NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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December 6, 2019

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Re: ***Alison Gill Falkoff v. Adam Scott Falkoff***
Case No. CL–2016–14102

Dear Counsel and Ms. Gill:

The issue before the Court is when courts should seal court files from public inspection pursuant to Virginia Code § 20-124, and whether it should seal the file in the present case. The Court has generated and considered a list of limiting principles any court may wish to consider to guide the exercise of its statutory discretion to seal a file.

The Court holds the parties in this case rebutted, in part, the strong presumption in favor of public access to their court file. Accordingly, the Court orders parts of the file to be sealed. This Opinion Letter and accompanying Order shall not be sealed.

OPINION LETTER

I. PROCEDURAL HISTORY AND FACTUAL OVERVIEW.[1]

On October 11, 2016, Alison Falkoff ("Wife") filed a Verified Complaint for Divorce in this Court. However, a long-pending divorce and child custody lawsuit was already pending in Florida. Despite this, Wife, in her Complaint, incorrectly swore that she had "not participated as a party, witness, or in any other capacity, in any other litigation concerning the custody of her children in this or any other state or country." Compl. ¶ 31(B). She also incorrectly swore that she did not "know of any custody proceeding concerning her children pending in any other court of this or any other state that could affect the current proceeding." Compl. ¶ 31(C). In reality, the parties were engaged in active Florida domestic relations litigation since February 2013.

Wife nonsuited the Fairfax case on December 6, 2016, after Adam Falkoff's ("Husband") lawyers alerted her lawyers to the Florida action. Def. Ex. 3. Florida finalized the couple's divorce on August 26, 2019. Husband now asks that the Court seal the records in the terminated Fairfax matter.

The Fairfax Complaint was filled with moral and salacious allegations, among other unpleasantries. Husband testified they were all false. He offered documentary evidence to support some of his testimony. Def. Ex. 4, 8-9. Since the matter was nonsuited, the allegations are unproven.

Husband testified he is a consultant of Capital Keys. He did not tell the Court the specific nature of his business but claimed his reputation is critical to obtaining and keeping clients. To promote his business, he highlights personal recognition, including his receipt of the 2018 Ellis Island Award and his inclusion on *Washington Life* magazine's "Power 100" list of the "most influential persons" in Washington, DC. Def. Ex. 7. Husband testified Wife has been trying to sabotage his business by sending copies of her nonsuited Complaint—long after it had already been nonsuited—to his clients, associates, and acquaintances. The organization that awarded him the Ellis Island Award revoked his award upon receiving the Complaint. They reinstated his award after he protested, proclaiming the falsity of the allegations. Things did not turn out as well with the "Power 100" list. Husband made the list in 2017 and 2018. However, the magazine told him he was not on the 2019 list because of the Complaint allegations. The magazine disregarded his protests as to the veracity of the allegations.

Husband has fewer clients this year than in the past and avers this is a direct result of Wife's sending them copies of the Complaint.

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[1] These facts were derived from the Court's file and the testimony of Adam Falkoff at the hearing on November 7, 2019. Alison Gill (f/k/a Falkoff) did not appear. She had been served with notice of the scheduling of the hearing, and copies of the ensuing Court Orders were mailed to her by the Office of the Clerk. On August 26, 2019, an Agreed Order to Seal Records was filed in this Court, endorsed by both parties as a joint request. It is clear Ms. Gill (Falkoff) does not contest this Motion.

To further demonstrate social harm, Husband points to at least one acquaintance who told him Wife recently sent her a copy of the Complaint. The acquaintance had thought the divorce concluded and so it puzzled her. Husband explained the circumstances to defend himself against the salacious allegations. Wife uses the fact that the Complaint is a public record as a sword—she treats it a type of proof text and encourages others to go to the Courthouse to see it for themselves.

Husband is the sole financial provider to his minor children and has sole custody of them. He fears his children will see the allegations and that, if they do see them, they, too, will be harmed.

