties to the [case]'—the standards for denying public access should be applied … with particular strictness.'" *Id.* (quoting *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001)).

When applying these principles to the facts of *Shane Group*, the Sixth Circuit explained, "the parties and the district court plainly conflated the standards for entering a protective order under Rule 26 with the vastly more demanding standards for sealing off judicial records from public view." *Id.* at 307. It found "the complete absence of any explanation, by the parties or the court, as to why the interests in favor of closure were compelling, or why those interests outweighed the public interest in access to court records—this, in a case of great importance to the public—or why the decision to seal off broad swaths of the court records was narrowly tailored," "telling." *Id.* As a result, it found that "every document that was sealed in the district court was sealed improperly." *Id.*

The facts of the instant case are practically indistinguishable from those in *Shane Group*. And, in fact, the public interest in access to the sealed records is stronger here because Senator Perdue was involved in the case. Just as in *Shane Group*, the justification for sealing large swaths of the court file in this case was the agreement of the parties, a general finding of "good cause," and a confidentiality designation by a party or non-party. (Doc. 17 at 1, 8.) The Priority Court Records are all substantive filings, including the amended complaint (Doc. 107), the answers (Doc. 109-111), depositions of Senator Perdue and related Exhibits that were filed in support of the Defendants' Motion for Summary Judgment (Docs. 290-293)[6], Plaintiffs' Response to Defendants' Motion for Judgment on the Pleadings (Doc. 241), and a host of Memoranda, Responses, Replies, and other filings related to Defendants' Motion for Summary Judgment (Docs. 303, 335, 336, 337, 342, 343). And these are just the sealed documents which CNS is seeking to have the Court prioritize review. There are more than 90 court records listed on the online docket as being under seal in this case based on the same purported grounds.

While the public interest in this case is, as in *Shane Group*, particularly high because it is a class action, Senator Perdue's involvement in the case lends even greater weight to the public interest in access to the sealed court records. At the time Dollar General was sold to KKR, Senator Perdue was Chairman of the Board and Chief Executive Officer of Dollar General. (Doc. 3 at 3.) He was elected to the U.S. Senate in 2014.[7] Senator Perdue is up for reelection at a run-

[6] Senator Perdue's depositions were filed as attachments to Defendants' Notice of Filing Depositions (Doc. 273), that was filed on October 16, 2008, the day before Defendants filed their Motion for Summary Judgment (Doc. 302), which states that it is supported by "the depositions previously filed with the Court…" (*id.* at 1). In addition, Local Rule § 22.01 specifically provides that discovery material, such as depositions, "will not be filed with the clerk unless and until such material is to be considered by the court for any purpose."

[7] https://www.perdue.senate.gov/about/david, last accessed on November 30, 2020; https://perduesenate.com/meet-david/, last accessed on November 30, 2020 (both listing Senator Perdue as former CEO of Dollar General).

off on January 5, 2021.[8] The presumption of access "is especially strong in a case like this where the evidence shows the actions of public officials." *Application of Nat'l Broad. Co., Inc.*, 635 F.2d 945, 952 (2d Cir. 1980); *see also In re Nat. Broad. Co., Inc.*, 653 F.2d 609, 614 (D.C. Cir. 1981) ("[T]he public has a legitimate interest in learning of the conduct of its elected officials.").

Just as the trial court did in *Shane Group*, the parties improperly filed large swaths of the record in this case under seal pursuant to a Stipulated Protective Order with minimal justification. As a result, the Court should enter an order unsealing those records.

C. The Parties Are Also Unable to Overcome the Presumption in Favor of Access under the Common Law.

Courts utilize a slightly different framework when analyzing requests to seal documents subject to the common law right of access. Like the constitutional right of access, court records are presumptively open under the common law. *See Kocher*, 546 S.W.2d at 85 (noting that judicial records are "presumptively open" and that the qualified right of access is based on both the common law and First Amendment). The test under the common law right of access balances the party seeking closure's interest in secrecy against the public right of access. *Nixon*, 435 U.S. at 602. Tennessee courts, however, have observed that "[t]he common law right of access establishes that court files and documents should be open, unless the court finds that the records are being used for improper purposes." *In re NHC*, at 561 (quoting *Ballard*, 924 S.W.2d at 661). Here, there is no improper purpose underlying CNS's request for access to the sealed court records—which CNS seeks for the purpose of its reporting—and the balance of the interests weigh in favor of access.

[8] https://www.cnbc.com/2020/11/17/here-are-the-key-dates-in-the-georgia-us-senate-runoff-elections.html, last accessed on November 30, 2020 (discussing Georgia runoff election on January 5, 2020 involving Senator Perdue); https://sos.ga.gov/admin/files/2020%20Revised%20Short%20Calendar.pdf, last access on November 30, 2020 (showing federal election runoff date as January 5, 2021).

The only showing the parties have made in this case is, presumably, that some portion of the contents of the sealed court records was designated as either Confidential or Highly Confidential by a party or non-party pursuant to the Stipulated Protective Order. Such a designation alone is not sufficient to overcome the presumption of access. *Shane Grp.*, 825 F.3d at 305-07.

As discussed above, because this case is a class action and because of the light it might shed on the actions of a public official, there is also a particularly strong public interest in the sealed court records that weighs heavily in favor of access. In this case, Senator Perdue was accused of, among other things, breach of fiduciary duty, in a case that was settled for $40 million. (Doc. 387 at 4, 7.) Senator Perdue is currently both a public official and candidate for public office, and that, along with the fact that the case is a class action matter, increases the burden on the parties to justify the sealed court records.

Because the parties have not—and cannot—overcome the heavy presumption in favor of access to the sealed records in this case and because CNS does not seek the sealed court records for any improper purpose, the Court should unseal the sealed court records pursuant to the common law right of access.

CONCLUSION

The parties made no showing that the heavy presumption in favor of public access under both the constitutional and common law rights of access is overcome as to any of the sealed records at issue. There was no showing that there are compelling interests that would be served by sealing the court records, that the Court considered reasonable alternatives to sealing or that such sealing is narrowly tailored. And there was no showing that any interest the parties have in secrecy outweighs the public interest in access to these court records, which are from a class

action and would shed light on the business activities of a sitting U.S. Senator. Instead, only the agreement of the parties, a general finding of good cause, and the identification of material by either parties or non-parties as being either Confidential or Highly Confidential pursuant to a Stipulated Protective Order was proffered to support the expansive sealing in this case. That is not enough to keep secret large swaths of the filed court records in this case under either the constitutional or common law rights of access. Even where sealing is appropriate, narrowly tailored redactions rather than sealing of entire documents is usually the proper remedy.

For these reasons, CNS respectfully requests that the Court unseal the sealed court records in this case and grant any further relief it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2020, a true and correct copy of the foregoing was furnished by U.S. Mail, facsimile, and email to each of the following:

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