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September 25, 2008

**VIA FEDERAL EXPRESS**

Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001

**Re: The New York Law Publishing Company, et al. v. Jane Doe, et al.**  
**No. 08-330**

Dear Sir/Madam:

I represent petitioners, The New York Law Publishing Company, the Legal Intelligencer and the Pennsylvania Law Journal, in the above-referenced case that was filed on September 9, 2008 and placed on the docket September 11, 2008.

I am writing to bring a subsequent development to the attention of the Court. On September 9, 2008, the United States Court of Appeals for the Third Circuit entered an Order. The Order was sealed. On September 11, 2008, the Third Circuit entered another Order that directed that the September 9, 2008 Order be unsealed. At that time, the Third Circuit notified Petitioners of the existence of the September 9<sup>th</sup> and September 11<sup>th</sup> Orders. Both Orders are attached.<sup>1</sup>

The September 9<sup>th</sup> Order sought to “clarify the scope of remand regarding the [Third Circuit’s] sealing order” that is at issue in Petitioners’ petition for writ of certiorari. Reiterating its prior suggestion that the Petitioners may “pursue this matter with the District Court upon remand,” the Third Circuit stated: “It is not our intention that the order we entered sealing the record on appeal would prevent the District Court from considering the issue anew; indeed, our order suggesting further pursuit of this issue was intended to reflect our view that the District Court was the better court in which this issue could be litigated...” The Third Circuit said that “the District Court should feel free to decide this issue unfettered by our rulings to date.”

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<sup>1</sup> These Orders were issued by the same three judge panel that issued the prior decisions and orders that are the subject of Petitioners’ petition for writ of certiorari. One of the three judges on that panel (and the author of the Third Circuit’s May 30, 2008 decision sealing the case) declined to join the order “because it was not requested by either party and because he considers it unnecessary.”



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Petitioners appreciate the Third Circuit's effort to clarify its prior rulings sealing the case and denying Petitioners any right to be heard. However, in our view, the Third Circuit's September 9, 2008 Order does not remedy the fundamental constitutional defects of the Third Circuit's rulings that are the subject of Petitioners' petition for writ of certiorari. That is the case for two reasons.

First, the Third Circuit's suggestion that Petitioners pursue the matter in the District Court does not alter the fact that the Third Circuit's own docket, records and proceedings were and, with but four exceptions, remain completely sealed from public view.<sup>2</sup> The District Court has no authority to unseal the Third Circuit's dockets, records and proceedings. Only the Third Circuit has the power to do so. With the Third Circuit's failure to act, Petitioners have sought relief in this Court.

Second, the Third Circuit's clarification does not alter the fact that the Third Circuit, in its May 30, 2008 "precedential decision," held that it was constitutionally permissible for the District Court to have completely sealed a case – the docket, all records and all proceedings – for a period of seven years. That holding establishes an unconstitutional precedent that is completely contrary to the decisions of this Court as well of other Circuit Courts of Appeal. If allowed to stand, that holding will do untold mischief to the public's rights of access in the future, permitting courts to seal cases in their entirety and deny access to the press and public without notice, without opportunity to be heard and without on-the-record articulation of a compelling interest and lack of less restrictive alternatives.<sup>3</sup>

For these reasons, it is our view that the Third Circuit's recent Order does not impact or undermine Petitioners' petition for writ of certiorari. An extraordinary constitutional violation remains in place, one that blesses secret cases and encourages more of them in the future.

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<sup>2</sup> The four exceptions are (1) the Third Circuit's May 30, 2008 decision affirming the District Court's sealing of the case; (2) the Third Circuit's June 19, 2008 Order denying Petitioners' motions and petitions seeking intervention and access; (3) the Third Circuit's September 9, 2008 Order "clarifying" the remand; and the Third Circuit's September 11, 2008 Order unsealing the September 9, 2008 Order. Everything else, at both the District Court and Third Circuit levels, is sealed.

<sup>3</sup> The Third Circuit's September 9<sup>th</sup> Order, in an aside, references a "hearing" conducted by the District Court on the sealing issue. The Third Circuit, however, does not state that it held a hearing prior to sealing its own docket, records and proceedings. Nor does the Third Circuit state that the District Court's "hearing" was open to the press and public, with notice and opportunity to be heard, as required by this Court.



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Inasmuch as the Third Circuit declines to correct its error, Petitioners respectfully ask this Court to assume jurisdiction over the matter and reverse the Third Circuit's rulings.

Respectfully submitted,

Abraham C. Reich

ACR/sas

Attachments

cc: Gary M. Davis, Esquire, Counsel for Respondent Jane Doe (Via Federal Express)  
Dean E. Collins, Esquire, Counsel for Respondents C.A.R.S Protection Plus, Inc. and  
Fred Kohl (Via Federal Express)  
Clerk of the Third Circuit Court of Appeals (Via Federal Express)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Nos. 06-3625, 06-4508

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JANE DOE,  
Appellant at No. 06-3625

v.

C.A.R.S PROTECTION PLUS, INC.; FRED KOHL

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JANE DOE

v.

C.A.R.S PROTECTION PLUS, INC.; FRED KOHL

C.A.R.S Protection Plus, Inc.,  
Appellant at No. 06-4508

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WD/PA Civil No. 01-cv-02352)  
District Judge: The Honorable Maurice B. Cohill, Jr.

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Before: RENDELL and NYGAARD, Circuit Judges, and McCLURE,<sup>1</sup> District Judge.

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O R D E R

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The panel recently entered three orders in connection with this appeal: the order vacating the grant of summary judgment, remanding the case to the District Court; an order granting a motion “to proceed under seal and in pseudonym”; and an order denying intervention sought by several publications desirous of challenging the sealing of the case, in which we stated “movant may pursue this matter with the District Court upon remand”. We believe we should clarify the scope of the remand regarding the sealing order. It is not our intention that the order we entered sealing the record on appeal would prevent the District Court from considering this issue anew; indeed, our order suggesting further pursuit of this issue was intended to reflect our view that the District Court was the better court in which this issue could be litigated, since it could hold a hearing, and

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<sup>1</sup>Honorable James F. McClure, Jr., District Judge for the United States District Court for the Middle District of Pennsylvania, sitting by designation.

had done so previously on this very issue at the outset of the case, and since the record on appeal consists in large measure of the record made in the District Court. The issue of the propriety of the continued sealing of the case now that it will proceed to trial is an important one; the District Court should feel free to decide this issue unfettered by our rulings to date.<sup>2</sup>

By the Court,

/s/ Marjorie O. Rendell  
Circuit Judge

Dated: September 9, 2008

cc: Gary M. Davis, Esq.  
Dean E. Collins, Esq.  
Robert J. Waine, Esq.

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<sup>2</sup>Judge Nygaard declines to join this order because it was not requested by either party and because he considers it unnecessary.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Nos. 06-3625, 06-4508

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JANE DOE,  
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Before: RENDELL and NYGAARD, Circuit Judges, and McCLURE,<sup>1</sup> District Judge.

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O R D E R

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The order entered by the Court in this case on September 9, 2008 is hereby unsealed.  
The clerk is directed to post said order on the Court website.

By the Court,

/s/ Marjorie O. Rendell  
Circuit Judge

Dated: September 12, 2008  
clc\cc: Gary M. Davis, Esq.  
Dean E. Collins, Esq.  
Robert J. Waine, Esq.

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<sup>1</sup>Honorable James F. McClure, Jr., District Judge for the United States District Court for the Middle District of Pennsylvania, sitting by designation.