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Plaintiffs' Motion For Reconsideration of Order Overruling Objections To Subpoena And For Protective Order Concerning Unpublished Manuscript [by Robert Proctor]

HNN Editor: Mr. Proctor noted in an email to us two corrections to the motion below: "On the first page, under "Background," it states that "Of the 42 university professors nationwide who specialize in the history of the tobacco industry, only two regularly testify against the tobacco industry in lawsuits." The reality--as I say in my affidavit--is that there have been about 40 historians who have testified for the defense in U.S. tobacco litigation, and only three who have testified for the plaintiffs--and only two who do this regularly (myself and Louis Kyriakoudes). Allan Brandt testified for the plaintiffs in USA v. Philip Morris."

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT

IN AND FOR VOLUSIA COUNTY, FLORIDA

CIVIL DIVISION

IN RE: ENGLE PROGENY CASES

TOBACCO LITIGATION

Pertains to: Stella Koballa and Robert Koballa,

Case No. 2007-333-CICI

**PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER OVERRULING
OBJECTIONS TO SUBPOENA AND FOR PROTECTIVE ORDER CONCERNING
UNPUBLISHED MANUSCRIPT**

Plaintiffs Stella Koballa and Robert Koballa move for reconsideration of the Order on Plaintiff's Objection to Subpoena Duces Tecum for Production From Non-Parties ("Previous Order") and for a protective order pursuant to Fla.R.Civ.P. 1.280(c) to protect Plaintiffs' expert witness, Robert Proctor, PhD, from being compelled to produce in this or any other case before this Court that certain unpublished manuscript which is the subject of the Prior Order.1

BACKGROUND

Dr. Proctor is a professor at Stanford University who specializes in the history of the tobacco industry. Of the 42 university professors nationwide who specialize in the history of the tobacco industry, only two regularly testify against the tobacco industry in lawsuits. The remaining 40 of them are either paid by, or are otherwise unwilling to publicly criticize, that industry. Declaration of Dr. Robert Proctor ("Proctor Decl.") ¶ 5-6. Dr. Proctor's Declaration is attached hereto as "[Exhibit A](#)." Dr. Proctor testifies on issues including when tobacco

companies became aware of the addictive properties of cigarettes and what steps they undertook to cover up that knowledge. *Id.* ¶ 7.

Dr. Proctor is a crucial witness in Plaintiffs case. His testimony is relevant in each phase, including class membership. His testimony explains how and why the Plaintiffs became addicted notwithstanding popular literature on the dangers of smoking tobacco. His testimony establishes that the tobacco industry, including Defendant, knew cigarettes were addicting long before the Surgeon General ever said so. Dr. Proctor presents internal records and memoranda discussing that smokers need a psychological crutch to keep smoking despite the 'health fanatics' claims. He is Plaintiffs single most important witness. Dr. Proctor can set the entire mood of the trial.

Dr. Proctor is now writing a book critical of the tobacco industry, which he has tentatively entitled *Golden Holocaust: A History of Global Tobacco*. (the "Manuscript") The Manuscript will contain previously unpublished information regarding tobacco industry practices. *Id.* ¶ 9. This is an unfinished and unpublished work in progress. It has substantial unwritten portions, and has not yet been edited by Dr. Proctor, peer-reviewed, cite- or spell-checked, or shown to a publisher. *Id.* ¶ 10. It still contains in places notes, mental impressions, and outlines. Only a handful of people, who were enlisted by Dr. Proctor to assist in the completion and proofing of particular segments, have seen any part of the Manuscript. No one has seen the entire Manuscript. *Id.* ¶ 9-10.

During this litigation, Defendant became aware of this Manuscript and served a subpoena under Fla. R. Civ. P. 1.341 for production. Plaintiffs objected, and Defendant moved for an order on the objections. On August 21, 2009, the Court heard argument on the motion from counsel for the parties. The Court did not hear argument from Dr. Proctor who was neither present nor represented. The Court overruled the objections for the most part and entered the Prior Order. Defendant then procured and served a subpoena from the Superior Court in the City and County of San Francisco, California commanding Dr. Proctor to produce the Manuscript at his continued deposition.