II. THIS COURT HAS JURISDICTION TO ACT.

Wife moved to nonsuit her case in November 2016. This Court entered an Order of Nonsuit on December 6, 2016, thus constituting the final order in this case. Almost three years later, on August 26, 2019, Husband reinstated the case and with it filed a sketch order to seal the file (titled "Agreed Order to Seal Records") signed by both Husband and Wife. The Court treats this as a motion to seal. Clearly, this motion is more than 21 days after the 2016 final order, and so the Court has lost jurisdiction to act on the merits. *See* VA. SUP. CT. R. 1:1. Another judge of this Court previously held that the Rule 1:1 limitation applies to motions to seal. *Martinez v. Martinez*, 79 Va. Cir. 185 (Fairfax 2009).

The Court disagrees with *Martinez*. In that case, and the present case, no one asked the Court to take any action on the final order. Rather, the parties there requested—and now here request—that the Court seal the intact file from public inspection. The substance of the proceedings and the final order would remain entirely unchanged. Rule 1:1 does not permit a court to "modify, vacate, or suspend" a final order. VA. SUP. CT. R. 1:1. A sealed file does none of those things—it merely limits public access to it. In other words, when a court exercises its discretion to seal a file, it is not making a decision on the merits of the underlying case. Therefore, Rule 1:1 does not apply. *See, e.g., Nelson v. Middlesex Dep't of Soc. Servs.*, 69 Va. App. 496, 517 (2018) (Rule 1:1 did not apply to grandparents' request to see the adoption file and other records pertaining to their grandchildren because the request did not seek to change the final order).

Furthermore, Virginia Code § 20-124, which grants a court discretion to seal a file in domestic cases, contains no deadline. This makes sense when one considers that a party may have no basis for sealing a file at the time of the final order or 21 days thereafter. It may take years for there to be cause to seal. Requiring motions to seal to come within 21 days would have the practical effect of foreclosing meritorious motions to seal. Considering the statute gives a party a separate cause of action, a better practice when requesting to seal a file long after the case has concluded is to file a new complaint under a new case number, rather than to re-open the file sought to be sealed. However, this is a matter of form over substance, and the Court treats the present motion to seal as a separate complaint. The parties have not asked the Court to rule on

the merits of the original case, i.e., the merits of the Complaint for divorce. Accordingly, the Court has jurisdiction to seal the file.

III. COURT RECORDS ARE PRESUMED PUBLIC.

Open judicial records are a deeply rooted constitutional and statutory principle. *See Press-Enterprise Co. v. Superior Court of Cal. for Riverside Cty.*, 478 U.S. 1, 15 (1986) (First Amendment "right of access"); VA. CODE ANN. § 17.1-208. Virginia adheres to a presumption of openness. *See* VA. CODE ANN. § 17.1-208 ("shall" be open to inspection); *Perreault v. The Free Lance-Star*, 276 Va. 375 (2008). Specifically, the Virginia Code states:

> *Except as otherwise provided by law*, any records that are maintained by the clerks of the circuit courts *shall* be open to inspection in the office of the clerk by any person . . .

VA. CODE ANN. § 17.1-208(B) (emphasis added).

Taking the phrase "except as otherwise provided by law," the Court turns to the Code's chapter on domestic relations. Virginia Code § 20-124 "Sequestration of record" states:

> Upon motion of a party to any suit under this chapter [divorce, affirmation, and annulment], the court *may* order the record thereof or any agreement of the parties, filed therein, to be sealed and withheld from public inspection and thereafter the same shall only be opened to the parties, their respective attorneys, and to such other persons as the *judge of such court at his discretion* decides have a proper interest therein.

