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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

IN RE THE EXXON VALDEZ,	Case No. A-89-095 Civ. (Consolidated)
This Document Relates To: All Cases	

JOINT MEMORANDUM OF DOW JONES & COMPANY, INC., ANCHORAGE DAILY NEWS, INC., THE ASSOCIATED PRESS, AND THE TIMES MIRROR COMPANY CONCERNING DEFENDANTS' PROPOSED PROTECTIVE ORDERS AND RESTRICTIONS ON PUBLIC ACCESS

This memorandum is filed jointly on behalf of Intervenors Dow Jones & Company, Inc., Anchorage Daily News, Inc., The Associated Press, and The Times Mirror Company (hereinafter referred to collectively as "Press Intervenors").[1]

[1] As noted in the accompanying moving papers of the Press Intervenors, the three publishing company intervenors own and publish The Wall Street Journal, the Anchorage Daily News, and the Los Angeles Times, respectively. The Associated Press is a mutual news cooperative engaged in gathering and distributing news across the United States and throughout the world.

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I. Introduction.

The Defendants filed a joint proposal on December 11, 1989, asking this court to approve wide-ranging and nonspecific protective orders that could dramatically restrict the flow of information to the press and public. Defendants' proposals are troublesome in and of themselves, and as a signal of the approach and attitude being taken in this tremendously important litigation. As noted below, this litigation is characterized by its overriding public significance and interest.

Each component of this litigation, be it the individual claim of a Prince William Sound seiner, or a dispute among the U.S. Coast Guard, the State of Alaska, Alyeska and Exxon over the timing and efficacy of using chemical dispersants, is important in its own right. The various threads of this litigation, taken together, become a tapestry of unparalleled dimensions and importance in terms of impact on the state and federal court systems in Alaska, the prevention of and response to environmental disasters nationally, and on the ability to meaningfully attend to the consequences of such environmental disasters. These cases have implications for state and federal legislation, for the regulatory environment in which the major industries operate in Alaska, for the manner in which the two primary industries in Alaska, fishing and oil, will co-exist, for the subsistence and other cultural values of Native Alaskans

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and others in coastal communities throughout Southcentral Alaska, and many other issues. The significance of this litigation, coupled with the demonstrated intent of the Defendants to restrict the flow of information coming out of these proceedings, demands that Defendants' requests for secrecy be carefully monitored by the public and critically scrutinized by the courts.

The public spectacle of what happened in Prince William Sound last spring and the Defendants' ensuing conduct raises serious questions about the credibility of Defendants. There is every reason to worry that Defendants are inclined to excessive secrecy and lack of candor.[2] Defendants want to keep under seal a variety of embarrassing details about how they polluted Prince William Sound and other areas, about the events leading up to and resulting from this disaster, and concerning the operation of their tankers and their preparedness to address major spills of this nature.

This court undoubtedly has the discretion and prerogative to conduct these proceedings in the most open fashion possible. That is precisely what the court should

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[2] It is the candor and credibility of the Defendants, and not of Defendants' counsel that is the important public issue at stake here. The arguments in this memorandum are not intended in any fashion to reflect upon the candor or credibility of Defendants' counsel.

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do. It should resist the urge to secrecy espoused by Defendants, and allow secrecy only where the parties demonstrate a specifically articulated, non-conjectural, precisely drawn and substantial justification. This should be done on a document-by-document or category-by-category basis in a manner that comports with Rule 26. The "good cause" requirement of Rule 26 should be assiduously applied, and construed in a fashion that takes into account First Amendment values relevant under the circumstances of this case.[3]

II. Both Of Defendants' Proposed Orders Are Seriously Defective.

Press Intervenors oppose Defendants' proposed "General Protective Order." It is seriously overbroad, unwarranted and unjustifiable. Press Intervenors do not oppose -- and indeed, acknowledge the propriety of -- narrowly drawn and specifically justified special protective orders to safeguard legitimate trade secrets and other protectible commercial information of like nature.[4]

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[3] The Defendants argue as though Seattle Times Co. v. Rhinehart, 467 U.S. 20, 81 L.Ed.2d, 104 S.Ct. 2199 (1984) makes the First Amendment irrelevant. Instead, that case recognizes that some level of First Amendment scrutiny is appropriate and must be taken into account in fashioning a proper protective order. See Section III, infra.

[4] Press Intervenors acknowledge that there will be (Footnote Continued)

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However, Defendants' proposed "Special Protective Order" is also defective. It, too, is overbroad. It ignores legal requirements, and reverses statutory presumptions. It encourages overdesignation, and consequently invites needless legal maneuvering and litigation.

Both proposed Orders ignore or reject the notion that the good cause requirement of Rule 26 must be satisfied by a specific and articulated showing of need applied to individual documents or categories of documents. Conjecture and abstract concerns are insufficient. In Re Continental Airlines Corp, 43 B.R. 130, 133-134 (Bkrtcy. S.D. Tex. 1984); see also Gulf Oil v. Bernard, 425 U.S. 89, 102 n.16, 101 S.Ct. 2193, 2201 n.16, 68 L.Ed.2d 693 (1981) (U.S.

(Footnote Continued)
certain such matters that are protectible in this case under Rule 26. What happened on the Exxon Valdez on March 24, 1989, does not fall into such category. What happened on the first and second days of the spill in Prince William Sound does not fall into this category. What happened in the weeks and months and years preceding the accident that affected the preparedness of Alyeska and others to respond to this spill does not fall into this category. Press Intervenors expect that the press and public will not be particularly concerned about how Exxon makes a double-hulled tanker, but will want access to information about why Exxon abandoned the notion of utilizing double-hulled tankers and whether they calculated that it would be cheaper to forego this means of transportation than to respond to a spill. The Defendants' proposal, undoubtedly as a result of the phase of the proceedings in which these issues are arising, fails to address any particular matter that might be the subject of a secrecy order or otherwise discuss any concrete examples. When and if specific instances arise that the Defendants feel necessitate the invocation of secrecy, it should become clearer exactly how the rules will apply.

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Supreme Court notes that to establish good cause for a protective order under F.R.C.P. 26(c) court have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements). The standards of Rule 26 require much more than the free ranging and unfettered discretion that defendants allow themselves to designate documents as confidential. A court must find "that disclosure will work a clearly defined and serious injury." Zenith Radio Corp. v. Matsushita Electric Industrial Co., 529 F. Supp. 866, 891 (E.D. Pa. 1981). The Defendants' burden can be met only with a showing of particularized harms; a court cannot "accept conclusory assertions as a surrogate for hard facts." Federal Trade Comm'n. v. Standard Financial Management Corp., 830 F.2d 404, 412 (1st Cir. 1987); see also In re Texaco, Inc., 84 B.R. 14 (Bkrtcy. S.D.N.Y. 1988) ("access to discovery materials is particularly appropriate when the subject matter of the litigation is of general public interest.")

By definition, all information that the Defendants are required to turn over will be relevant to the Exxon Valdez oil spill and issues of causation and damage arising from that spill. To trigger the requirements of disclosure by the Defendants, the information need not be admissible in the strict legal sense, but it must be relevant, non-privileged and reasonably calculated to lead to admissible

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evidence. There is a public interest in this information based on its relevance quite apart from its admissibility.