Dr. Proctor retained the San Francisco law firm of Gross Belsky Alonso, LLP ("BKA) to represent his interest in maintaining the confidentiality of his unfinished Manuscript. BKA then filed timely and appropriate objections to the subpoena in the Superior Court. BKA has informed undersigned counsel that a motion for protective order is under preparation and will be filed promptly. Meanwhile, on the advice of counsel, Dr. Proctor did not produce the Manuscript when he attended the continued deposition. He brought with him the other items commanded by the subpoena.

Falsely claiming that Dr. Proctor is defying this Court's order, Defendant then filed, in this Court a motion in limine seeking to preclude the testimony of Dr. Proctor on behalf of Plaintiffs in this matter. This motion seeks to exclude his testimony as a sanction against Plaintiffs for the witness' nonproduction of the Manuscript. Defendant will pursue this motion in limine regardless of the decision of the California Superior Court on Dr. Proctor's motion for protective order.

Plaintiffs now face a potential whipsaw. If the California court grants the requested protective order, and Dr. Proctor declines to produce the Manuscript, Defendant then will seek to bar his testimony in this Court. Dr. Proctor is a crucial witness in Plaintiffs case. In light of that potential, Plaintiffs now ask this Court to reconsider the Prior Order and to consider this

motion for protective order. This motion presents facts and arguments that were not fully presented or considered in the previous hearing. It would be a miscarriage of justice if these issues were not given full and fair consideration and Plaintiffs were thereby denied their right to present the testimony of this crucial witness.

SUMMARY OF ARGUMENT

Compelled production of this unfinished and unpublished Manuscript implicates substantial overlapping constitutional and statutory rights of the author. Because these rights were not considered or balanced against the litigant's interest in discovery in the previous hearing, the Court should reconsider the Prior Order and perform the applicable balancing analysis. Upon reconsideration, the Court should determine that the litigant's interest in obtaining this discovery is not sufficiently compelling to justify overriding the author's rights and enter the requested protective order.

Those rights of the author that are implicated (and infringed) by a compelled production of the Manuscript include: his exclusive rights under the Copyright Act; his right of privacy under the Florida constitution; and his right to research and gather and publish news and information under the First Amendment. The Court may override these rights in the interest of civil discovery if, but only if, the proponent of discovery establishes that its need for the information is sufficiently compelling to overbalance the rights of the author.

In the proceedings leading to the Prior Order, these rights were not considered or taken into the balance. The Court was presented with argument on the threshold question of discoverability of the information under Florida's broad rules of civil discovery. When it concluded that the Defendant had that minimal interest in disclosure required by the discovery rule, the Court overruled Plaintiffs objections to the subpoena. Please see the transcript of the Case Management Conference held on August 21, 2009 before Judge Parsons at page 27. The transcript is attached hereto as "Exhibit B." The Court should now reconsider the Prior Order and weigh the Defendant's interest in this discovery against the Plaintiffs interest in confidentiality of the unpublished Manuscript.

Each of the rights implicated here is guarded by a balancing test. Though the tests differ from one to the other, each ultimately requires the proponent of discovery to show that that the need for the requested information is sufficiently strong to override the right. Mere discoverability is not sufficient.

ARGUMENT

- **THE INTEREST SERVED BY DISCOVERY: DEFENDANT DOES NOT HAVE A COMPELLING OR OVERRIDING NEED FOR DISCLOSURE OF THE MANUSCRIPT SUFFICIENT TO OVERBALANCE ANY OF THE IMPLICATED RIGHTS.**

Defendant's interest in discovering the Manuscript is the least possible interest in discovery. It has justified its demand for access to the Manuscript only by speculating that review of the Manuscript might lead to the discovery of admissible evidence and that it might provide "fodder" for impeaching Dr. Proctor on cross-examination as the source of a possible prior inconsistent statement. This Court found no particular need for the discovery but determined that this tenuous interest is sufficient to meet the requirement for discovery under the broad

standard set by Fla. R. Civ. P. 1.280(b)(1). It is nevertheless the most general and lowest possible need for discovery.

