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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

JUN 25 2014

The Honorable Carmen T. Mullen, Circuit Court Judge

SC Court of Appeals

Case No. 2012-CP-07-3746
Appellate Case No. 2014-000827

Albert R. LaFleur and Eileen M. LaFleur,.....Appellants,

v.

Coral Resorts, LLC, Hilton Head Hospitality, LLC d/b/a Hilton Head Guest Services, Sunrise Vacation Properties, Ltd., Sherri J. Smith, Patrick Budnik, Steven Deutsch, Katherine Swisher, and Reba Management, Inc.,
.....Respondents.

**RESPONDENTS' JOINT RETURN TO EAST COAST
NEWSPAPERS, INC.'S MOTION TO INTERVENE**

Respondents Coral Resorts, LLC, Hilton Head Hospitality, LLC d/b/a Hilton Head Guest Services, Sunrise Vacation Properties, Ltd., Sherri J. Smith, Patrick Budnik, Steven Deutsch, Katherine Swisher, and Reba Management, Inc.¹ (collectively, Respondents) respectfully submit this Joint

¹ Respondents Sunrise Vacation Properties, Ltd., Sherri J. Smith, Patrick Budnik, Steven Deutsch, and Katherine Swisher have not been served with East Coast Newspaper, Inc.'s Motion to Intervene; however, they are joining

Return to East Coast Newspapers, Inc.’s Motion to Intervene “for the limited purpose of challenging the sealing of the record on appeal.”² (Mot. to Intervene at 1, 3.) In other words, East Coast Newspapers, Inc. (Movant) does not appear to contest the trial court’s sealing of certain records below but instead only contests how this Court handles the accessibility of this appeal and events and filings therein. The Respondents do not object to this Court making the caption visible to the public. Indeed, the Respondents only concern is that those documents which were sealed by the trial court should remained sealed in this appeal. For the reasons set forth herein, Respondents assert this Court should deny Movant’s Motion to Intervene.

Notwithstanding the need to protect their confidential commercial information and trade secrets, Respondents welcome the opportunity to try the underlying case in the trial court. Respondents are confident the trial court will determine that the Appellants’ underlying claims are meritless. Respondents are dismayed by the months of delay and thousands of dollars that this appeal has cost the parties and the judicial system and request this

the other Respondents to this appeal in order to respond jointly to the Motion to Intervene.

² To the extent Movant is challenging this Court sealing general information concerning this appeal, including the caption, parties, and events, Respondents do not object to this Court making this information public. However, as set forth herein, Respondents assert certain of the filings in this appeal should remain sealed and non-public.

Court put an end to the appellate wrangling so that the merits of the case can be addressed in the trial court.

ARGUMENT

I. MOVANT LACKS ANY AUTHORITY TO INTERVENE

Respondents assert Movant should not be permitted to intervene in this appellate proceeding because there is no right to intervene at the appellate level provided for in the South Carolina Appellate Court Rules. Rule 240(c), SCACR, requires movants to set forth the grounds for relief they are seeking and to cite authorities in support of their motion. Although Movant's Motion to Intervene cites authorities addressing the sealing of records generally, it neither asserts it has a right to intervene in this appellate proceeding nor does it cite any authority indicating it has such a right.

The South Carolina Appellate Court Rules, despite having been amended several times since their adoption in 1990, do not provide for intervention in appellate court proceedings. In *Davis v. Jennings*, 304 S.C. 502, 503, 405 S.E.2d 601, 602 (1991), the supreme court held a newspaper could move to intervene in a circuit court matter based on Rule 24 of the South Carolina Rules of Civil Procedure, which governs intervention at the trial court level; however, there is no analogous rule set forth in the South Carolina Appellate Court Rules. In the twenty-three years since the supreme

court issued *Davis*, the South Carolina Appellate Court Rules have been amended several times; however, they have not been amended to provide for intervention at the appellate court level. Respondents have found no South Carolina cases permitting intervention at the appellate court level. Respondents assert this Court should deny Movant's Motion to Intervene because South Carolina law does not provide for intervention in appellate court proceedings and Movant has failed to set forth any authority in its Motion to Intervene indicating it has a right to intervene in this appeal.