The Defendants' proposed orders will have a "ripple effect," extending waves of unwarranted secrecy to numerous pleadings, deposition transcripts and court proceedings. See Defendants' Proposals, p. 18. The general protective order would narrowly proscribe the use of even documents obtained informally during the discovery stages of this case.[5] The parties to this case, and their counsel, are precluded from using information or documents received from any other party, whether in the form originally supplied or in whatever form counsel or the parties may incorporate this information in the process of preparing for this litigation, for "any business, competitive, personal, publicity or other purpose." Id.

So, for example, fishermen would be precluded from using information obtained formally or informally from the Defendants (before or after the date of any protective order that might be entered here) in commenting to Congress on pending oil spill liability and compensation legislation, in

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[5] See "All Defendants' Joint Proposals Supplemental To The Agreed Procedures For Discovery And Discovery Scheduling," submitted December 11, 1989 (hereinafter "Defendants' Proposals"), p. 12 ["all documents, discovery responses and other information obtained . . . through informal discovery exchanges, whether before or after the date of (the protective order)"].

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dealing with the United States Coast Guard on dispersant regulations and policies, or in raising funds to support their litigation. The state attorneys or environmental plaintiffs may learn of measures that they feel need to be taken to represent and protect their constituencies. They cannot use the discovery information. The State of Alaska cannot use this information for legislative and regulatory oversight, in making decisions about the operation of the pipeline -- part of the business of the State of Alaska -- or for evaluating the performance of Alyeska and other defendants. The United States Coast Guard cannot use such documents to improve its preparedness for future spills or to complete clean-up of the Exxon Valdez spill. This sort of enforced secrecy and nondisclosure is wholly unwarranted and contrary to the public interest. The court should not become a party to it, and instead should decline to authorize it.

The Pennsylvania district court's opinion in Zenith confirms the near-certainty of wholesale abuses if the Defendants' protective orders are approved. In Zenith, because no objections were made initially to imposition of blanket protective orders, and hundreds of thousands of documents were marked confidential over a period of years without one single challenge to the propriety of such designations, the horse was out of the barn before the court

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or counsel thought about locking the door. 529 F. Supp. 875. The court noted:

> Indeed the parties had long since gone far beyond erring on the side of caution and had stamped "confidential" on their submissions and discovery materials almost as a matter of course. The inertia of habit ultimately carried the parties to such an extreme that even innocuous legal briefs began to sport the badge of confidentiality.

529 F. Supp. at 878-879. This court has the opportunity to "do it right" from the outset and avoid the trap the Pennsylvania court found itself in after literally millions of documents had been rubber-stamped "confidential". The parties here represent a much broader spectrum of interests than was the case in Zenith,[6] and the subject matter of these suits is impregnated with a public interest far greater in kind and degree than in Zenith. If the Defendants here can get the court to travel just a short way down the road with umbrella secrecy orders, it will be extremely difficult to turn back.

The Defendants' "expert" -- apparently willing to testify without the benefit of firsthand knowledge of Defendants' businesses or their records -- leaves no doubt

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[6] In addition, Zenith did not involve press and public requests for access. There, the plaintiffs sought release of documents, post hoc, after years of participating without objection in the creation of a confidential morass the court obviously found impossible to deal with when the issue was first raised after judgment.

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that the secrecy stampers will be working overtime if the court accepts his speculations and approves the proposed orders. Mr. Anderson states in his affidavit that by adding non-secret documents to non-secret documents we create an aggregate of now-secret documents. This court should reject the alchemy of self-interest that has produced this novel, wholly unsubstantiated, and unjustifiable position. A thousand or a million documents, none of which are secret, cannot be converted into a black box of secrecy by aggregating them. The court should give more consideration to John Q. Public than to John Q. Anderson. It should reject these secrecy requests from the outset. Unless and until a clear necessity is proven, the public has a right to expect that the court will preserve the openness of these proceedings.

III. This Court Has And Should Exercise Discretion To Maintain Complete Openness Of These Proceedings.

A. The Court Should Refuse To Become Involved In Keeping Most Discovery Information From The Public.

In In re "Agent Orange" Product Liability Litigation, 821 F.2d 139 (2nd Cir. 1987), cert. denied 108 S.Ct. 289 ("Agent Orange"), public access to discovery information became an issue when Judge Weinstein identified it as a concern while canvassing members of the plaintiff classes about a proposed settlement. 821 F.2d at 143. In this case, we have the opportunity to proceed openly

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throughout. In order to analyze what the court should do in this case about leaving documents open, or making them secret, it is instructive to revisit for a moment the basic principles.

Defendants appear to start from the premise that there is a divine right to protective orders, or at least a right naturally flowing from their bigness and the substantial nature of their operations. Instead, the law is precisely the opposite. In the absence of a protective order, there is no restriction on the right to use or discuss information acquired. Parties and counsel are generally free to use information obtained through discovery in any fashion the law permits. In re Continental Airlines Corp., 43 B.R. at 134; In re Halkin, 598 F.2d 176, 189 (D.C. Cir. 1979). Rigid restrictions upon the rights of attorneys or parties to discuss pending litigation or disclose information concerning a case not only encroach upon their rights to freedom of expression, Ruggieri v. Johns-Manville Products Corp., 503 F. Supp. 1036, 1039 (D.R.I. 1980), but also denigrate important values served by maximizing the openness of civil litigation. This is particularly true in litigation involving important social issues.

> In our present society many important social issues became entangled to some degree in civil litigation. Indeed, certain civil suits may be instigated for the very purpose of gaining information for the public. Often actions are brought on behalf of the public interest on a private attorney general theory. Civil litigation in general often

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> exposes the need for governmental action or correction. Such revelations should not be kept from the public. Yet it is normally only the attorney who will have this knowledge or realize its significance. Sometimes a class of poor or powerless citizens challenges, by way of a civil suit, actions taken by our established private or semiprivate institutions or governmental entities . . .

Ruggieri, 503 F. Supp. at 1039, quoting Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975) cert. denied, 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976).

A protective order is an extraordinary device. In re Continental Airlines Corp., 43 B.R. at 134; In re DeLorean Motor Co., 31 B.R. 53, 56 (Bkrtcy. E.D. Mich. 1983). As noted above, such an order should be entered only upon a showing of good cause, after the movant has carried its burden of demonstrating concrete and specific harm, not based on conjecture. From televised proceedings, public records, and news accounts, it is clear that many of the parties and counsel involved in the numerous cases consolidated in this court as "the Exxon Valdez litigation" have been speaking out publicly, to legislative committees and elsewhere, for almost a year. Press Intervenors respectfully submit that it would be a mistake were this court to now restrict the ability of these parties and counsel to do so -- or chill it by subjecting them to contempt sanctions for possible violations of court orders if the information they are discussing may be found in or

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derive from documents they have seen in the course of discovery.

