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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN THE MATTER OF THE ESTATE OF LARRY LEE HILLBLOM, Deceased.) Civil Action No. 95-626P) **ORDER RE: SEALING OF CLAIMS**

This matter came before the Court on September 25, 1995, in response to the Court's Order of September 8, 1995. Certain claimants to the Estate had filed claims under seal, and the Court requested a showing of further justification from these claimants to overcome the presumption of open Court records. The Court also authorized intervention on the part of Saipan Cable TV, which argues that the First Amendment and the public interest in this contested probate matter require the unsealing of the claims. The Court, having examined the pleadings, considered the arguments of counsel and identified the applicable law, now renders its decision.

I. FACTS

The claims in question were filed on September 1 and September 5, 1995. Seven claims were filed by the firm of Eason & Halsell on behalf of various clients. The other claim was filed by

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1 Michael Dotts on behalf of a single client. In response to the Court's September 8, 1995 Order, these
2 counsel have filed publicly-available memoranda and separate declarations under seal.

3 As to Mr. **Dotts'** client's claim, it is argued that the Claimant is a "very private **person**" whose
4 life has been "invaded by the parties and the press." Memorandum in Support of **Maintaining Seal**
5 on Claim at 2 (Sep. 18, 1995). Mr. Dotts' sealed declaration provides greater detail as to the nature
6 of these contentions. On the other hand, Claimant Adonis Gotas argues in his memorandum that both
7 the identity of this Claimant and the general nature of her claim have been described in open court.
8 See Memorandum on the Question of Sealed Claims at 5 (Sep. 18, 1995). At the September 25
9 hearing, various counsel made further statements as to the identity of this Claimant. These statements
10 were not disputed by Counsel for the Claimant, although he did dispute opposing counsel's
11 speculation **as** to the precise nature of her claim.

12 As to the Claimants represented by Ms. Eason and Ms. Halsell, their legal memorandum
13 asserts both privacy and confidential business information claims, but does not reveal any fact about
14 the claims themselves. See Memorandum of Law re: Sealing of Claims at 8-14 (Sep. 18, 1995).
15 Additional declarations filed under seal detail the nature of these interests. Claimant Adonis **Gotas**,
16 Petitioner, Kaelani **Kinney** and Intervenor Saipan Cable TV have objected to the sealing of these
17 declarations, pointing out that they have no way of evaluating the interest to be protected if they
18 cannot know what it is. At the hearing on this motion, counsel opposing sealing of these claims
19 engaged in extended speculation as to the nature of the claims.

21 II. ANALYSIS

22 A. COMMON LAW **AND FIRST AMENDMENT ACCESS**

23 As noted in the Court's September 8, 1995 Order, legal criteria for the sealing of records and
24 the closure of proceedings in criminal trials have already been established in the Commonwealth. See
25 Commonwealth v. Evangelista, Crim. Case No. 93-174F (N.M.I. Super. Ct. Oct. 11, 1994).
26 Evangelista adopted the Ninth Circuit's three-part test for balancing the First Amendment right of
27 public access to criminal proceedings against other protected rights such as the right to a fair trial,

1 requiring a party seeking closure to show a substantial probability that: 1) irreparable damage to a
2 protected right will result from public access; 2) alternatives to closure will not protect adequately the
3 right in question; and 3) that closure will be effective in preventing the **perceived** damage. *Id.*, slip
4 op. at 6 (citing *U.S. v. Brooklier*, 658 F.2d 1162, 1167 (9th Cir. 1982). Where a defendant's
5 privacy concerns are implicated, the threat of "mere embarrassment" resulting from media exposure
6 is not sufficient to justify the sealing of criminal records. *Id.* at 11.