Defendant can show no reasonable likelihood that its reading of the Manuscript will lead to admissible evidence. It merely speculates that it might lead to admissible evidence, a likelihood roughly equal to stating that “anything is possible.” Standing alone, this minimal level of curiosity might be sufficient to warrant discovery under our broad discovery rules, but when weighed against Dr. Proctor’s competing interest in nondisclosure, it is tenuous, speculative, and feather light on the balancing scale.

Defendant also speculates that the Manuscript might prove to be “fodder” for cross-examination of Dr. Proctor. However, the Manuscript would not be admissible for this purpose because Defendant could not demonstrate that the Manuscript is effective to show bias, corruption, or lack of competency of Dr. Proctor. *Graham v. Dacheikh*, 991 So. 2d 932 (Fla. 2d DCA 2008) (citing Charles W. Ehrhardt, Florida Evidence § 608.1 at 521 (2008 ed.); *Lawson v. State*, 651 So. 2d 713, 715 (Fla. 2d DCA 1995)). In *Graham*, Judge Altenbernd applied this standard to disapprove discovery of patients’ private information in the records of a medical expert. He explained:

The [plaintiffs] claim they need this information to impeach [the expert doctor]. However, it would appear the documents requested would be inadmissible as collateral impeachment unless they demonstrate bias, corruption, or lack of competency of [the medical expert]. (citations omitted) The [plaintiffs] do not point to anything specific in a deposition of [the expert] in this case that they hope to impeach with the use of these documents. Moreover, if the [the plaintiffs] intend to use these documents to provide a predicate for questions designed to prove that [the expert] is biased and always renders an opinion favorable to the defense, we are unconvinced that they need to obtain copies of the medical history or descriptions of the physical examinations of all of these patients, as compared to the doctor's impression or conclusions at the end of his report.

Here, as shown by the motion in limine, the Defendant has ample “fodder” for attacking the bias of Dr. Proctor in the material he has already published. Such evidence is otherwise available and Defendant therefore has no justifying need for the Manuscript that would be sufficient to outweigh any of the rights that disclosure would infringe.

Finally, the mere speculation that Defendant might discover a prior inconsistent statement in the Manuscript does not justify infringing Dr. Proctor’s rights. Such statements are not substantive evidence in themselves and do not contribute to proving the case for the Defendant.

- **COPYRIGHT: DEFENDANT CANNOT MEET THE STANDARD FOR FAIR USE OF THIS COPYRIGHTED WORK.**

Defendant asserts that Dr. Proctor's refusal to produce the manuscript for *The Golden Holocaust* as one of the grounds for excluding him as an expert witness. Specifically, Defendant argue that Dr. Proctor should be excluded as an expert witness on the basis of "his failure to comply with this Court's order requiring him to produce his manuscript *The Golden Holocaust*." (Mot. in Limine at 1.) In truth, this Court instructed Defendant to issue a subpoena to Dr. Proctor, to which Dr. Proctor has timely objected in the issuing court in

California. Neither this Court nor the California court has ordered Dr. Proctor to produce the manuscript to Defendant.

Dr. Proctor's objection to such disclosure is justified. Defendant desire to review an unfinished, unpublished manuscript does not trump Dr. Proctor's rights under the Copyright Act. Properly balanced, the remote possibility that the Manuscript would provide information to the Defendant that is not otherwise available, is outweighed by Dr. Proctor's right to retain the economic value of his work and to protect his unfinished work from disclosure, dissemination, and scrutiny.

The subpoena and Motion in Limine seek to force Dr. Proctor to provide a copy of his unfinished Manuscript to the Defendant and its attorneys. Section 102 of the Copyright Act provides that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated . . . Works of authorship include . . . literary works." As the Manuscript is a literary work fixed in a tangible medium, Dr. Proctor owns the copyright therein. Section 106 of the Copyright Act provides certain exclusive rights to Dr. Proctor as the copyright owner, including:

[T]he exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work . . .
- (3) to distribute copies . . . of the copyrighted work to the public . . . [and]
- (5) in the case of literary . . . works . . . to display the copyrighted work publicly.