The multifaceted web of First Amendment rights of the press to gather news, the public to receive information, of the parties and their counsel to communicate freely, and of the public's general right of access to matters transpiring in our court system, as well as common law and other nonconstitutional and policy considerations reflecting these interests, dictate that the court take these values into account in a substantial and meaningful fashion in every decision that affects the flow of information concerning this litigation. It is beyond question that this court, at the very least, has the discretion to maintain this as an open process.[7]

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[7] The civil rules of procedure have been modified in recent years so that discovery materials need no longer be routinely filed. However, fundamentally important values of public access guaranteed by common law and the federal constitution -- and the values and considerations giving rise to these decisions -- should not be rejected or ignored due to the expedient of storage problems. A review of Alaska Court System files shows that the state court's adoption of the present Alaska Civil Rule 5(d) was prompted entirely by concerns over the costs and efforts associated with document storage, as was the case with the counterpart federal rule 5(d). See December 4, 1979, Memorandum from Alaska Court System General Counsel Grant Callow to the Supreme Court: "The purpose for the amendment was simple and straightforward; to cut down excessive bulk of court case files by restricting the filing of documents that generally play not active roles in the litigation." Compare August 12, 1976, letter to Court System Administrative Director Arthur Snowden from Peter J. Aschenbrenner, (Footnote Continued)

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B. Defendants' Umbrella Order Is Untenable And Onerous Given The Public Nature Of Much Information Related To This Spill.

Defendants' proposals for umbrella secrecy orders are particularly onerous in light of the fact that key parties to this litigation are public entities. Both the State of Alaska and the United States Government are parties. Each of them has voluminous documents relevant to this case that will be produced, and each are subject to public disclosure laws allowing citizens access to records maintained by agencies of these respective sovereigns.[8]

(Footnote Continued)
Reporter for Civil Rules Committee. The Committee, including L. Hoppner, M. Ingraham, A. Kleinfeld and P. Aschenbrenner, in its comments on proposed changes to Rule 5(d), noted inter alia that "court files are public records . . . the committee feels the press has the right to examine a complete case file in any proceeding . . . the public's absolute right to inspect the progress of litigation in the Alaska Court System should not be limited (for convenience)." Comp. Agent Orange, 821 F.2d at 146. (Federal Rules Committee did not anticipate that the change would excuse parties from filing discovery materials in any case in which the public or press has an interest).

[8] As these consolidated cases proceed in the court systems of these dual sovereigns, there may be occasions on which one court will be more inclined to require disclosure than the other, either based upon legal interpretation or exercise of sound discretion. In such event, any requirement of either jurisdiction providing for disclosure would obviously govern considerations of uniformity or symmetry. Indeed, even where the question is one of differences over how to exercise discretion, considerations of uniformity or symmetry should be dictated by or follow the rules or choices providing for the greatest disclosure. Compare, e.g., 2 Weinstein on Evidence ¶501[02] (Congress in adopting the federal evidence code, and specifically Rule 501, suggested that if the rule would result in two conflicting
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See, e.g., A.S. 09.25.110-.120 (Alaska Public Records Act); 5 U.S.C. § 552 (Federal Freedom of Information Act). The State has indicated in its pleadings that it will be producing "millions" of pages of documents in this case. As the Defendants themselves note, various government agencies during the past year have been inquiring about and obtaining documents concerning the Exxon Valdez spill, including both state and federal legislatures, the Bush administration, the United States Coast Guard, the National Transportation Safety Board and the Alaska Oil Spill Commission. See Defendants' Reply Memorandum at 12. Public hearings have been held, documents have been acquired and used, and reports have been and are being issued.

The Defendants' request that the court impose upon the parties and counsel secrecy obligations with respect to documents that have been or will be turned over by any party in this case creates untenable conditions, unless any rule of secrecy is carefully limited only to documents that are validly found to be confidential after a discrete and particularized showing satisfying the standards discussed above. Otherwise, the court's imprimatur on the Defendants'

(Footnote Continued)
bodies of privilege law applying to the same piece of evidence in the same case because of both state and federal claims or defenses, "it is contemplated that the rules favoring reception of the evidence should be applied," citing Report No. 93-1277, Comm. on the Judiciary, United States Senate 93d Cong., 2d Sess., p. 12, n. 17 (1974)).

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proposals for secrecy will predictably restrict access to documents that are otherwise open.

This is so even if these documents could be obtained otherwise, and despite the fact that the Defendants' proposal on its face admits of exceptions for documents that are obtained other than through discovery. The orders Defendants request subject all of the parties and their counsel to the threat of contempt sanctions -- or at the least, harassing charges or inquiries -- based on allegations over the source of communications made or information used by the hundreds of parties and attorneys in this case. The circumstances of this case make the imposition of any blanket secrecy order inappropriate -- particularly one directed at disclosure of any and all information exchanged during the discovery stages. Such an order would deter people from circulating or discussing documents that are or should be public notwithstanding this court's protective order.

While it is evident that documents to be produced through exchanges of discovery materials in this case will be voluminous, it is less clear what the incremental volume of documents is that would not otherwise be available for public inspection. In any event, "voluminous" need not be synonymous with unmanageable. Scores, if not hundreds, of lawyers have been sifting through, reading, analyzing and readying these documents, with the assistance of numerous

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paralegals and computers. This is a case in which the court can assume that the parties have a substantial degree of sophistication in document control, and have the resources to handle these issues.

Counsel for Defendants have already committed to complete a document-by-document review of all materials, for reasons quite independent of any issue of public access to, or court-ordered restrictions upon disclosure of, discovery materials. See Defendants' Proposals, p. 6 ("The Discovery Plan requires all parties to 'make a reasonable and diligent effort to assert any claims of attorney-client privilege, work-product protection or other recognized evidentiary or discovery privilege' before the fact. As a practical matter, this will necessitate time consuming and costly document-by-document review of the hundreds of thousands of documents certain to be produced as discovery goes forward.") Presumably all parties, and not only the Defendants, will be approaching this process with similar diligence, good faith and effort. Consequently, the incremental burdens upon the parties, if any, will be minimal if the court rejects the blanket confidentiality requests of Defendants and refuses to endorse the Defendants' attempts to limit disclosure of documents here. However substantial any such incremental burden, it is not sufficient to outweigh the interests of the press and public in having as complete and timely access as possible to this

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important litigation. The normal process of requiring the party requesting that a document be protected from disclosure demonstrate specific and concrete, nonconclusory objections to its dissemination should apply here.

C. The Seattle Times Decision Does Not Impair This Court's Discretion To Maintain The Openness Of These Proceedings. It Is Distinguishable And In Important Respects Supportive.

For obvious reasons, the Defendants attempt to gain as much mileage as possible with the Supreme Court's ruling in Seattle Times Co. v. Rhinehart. Rhinehart, however, is distinguishable on its facts, limited in its reach, and supportive in important respects of the Press Intervenor's position. In any event, as an irreducible minimum, it is clear that the court has discretion to make this a completely open process. While a number of the cases cited herein may limit the court's discretion to close proceedings and records, none seriously suggest that the court lacks the wherewithall to keep all significant aspects of a case of such public importance as this open and accessible.

In Rhinehart the Court recognized that the First Amendment is applicable to requests for protective orders, and that some "less exacting" level of First Amendment scrutiny must be applied to such requests. 467 U.S. at

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33-34; 104 S.Ct. at 2208; 81 L.Ed.2d at 27.[9] Under the circumstances of the peculiar case before it in which a litigant sought access to records of a religious organization -- sensitive records that have always been accorded a high degree of First Amendment solicitude -- the Court found the good cause requirement of Rule 26, applied in a careful, limited, and specifically articulated fashion, was satisfied in a way that comported with minimum First Amendment requirements.