II. THIS APPEAL IS NOT PROPERLY BEFORE THIS COURT

Movant should not be permitted to intervene in this appeal because this Court has not yet ruled on Respondents' Motion to Dismiss this appeal. Appellants are appealing several orders and rulings that are not immediately appealable, and to the extent any such order or ruling was previously immediately appealable, Appellants' appeal is untimely. (*See* Respts' Jt. Mot. to Dismiss.) Therefore, if Respondents' Motion to Dismiss is granted, this Court lacks jurisdiction over the matter and cannot entertain Movant's Motion to Intervene. Movants cannot utilize a motion to intervene to breathe life into an interlocutory or untimely appeal. *See* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1917 ("Intervention presupposes the pendency of an action in a court of competent jurisdiction

and cannot create jurisdiction if none existed before.”) This appeal should be dismissed before this Court even entertains a motion from any non-party to intervene for any purpose.

III. MAINTAINING AS SEALED CERTAIN DOCUMENTS AND INFORMATION IS PROPER IN THIS APPEAL

If this Court determines (1) that non-parties are permitted to intervene in appeals despite there being no appellate court rule or precedent permitting it and (2) that a decision on intervention before a decision on a motion to dismiss is appropriate, then Respondents contend that maintaining as sealed certain of the materials in this appeal is proper.

Importantly, the trial judge only sealed certain documents below and did not seal the case in its entirety. Accordingly, Respondents request that all documents sealed in the record of the trial court remain sealed in this Court. In addition, the Respondents request that this Court also seal any brief, motion, or other filing incorporating, summarizing, or otherwise referencing any information contained in sealed documents.

The South Carolina Supreme Court has set forth the standard by which appellate courts should analyze requests to seal records, which also applies to maintaining records as sealed. The Supreme Court’s order entitled, *In re Revised Order Concerning Personal Identifying Information And Other Sensitive Information In Appellate Court Filings*, S.C. Sup. Ct.

Order dated April 15, 2014 (Shearouse Adv. Sh. No. 15 at 34), provides in pertinent part:

A party seeking to seal material beyond those personal identifiers listed above must file a motion to seal with the appellate court in which the matter is pending. . . . Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. **Parties and counsel are reminded that the standard established in *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006), and *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991), must be met before any request to seal all or a portion of a record will be granted.**

Id. at 35-36 (emphasis added). As referenced in the Supreme Court’s April 15, 2014 order and as set forth in *Ex parte Capital U-Drive-It, Inc.*, the sealing of records is within a court’s “supervisory power over its own records and files.” 369 S.C. at 9, 630 S.E.2d at 469. In considering motions to seal, courts have properly denied access to records “where court files might have become a vehicle for improper purposes.” *Id.* Ultimately, a court must decide whether an interest in privacy outweighs the need for access. *Id.*

Through its April 15, 2014 order and *Ex parte Capital U-Drive-It*, the Supreme Court expressly incorporated the analysis for sealing under Rule 41.1, SCRCF, into appellate practice. Rule 41.1, SCRCF, provides the

following non-exhaustive list of items for a court's consideration of a motion to seal:

- (1) ensuring the parties' right to a fair trial or hearing;
- (2) the need for witness cooperation;
- (3) the reliance of the parties upon expectations of confidentiality of the proceeding;
- (4) the public or professional significance of the proceeding;
- (5) the perceived harm to the parties from disclosure;
- (5) why alternatives other than sealing the documents are not available to protect legitimate private interests; and
- (6) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

Id. at 12, 630 S.E.2d at 470. Additionally, the Supreme Court noted a court determining whether to grant a motion to seal may also consider other relevant factors. *Id.* As set forth below, a consideration of the facts specific to this appeal as well as the standard set forth in *Ex parte Capital U-Drive-It* weigh in favor of maintaining as sealed in this appeal the documents and information that were sealed below.

a. Circumstances Specific to this Appeal

Before analyzing the factors outlined above, it is important for this Court to consider certain circumstances specific to this appeal that weigh in favor of this Court sealing certain records. Importantly, Respondents are not

requesting that the entire appeal remain sealed completely out of the public record. Respondents limit this request to seal to those items that were sealed out of the record by the trial court as well as any brief, motion, or other filing incorporating any information contained in a sealed documents.