VA. CODE ANN. § 20-124 (emphasis added). Thus, while a presumption of openness exists, the General Assembly has granted judges the authority to seal in domestic relations cases.[2] This, however, does not mean *all* domestic relations records enjoy *automatic* shielding from the public eye. "When the sealing of a record or part thereof is not a duty imposed by law, the decision whether to seal the record rests within the sound discretion of the circuit court." *Perreault*, 276 Va. at 389 (citation omitted).

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[2] The grant of discretion does not extend to all domestic relations matters, however. Virginia Code § 20-124 expressly refers to "this chapter"—Chapter 6 of Title 20 (VA. CODE ANN. §§ 20-89—124) —dealing with divorce, affirmation, and annulment. Under the principle of *expressio unius est exclusio alterius*, it, therefore, excludes Chapter 6.1 (VA. CODE ANN. §§ 20-124.1—124.6) dealing with custody and visitation. *See, e.g., Everett v. Tawes*, 833 S.E.2d 876 (Va. 2019). The Complaint in the Falkoffs' case involves both divorce and custody. These issues are inextricably mixed in this and most cases. Indeed, Chapter 6 deals with child support along with divorce. Since the Court has clear discretion to seal divorce records, some circumstances will be present where divorce record sealing will cause the ancillary sealing of some related custody and visitation records. This must be balanced on a case-by-case basis.

Virginia Code § 17.1-208 creates a "strong presumption in favor of public access to judicial records." VA. CODE. ANN. § 17.1-208. To overcome this presumption, the moving party "must bear the burden of establishing an interest so compelling that it cannot be protected reasonably by some measure other than a protective order, and that any such order must be drafted in the manner least restrictive of the public's interest." *Shenandoah Publ'g House, Inc. v. Fanning*, 235 Va. 253, 259 (1988) (citation omitted). "[T]he desire of the litigants is not sufficient reason to override the presumption of openness." *Id.* "Nor [does the Supreme Court of Virginia believe that] risks of damage to professional reputation, emotional damage, or financial harm, stated in the abstract, constitute sufficient reasons to seal judicial records." *Id. See also Shiembob v. Shiembob*, 55 Va. App. 234, 244 (2009).

In *Shiembob*, a divorce case as is the present case, the husband wanted to seal the court file to protect the parties' financial disclosures and their personal and professional privacy. 55 Va. App. at 243. The appellate court held that the husband's undefined concern for his professional reputation did not rebut the presumption of openness of judicial records in the divorce action, and thus, the trial court did not abuse its discretion when it vacated its earlier order sealing the entire record. *Id.* at 244.

There is logic to open judicial records. Circuit courts exercise tremendous discretion—especially in domestic relations cases where there is no jury. Courts assess child support and spousal support and make important custody and visitation decisions. The public has a strong interest in seeing how the courts exercise such discretion. If a significant percentage of these files are sealed, the public would be significantly hampered in its check on its courts and judges.

Importantly, while Virginia Code § 20-124 is a *grant of discretion* absent from § 17.1-208, it is not an *exception* from the openness principles of § 17.1-208, as the Honorable Randy Bellows of this Court explained in his Memorandum Opinion and Order in *Burchfield v. Burchfield*, CL-2018-744 (Va. Cir. Ct. (Fairfax) Feb. 20, 2018) (order denying motion to seal). *Shiembob* quoted Virginia Code § 17.1-208 and *Shenandoah Publishing House* for the admonition that the following are bad reasons for sealing a file: (1) desire of the litigants; and (2) when stated in the abstract, risks of damage to professional reputation, emotional damage, or financial harm. *Shiembob*, 55 Va. App. at 243-44; *Shenandoah Publ'g House*, 235 Va. at 259.

Sealing is not an "all or nothing" concept. Courts can seal parts of a file in appropriate circumstances. The Supreme Court of Virginia expressly cautions that, if anything is to be sealed, it be performed in a manner "least restrictive of the public's interest." *Shenandoah Publ'g House*, 235 Va. at 259. When choosing to seal part of a judicial file, courts must give extra deference to keeping open "judicial records"—pleadings, exhibits, motions, and orders—versus "pretrial documents"—"all data assembled by the parties in the discovery process." *Burchfield*, CL-2018-744, at 2 (citing *Shenandoah Publ'g House*, 235 Va. at 256-57).

