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Pages: 18 (including this cover sheet)

Sender ID#: 8906

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Comment: Re: State of Missouri, ex rel., Cypress Media LLC and K.C. Pitch LLC
Case No. WD68104

Please find attached Respondent's Suggestions in Opposition to Relators' Petition for Writ Prohibition and Motion to File Exhibits Under Seal.

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**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI, ex rel., CYPRESS)
MEDIA, LLC and KANSAS CITY PITCH,)
LLC,)
)
Relators,)
)
v.)
)
HON. KELLY J. MOORHOUSE, Judge of)
the Circuit Court of Jackson County,)
Sixteenth Judicial Circuit,)
)
Respondent.)

Case No. WD68104
0716CV04986

**RESPONDENT'S SUGGESTIONS IN OPPOSITION TO RELATORS'
PETITION FOR WRIT PROHIBITION**

COMES NOW Respondent, the Honorable Kelly J. Moorhouse, Judge of the Circuit Court of Jackson County, Sixteenth Judicial Circuit at Kansas City, and for her suggestions in opposition to the Petition for Writ of Prohibition, states as follows:

STATEMENT OF FACTS

1. Prior to February 28, 2007, the Kansas City Star newspaper received a copy of a privileged document prepared by Mr. Stanley A Reigel of Stinson Morrison Hecker LLP for a client, the Kansas City Board of Public Utilities ("BPU"). Paragraph 6 of Verified Petition for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction (sometimes hereinafter "Verified Petition"). A copy of the Verified Petition is attached hereto as Exhibit A.

2. Stanley A. Reigel's Memorandum of November 6, 2004 (hereinafter "Memorandum") is a privileged communication addressed to Marc D. Conklin, Manager of Human Resources and General Counsel of BPU. Verified Petition, paragraph 4.

3. Neither BPU nor any of its authorized representatives consented to or approved of the delivery of the privileged communication to either of the Relators. Verified Petition, paragraph 9.

4. Relators received their copies of the Memorandum from an anonymous and unknown source via the mail bearing no return address. Petition for Writ of Prohibition, paragraph 4.

5. On March 2, 2007, the managing editor of the Kansas City Star and the editor of the Pitch were informed of BPU's intent to seek a Temporary Restraining Order late in the day on March 2. See Affidavit of Stanley A. Reigel attached to Verified Petition.

6. After receiving notice of BPU's intent to seek injunctive relief against them, the Kansas City Star and The Pitch published on their respective news websites privileged information disclosed by the Memorandum. Petition for Writ of Prohibition, paragraph 6.

STANDARD OF REVIEW

"[P]rohibition will lie only where necessary to prevent a usurpation of judicial power, to remedy an excess of jurisdiction, or to prevent an absolute irreparable harm to a party." *Abdullah v. Roldan*, 207 S.W.3d 642, 645 (Mo. Ct. App. 2006) (citing *Boyle v. Sutherland*, 77 S.W.3d 736, 737 (Mo. Ct. App. 2002).

THE ISSUE

Whether the news media can publically destroy the confidentiality of an attorney-client privileged communication, by publishing or referring to the contents of the privileged communication, where the privileged communication was provided to the news media by an anonymous person who stole the privileged communication from its owner?

ARGUMENT

Under the narrow circumstances of this case, the Respondent's Temporary Restraining Order was lawful and valid. Relator's Suggestions in Support of Petition of Writ of Prohibition ("Suggestions") recite a number of well-known cases standing for the proposition that prior restraints against the media should be avoided in almost all circumstances. This case is an important exception. The issue in this case is so important that one of the very essential instruments for the administration of justice is at stake --- the ability of a client to communicate with her lawyer without fear of disclosure.

Stated another way, the proposition the Relators are advancing would have the practical effect of allowing any stolen attorney-client privileged document to be published on the front page of any newspaper and to be sent around the world via any newspaper outlet or blogger with access to the internet. In consequence, Relators' reliance on the "prior restraint" line of cases really does not meet the issue in this case. Indeed, the Supreme Court has stated: "This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed," *Nebraska Press Association v. Stuart*, 427 U.S. 539, 570, 96 S.Ct. 2791, 2808, 49 L. Ed. 2d, 683 (1976).

