

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
No. 08-CR-364 (RHK/AJB)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

**MEMORANDUM OF INTERVENER
STAR TRIBUNE OPPOSING
DEFENDANT PETTERS' MOTION
TO SEAL DOCUMENT**

THOMAS JOSEPH PETTERS; PETTERS
COMPANY, INC.; PETTERS GROUP
WORLDWIDE, LLC,

Defendants.

Introduction

Intervenor Star Tribune opposes the generic Motion to Seal [Doc. 286] filed on October 5, 2009 by defendant Thomas Joseph Petters.

Statement of Facts

On October 10, 2008, Defendant Petters was arrested and charged with crimes related to what federal investigators allege was a fraudulent investment scheme exceeding \$3 billion. The prosecution of Mr. Petters, a well-known Twin Cities business man whose holdings included Sun Country Airlines and Polaroid, has garnered significant public and press interest. In particular, the Star Tribune has closely monitored the Petters prosecution. On July 8, 2009, the Star Tribune moved to intervene for the limited purpose of seeking access to public files. [Doc. Nos. 226-228.] The Court granted the motion to intervene and granted in part the motion for public access (allowing limited redactions in certain previously filed material). [Doc. Nos. 239, 246, 254, and 267.]

Although the First Amendment requires parties who seek to restrict public access to judicial documents to demonstrate a compelling reason why each specific piece of information should be kept secret, the publicly available docket information does not reflect the basis for Defendant Petters' current motion, which states no more than that he "moves that the Court issue an order sealing the document attached to the affidavit submitted pursuant to CM/ECF-Criminal §IV.D.5." Star Tribune has not seen the referenced affidavit or document.

Argument

Defendant Petters' motion follows the literal language of the CM/ECF Rule, which specifies a "generic 'Motion to Seal.' This generic motion should not in any way describe the actual document(s) to be sealed."¹ Such a bland description (barely plain-vanilla, and far short even of vanilla-bean) does not, however, serve the purposes of public access to judicial records and proceedings that led to the Star Tribune's limited-purpose intervention in this matter and does not comply with controlling legal principles.

The press and public have a First Amendment and common law right of access to criminal proceedings. *See Globe Newspaper v. Superior Court*, 457 U.S. 596, 606–07 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980); *see also Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property."). These rights extend to documents submitted to the court as part of

¹ The Star Tribune has significant concerns in general with the extent of sealed documents and even entire files in the District of Minnesota, which it intends to address in an appropriate and broader fashion at a later time. It limits the present opposition to the single pending motion of Defendant Petters.

those proceedings, such as documents filed in support of search warrant applications, *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988), and docket sheets, *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91–92 (2d Cir. 2004) (citing cases and holding that “the media and the public possess a qualified First Amendment right to inspect docket sheets, which provide an index to the records of judicial proceedings”). The rationale for this conclusion is solid: “Not only do such [court] records often concern issues in which the public has an interest, in which event concealing the records disserves the values protected by the free-speech and free-press clauses of the First Amendment, but also the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret.” *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002).

Before a court seals such documents from public view it must make specific, on-the-record findings that sealing is “essential to preserve higher values and is narrowly tailored to that interest.” *In re—Gunn*, 855 F.2d at 574. Specifically, it must explain why sealing is necessary to serve a compelling government interest and why less restrictive alternatives are not appropriate. *Id.*; see also *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*).

Normally, the party seeking a sealing order must show that restricting the press and public’s First Amendment right of public access “is necessitated by a compelling government interest.” *In re—Gunn*, 855 F.2d at 574. Logically, the moving party should make that showing through public documents and arguments (albeit in a fashion that does not itself disclose the precise information that should be sealed), so that the press or public can challenge the legal basis for such contentions or suggest less restrictive means available to

protect any legitimate asserted interest, such as redacting only limited and specific sensitive information from the public filings. *See, e.g., Press-Enterprise I*, 464 U.S. at 513 (“The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected.”). Defendant Petters has not done so here.

Although a district court may file its findings under seal if it determines that restricting access is warranted, its findings must be specific enough to enable the appellate court to determine whether its decision was proper. *See In re—Gunn*, 855 F.2d at 574. This Court should not grant Defendant Petters’ motion without such findings, preferably in a public order.

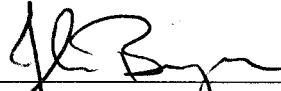
Accordingly, Star Tribune requests that the Court require Defendant Petters to make public justifications for his motion and allow the Star Tribune a subsequent opportunity to be heard in a meaningful way.

Conclusion

This Court should vigilantly protect the principle of public access to judicial records and should deny Defendant Petters’ motion without prejudice to a further motion that publicly states its basis and permits meaningful evaluation (and possible opposition) by Intervener Star Tribune.

Dated: October 6, 2009

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