Seattle Times Co. v. Rhinehart was not an "access case." It was fundamentally a free speech case, and the First Amendment interests asserted by Rhinehart in moving for the protective order in that case are ones which the courts for many years have recognized as truly legitimate and fundamental aspects of religious and expressive freedom. The substantial and developing line of cases involving access to the judicial system and information arising out of it[10] was neither cited nor relied upon or distinguished by

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[9] See also, concurring opinion of Justice Brennan, 467 U.S. at 37, 81 L.Ed.2d at 30 ("the Court today recognizes that pretrial protective orders, designed to limit the dissemination of information gained through the civil discovery process, are subject to scrutiny under the First Amendment.")

[10] See, e.g., Richmond Newspapers, Inc. v. Commonwealth of Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); Globe Newspapers Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); (Footnote Continued)

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the court in the Rhinehart opinion. This underscores the fact that the Court viewed as a critical factor that the Seattle Times was a litigant, in a position to abuse the information obtained for its litigation strategies. Because this was the focus of the Court's concern, the Court did not address the important and competing considerations that come into play when the public, through the media, seek access to documents and proceedings generated in the course of litigation affecting the public interest in significant ways.

Even if the most stringent First Amendment scrutiny is not required under circumstances like those found in Rhinehart, a lower level of First Amendment scrutiny still demands careful consideration of the values underlying the constitutional guarantees of freedom of the press and free speech. Compare "commercial speech" cases, also applying a lower level of scrutiny under the First Amendment. See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d. 341 (1980); Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

(Footnote Continued)
Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510; 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

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D. The Values Protected By The First Amendment Right Of Access Are Applicable Whether Or Not The Most Exacting First Amendment Scrutiny Is Required Here.

The First Amendment to the United States Constitution, and its counterpart, Article I, Section 5 of the Alaska Constitution, protect a broad range of rights, including rights not widely recognized before the last ten years. Chief among these latter are the constitutional rights of access to judicial proceedings and records first articulated in Richmond Newspapers, and further developed in the progeny of that case including Globe Newspapers, Press-Enterprise I and II, and a variety of other cases. Although these initial cases dealt with criminal proceedings, opinions subscribed to by six of the eight justices sitting in the Richmond Newspapers case clearly implied that the constitutional right of access applies to civil as well as criminal cases. Lower courts have since then unanimously found that both common law and constitutional rights of access apply to civil proceedings. See, e.g., Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1068-70 (3rd Cir. 1984); Brown and Williamson Tobacco Corp. v. F.T.C., 710 F.2d at 1165, 1179 (6th Cir. 1983), cert. denied, 104 S.Ct. 1595 (1984). Whether this court finds that a less exacting level of First Amendment scrutiny is applicable here, or the heightened level of First Amendment scrutiny that would normally apply absent the peculiar circumstances in Rhinehart, consideration of the

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values that inform the First Amendment right of access opinions is instructive here.[11] Even if the court assumes its review of these protective order requests solely involves an exercise of discretion, the considerations which inform these decisions apply here as well. In Brown and Williamson, the Sixth Circuit observed:

> The policy considerations [mandating open courtrooms] discussed in Richmond Newspapers apply to civil as well as criminal cases. The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. Community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases.

710 F.2d at 1179. The "emotionalism" surrounding the Exxon Valdez spill, to which Defendants have alluded, to the extent it exists, underscores the need for maximum openness to facilitate this "community catharsis." See also Publicker Industries, Inc., 733 F.2d at 1068-1070. In a similar vein, Oliver Wendell Holmes, writing as a member of the Supreme Judicial Court of Massachusetts, stated:

> Though the publication of such [civil] proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the

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[11] As Chief Justice Burger noted in Richmond Newspapers: "The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." 448 U.S. at 576-577, 100 S.Ct. at 2826-2827, 65 L.Ed.2d at 989, quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).

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> proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose contact may be the subject of such proceedings.

Cowley v. Pulsifer, 137 Mass. 392, 394 (Mass. 1884).

In In re Express-News Corp, 695 F.2d 807 (5th Cir. 1982), the Fifth Circuit struck down a district court rule prohibiting any person from interviewing jurors concerning their deliberations without leave of court upon a showing of good cause. The appellate court held that:

> A court may not impose a restraint that sweeps so broadly and then require those who would speak freely to justify special treatment by carrying the burden of showing good cause. The First Amendment right to gather news 'is good cause' enough.

Particularly instructive here is Ericson v. Ford Motor Co., 107 F.R.D. 92 (E.D. Ark. 1985), clarified 3 Fed. R. Serv. 3d 944 (E.D. Ark. 1986). In Ericson, the estate of a motorist who was killed when her Ford automobile spontaneously went from park into reverse sought disclosure of all consumer complaints and litigation against the automobile company involving a similar malfunction. Ford sought a protective order, relying on Rhinehart in support of its contention that protective orders are mandated in all situations where a possibility of harmful public disclosure exists. The court rejected Ford's request, interpreting Rhinehart to:

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> "mean that trial courts have wide discretion in deciding when, under Fed. R. Civ. P. 26, protective orders are warranted. . . . A burden which litigants must bear is that sometimes the public may learn of information which the litigant would rather the public not know."

107 F.R.D. at 94.

In In re Texaco, Inc. the court held that Pennzoil had not demonstrated good cause for the protective order it sought under Fed. R. Civ. P. 26(c) to seal transcripts of all depositions taken in connection with the Chapter 11 reorganization proceedings of Texaco after Pennzoil had obtained its judgment against Texaco. The court left most of the record open to the public.

Finally, in another case involving a similar request for a blanket protective order, the defendant moved for an order placing all written material produced at trial or during discovery under seal and prohibiting all parties from using any information gained through litigation for any other purpose. Plaintiffs objected on the ground, inter alia, that "First Amendment considerations protect[ed] against imposition of broad protective orders restraining political speech and publication of court records." International Union v. Garner, 102 F.R.D. 108, 110 (N.D. Tenn. 1984). Shortly before the Supreme Court's decision in Rhinehart, the district court held in Garner that: 1) the portion of the proposed order restraining communications about information adduced at trial was an unconstitutional

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prior restraint because defendants failed to offer a compelling reason for secrecy; and 2) the portion of the proposed order restraining use of information disclosed through discovery was also an unconstitutional prior restraint because defendant failed to establish good cause for the order. Reevaluating its initial rulings in light of Seattle Times Co. v. Rhinehart, the court rejected defendants' efforts to alter or reverse them.

> Seattle Times did not force a trial court to enter a protective order, it upheld the trial court's discretion to issue one. The Court stressed that Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate. . . . [T]he discussion in Seattle Times . . . does not in any way diminish the Court's discretion not to seal pretrial discovery. . . . The Supreme Court's holding that discovery materials are entitled to no heightened first amendment scrutiny simply does not mandate that this Court issue a protective order at every turn.

Id. at 117.