THE ATTORNEY-CLIENT PRIVILEGE IS VITAL TO THE ADMINISTRATION OF JUSTICE

An independent judiciary and a sacrosanct confidential relationship between lawyer and client are the bastions of an ordered liberty. The attorney-client privilege is the oldest of the testimonial privileges protecting confidential communications. See *Annesley v. Anglesea*, 17 How. St. Tr. 1139 (1743). The ability of a client to converse freely with a lawyer, without fear of disclosure, is paramount to an orderly administration of justice.

The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of

justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed when free from the consequences or the apprehension of disclosure.

Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

See also *Natta v. Hogan*, 392 F.2d, 686, 691 (10th Cir. 1968) ("The attorney-client privilege is designed to facilitate the administration of justice in order to promote freedom of consultation of legal advisors by clients.").

In this case, BPU is asserting its right to maintain its protected interest in the attorney-client privileged communication contained in the November 16, 2004 Memorandum. The Relators have already damaged BPU by their short-term publication about the Memorandum. BPU wants to stop any more harm or damage.

A PRIOR RESTRAINT WAS ISSUED BY A COURT BASED UPON THE NEWS MEDIA'S DESIRE TO BROADCAST ATTORNEY-CLIENT COMMUNICATIONS

The Kansas City Star and the Pitch concede the following:

In sum, the *Noriega* case is the only exception to the rule that claims of confidentiality cannot support a prior restraint. (Emphasis added)

Relators' Suggestions at p. 14.

In the case of *USA v. Noriega*, 752 F. Supp. 1032, (S.D. Fla.1990) Manuel Noriega moved to enjoin CNN from broadcasting tape recordings of attorney-client privileged telephone conversations. The U.S. District Court was fully cognizant of the First Amendment rights involved. The Court was also aware that a movant bears a heavy burden to show a justification for the imposition of a prior restraint. However, after the court took into account Mr. Noriega's rights to a fair trial, under our administration of justice, the court entered orders preventing CNN from airing the tape recordings for a limited period of time. In its supplemental order, the District Court stated the initial question as follows:

The initial question presented by the case is whether the press can constitutionally be prohibited from publishing privileged attorney-client communications which have not been waived, regardless of how the communications were obtained by the press and regardless of the particular content of the attorney-client communications.

Id. at 1035.

CNN filed an emergency appeal to the Eleventh Circuit. *The United States of America v. Noriega*, 917 F.2d. 1543 (11th Cir. 1990). Although CNN filed an emergency motion to vacate the purported prior restraint, the Eleventh Circuit treated CNN's motion as a Petition For Writ of Mandamus which required CNN to demonstrate a clear and indisputable right to the issuance of the Writ.

The Eleventh Circuit also dealt with balancing First Amendment protections and the need to determine whether publication of attorney-client privileged communications would impinge upon Mr. Noriega's Sixth Amendment right to a fair trial. The Court noted that:

The purpose of the attorney-client privilege is to encourage open and complete communication between a client and his attorney by eliminating the possibility of subsequent compelled disclosure of their confidential communications.

Id. at 1550.

Ultimately, the Court of Appeals upheld the prior restraint in the TRO reasoning that in order for district court to determine whether there were, in fact, attorney-client privileged communications on the tapes and the extent to which a disclosure of such communications would impinge on Noriega's right to a fair trial, CNN must be enjoined from broadcasting the tapes.¹

Id. at 1551-52.

With regard to the instant case, although there is no imminent public trial, BPU remains steadfast in its right to seek protection of sensitive privileged communications. The privileged

¹ Subsequently, CNN was held in contempt of Court for broadcasting the tapes in contravention of the TRO. *USA v. CableNews Network, Inc.*, 865 F.Supp. 1549 (S.D. Fla. 1994)

communication should not be published given the unique factual circumstances attendant; i.e., "an anonymous" person took the privileged communication from BPU and provided a copy to Relators.

If this Court prevents Respondent from proceeding with this case, a message will be sent out loudly and clearly. Every disgruntled employee, every upset legal secretary, paralegal or law clerk, and every terminated attorney will be told --- "If you want to 'get even', just grab a sensitive attorney-client privileged communication and send it off to the news media where it will be cheerfully published for you."