Recognizing the strong constitutional and statutory presumption of open files, when a court does seal all or part of the file the reasons for doing so should itself be open and public. Rarely should the sealing of the file include sealing the very reasons for doing so. Otherwise, the

public is unable to determine whether the decision to seal was a reasonable one. When presented with a sealed file and no justification, the public rationally can be suspicious that the reasons to close it are bad or arbitrary. The ordinary disinfectant of an appellate review is absent in most of these cases because the parties seeking the sealing of the records are usually the parties themselves. A third party, such as the media, might have the motivation to challenge a decision to seal. However, without knowing the reasons they were sealed, there is no way to ascertain the wisdom of a challenge. Also, the public should not feel compelled to intervene in a sealed case and bear the expense of litigation merely to learn that the matter was sealed for good reason.

Expressing the reasons for sealing creates a paradox. When sealing is appropriate, a court's explanation for doing so necessarily reveals the substance of that which the parties seek to seal. By analogy, if one sought to expunge a criminal arrest pursuant to Virginia Code § 19.2-392.2 and a court were to explain in writing why the expungement was warranted, it would disclose the fact that the petitioner was arrested—the very thing he wants the expungement process to prevent. As discussed, *infra*, the expungement process and the sealing process are very different. The former results from one presumed innocent sealing his arrest records; the latter involves records presumed open and which may only be sealed in the manner least restrictive of the public's interests. An order to seal is not an expungement. Courts must balance the public's interest to open records with the litigant's reasons for sealing. There may be rare instances where the litigant's reasons for sealing are so compelling that the reason itself should be sealed.

The Supreme Court of Virginia jurisprudence is sparse as to what factors courts should consider when granting or denying motions to seal. Without listing factors to consider, other than a presumption of openness with a compelling reason exception, it reversed a circuit court for sealing records in a wrongful death action, including the final order detailing the compromise settlement between the parties.[3] *Shenandoah Publ'g House*, 235 Va. at 255-56.

Thus, the standard of review is abuse of discretion in the face of the strong presumption of openness. To guide the Court in its exercise of discretion, the Court developed a principled list of considerations.

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[3] It held improper the sealing of the "judicial records" of the case—i.e., the pleadings, exhibits, and motions filed by the parties as well as the orders of the court, including the order memorializing the settlement. *Id.* at 260.

IV. BAD REASONS FOR CLOSING AND SEALING A FILE.

Naturally, the list begins with the considerations against sealing expressed by the Supreme Court of Virginia in *Shenandoah Publishing House*: agreement by or desire of the litigants to seal is, alone, a bad reason to seal, as is an unparticularized concern of damage to professional reputation, emotional damage, or financial harm. Flowing from this, logically, is mere existence of salacious allegations as a bad reason to seal. Virginia law provides for fault-based divorce. Parties often allege adultery, abuse, and abandonment. If salaciousness alone was cause to seal a file, a large percentage of the civil domestic relations files would be sealed. In other words, the exception would swallow the rule.

In addition to the bad reasons articulated in *Shenandoah Publishing House*, this Court adds the following to the list: public figure status, publicity surrounding the case, and malicious use of court records. In isolation, such factors do not override the presumption of openness.

A party's status as a public figure, standing alone, is insufficient reason to seal. For the same reasons a public figure has a higher burden than others in proving defamation (*see New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964)), the public figure should be able to weather the scrutiny of his public judicial actions. The fact one is a public figure makes openness of judicial records related to the public figure even more compelling because it provides information necessary to assess the value of the public figure's influence.[4] Additionally, a citizen who is not in the limelight should not receive less privacy protection by default than a celebrity co-citizen.