E. Defendants' Arguments That Blanket Confidentiality Orders Are So Routine That One Must Be Imposed Here Are Unpersuasive.

Numerous other complex and lengthy lawsuits have occurred in Alaska and throughout the country for decades in which it has not been found necessary to resort to the sort of umbrella protective orders espoused by Defendants here. Defendants' unsupported suggestion or assertion that such orders are routine, or the norm, or standard is unpersuasive generally, and particularly inapt under the circumstances of this case. Apparently the courts in such cases as the IBM

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and AT&T litigation referred to by Defendants found it unnecessary or unwarranted to impose such orders, since Defendants use these as examples of this.

Defendants' assertion that an umbrella protective order has been entered in the Glacier Bay litigation[12] is no justification for entry of an order here. At most, it may mean that insufficient public and press attention have been given to the matter in that case. Press Intervenors are unaware of any open and full consideration of the public interest consequences of such an order in that case. It is very questionable whether such an order, if one has been adopted, would best serve the interests of the numerous primary plaintiffs who have a continuing stake in the well-being of the Cook Inlet fishery affected by the 1987 Glacier Bay spill. Indeed, the fact that the Cook Inlet fishery has been disrupted by oil spills in each of the last three years underscores the dangers of requiring confidential treatment of information relevant to the causes of tanker oil spills, and the means and preparedness to respond to them and mitigate their consequences.

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[12] In re Glacier Bay, (Consolidated) Case No. A88-115 Civ. (D. Alaska).

The other Alaska cases cited by the Defendants[13] are readily distinguishable because they involve litigation over taxes and related royalty issues. See State v. Amerada Hess, et al., No. 1JU-77-847 Civ.; Atlantic Richfield Co. v. State, 3AN-79-1903 Civ. The protective orders arose from the traditional secrecy imposed upon disclosure of taxpayer information by government agencies and as expressly provided by statute. Moreover, the fact that such protective orders may have been entered does not mean that they are correct or

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[13] Defendants also rely upon the Manual for Complex Litigation ("Manual") and cases citing it. The mere fact that the authors of the Manual have suggested that a particular order be used does not invest it with any inherent legitimacy nor immunize it from challenge on First Amendment grounds. See, e.g., Gulf Oil Co. v. Bernard. In Gulf Oil, the district court issued an order restricting communications by named plaintiffs and their counsel with actual and potential class members not formal parties to this civil rights suit. The order was explicitly modeled on one suggested in the Manual. The Fifth Circuit reversed, and the U.S. Supreme Court affirmed the appellate court, holding:

> We conclude that the imposition of the order was an abuse of discretion. The record reveals no grounds on which the District Court could have determined that it was necessary or appropriate to impose this order. Although we do not decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involved serious restraints on expression. This fact, at a minimum, counsels caution on the part of a District Court in drafting such an order, and attention to whether the restraint is justified by a likelihood of serious abuses.

452 U.S. at 2201.

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justified. Press Intervenors are unaware of whether a proper hearing was conducted to determine the propriety of either of these orders, but Press Intervenors are aware that there is considerable concern that the entry of these orders has hampered the ability of legislative and executive personnel charged with oversight of these industries to adequately discharge their duties.

IV. Defendants' Alleged Justifications For Umbrella Secrecy Orders And Presumptive Confidentiality Are Are Unpersuasive, Generally And Especially In The Context Of This Case.

A. The Proposed Protective Orders Are Not Dictated By The Code Of Professional Responsibility, And Chill Communicative Rights Protected By The First Amendment.

Defendants suggest their requests for protective orders are innocuous, if not superfluous, because they are "nothing more than an affirmation of the general professional responsibility to use discovery only for authorized purposes." Defendants' Proposals at 22. Specifically, they cite Alaska Bar Association Disciplinary Rule 7-107(G). In fact, the imposition of a court order restraining publication and dissemination of information significantly alters the relations and obligations of the principals here. It constitutes a prior restraint upon communication of information of public interest, and substantially implicates First Amendment values. It makes the court a party to the Defendants' on-going efforts to

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withhold as much information from the public as possible. It makes counsel and the parties, including the State of Alaska and United States Government, subject to contempt of court sanctions should they violate the orders. This in turn, will have a substantial chilling effect on the First Amendment rights to communicate and receive information concerning the nation's worst environmental disaster and its causes.

Moreover, assuming arguendo that the disciplinary rule cited would on its face restrict the rights of counsel to communicate as Defendants say, this does not wholly answer the question. First, the disciplinary rule imposes no such restrictions on the parties, nor could it. Yet, the proposed protective order would preclude a fisherman or processor from talking with the press or with his or her congressman, or an environmental organization from talking to its members or a research scientist, about information learned through the formal or informal discovery process. Defendants largely ignore this. More to Defendants' point, there is serious and substantial question whether their broad reading of DR 7-107(G) could withstand scrutiny under the First Amendment. If not, their proposed protective orders go beyond what restrictions would otherwise obtain, and involve this court in restricting communicative rights otherwise protected by the First Amendment. Numerous cases have so held.

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In Bailey v. Systems Innovations, Inc., 852 F.2d 93 (3rd Cir. 1988), the Third Circuit rejected an order based upon a local rule of the district court entitled "Extra Judicial Statements by Attorneys in Civil Cases."[14] The Third Circuit held that this order, imposed because of publicity surrounding the case, violated the First Amendment. The court noted that the rule was an attempt to balance freedom of speech and the right to fairness at a jury trial. Because the order was a prior restraint, the court subjected it to close scrutiny and considered the factors listed in Nebraska Press Association v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976). The Third Circuit held that the prior restraint was not justified and vacated the district court's order imposing speech restrictions on the litigants. This decision came two years after the Third Circuit's decision in Cipollone discussed by

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[14] Compare, CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (per curiam) (applying standard of "serious and imminent threats to the fairness and integrity of the trial.") And see United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978) (striking down an order concerning communications with jurors after a criminal case, based on a finding that the government had failed to meet its heavy burden of showing that the "activity restrained pose[d] a clear and present danger or a serious and imminent threat to a protected competing interest." See also United States v. Marcano Garcia, 456 F. Supp. 1354 (D.P.R. 1978) (gag order prohibiting attorneys from making statements that "may" interfere with a fair trial is unconstitutional, and such order can issue only upon a finding of "serious or imminent threat to the fairness of the trial.")

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the parties in their briefs on the protective order issue. Cipollone v. Liggett Group, Inc., 785 F.2d 1108 (3rd Cir. 1986).

In Chicago Council of Lawyers v. Bauer, 522 F.2d 242, the Seventh Circuit struck down as unconstitutionally overbroad court rules prohibiting extra-judicial comments by attorneys. These rules included DR7-107(G), the counterpart of the Alaska rule cited by Defendants.