7 In civil proceedings, the U.S. Supreme Court and the Ninth Circuit have held that the common
8 law right of access, rather than the First Amendment, governs the powers of courts to seal records
9 and hold hearings in camera. See *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 n. 6 (9th Cir. 1995);
10 *E.E.O.C. v. Erection Co, Inc.*, 900 F.2d 168, 170 (9th Cir. 1990), citing *Valley Broadcasting Co.*
11 *v. U.S. District Court*, 798 F.2d 1289 (9th Cir. 1986). However, a few lower courts within the
12 Circuit have adopted the analysis of the Third and Sixth Circuit that the First Amendment does apply
13 to civil proceedings. See *McCoy v. California Medical Review*, 133 F.R.D. 143, 147 (N.D. Cal.
14 1990) (citing *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983) and
15 *Publiker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d. Cir. 1984)); *Cable News v. Superior Court*
16 *of Guam*, Civil Case No. 93-00082, slip op. at 3 (*Guam App. Div.* 1994). Likewise, this Court finds
17 the Third Circuit analysis in *Publiker* to be the most thoughtful and well-reasoned approach. While
18 both the common law and the First Amendment create a presumption of openness,' the First
19 Amendment analysis imposes a stricter test for the sealing of records, requiring a demonstration that
20 any closure order "serves an important government interest and that there is no less restrictive way
21 to serve that government interest." *Publiker*, 733 F.2d at 1070.

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24 ¹ At common law, applicable in the Commonwealth via 7 CMC § 3401, there is a strong
25 presumption of openness of judicial records, grounded in concern for public accountability of judicial
26 processes. *Valley Broadcasting*, 798 F.2d at 1293. However, this presumption is not of
27 constitutional dimension, and it is subject to rebuttal based on "articulable facts known to the Court"
demonstrating that the information to be sealed is likely to be used for an improper purpose if made
public. Such improper purposes include "publication of scandalous, libelous, pornographic or trade
secret information; infringement of fair trial rights of the defendants or third persons; and residual
privacy right.." *Id.* at 1295.

1 Here, the Court finds that the level of legitimate public concern aroused by this case implicates
2 precisely the freedoms the First Amendment was enacted to protect. The Decedent here was an
3 important figure in the Commonwealth's political and economic life. This probate action has attracted
4 media scrutiny, both because of the size of the assets at stake and because of the allegations of conflict
5 of interest which have been leveled against the Executor. These policy considerations bolster this
6 Court's decision to apply a First Amendment analysis in balancing the competing interests presented
7 by the Claimants under seal

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9 **B. PRIVACY RIGHTS**

10 Article I, § 10 of the Commonwealth Constitution protects an individual's right to privacy,
11 which "shall not be infringed except upon a showing of compelling interest." The Analysis to the
12 Constitution makes clear that this right of privacy attaches to all persons present "within the
13 jurisdiction of the Commonwealth," but does not apply to corporations. Analysis of the Constitution
14 of the Commonwealth of the Northern *Mariana* Islands, 24 (1976).

15 Claimants under seal have argued that this provision sets up a presumption of confidentiality
16 of Court records, which the other parties must rebut upon a showing of compelling interest. No
17 Commonwealth precedent has so held. On the other hand, other jurisdictions have held that express
18 constitutional rights to privacy do not alter traditional presumptions regarding disclosure of judicial
19 records. See *Florida Freedom Newspapers, Inc. v. Sirmons*, 508 So.2d 462, 463 (Fla. App. Ct.
20 1987) (right of privacy protects parties from government intrusion, but does not authorize conduct
21 of private litigation). In more general terms, a party must have a legitimate expectation of privacy
22 which society is willing to recognize in order for the right of privacy to attach. See *Flesh v. Board*
23 *of Trustees*, 786 P.2d 4 (Mont. 1990); see *also* *State v. Long*, 544 So.2d 219 (Fla. App. 1989).

1 Here, the traditional openness of judicial records and proceedings weighs against any legitimate
2 expectation of privacy.²

3 Even if such a right of privacy attaches, the balancing test is not substantially different from
4 the traditional analysis under federal precedents. In *Flesh*, the Montana Supreme Court balanced the
5 state constitutional guarantee of privacy against the public's "right to know" by determining whether
6 "the demands of individual privacy clearly exceed the merits of public disclosure. Under this
7 standard the right to know *may* outweigh the right to individual privacy, depending on the facts."
8 786 P.2d at 8. Thus, an **asserted** privacy interest may overcome the First Amendment right of access,
9 but the Court must identify specific facts upon which the need for closure is based and must find that
10 the clash between the two interests cannot be resolved in a less restrictive fashion.