Publicity surrounding the case is, alone, a bad reason to seal. In such cases, information already publicly accessible and permanent is incomplete or inaccurate. Open judicial files can, in some circumstances, protect the maligned or spotlight the false prophet. In other words, it will allow the full story to be told. Moreover, once the information is in the public domain it is hard to show harm by keeping the court files open when they contain the same information.

Finally, malicious filings in court files should not, alone, support sealing. This may seem counterintuitive until one considers that victims of malicious filings have remedies. Courts can impose sanctions against one who improperly files pleadings. VA. CODE ANN. § 8.01-271.1.

It is true open judicial files may cause a person or entity unpleasantness or even damage despite all the considerations set forth herein. However, the advantages of open files usually outweigh the disadvantages of closed records.

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[4] There can be circumstances in this category that weigh in favor of at least some sealing. For example, if a public figure's residence is not well known, and if the residence is unrelated to the merits of the litigation, a court should consider a request to redact the address. Similarly, proof of unique harm to a public figure should not be discarded solely because the person is a public figure.

V. GOOD REASONS TO CONSIDER FOR CLOSING AND SEALING A FILE.

The General Assembly has not handcuffed the courts when faced with a strong rebuttal against the presumption of openness. Indeed, Virginia Code § 20-124 expressly grants the courts discretion to seal where appropriate. Here, then, are factors a court may want to consider when assessing whether sealing a file is appropriate. No one factor is dispositive, and no specific combination of these factors should control a decision to seal a file in every case. However, these factors may prove helpful in guiding the exercise of discretion to do so.

A. Particularized Proof of Harm.

Simply stated, this factor involves the actual versus the abstract; concrete and not intangible. Starting with the Supreme Court of Virginia's general admonition against sealing files based on "abstract" concerns of damage to professional reputation, emotional damage, or financial harm is the implicit permission to seal for *particularized* or concrete concerns. Thus, where a party to a case shows specific or actual damage to professional reputation, emotional damage, or financial harm, courts should consider requests to seal. By using the abstract versus particularized line, the Supreme Court raises the bar to seal records much higher than, for example, its bar for the expungement of criminal charges, which permits expungements based on substantial speculation. *See A.R.A. v. Commonwealth*, 295 Va. 153 (2018). In *A.R.A.*, an expungement petitioner proved "manifest injustice" to support expunging her arrest records even though she could not show actual adverse effects on her employment—certainly a "stated in the abstract" harm. *See Shenandoah Publ'g House*, 235 Va. at 259.

As with sealing records, the expungement of a case involves making the judicial process opaque and impermeable. Both the open records law, Virginia Code § 20-124, and the expungement law, § 19.2-392.2(F), grant the circuit court discretionary authority to close records using the permissive word "may." But there is logic to a distinction between the two statutes considering the starting points of each: judicial records are presumed to be open, *see* VA. CODE ANN. § 17.1-208; persons are presumed innocent, and those who have their cases dismissed thereafter occupy the status of "innocent," *see A.R.A.*, 295 Va. at 159.

Thus, the presumption against sealing can be lifted when a party points to a real harm that has occurred as opposed to a theoretical, to-be-determined harm.

B. Privileged Materials, Personally Identifiable Information, and Trade Secrets.

Sealing a record makes sense when doing so is necessary to respect a competing legal good, such as when the record contains information protected by the attorney-client privilege. *See Tianti v. Rohrer*, 91 Va. Cir. 111 (Fairfax 2015).

Relatedly, information in the file amounting to personally identifiable information ("PII"), such as Social Security numbers or bank account information, do not help the public in

assessing a case or advance the aims of transparency. Instead, access to such PII exposes litigants to identity theft or property theft.