A requirement that Dr. Proctor disclose his unfinished Manuscript to the Defendant implicates the right of reproduction, the right of distribution, and the right of public display of the Manuscript. Unauthorized reproduction, distribution, and display of a work subject to copyright protection constitutes infringement, unless the entity undertaking such unauthorized conduct can establish a valid defense. *See Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547-48 (1985). The most common defense to a claim of infringement, and the one that Defendant is most likely to raise in this case, is that use of the materials is permitted under the doctrine of fair use.

FAIR USE

The doctrine of fair use has a long and respected history in the United States and reaches back to our British forebears. *See Campbell v. Acuff Rose Music, Inc.*, 510 U.S. 569, 575 (1994). The purpose of the fair use doctrine is to strike a balance between the copyright owner's right to protect and profit from his or her creative works and the public's access to knowledge. *Id.* Fair use was a judicial doctrine until its codification in the 1976 overhaul of the Copyright Act. H.R. Rep. No. 1476 (1976). Section 107 of the Copyright Act provides that:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (2008).

Upon adding this provision, Congress recognized that fair use issues would arise in litigation, and further recognized that the same standards apply in such circumstances. H.R. Rep. No. 1476 (1976). It is well established that each fair use case must be assessed on a case-by-case basis as the analysis of the factors is highly fact dependent. 2 *Campbell*, 510 U.S. at 577.

FAIR USE - BURDEN OF PROOF

Fair use is an affirmative defense to copyright infringement. As such, the burden of establishing a right to the Manuscript is on the Defendant. 17 U.S.C. § 107. The following is an analysis of the fair use factors which establishes that the Defendant cannot meet this burden.

FAIR USE - FACTOR 1 - PURPOSE AND CHARACTER OF USE

The first factor in the fair use analysis is "the purpose and character of the use of the work, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107.

Commenting on Congressional use of copyrighted material, the House Report finds that such use may be characterized as "fair" where the length of the work or excerpt published and the number of copies authorized are reasonable under the circumstances, and the work itself is directly relevant to a matter of legitimate legislative concern." One of the leading commentators on the 1976 revisions to the Copyright Act agrees that this is sound policy, but notes, as we must in the instant case, that "the use must . . . be reasonable; the government should not be permitted to avoid its responsibility to respect private property by engaging in activities that, if done by the private sector, would be easily regarded as infringing." William F. Patry, *The Fair Use Privilege in Copyright Law* 486 (1985).

In the instant case, the foregoing elements (i.e. length of the work, number of copies, and relevance) militate against a finding of fair use. The Defendant seeks the entire Manuscript, which is of limited relevance to the central issues in the case. In light of the foregoing, this factor weighs against a finding of fair use.

FAIR USE - FACTOR 2 - NATURE OF THE COPYRIGHTED WORK

The second factor in the fair use analysis is "the nature of the copyrighted work." 17 U.S.C. § 107. Central to this analysis is whether the work is published or unpublished.

While the current version of the Copyright Act admits the possibility that a fair use may be made of an unpublished work, *see* 17 U.S.C. § 107, the Supreme Court has made it abundantly clear that such a finding will be rare. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

The *Harper & Row* case dealt with the extensive publication of excerpts from President Ford's unpublished memoirs in an article in the *Nation* magazine. The owner of the copyright, Harper & Row, had promised first publication rights to *Time* magazine, and the appearance of the works in the *Nation* resulted in *Time* cancelling its contract with Harper & Row. Harper & Row sued the *Nation*, which claimed fair use of the work. *Id.* at 541-43.