In its October 31, 2013 order, the trial court held that certain of the Respondents' information would be maintained as private because it contains trade secrets. (*See* Order of Judge Mullen, October 31, 2013.) If this Court dismisses this appeal as interlocutory but fails to maintain as sealed the trade secret information, then this Court would essentially reverse the trial court's decision without ever reaching the merits of the appeal. This Court should not unseal these highly sensitive, sealed documents or their contents in a case that is not properly before this Court and that Respondents assert lacks merit.

In addition, the sealed documents contain confidential commercial information and trade secrets that could be of benefit to Respondents' competitors. Counsel for Appellants also represents one such competitor, and unsealing the information at issue could provide that competitor, and others, with otherwise unavailable information and an unfair competitive advantage over Respondents.

b. Ensuring the Parties' Right to a Fair Trial or Hearing

Turning to the *Ex parte Capital U-Drive-It* factors analysis, the first factor is whether sealing will preserve the status quo and ensure the parties' right to a fair appeal. *See*, 369 S.C. at 12, 630 S.E.2d at 470. This is particularly important because this Court lacks appellate jurisdiction because the appeal is interlocutory and/or untimely as set forth in Respondents' Joint Motion to Dismiss. Maintaining the documents sealed below as sealed in this appeal would have no bearing on the fairness of this appeal, but failing to maintain as sealed portions of the record of this appeal would essentially reverse the trial court's decision.

c. The Need for Witness Cooperation and the Reliance of the Parties Upon Expectations of Confidentiality of the Proceeding

Further, the documents that the trial court sealed involve trade secrets, which by definition derive "independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by the public." S.C. Code Ann. § 39-8-20(5) (Supp. 2013). Thus, Respondents have appropriately relied on the non-public nature of their trade secrets and continue to actively seek to protect such trade secrets from public disclosure.

As the matter before the trial court addressed a discovery issue, no witnesses participated in the proceeding, so the effect of witness cooperation neither argues for nor against maintaining the sealed documents as sealed.

d. The Public or Professional Significance of the Proceeding and Whether the Public Already has Access to Information

Additionally, the public or professional significance of this appeal is practically non-existent. *See Ex parte Capital U-Drive-It*, 369 S.C. at 12, 630 S.E.2d at 470. The records currently on file with this Court will add nothing to the public's "understanding of the litigation between and among the parties to this appeal," (Mot. to Intervene at 3) particularly because no record on appeal will be filed in this appeal because it is not properly before this Court. This appeal does not address the merits of the litigation pending in the trial court, thus Movant's asserted interest in "business activities."

e. The Perceived Harm to the Parties From Disclosure

Moreover, Respondents assert that if this Court were to unseal this information, irreparable harm would result because Respondents' private, highly sensitive commercial documents and trade secret information and their contents would enter the public record and become easily accessible to anyone with an internet connection, including competitors. *See Ex parte Capital U-Drive-It*, 369 S.C. at 12, 630 S.E.2d at 470. Unsealing the record would, in effect, grant the relief sought by Appellants in this appeal.

Additionally, it would cause Respondents' hard-fought battle to protect its private, confidential commercial information and trade secrets from public disclosure to be lost. Respondents assert this would be extremely inequitable considering the fact that Respondents believe this appeal is not even properly before this Court and the fact that Appellants and their counsel are in possession of certain documents in violation of a court order requiring them to disgorge certain documents. *See Nixon*, 435 U.S. at 597–98 (“[T]he right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and *access has been denied where court files might have become a vehicle for improper purposes.*” (emphasis added)).

f. Alternatives Other Than Sealing Are Not Available

Respondents do not contend the entire appeal should be sealed out of the public record. Respondents seek only a ruling maintaining as sealed any information sealed by the trial court. This would maintain the balance between the public's interest in the status of this appeal and Respondents' right to protect private, confidential, and trade secret information. Specifically, the Respondents do not object to the Court making public the caption of this appeal or the events. However, Respondents believe that any of the documents that the trial court sealed or any document or filing

containing any reference to the documents sealed below should also remain sealed in this Court.

g. The Public is Minimally Impacted, if at all, By Sealing

Importantly, this appeal does not involve the public's health or safety—it does not even involve the merits of this litigation. *See id.* Understandably, the “unknown” can be intriguing to a media outlet, but this appeal is nothing more than an improper appeal of a discovery order. Maintaining as sealed the materials that were sealed by the trial court will have no effect on the public's health or safety.