As with expungements, protecting attorney-client privilege acts to make the judicial system more opaque. However, the policies underlying the attorney-client relationship, and hence the privilege, justify judicial cooperation in the maintenance of some secrets. A similar policy balance justifies shielding PII and trade secrets from the public eye. Financial or trade secrets can undoubtedly serve as the crux of a case; but requiring their disclosure for the court to render an opinion does not ipso facto mean the disclosure endures. Such disclosure could result in the judicial process collaterally and unnecessarily harming litigants.

C. Items to Be Sealed Have Little Relevance to the Merits of the Case.

Another, more general, category of seal-worthy items includes ancillary or tangential information that provides no aid to the public in understanding the adjudicative process of the case. For instance, consider a divorce case in which adultery is alleged. If the record adequately establishes proof of the adultery, it is unnecessary to keep public actual photographs of the adultery *in flagrante delicto*. Other than indulging a prurient interest, such photographs usually do nothing to illuminate the issues or the basis for any judicial decisions.

Relatedly, sealing may be warranted when the material does nothing to establish the deliberative process of the court. For example, parties will occasionally file what this Court calls "orphaned pleadings"—pleadings upon which the Court takes absolutely no action, and which are not even remotely the basis for any significant judicial decisions or exercise of discretion. For example, a party files a motion to compel discovery, but that motion is never adjudicated because the parties never present it to the court. If the motion and underlying issue is unrelated to the merits of the case and is simply an outlier document, a court could justify sealing it if (1) it is truly not relevant to the merits of the case; and (2) the court never used it as the basis for any decision-making.

Of course, this category must be considered on a case-by-case basis since settlements are sometimes spurred by the filing of truthful, yet unproven, salacious materials. For example, where a party files a Plea in Bar but never dockets it for a hearing and the underlying case settles with an agreed order, the allegations in the Plea in Bar might do little to illuminate the decision-making process or the basis for the settlement. Following this example, if the Plea in Bar alleges adultery and the parties settle in a manner unbalanced to the accused party, the unadjudicated plea could be very relevant to the disposition.

D. Protection of Children.

Acting in the best interests of children is an axiomatic principle of Virginia law. *See, e.g.,* VA. CODE ANN. § 20-124.3. This, however, does not mean the presence of children is a lid. Abstract fears of harm to children risk making this the exception that swallows the rule. Nonetheless, in cases where harm or potential harm is shown with particularity, sealing all or

part of a case file is a reasonable exercise in judicial discretion. In addition, there are instances where court records present children as victims or perpetrators. In both instances, courts should consider requests to seal such records for the same reason Juvenile and Domestic Relations Court records are sealed by default. *See* VA. CODE ANN. §§ 16.1-300—302, -305.

E. Demonstrably False Information.

Sometimes, parties make wild allegations in court that are not only doubtful, they are proven false. Sometimes a party engages in vexatious litigation. In such instances, maintenance of such false allegations grants them an undeserved gloss of validity simply because the allegations are embedded in records maintained by the court with official stamps and seals.

Of course, it can be very difficult to establish an allegation's falsity. The law assigns burdens of proof, and courts weigh credibility of evidence. In cases alleging adultery, for example, the party accusing adultery must prove it by "clear and convincing evidence." *Seemann v. Seemann*, 233 Va. 290, 293 (1987) (adultery unproven even though husband proved wife spent seven nights in hotel rooms or an apartment with a male she dated for whom she had "strong feelings"). "'[O]cular proof [of adultery] is seldom expected.' Adultery is peculiarly a wrong of darkness and secrecy, wherein the parties are rarely surprised; hence it follows that ordinarily the evidence is of necessity circumstantial." *Kirby v. Kirby*, 159 Va. 544, 555 (1932) (citation omitted).

Considering the high legal standard of proof for clandestine acts, it is possible that a party could allege adultery, state a compelling circumstantial evidence case showing inappropriate conduct by the greater weight of evidence, but still fail to meet the clear and convincing evidence standard. In such an instance the failure to prove adultery by clear and convincing evidence is not an exoneration. It does not prove the allegations are false; it fails to prove them true. In such an instance, sealing the file may spare the accused spouse from embarrassment. However, it could also sanitize the record to the degree that the ultimate judgment does not flow from the available evidence.