11 Here, the Court would ordinarily be skeptical that the Claimant represented by Mr. **Dotts** has
12 a legitimate expectation of privacy in these proceedings, since civil records are generally open to the
13 public. However, this Claimant may have relied on the Court's order granting her motion to seal the
14 claim prior to filing it. Such reliance on the Court's previous order arguably confers an expectation
15 of privacy where none would otherwise exist. Thus, the Court will accept in these limited
16 circumstances that the Claimant is entitled to the privacy protections of Art. I, § 10.

17 Nevertheless, even under the balancing test enunciated in *Flesh*, her privacy interests do not
18 clearly outweigh the First Amendment concerns presented here. First, the facts she relates do not
19 demonstrate to the Court that she is in a position substantially different from other parties connected
20 to high-profile court **cases**. Second, the Court is unconvinced that maintaining her claim under seal
21 will protect the privacy interest she seeks to protect. As noted above, both the Executor and other
22 parties to this case have disclosed the identity of the Claimant in open court, as well as the general
23 nature of her claim against the Estate. Having viewed the documents she has filed under seal, the
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25 ² This lack of expectation of privacy is different from the privacy expectation attaching to
26 personal records which become subject to discovery in a civil suit. Courts have generally recognized
27 a less strict test for maintaining confidentiality of such records, which have not been traditionally
28 open to the public. See Miller, "Confidentiality, Protective Orders and Public Access to the Courts,"
105 *Harv. L.R.* 427 (1991).

1 Court finds nothing in them which would subject her to additional media scrutiny, beyond that which
2 she has already experienced. See *Cable News*, slip op. at 6. Rather, the unsealing of her claim may
3 lessen media attention to her personally, as it will provide a direct source of information about her
4 claim other than herself.

5 The Court also believes that less restrictive alternatives may be effective to protect this
6 Claimant's privacy. Her sealed affidavit relates primarily to emotional distress caused by unwanted
7 intrusions on her solitude by other parties to this case and by the press. Article I, § 10 protects "an
8 individual's right to physical solitude free from intrusions such as another's eavesdropping on
9 telephone calls, on conversations, harassing telephone calls, constant and manifest surveillance, and
10 any other intrusions that a reasonable person would **find** offensive and objectionable." This Claimant
11 is free to apply to this Court for an order restraining third parties from intruding on the privacy of her
12 domicile.

13 As to the clients represented by Ms. Eason and Ms. **Halsell**, the Court **finds** that no privacy
14 interest as **defined** by the Commonwealth Constitution is presented in their papers. As noted above,
15 Art. I, § 10 does not apply to corporations or to persons outside the Commonwealth. These claimants
16 are either corporations or individuals outside the Commonwealth. Nor do the submissions of these
17 Claimants implicate the implied rights of privacy of the U.S. Constitution. Rather, the sealed
18 declarations relating to these claims describe **financial** injury which may result from disclosure of the
19 claims. Financial injury of this sort is considered a property interest, rather than a privacy interest.
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22 C. CONFIDENTIAL BUSINESS INFORMATION

23 Courts have recognized that the common law and First Amendment rights of access to civil
24 proceedings may be outweighed by property interests where the records contain "business information
25 which might harm a litigant's competitive standing." *Crain Communications, Inc. v. Hughes*, 521
26 N.Y.S.2d 244 (N.Y. App. 1987); *Publicker*, 733 F.2d at 1071; *Valley Communications*, 798 F.2d
27 at 1295. Once again, the Court must base its decision on "**articulable** facts known to the court, not
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1 on the basis of unsupported hypothesis or conjecture." *Id.* Likewise, the Court must narrowly tailor
2 any closure order to accomplish an important government interest and must make use of any less
3 restrictive alternatives which will serve the interest at stake. *Publicker*, 733 F.2d at 1070. Courts
4 often protect such information while at the same time allowing access by opposing parties under the
5 terms of stipulated protective orders, whereby every lawyer becomes bound not to reveal confidential
6 information, even to his or her client. See *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*,
7 529 F. Supp. 866, 889 (E.D. Pa. 1981), citing *Manual for Complex Litigation*, § 2.50.