h. Preventing Unintended Consequences

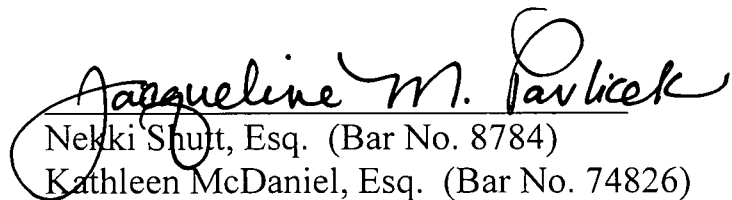
Respondents assert that should this Court grant Movant's Motion to Intervene, this Court should exercise its discretion in limiting which filings should be made public. *See id.* at 10, 630 S.E.2d at 469 (noting courts have the power to seal portions or the entirety of a record (citing *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002))). It is particularly important for this Court to consider any unintended effect of granting Respondent's Joint Motion to Dismiss but permitting Movant to intervene and unseal certain documents. Specifically, should such a situation occur, Respondents assert that unsealing certain filings would permit Appellants to inject Respondents' private

commercial and trade secret information into this Court's record and would effectively reverse the trial court's substantive ruling.

CONCLUSION

Accordingly, Respondents assert this Court should deny East Coast Newspapers' Motion to Intervene and should grant Respondents' Motion to Seal and Respondents' Joint Motion to Dismiss.

Respectfully submitted,



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GUEST SERVICES, AND REBA
MANAGEMENT, INC.**

Columbia, South Carolina

June 25, 2014

AND

Bess J. DuRant w/express permission jmp

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Columbia, South Carolina

June 25, 2014

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In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY **SC Court of Appeals**
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

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Albert R. LaFleur and Eileen M. LaFleur,.....Appellants,

v.

Coral Resorts, LLC, Hilton Head Hospitality, LLC d/b/a Hilton Head Guest Services, Sunrise Vacation Properties, Ltd., Sherri J. Smith, Patrick Budnik, Steven Deutsch, Katherine Swisher, and Reba Management, Inc.,.....Respondents.

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the following as indicated herein below, by mailing a copy of same by first class U.S. Mail postage pre-paid on the date below to the following:

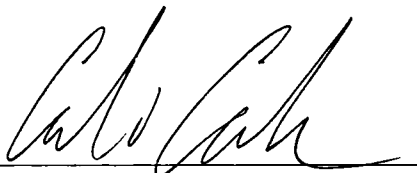
DOCUMENT SERVED: RESPONDENTS' JOINT RETURN TO EAST COAST NEWSPAPERS, INC.'S MOTION TO INTERVENE

PARTIES SERVED:

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June 25, 2014

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VIA HAND DELIVERY

The Honorable Jenny Abbot Kitchings, Clerk
SOUTH CAROLINA COURT OF APPEALS
Calhoun Building
1015 Sumter Street
Columbia, South Carolina 29201

SC Court of Appeals

**Re: Albert R. Lafleur and Eileen M. LaFleur v. Coral Resorts, LLC, Hilton Hilton Head Hospitality, LLC d/b/a Hilton Head Guest Services, Sunrise Vacation Properties, Ltd., Sherri J. Smith, Patrick Budnik, Steven Deutsch, Katherine Swisher, and Reba Management, Inc.
Appellate Case No.: 2014-000827
Our File No.: 5387.015**

Dear Madam Clerk:


Enclosed for filing, please find an original and seven (7) copies of the Respondents' Joint Return to East Coast Newspapers, Inc.'s Motion to Intervene along with a Certificate of Service in the above-referenced matter. Please file the original and six of the copies, clock-in the seventh copy, and return it to us via the courier delivering same.

By copy of this letter, I am serving all counsel of record with a copy of the same.

If you have any questions or need anything further regarding this matter, please do not hesitate to contact me at my office.

With kind regards, I remain

Very truly yours,


Jacqueline M. Pavlicek, Esquire

JMP:cnc

Enclosures

cc: Nekki Shutt, Esquire (w/o enclosure)
Kathleen M. McDaniel, Esq. (w/o enclosure)
James Emerson Smith, Jr., Esquire (w/enclosure)
Darra J. Coleman, Esquire (w/enclosure)
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