VI. THE FALKOFF FILE SHOULD BE SEALED, IN PART.

The Falkoff file should be sealed, in part, but the Court's reasons for doing so—including this Opinion Letter—should be public. In this case, the Falkoffs were long engaged in domestic relations litigation in Florida. Knowing this, Wife filed a salacious Verified Complaint of Divorce falsely denying the existence of the Florida action. Thus, the entire Virginia action was based on a foundational misrepresentation. Once Husband's counsel alerted Wife's Virginia counsel of the Florida action, Wife nonsuited the action.

The case file consists of the Complaint, materials connected to the service of the Complaint, a special appearance to contest jurisdiction, a motion and Order to nonsuit the Complaint, and materials related to the present action to seal the file.

Presumption of Openness is Rebutted

The Court begins its analysis by looking at reasons to keep the file open. It recognizes the strong presumption of openness. The Court discounts the fact that both parties asked the Court to seal the records. Husband is a public figure, owing to his inclusion on the "Power 100" list of the "most influential persons" in Washington, so the parties' hurdle to seal the record is higher than for most. Nevertheless, the parties' reasons for sealing the records are particularized and are not stated in the abstract. Husband has lost clients because they learned of the allegations in the Virginia Complaint. He lost recognition important to him—the Ellis Island Award and his inclusion on the "Power 100" list. He was able to reinstate the former award but had to protest to regain it. He was unable to reinstate the latter recognition. In both cases, the awarding organizations told him the Complaint triggered his losses.

Finally, there was no evidence of any existing publicity concerning this case beyond the professional associates and other acquaintances who had seen the Complaint.

Since the reasons to keep the file open do not foreclose sealing of the records in this case, the Court turns to a review of legitimate reasons to seal.

Particularized Proof of Harm

As previously set forth, Husband established particularized proof of harm—loss of clients and loss of professional recognition.

Privileged Materials, PII, and Trade Secrets

Privilege (e.g., attorney-client) and trade secrets are generally inapplicable to this case. There are some Social Security numbers and banking information that should be sealed.

Documents Relevant to the Merits of the Case

Presently, the file contains only the following items: the Complaint, Nonsuit Order, service materials, and the Motion to Seal materials. The Complaint is inherently relevant to the merits of the case; the balance of the materials is not. However, the Complaint is an orphaned pleading. Other than receiving it from Wife, the Court took no action on it other than to dismiss it on the parties' request to nonsuit it. The Court adjudicated no issues on the merits. Nothing in the file demonstrates the Court's deliberative process or decision-making.

Protection of Children

Husband proffered a fear, in the abstract, that his children would be harmed if the judicial records remained open for two reasons. First, he asserted that he was the sole financial support and the custodian of his children. Leaving the files open would damage his ability to earn a living. As a result, he reasons, open records would harm his children for whom he provides sole

support through his lost income. Second, he asserted the children would be harmed if they learned of the inflammatory allegations.

This non-particularized harm is exactly the type of reason to seal disavowed by the Supreme Court of Virginia. *Shenandoah Publ'g House*, 235 Va. at 259. The evidence showed that the Complaint had some effect on his business, but Husband did not quantify the financial harm or how any losses would actually affect the children. There is always a difference between a parent's income dropping to a degree that the family forgoes necessities versus a drop wherein some luxuries are truncated.

If the Court viewed this factor in isolation, it must deny the request to seal the file. Indeed, every divorce action involving children has unfortunate effects on the children. Again, however, other factors are at issue.