The Supreme Court held that the *Nation's* publication was not fair use, relying almost entirely on the fact that the memoir was an unpublished work. The *Nation* initially argued that published and unpublished works were to be treated equally under the Copyright Act because of the language bringing unpublished works into the ambit of the fair use statute. *Id.* at 552. Justice O'Connor dismissed this argument holding that "it has never been seriously disputed that 'the fact that the plaintiff's work is unpublished . . . is a factor tending to negate the defense of fair use.' Publication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public, a factor not present in fair use of published works." *Id.* at 551 (internal citations omitted).

Justice O'Connor expands on this right of first publication throughout the opinion, holding that "[t]he right of first publication implicates a threshold decision by the author whether and in what form to release his work Because the potential damage to the author from judicially enforced 'sharing' of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts." *Id.* at 553. The Court found further support for this position in the Senate Report on the changes to the Copyright Act. *Id.* ("The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of deliberate choice on the part of the copyright owner."). Finally, Justice O'Connor "conclude[s] that the unpublished nature of a work is '[a] key, though not necessarily determinative, factor' tending to negate a defense of fair use." *Id.* at 554 (citing Sen. Rep. No.94-473, at 64 (1975)).

The interests which the Supreme Court declared to be entitled to protection in *Harper & Row*, are precisely those interests that must be protected here. The Manuscript is not finished. (Proctor Decl. ¶¶ 9-10.) It has not been peer reviewed, proofread or edited. (Proctor Decl. ¶¶ 10-11.) By forcing reproduction and distribution of the Manuscript, the Court is forcing Dr. Proctor to share a rough draft of his work, eliminating his "right to decide when and whether it will be made public." *Id.* at 551. The Supreme Court expressed particular concern about forced disclosure of works at this stage of development, finding that:

[t]he period encompassing the work's initiation, its preparation, and its grooming for public dissemination is a crucial one for any literary endeavor. The Copyright Act, which accords the copyright owner the "right to control the first public distribution" of his work . . . echoes the common law's concern that the author or copyright owner retain control throughout this

critical stage. . . . The obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation outweighs any short-term 'news value' to be gained from premature publication of the author's expression.

Id. at 555.

This last sentence of this passage reiterates the overarching requirement of the fair use test. The court must balance the Defendant's need to use copyrighted material against the author's right to control disclosure of an unfinished work. In the instant case, the Defendant has access to the author himself and has had an abundant opportunity to ask him whatever it wishes. It has his previous published writings, his testimony in previous cases, and a great deal of experience with the development and disclosure of his opinions. The addition of the Manuscript can only be considered cumulative. Balanced against this desire for cumulative discovery material is Dr. Proctor's right to control his unfinished work; to completely protect it from exposure until he has fully fleshed out his ideas, decided what ideas he is so committed to that he wishes to toss them into the public fray, and finally determine how to present these ideas in a form that he believes most persuasively conveys them. Such balancing must result in a finding against a fair use defense.

FAIR USE - FACTOR 3 - AMOUNT AND SUBSTANTIALITY OF THE PORTION USED IN RELATION TO THE COPYRIGHTED WORK AS A WHOLE.

The third factor in the fair use test is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. 17 U.S.C. § 107. The greater the proportion of the work used, the less likely that such use will be deemed to be fair. *Harper & Row*, 471 U.S. at 565-566. In the instant case, Defendant seeks reproduction and distribution of the entire work. This factor weighs against a finding of fair use.

FAIR USE - FACTOR 4 - EFFECT UPON PLAINTIFF'S MARKET

The fourth factor in the fair use test is the "effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107. This factor addresses the potential negative impact on the Manuscript's value from the disclosure of the Manuscript in response to the subpoena. This raises multiple potential damaging effects.

First, disclosure of materials in discovery is a precursor to the materials being entered into evidence in the trial, and thereby becoming a matter of public record subject to a strong presumption of openness. See Art. I, § 24, Fla. Const.; Fla. R. Jud. Admin. 2.420. If the Manuscript, or any portion thereof, becomes part of the record in this case, the author has effectively "scooped" his own book by agreeing to provide his expert opinion. The consuming public is significantly less likely to buy a book if it can be viewed as a public record at a lower cost.