IN CIRCUMSTANCES LIKE THESE, BPU SHOULD BE ALLOWED TO PROTECT ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS

Times have changed. Individuals and companies no longer rely upon written or hard-copy documentation. Electronic data is now being used by virtually every company and organization in this country. Courts, like other organizations, have been making changes to keep abreast of the times. For example, the Federal Rules of Civil Procedure have been amended recently to encompass the world of electronically stored information. Now, Rule 26(b)(5) requires a receiving party, who is put on notice that privileged information has been produced, to "promptly return, sequester, or destroy the specified information and any copies it has, it may not use or disclose the information until the claim is resolved...If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it." *Id.*

The people of Missouri and Kansas have spoken through their legislatures. Attorney-client communications are exempt from public disclosure pursuant to Missouri's Sunshine Law Mo. Rev. Stat. § 610.021(1) (2006). Likewise, Kansas' Open Records Act exempts privileged communications from disclosure. K.S.A. 45-221(2). See also *Lanza v. New York State Joint Legislative Committee*, 143 N.E. 2d 772 (N.Y. 1957) ("who could foresee the development of

electronic devices making useless the most elaborate precautions to safeguard the confidence of attorney and client.").

**AN UNAUTHORIZED DISCLOSURE OF THE PRIVILEGED MEMORANDUM
DID NOT WAIVE THE ATTORNEY-CLIENT PRIVILEGE**

Relators seem to take the position because they obtained copies of the privileged Memorandum, the attorney-client privilege disappeared. Such is not the case. In the case of *Mayman v. Martin Marietta Corporation*, 886 F. Supp. 1243 (D. Md. 1995), an employee moving to a smaller office found certain office files, including a copy of a draft memorandum prepared by the general counsel for Martin Marietta. The partial draft was provided to plaintiffs when the now former employee contacted a government investigator and counsel for plaintiff Mayman seeking to obtain compensation for turning over the document. Counsel for plaintiffs properly notified defense counsel and the matter was taken up by the court. The plaintiffs claimed that the defendant had waived the attorney-client privilege as to the partial draft when it allowed the employee's predecessor to have access to the general counsel's office. Plaintiffs also claimed that the defendant had failed to take reasonable precautions to prevent the employee from taking the partial draft when he left the company's employ. The court determined that the document should remain privileged. The court concluded that whoever placed the partial draft in the former employee's office "had obtained it without authority to do so." *Id.* at 1245. In addition, the court found that the former employee had stolen the copy of the partial draft when he removed it from defendant's premises. *Id.* at 1246.

In the case of *In Re Dayco Corporation, Derivative Securities Litigation*, 102 F.R.D. 468 (W.D. Oh. 1984), the plaintiffs moved to compel the production of a "diary" which defendants claimed was attorney-client privilege. The plaintiffs learned about the diary because references to it appeared to come from a newspaper account written by a reporter, Andrew Alexander.

Alexander indicated that he had obtained a copy of the diary from an unidentified source and quoted extensively from it. Defendants argued that no authorized disclosure had been made to the reporter.

After the court reviewed the diary in camera, the court determined the diary should be considered attorney-corporate client privilege and work product and held:

Absent any indication that Ms. Curry or Dayco officials voluntarily gave the diary to the Dayton Daily News, publication of excerpts of same should not be considered a waiver of the privilege.

Id. at 470.

The law does not allow the Kansas City Star or the Pitch to claim that their mere access to the privileged Memorandum is a waiver of the privilege.

**ANY FURTHER PUBLICATION OF THE PRIVILEGED COMMUNICATION WILL
RESULT IN ADDITIONAL HARM TO BPU**

As noted above, the Pitch and the Kansas City Star's attorneys were notified of BPU's intent to seek judicial intervention to prevent the publication of the privileged Memorandum. After the Pitch and the Kansas City Star were so notified, both organizations published for the first time articles revealing some of the contents of the privileged communication. Filed contemporaneously with these Suggestions in Oppositions are copies of the website publications made by each Relator. The publications are provided under seal to prevent any further dissemination to the public.² Relators' rush to publication was reprehensible given Relators' knowledge of a court hearing to be held a couple of hours later. It must be remembered that the Kansas City Star had obtained the privileged Memorandum sometime prior to February 28, 2007, and voluntarily restrained itself from publishing anything about it. Essentially, Relators'

² This Court issued an order dated March 5, 2007 stating that Relators' motion to file exhibits under seal is sustained. To insure confidentiality, the Respondent has contemporaneously filed a motion with the Court to maintain such publications under seal. If the Court denies such motion, it is requested that BPU's counsel be so advised so it may retrieve from the Court the sealed documents.

litigation strategy prompted the Kansas City Star and the Pitch to harm BPU.