8 Here, the Claimants represented by Ms. **Eason** and Ms. Halsell have filed affidavits alleging
9 the threat of loss of competitive standing if their claims are made public. The Court, having reviewed
10 these affidavits in camera, agrees that the facts contained in these affidavit are sufficient to warrant
11 some protection of the information contained. However, the Court is not at this stage convinced that
12 these property interests warrant the suppression of all information relating to these claims. The public
13 interest in disclosure of the details of these claims is relatively small. However, the public interest
14 in knowing something about the general nature of these claims is much greater. This probate action
15 has been subject to intense media scrutiny, prompted in part by charges of conflict of interest and
16 other improprieties on the part of the Executor. The public has an interest in knowing whether these
17 claims are related in any way to those allegations. If the public is prevented from obtaining at least
18 this general knowledge, legitimate concerns over the integrity of this Court's processes may fester in
19 the public. It is precisely to prevent this kind of damage to the Court's integrity that the common law
20 and First Amendment presumptions of access were designed to combat. *Publicker*, 733 F.2d at 1070.

21 The Court therefore will order counsel to indicate whether any limited disclosure of some
22 general information regarding these claims, short of unsealing the entire claim but beyond the present
23 complete lack of public information, would still provide effective protection for these Claimants'
24 property interests. Counsel should consider which facts must remain private and which may be
25 disclosed, and should transmit this information to the Court for in camera review. Final decision as
26 to the sealing of these claims is reserved pending that review.

1 Access to these claims by other parties to this litigation presents a related concern. Claimant
2 Adonis Gotas and Petitioner Kaelani **Kinney** both objected to the fact that they have heretofore been
3 obliged to litigate this action without any knowledge about the nature of these claims. This Court has
4 already held that claimants are "interested persons" regarding the overall management of the Estate.
5 The same reasoning dictates that these parties must have access to other claims against the Estate,
6 especially when there is a possibility that these claims may be related in some way to the allegations
7 of impropriety leveled against the Executor. Likewise, the Special Master appointed by Order of this
8 Court on September 28, 1995 needs access to these claims in order to evaluate those allegations of
9 impropriety. The Court believes that a stipulated protective order, preventing all persons beyond the
10 counsel to this litigation and the Master from disclosing the sealed information, may be the
11 appropriate way to address these **concerns**.³ The parties are therefore ordered to meet and confer
12 over the terms of such a stipulated protective order and report back to the Court.

14 **III. CONCLUSION**

15 For the foregoing reasons, the Court hereby **ORDERS**:

- 16 1. The Claim filed by Mr. **Dotts** is hereby ordered **UNSEALED**.
- 17 2. Ms. **Eason** and Ms. Halsell shall file, by the close of business on October 4, 1995, a
18 supplemental submission to the Court for in camera review, indicating which general facts regarding
19 their **claim** may be made public without sacrificing the Claimants' property interests. Upon receiving
20 this submission, the Court will issue a ruling on their motion to keep their claims under seal.
- 21 3. Ms. Eason and Ms. Halsell will meet and confer with other interested parties over the
22 terms of a stipulated protective order which would give opposing counsel and the Special Master
23 access to the claims but prevent them from disseminating this information to any person, including
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26 ³ Such a confidentiality order could be structured so as to carry the penalty of sanctions for
27 contempt upon any violation, as well as the threat of civil liability for damages resulting from
28 unauthorized disclosure.

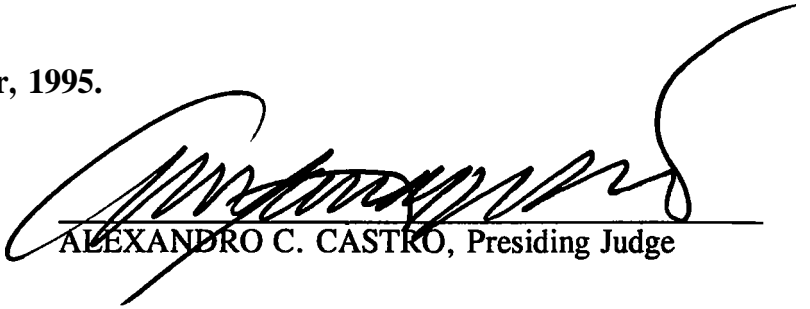
1 their clients. If these efforts fail, any party may move for the imposition of such an order by this
2 Court.

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4 So ORDERED this 2nd day of October, 1995.

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ALEXANDRO C. CASTRO, Presiding Judge

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