Second, by disclosing the Manuscript in unfinished form, Dr. Proctor is forced to accept public dissemination of his work in a form that has the potential to damage his reputation and diminish the value of this book (if it is ever formally published) and his other works. Moreover, should Dr. Proctor revise the Manuscript and, as he is entitled to do, change his mind about an opinion expressed in the Manuscript, the forced disclosure of the Manuscript may place Dr. Proctor in the position of having his later book impeached by the current version of the unfinished Manuscript.

The Defendant may argue that it does not seek the Manuscript for the purpose of requesting that some or all of it be admitted in the record. This merely supports the argument that disclosure of the Manuscript is not relevant to the Defendant's case. And in any case, the Defendant cannot use any portion of the Manuscript for impeachment purposes without introducing it into the fully public record of the public trial. The Court cannot now determine that such portion would be great or small nor determine that the Plaintiffs could not on re-direct introduce even more of the text into the public record of the trial.

As the Supreme Court found in *Harper & Row*, "[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." *Harper & Row*, 471 U.S. at 546. The risk of requiring disclosure of the Manuscript is that its value will be diminished by premature public exposure. As such, this factor weighs against a finding of fair use.

CONCLUSION

Fair use is the only basis upon which Defendant can claim a right to use Dr. Proctor's copyrighted Manuscript. The foregoing analysis of the four fair use factors starkly conveys that Defendant cannot establish fair use in this case.

- **PRIVACY: THE MANUSCRIPT IS PROTECTED BY THE RIGHT OF PRIVACY AFFORDED BY THE FLORIDA CONSTITUTION.**

The privacy clause of the Florida Constitution provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life" Art. I, § 23. This distinct state constitutional right of privacy is broader in scope than the protection provided in the United States Constitution. See, *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985); *Berkeley v. Eisen*, 699 So. 2d 789, 790 (Fla. 4th DCA 1997).

As applied to the disclosure of information, the privacy clause protects information with respect to which the subject has a legitimate expectation of privacy. Dr. Proctor has a reasonable and legitimate expectation of privacy in his unfinished and unpublished Manuscript.

Determining whether an individual has a legitimate expectation of privacy in a given case must be made by considering all the circumstances, especially objective manifestations of that expectation. See *State v. Conforti*, 688 So.2d 350, 357-58 (Fla. 4th DCA 1997) (quoting *Stall v. State*, 570 So.2d 257, 260 (Fla. 1990)). Although a person's subjective expectation of privacy is one consideration in deciding whether a constitutional zone of privacy exists, the final determination of an expectation's legitimacy takes a more global view, placing the individual in the context of a society and the values that the society seeks to foster. See *Conforti*, 688 So.2d at 358-59. A protected expectation of privacy is one that society is prepared to consider as reasonable.

Daniel v. Daniel, 922 So. 2d 1041, 1045 (Fla. 4th DCA 2006).

The intellectual property rights, including the exclusive right to determine when and how a work is published, are obviously rights that society considers reasonable. Dr. Proctor has reasonably relied on the presumption his exposé would not be released outside his control

until published, and certainly not before he determines that it is ready for publication. It is unimaginable that Dr. Proctor's unpublished and unfinished manuscript would be made available to the tobacco industry, the subject of its criticisms, before Dr. Proctor officially published it. (Proctor Decl. ¶ 10-12.) He has always presumed he would have the ability to determine the course of his own work, and that his personal outlines, notes, and unrefined drafts would remain as private as mental musings unless he chose to release them. *Id.* His expectation of privacy in the unpublished Manuscript is reasonable and legitimate.