Attempts by the defendants to control comments and use of documents by an attorney for plaintiffs in asbestos litigation were rejected by the court in Ruggieri v. Johns-Manville Products Corp. This case, too, specifically considered the applicability of American Bar Association Disciplinary Rule 7-107(G). In Ruggieri, a plaintiffs' attorney appeared on a nationally televised program and referred to certain letters purportedly showing that the major asbestos companies were aware of the claimed danger of asbestos inhalation as early as 1935. The defendants moved for an order disqualifying the attorney from this or any other asbestos litigation and prohibiting him from making extra-judicial comments concerning such cases. Refusing to issue the order sought, the district court adopted the Seventh Circuit's view that extra-judicial comments will not be curtailed unless a "serious and imminent" threat to a fair trial is posed. It "would be a serious invasion of a treasured liberty to prohibit the attorney from continuing

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to discuss this very controversial issue of asbestos inhalation," especially in light of the fact that the defendant submitted no evidence supporting the conclusion that the statements would affect any potential jurors. 503 F. Supp. at 1041.

B. Defendants Have No Privacy Interest That Justify Entry Of The Protective Orders Sought By Them.

Defendants will probably find no one to quarrel with their assertion that a statute would be invalid "that purported to allow private parties to compel corporations to disclose their internal files simply because 'inquiring minds want to know.'" [Reply at 18.] However, Press Intervenors, among others, take considerable issue with Defendants' attempt to apply this irrelevant formulation to the facts of the case at bar. Specifically, what we have here is not mere prurient curiosity about the internal affairs of randomly chosen corporations. The public is interested in Defendants specifically because they are at least in some measure responsible for the nation's largest environmental disaster, and the pollution of pristine Alaska waters and coastal territories with over 11 million gallons of crude oil. It is interested because of the disastrous consequences of the accident caused by Defendants' agents.

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It is interested because of the nature of the Defendants,[15] the nature of the highly regulated activities in which the Defendants are engaged, because of pending state and federal legislation arising out of the Defendants' activities,[16] and various inquiries by state and federal regulatory agencies concerning the causes and consequences of the accident. The public is interested in potential remedial measures including possible imposition of costly changes to the operation of the tanker fleet, in the efficacy of dispersants, and generally in the ability to protect the state and its resources and the livelihood of citizens who depend on those resources for cash income and subsistence. All of this provides a context in which the privacy interests alleged by Defendants must be evaluated. In such context, it is evident that the asserted privacy interests do not exist or are of minimal significance.

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[15] The Defendants in this case include Exxon Corp. and Alyeska Pipeline Service Co. Alyeska is a close corporation owned by seven of the major petroleum companies in the world. Exxon and most of the other Alyeska owners rank among the largest industrial corporations in America and in the world.

[16] The Anchorage Legislative Information Office reports that the Alaska Legislature enacted nine bills into law that were filed in response to the oil spill in Prince William Sound. Already, the Legislature has before it some twenty-two new "spill bills." Similarly, the Congress is considering thirty "spill bills" this session. Two of these, HR 1465 and S.686 are comprehensive bills with substantial chance of success, each having passed in its (Footnote Continued)

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The oil industry in Alaska is heavily regulated in general and with regard to the transportation of oil from the wellhead in particular. The crude oil that polluted Prince William Sound came from the nation's largest producing oilfield, on the North Slope of Alaska. More than 1.8 million barrels of crude oil are shipped daily from Prudhoe Bay and adjoining fields through the Trans-Alaska Pipeline System. The TAPL System was built with intense government regulation and scrutiny. The oil industry in Alaska continues to operate under close scrutiny and substantial regulation by state and federal agencies, including the United States Coast Guard, the Alaska Department of Environmental Conservation, and others, both with respect to its production operations and its transportation of petroleum products from the terminus of the Trans-Alaska Pipeline at Valdez through Alaska's coastal waters and southbound.[17]

(Footnote Continued)
respective chamber and been referred to conference committee.

[17] See, for example, Alaska Pipeline Act, A.S. 42.06.140 et seq.; Alaska Coastal Management Program, A.S. 46.40.010 et seq.; Environmental Procedures Coordination Act, A.S. 46.35.020 et seq.; and provisions of the Alaska Land Act, A.S. 38.05.005 et seq. See also The Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1655; and see, The Alaska Environmental Conservation Act, A.S. 46.03.010 et seq.; The Oil Pollution Control Act, A.S. 46.04.010 et seq.; and The Hazardous Substance Releases Act, A.S. 46.09.010. See also The Clean Water Act of 1977, 33 U.S.C. § 1251 et
(Footnote Continued)

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Assuming arguendo that the Fourth Amendment's unreasonable search and seizures standard applied in this context, as an abstract principle,[18] it has no applicability in the specific circumstances of this case in any event. The Alaska Supreme Court has frequently noted that Article I, Section 14 is broader than the requirements of the Fourth Amendment. Nonetheless, Alaska Supreme Court decisions construing the search and seizure clause give little aid or comfort to the Defendants' position. The primary purpose of sections 14 and 22 of Article I is the

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(Footnote Continued)
seq.; and The Deepwater Port Act, 33 U.S.C. § 1501 et seq.; 42 U.S.C. § 1915 involves the United States Coast Guard on the national response team charged with clean up responsibilities in the event of a release or threatened release of hazardous substances to the environment. Operations of Alyeska are governed extensively by provisions in its lease from the Alaska Department of Lands.

[18] Defendants' "Fourth Amendment" analysis is of such marginal relevance or utility that it ought to be dismissed out of hand. The Fourth Amendment no more dictates secrecy in this case than does the body of Fifth Amendment case law providing that a corporation has no privilege against self-incrimination, per se, dictate that the public has complete access to the books and records of the Defendants. See United States v. White, 322 U.S. 694, 64 S.Ct. 1248 88 L.Ed. 1542 (1944); United States v. Bausch and Lomb Optical Co., 321 U.S. 707, 88 L.Ed. 1027, 64 S.Ct. 805 (1944); cf., United States v. Rylander, 656 F.2d 1313, (9th Cir. 1981). It is probably axiomatic, but worth noting as the court did in U.S. v. White, that "the greater portion of evidence of wrongdoing by an organization or its representatives will usually be found in the organization's official records and documents." 322 U.S. at 700, 64 S.Ct. at 1252, 88 L.Ed. at 1547. In any event, the Fourth Amendment standard is "reasonableness;" Rule 26 requires no less. Compare Ericson, 107 F.R.D. at 94.

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protection of "personal privacy and dignity against unwarranted intrusions by the state." Weltz v. State, 431 P.2d 502, 506 (Alaska 1967). See also Doe v. Alaska Superior Ct., Third Judicial District, 721 P.2d 617, 629 (Alaska 1986):

> A common thread woven into our decisions is that privacy protection extends to the communication of "private matters," State v. Glass, 583 P.2d 872, 880 (Alaska 1978), or, phrased differently, "sensitive personal information," Falcon v. Alaska Public Offices Commission, 570 P.2d 469, 480 (Alaska 1977), or "a person's more intimate concerns," Pharr v. Fairbanks North Star Borough, 638 P.2d 666, 670 (Alaska 1981) (quoting State v. Oliver, 636 P.2d 1156, 1167 (Alaska 1981)). This is the type of personal information which, if disclosed even to a friend, could cause embarrassment or anxiety. Falcon, 570 P.2d at 479. We have also recognized that Article I, Section 22 affords special protection to privacy of the home. See Ravin v. State, 537 P.2d at 503-04.
>
> In short, our decisions have held that the right of privacy embodied in the Alaska Constitution as implicated by the disclosure of personal information about one's self the instant situation is distinguishable . . . [as it] does not involve the type of "sensitive personal information" protected by Article I, Section 22."