CONCLUSION

The Respondent requests that BPU be given the opportunity to protect its attorney-client communication in the Circuit Court. This judicial procedure will balance the right of the media to seek to publish the attorney-client communication if it were determined that the disclosure was authorized, the communication was not attorney-client privileged or that BPU had waived the attorney-client privilege somehow. Assuming BPU prevails, non-publication of the privileged communication would, of course, serve the public interest where BPU would not be punished or harmed by the potential illegal act of someone stealing the privileged communication and mailing it to the Kansas City Star and the Pitch. Most important, however, the attorney-client privilege will have been protected.

Respectfully submitted,

STINSON MORRISON HECKER LLP

By: 

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing was served via facsimile on the 6th day of

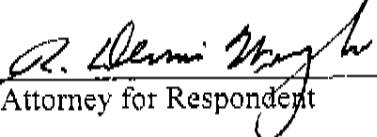
March, 2007, on the following:

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ATTORNEYS FOR RELATOR
KANSAS CITY PITCH, LLC



Attorney for Respondent

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

KANSAS CITY BOARD OF PUBLIC UTILITIES
540 Minnesota Ave.
Kansas City, Kansas

Plaintiff,

v.

THE KANSAS CITY STAR
1729 Grand Blvd.
Kansas City, MO 64108

and

THE PITCH NEWSPAPER

Serve: Donald A. Peterson, Registered Agent
922 Walnut Street
Kansas City, MO 64106

Defendants.

0716-CV04986

Case No. _____

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CIRCUIT COURT
JACKSON COUNTY
MO-KC

**PETITION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY
INJUNCTION AND PERMANENT INJUNCTION**

COMES NOW plaintiff and for its cause of action states to the Court as follows:

1. Plaintiff is a municipally-owned Kansas public utility providing electrical service to its customers.
2. Each defendant does business and can be found in Jackson County, Missouri.
3. In 2004, plaintiff had engaged the law firm of Stinson Morrison Hecker LLP to provide certain legal services to plaintiff.
4. On November 16, 2004, Stanley A. Reigel, a partner of Stinson Morrison Hecker LLP, delivered to plaintiff a privileged communication providing legal advice to Marc D. Conklin, Manager of Human Resources and general counsel of plaintiff.

Exhibit A

5. The document provided to Mr. Conklin was marked "Confidential – Attorney/Client Communication – Do Not Duplicate Without Authorization of Marc Conklin." A copy of said document is submitted to the Court under seal.

6. On or about February 28, 2007, Marc D. Conklin received a telephone call from a Mark Wiebe who identified himself as a reporter for the Kansas City Star newspaper. The reporter stated that he had obtained a copy of the privileged document written by Mr. Reigel in November, 2004. The reporter further indicated a desire to discuss the document with Marc D. Conklin.

7. It is Mr. Conklin's understanding and belief that the Kansas City Star intends to publish the privileged document or publish information contained in said privileged document.

8. On March 2, 2007, Justin Kendall, representative of the Pitch weekly newspaper, stated to plaintiff that said newspaper was either going to publish the privileged document on March 2, 2007 or display such document on its website on March 2, 2007.

9. Neither plaintiff nor any of its authorized representatives consented or approved of the delivery of the privileged communication to either Kansas City Star, The Pitch, or to anyone else.

10. If the privileged communication is published publicly by either defendant or if the contents of the privileged communication is disclosed in any way by either defendant, the communication intended to be privileged and confidential shall become public information. The publication of the privileged communication or a summary of its contents published publicly could lead to claims that information contained in the privileged communication had been waived.

11. Public disclosure of the contents of the privileged communication or the forced waiver of the attorney-client privilege under the present circumstances where the privileged communication was leaked to the defendants without the consent of the holder of the privilege, plaintiff herein, will result in immediate and irreparable injury to plaintiff.