Demonstrably False Information

The veracity of the allegations in the Complaint are largely untested. Wife made sworn allegations; Husband later swore the allegations are untrue. There was no cross examination or other evidentiary testing in either instance. Nevertheless, the fact that Wife filed the Complaint with an affidavit swearing no similar action was pending in another state even though an action had been long pending in Florida suggests a bad motive by Wife. Linking Husband's sworn testimony, Defendant Exhibits 8 and 9,[5] and the fact that the Complaint was dismissed without court action, the Court is led to disbelieve the allegations in the Complaint.

Decision to Seal

Having considered all the above factors, the Court finds that the file should be sealed in part. The initial filing was improper. The key document in the file—the Complaint—is an orphaned pleading that was never tested by the Court. As a result, the Court's involvement was truly minimal. There were no rulings on the merits, and nothing in the file illustrates the Court's deliberative process. Husband introduced credible evidence that the fully open file has caused actual, particularized harm. Based on the November 7, 2019, hearing, the Court has doubts as to the veracity of at least some of allegations contained in the Complaint. The parties rebutted the presumption against sealing.

Least Restrictive Sealing

Having decided to seal the file, the Court must do so in the least restrictive manner. It must first separately consider judicial records and pretrial documents, the former enjoying special constitutional openness. *Shenandoah Publ'g House*, 235 Va. 256-57.

[5] These are exhibits to the Motion to Seal only. The Court, in its discretion and for the reasons outlined in this opinion, believe they should be sealed in this file.

Considering the judicial records, the Verified Complaint (with Private Addendum) and Motion for Pendente Relief are judicial records. However, for the reasons set forth in this Opinion, the strong presumption against sealing is rebutted, and they shall be sealed.

Considering the pretrial documents, the Private Addendums to the Subpoenas Duces Tecum shall be sealed as they contain Husband's Social Security and account numbers. In addition, the following exhibits admitted in the hearing on the parties' Motion to Seal File shall be sealed: Defendant Exhibit 1 (Verified Complaint for Divorce), Defendant Exhibit 4 (diary entry), Defendant Exhibit 8, and Defendant Exhibit 9.[6] Finally, any materials already sealed shall remain so.

The balance of the Court's file shall remain open to public inspection.

The Court considered sealing its reasons for partially sealing the file. However, upon balancing the parties' interests and the public's interests, it finds that to partially seal the file in the manner least restrictive of the public's interests, it must publicly state its reasons for doing so. The Court was careful to present the contents of the Complaint in a cursory, benign fashion. In so doing, it prevents the harm it seeks to prevent.

VII. CONCLUSION.

The Court lists factors it believes a court should consider in the proper exercise of its discretion to seal or maintain as open a court file or the records therein. For the reasons stated herein, the Court finds that portions of the file in this matter must be sealed from public inspection. The parties rebutted the presumption of openness for these portions of the file. This Opinion Letter and accompanying Order shall remain open to inspection, as well as all documents in the file not expressly sealed by the Order.

An appropriate Order is attached.

Kind regards,

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

[6] The Court deliberately does not describe Defendant Exhibits 8 and 9 because doing so would disclose their contents. For the same reasons it seals the Complaint, it seals these exhibits to the Motion to Seal.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ALISON GILL FALKOFF	)	
	)	
Plaintiff,	)	
	)	
v.	)	CL–2016–14102
	)	
ADAM SCOTT FALKOFF	)	
	)	
Defendant.	)	

FINAL ORDER

Based on the parties' Agreed Order to Seal Records (August 26, 2019); the evidentiary hearing (November 7, 2019); and the Court's Opinion Letter (December 6, 2019), which is incorporated herein, it is hereby ADJUDGED, ORDERED, and DECREED as follows:

The following contents of the case file shall be SEALED: Verified Complaint; Private Addendums to the Subpoena Duces Tecum; Motion for *Pendente Lite* Relief; Defendant Exhibits 1, 4, 8, and 9; and all other records already sealed.

The balance shall remain UNSEALED, including this Order and the Opinion Letter.

And this CAUSE IS FINAL.

12-6-19
Dated

Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.