721 P.2d at 629 [emphasis in original].

Alaska's constitutional protection for privacy is shaped by the context in which it is asserted. Thus, for example, in Nathanson v. State, 554 P.2d 456, 458 (Alaska 1976), the court's determination of whether the defendant had a reasonable expectation of privacy that could stand up under constitutional scrutiny required evaluation of his

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Fourth Amendment interest in the context of commercial fishing, just as the evaluation of the Defendants' alleged Fourth Amendment privacy interests here would require scrutiny in the context of the activities and operations of the oil industry in Alaska. Addressing the salient features of the commercial fishery in 1976 when the Nathanson case arose, the court found:

> Alaska's fisheries are unquestionably an important resource of this state, for they provide a source of food and employment for the people of this state. As we recently noted . . . fishing is the "largest single industry in Alaska and crabbing is a substantial portion of that activity." To ensure the viability of this resource and the welfare of those dependent upon it, the State has broad powers in the regulation of the fisheries in the areas off the coast of Alaska. . . . Commercial crabbing is closely regulated by the state, with nearly every phase of the operation coming under public scrutiny through licensing and inspecting of vessels and gear. . . .
>
> We find, therefore, that fishermen such as Nathanson could not harbor an "actual (subjective) expectation of privacy" in conducting their crabbing operation in the waters of the state, at least not one that "society is prepared to recognize as reasonable." Thus, Nathanson had no protectible federal or state constitutional interest in the seized interest.

554 P.2d at 458-459. Like the fishing industry in 1976, the oil industry in Alaska in 1990 is both the major economic force in the state and a highly regulated industry. Its expectation of privacy as a general matter is substantially less than that which might be reasonable for less regulated and less substantial industries in our state. There are

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other reasons why no right of privacy obtains in this instance to shield the Defendants' documents from public scrutiny. As the Alaska Supreme Court has noted on more than one occasion, an otherwise legitimate privacy interest may go unprotected when a party's activities adversely affect others:

> When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.

Doe v. Alaska Superior Court, 721 P.2d at 629-630, quoting Ravin v. State, 537 P.2d at 504. In Doe the issue was whether the trial court properly ordered discovery of certain documents, over Rule 26 objections. The court noted that the legislature is expressly authorized to implement the privacy provision of Article I, Section 22 of the Alaska Constitution, and could choose to amend the public records statute, A.S. 09.25.110-.120, to prevent the disclosure of documents such as those at issue in that case. "Absent such action, however, we do not infer any intent to encompass such letters within the protection provided by Article I, Section 22." Doe, 721 P.2d at 629, n.18.

C. Defendants Cannot Make Sufficient A Showing That Any "Fair Trial Rights" They Have Dictate The Suppression Of Information They Request.

Defendants' refrain "It is inconsistent with the notion of fair trial for parties to 'try their case in the

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newspapers,'" [Reply at 25] sheds little light on this discussion. These cases, assuming they are tried,[19] will be tried in a courtroom, with all of the safeguards routinely afforded parties by our system. These safeguards will assure Defendants here the same fair consideration that is given to other litigants in the many other cases of importance and interest to the public that reach our courts

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[19] Experience strongly suggests that few if any of the cases grouped under the label "Exxon Valdez Litigation" will ever come to trial. Most cases, including most major and complicated cases, settle rather than proceed through full term to trial. The reported cases show that this is the pattern in most other "mass tort" cases. Statistical information provided by the Alaska Court System's Research Analyst Lean Flickinger shows the low percentage of cases disposed of by trial in Alaska compared to the total number of case dispositions. In FY 1987 only 3.75% cases were disposed of by trial. In FY 1988 the percentage was 6.02% and in FY 1989 the percentage was 5.46%. Statistics furnished by Ellen Vail, Chief of the Non-Criminal Branch of the Administrative Office of the United States Courts show an even lower percentage of cases disposed of through trial in the federal court for the district of Alaska. In FY 1987 5.01% of dispositions were by trial. In FY 1988 the number was only 2.75% and in FY 1989 the total dispositions by trial was a mere .16%.

This underscores the need to view with skepticism or at least extreme caution claims that the court must help restrict the flow of information to the public in order to ensure a "fair trial." The efficacy of such government controls over the use and consequences of information is speculative at best. In any event, the United States Supreme Court has recognized that the public has a presumptive right of access even to information that may be prejudicial to defendants and inadmissible at trial, in light of the higher or competing values served by an open process. See Press-Enterprise v. Riverside County Superior Court, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ("Press-Enterprise II") (recognizing First Amendment right of access to preliminary hearings in criminal cases).

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annually. Defendants' proposals would restrict rights that the parties and their counsel would have, absent these protective orders, to communicate with the public, the press, legislators, and others. Any order that restricts First Amendment rights of parties and their counsel in the interest of a fair trial must be neither vague nor overbroad. Kemner v. Monsanto Co., 492 N.E.2d 1327, 1337 (Ill. 1986), citing CBS v. Young, 522 F.2d at 239.

It is not the proper role of this court to speculate how the incremental effect of information contained in documents produced in discovery -- but not otherwise known or available to the public -- might affect a trial that may or may not occur some years hence. If the Defendants wished to communicate to those comprising the state and federal jury pools in a way that suggested that decisions adverse to the Defendants' interests could lead the Defendants to pull the plug on their operations in Alaska, turn off the spiggot on the source of government and arts funding, and generally lower the quality of life in the state, clearly the court would not have the right to prohibit such communications for the purpose of ensuring a fair trial.[20] See, In re Asbestos School Litigation, 115

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[20] Defendants' numerous references to language normally used to describe the constitutional rights of criminal defendants might imply the existence of Sixth (Footnote Continued)

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F.R.D. 22 (E.D. Pa. 1987) (court denied injunction against distribution by defendants in a class action of a trade association booklet to class members, and instead ordered special notice to be displayed in all future mailings clearly indicating the relationship of defendants to the trade association); see also Kemner v. Monsanto Co., in which the Illinois Supreme Court held that an order restraining parties and their attorneys from making extra-judicial comments about a pending case involving a dioxin spill was constitutionally allowable "only if the record contains sufficient specific findings . . . establishing . . . a clear and present danger or a serious and imminent threat to . . . fairness and integrity." 492 N.E.2d at 1328.

The First Amendment, and Article I, Section 5 of the Alaska Constitution dictate the same answer here, as does recognition that these court proceedings are but one piece of the mosaic that depicts the relationship of the

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(Footnote Continued)
Amendment "fair trial" rights here. That, of course, is not the case. Defendants are entitled to due process, and their rights are limited to the dictates of the federal and state due process clauses construed in light of other competing legal interests, both constitutional (including the First Amendment) and otherwise (including Rule 26 requirement that they carry the burden of showing good cause for the restrictions they seek). Cf. Chicago Lawyers Council v. Bauer, 522 F.2d at 257-258 ("The point to be made is that the mere invocation of the phrase 'fair trial' does not as readily justify a restriction on speech when we are referring to civil trials.")