12. The harm referred to in paragraph 11 cannot be remedied by money damages or by further order of this Court.

WHEREFORE, plaintiff prays for an Order temporarily restraining each defendant from publishing or referring to the contents of the privileged communication or distributing the privileged communication to any other person or entity; that defendants maintain all copies of the privileged communication in a sealed envelope kept in a secure location; that the Court set for hearing on plaintiff's request for a preliminary injunction on the 9th day of March, 2007, and thereafter issue a permanent injunction against defendants after a trial on the merits.

Respectfully submitted,

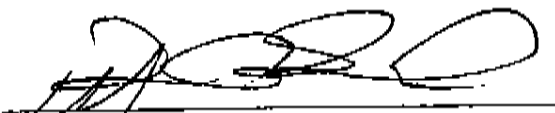
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STATE OF MISSOURI)
) ss:
COUNTY OF JACKSON)

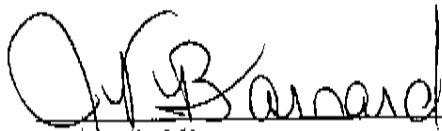
VERIFICATION

The undersigned, Marc D. Conklin, first being duly sworn states upon his oath that he has personal knowledge of the facts stated in plaintiff's Petition For Temporary Restraining Order, Preliminary Injunction and Permanent Injunction and that the facts stated therein are true and correct.



Marc D. Conklin

SUBSCRIBED AND SWORN to before me this 2nd day of March, 2007.



Notary Public

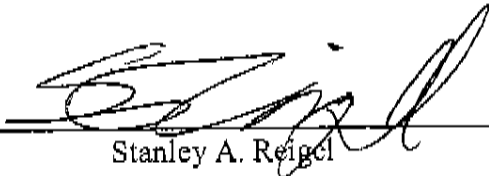
My Commission expires: _____
JESSICA V. BARNARD
Notary Public - Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: Nov. 14, 2009
Commission #05796941

AFFIDAVIT

STATE OF MISSOURI)
)
COUNTY OF JACKSON) ss.

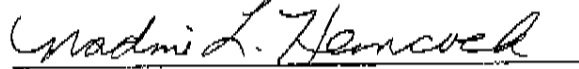
I, Stanley A. Reigel, of legal age, state upon my oath:

- 1) I am an attorney with Stinson Morrison Hecker LLP;
- 2) I represent Board of Public Utilities;
- 3) I notified Mr. Steve Shirk, Managing Editor of the Kansas City Star Newspaper of our intent to petition this Court for a temporary restraining order and provided the date and approximate time of our anticipated hearing.
- 4) Likewise, I notified Ms. C.J. Janovy, Editor of the Pitch, of the matters set out in paragraph 3 above.
- 5) Further Affiant sayeth not.



Stanley A. Reigel

Subscribed and sworn to before me, a Notary Public, this 2nd day of March, 2007.



Notary Public

NADINE L. HANCOCK
Notary Public - Notary Seal
STATE OF MISSOURI
Jackson County
My Commission Expires: March 14, 2010
Commission # 06501817

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI, ex rel., CYPRESS)
MEDIA, LLC and KANSAS CITY PITCH,)
LLC,)
Relators,)
v.)
HON. KELLY J. MOORHOUSE, Judge of)
the Circuit Court of Jackson County,)
Sixteenth Judicial Circuit,)
Respondent.)

Case No. WD68104
0716CV04986

MOTION TO FILE EXHIBITS UNDER SEAL

COMES NOW Respondent and moves the Court for its Order permitting the Respondent to file under seal copies of Relators' website publications of privileged communications contained in the March 16, 2004 memorandum from attorney Stanley A. Reigel to his client, Kansas City Board of Public Utilities.

If the Court denies this motion, it is requested that the Court so advise counsel immediately so that counsel may retrieve said sealed publications from the Court.

WHEREFORE, Respondent prays the Order of the Court.

Respectfully submitted,

STINSON MORRISON HECKER LLP

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CERTIFICATE OF SERVICE

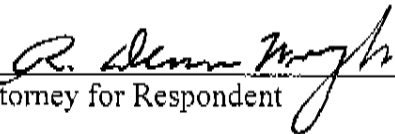
I hereby certify that the above and foregoing was served via facsimile on the 6th day of

March, 2007, on the following:

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ATTORNEYS FOR RELATOR
KANSAS CITY PITCH, LLC



Attorney for Respondent