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parties to this case. The oil industry, the seafood industry, Native Alaskans, the State of Alaska, the United States government, environmental groups, corporate shareholders and the other parties to this action all interact with each other on these same issues, before state and federal regulatory agencies, in the electoral process, in legislative hallways and committee rooms, in boardrooms and shareholder meetings, in scientific conferences, and on the beaches. This is not a static or self-contained process. Nor can the significance of the matters being litigated here, or the process of the litigation itself, be underestimated.

V. Miscellaneous Other Matters.

A. Disposition of Confidential Material.

The Defendants propose that all parties and their counsel must return all confidential material at the termination of these proceedings, and either destroy materials that summarize, excerpt or otherwise record any confidential material, or retain such confidential material under the terms of the protective orders. Such a provision would probably be unobjectionable if there were no question that the only documents marked confidential were specific trade secrets or other similarly legitimate confidential matters, as to each of which Defendants had sustained their burden of showing specific good cause for nondisclosure.

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However, viewed in conjunction with Defendants' proposed umbrella secrecy orders, and their presumptive confidentiality scheme, such a provision probably would not be enforceable at the conclusion of this litigation, see Agent Orange, 821 F.2d at 144-145, and in any event is unnecessary and contrary to the public interest. Id., and see generally "Public Courts, Private Justice," The Washington Post, October 23, 24, 25 and 26, 1988.

Defendants' proposal for permanent secrecy after settlement or other final disposition of the cases underscores the problems inherent in the proposed protective orders. The public's right of access to important information in this case would quite predictably be held hostage to secrecy demands imposed by the Defendants as a condition of settlement. Some or all of the plaintiffs may be willing or pressured to acquiesce in such demands, and sacrifice broader public interest in order to maximize the benefits to be secured by settlement. Instead, however, the parties should be able to negotiate knowing that this sort of provision is not "on the table."[21] No party should later

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[21] As a matter of public policy, the parties should not be free to enter into, nor should the courts approve, certain settlement terms or conditions. Such would be the case, for example, if the Defendants insisted that as a condition of settlement the Plaintiffs mitigate their damages by selling to the public seafood products known to be tainted with oil, or by paying clean-up workers at less
(Footnote Continued)

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be heard to argue that it relied upon secrecy as an integral part of such settlement. Comp. Agent Orange, 821 at F.2d at 144-145.

B. Press Intervenors Have A Right To Notice And An Opportunity To Be Heard Concerning Attempts To Restrict Or Deny Access to Documents And Proceedings In This Case.

The right of the press to assert and protect the public interest in access to records and proceedings in this case can only be meaningfully asserted if Press Intervenors have adequate notice and opportunity to be heard on these limited issues. See, e.g., United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982) where the Ninth Circuit noted in passing that the motion under review "was submitted under seal and became known publicly only fortuitously, suggesting the need for reasonable steps to make knowledge of the pendency of such motions available." See also, United States v. Criden, 675 F.2d 550, 559 (3rd Cir. 1982) (Third Circuit ruled a closure motion must be docketed sufficiently in advance of a hearing on such motion to permit intervention by interested members of the public); and see, United States v. Haller, 837 F.2d 84, 87 (2nd Cir. 1988); In re Herald Company, 734 F.2d 93, 102 (2nd Cir. 1984). In

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(Footnote Continued)
than the applicable state or federal minimum wage. Similarly, the court should not approve a settlement that hides important information relating to the spill from the public. Comp. Anchorage School District v. Anchorage Daily News, 779 P.2d 1191 (Alaska 1989).

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this case, assuming Press Intervenors are added to the master service list at the time of this intervention, no further special notice is requested or required, except such notice as may not timely be circulated to those on the master service list on issues directly relating to access to documents and records. Press Intervenors do not anticipate becoming involved in all of the disputes that are likely to arise over confidentiality of documents. However, in order to determine when it is appropriate to make a timely appearance and in order to assert their interests in a timely fashion, they must have some sort of notice.

C. Press Intervenors Object To Any Provision Of The Protective Order That Would Require Or Permit The Parties To Submit Pleadings Under Seal To The Court Or Discovery Master.

Press Intervenors concur with the position taken by the Plaintiffs objecting to provisions allowing pleadings -- as opposed to discrete exhibits to pleadings -- to be filed under seal.[22] Whatever arguments Defendants have with respect to nondisclosure of discovery materials before they

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[22] See, December 11, 1989 Environmental Plaintiffs' Position on the Proposed Consolidated Pretrial Order, § VII(C)(1), p. 4-5. It appears that all plaintiffs concur in this position. See Consolidated Plaintiffs' Reply Memorandum Regarding Disputed Provisions In The Proposed Discovery Pretrial Order (hereinafter "Plaintiffs' Reply"), submitted December 18, 1989, at p. 8, n. 6; see also, State of Alaska's Reply Memorandum, dated December 18, 1989 (joining in Consolidated Plaintiffs' Reply Memorandum, with certain inapplicable exceptions).

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are used in connection with any proceedings or submitted to the court, such legal arguments clearly do not apply to documents that are actually filed with the court. As to these, both common law and constitutional rights of access apply.[23] Further, should the court choose to utilize a magistrate or master to help carry out its judicial functions, proceedings and documents relating to the magistrate's or master's work are also subject to public access.

The United States Supreme Court has noted that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597, 55 L.Ed.2d 570, 98 S.Ct. 1306, 1312 (1978). This right of access to documents filed in civil actions is commonplace throughout the country. See Bank of America National Trust and Savings Ass'n v. Hotel Rittenhouse Assoc., 800 F.2d 339, 343 (3rd Cir. 1986) ("The right of the public to inspect and copy judicial records antedates the Constitution"); Wilson v.

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[23] Defendants appear to recognize as much, notwithstanding their proposed protective order provisions allowing for sealing documents. See Defendants' Reply Memo at 26-27. Defendants acknowledge the presumptive right of access, but effectively reverse this presumption through their proposed process for designating documents as confidential.

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American Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985) ("Documents filed in civil action may be sealed only if it is shown that denial of access "is necessitated by a compelling governmental interest, and is narrowly tailored to that interest."); Publicker Industries Inc. v. Cohen, 733 F.2d at 1071 (3rd Cir. 1984) (applying First Amendment analysis in reversing trial court's order sealing courtroom transcripts, and portions of briefs). These, and numerous other cases to the same effect, make it clear that as soon as documents are filed in this case, they must be made available to the public.

D. Press Intervenors' Concur With Plaintiffs' Position Regarding Reasonable Access To Depositions.

Press Intervenors also concur with the position taken by the Plaintiffs with respect to reasonable access, upon reasonable notice and subject to reasonable conditions, to depositions. See Environmental Plaintiffs' Position, Section VI(L), and see Plaintiffs' Reply Memorandum, p. 8, n. 6; State of Alaska's Reply Memorandum, p. 1.

VI. Conclusion.

The Exxon Valdez litigation may be sui generis. If it is not, it is one of a handful of cases to be litigated in this country that most clearly and substantially affects a broad range of public interests and concerns. The court should seize the opportunity to ensure

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this case is conducted as openly as possible in every respect, and avoid being lured by Defendants' facile arguments into erring on the side of caution.

DATED at Anchorage, Alaska this 22nd day of January, 1990.

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