Accordingly, the privacy clause of the Florida Constitution protects Dr. Proctor from state action that infringes this right of privacy. Discovery under the rules of Court constitutes state action for purposes of the constitutional right of privacy, and the exercise of this power to compel the disclosure of private information is subject to the constraints required to uphold the constitutional right of privacy. In *Alterra Healthcare Corp. v. Estate of Shelley* 827 So. 2d 936, 941, n.5 (Fla. 2002), the Court quoted with approval then-Judge Pariente's opinion for the Fourth District in *Berkeley v. Eisen*, 699 So. 2d 789, 790 (Fla. 4th DCA 1997) (denying discovery of private financial information of non-parties):

Court orders compelling discovery constitute state action that may impinge on constitutional rights, including the constitutional right of privacy. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 803 (Fla. 3d DCA 1985), *aff'd*, 500 So. 2d 533 (Fla.1987). As recognized by our supreme court's decision in *Rasmussen*, "[t]he potential for invasion of privacy is inherent in the litigation process." 500 So. 2d at 535.

Accord Barker v. Barker, 909 So. 2d 333, 338 (Fla. 2d DCA 2005) (restricting discovery of patient records based on privacy); *Straub v. Matte*, 805 So. 2d 99 (Fla. 4th DCA 2002) (barring discovery of former husband's subsequent marital agreement with second wife in modification action by first wife); *Haywood v. Samai*, 624 So. 2d 1154, 1154 (Fla. 4th DCA1993) (barring discovery of records of patients of defendant doctor).

When the interest in civil discovery competes with the right of privacy, the courts must employ a balancing test because the right of privacy is not absolute. *See Fla. Bd. of Bar Examiners re: Applicant*, 443 So. 2d 71, 74 (Fla.1983) (explaining that the right of privacy was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual). The right will yield to compelling governmental interests. *Winfield*, 477 So. 2d at 547.

The test for reconciling the right of privacy with a litigant's interest in civil discovery is well-settled. In deciding whether a protective order is appropriate in a particular case, the court must balance the competing interests that would be served by granting discovery or by denying it. *Rasmussen v. South Florida Blood Serv. Inc.*, 500 So. 2d 533, 535 (Fla. 1987) (denying discovery of identity of blood donors sought by civil plaintiff seeking damages for HIV infection). The court must weigh the state's important interest in the fair and efficient resolution of disputes against the individual's constitutional right of privacy. *Id.*

In *Friedman v. Heart Institute of Port St. Lucie, Inc.*, 863 So. 2d 189, 193-94 (Fla. 2003), the Court held that an action under the fraudulent conveyance act should not be stayed pending the resolution of the underlying claim because to do so would frustrate the intent of the act. In *dictum*, Justice Lewis added that the defendant's concern with the effect of discovery should be addressed by the court's control of discovery. He stated:

[T]he constitutional right of privacy undoubtedly expresses a policy that compelled disclosure through discovery be limited to that which is necessary for a court to determine contested issues...." *Woodward v. Berkery*, 714 So.2d 1027, 1036 (Fla. 4th DCA 1998). Thus, as is always the case, "the scope and limitation of discovery is within the broad discretion of the trial court.

SCI Funeral Servs. of Fla., Inc. v. Light, 811 So. 2d 796, 798 (Fla. 4th DCA2002). The trial court has broad discretion in determining how to balance the right of privacy with the state interest in civil discovery, and the framework within which this discretion must be exercised is settled by the cases.

The burden of justifying the invasion of privacy for the sake of discovery rests on the proponent of the discovery. AThe party seeking discovery of confidential information must make a showing of necessity which outweighs the countervailing interest in maintaining the confidentiality of such information. @ *Berkeley* 699 So. 2d at 791-92 (quoting *Higgs v. Campgrounds of America*, 526 So. 2d 980, 981 (Fla. 3d DCA 1988) and citing *CAC-Ramsay Health Plans, Inc. v. Johnson*, 641 So. 2d 434 (Fla. 3d DCA 1994)). The constitutional right of privacy dictates that discovery be limited to that which is necessary for the determination of the case. *Friedman*, 863 So. 2d 189 (quoting *Berkely* 699 So. 2d 789).

This balancing test, like the others, weighs against Defendant. It has not shown that the Manuscript is directly and immediately relevant to proving any fact in issue in the case or even that it would be admissible as evidence in the Defendant's case. It is far from necessary for the determination of the case. Dr. Proctor's right of privacy in the unpublished work-in-progress must be protected against this highly attenuated interest in its discovery.

- **FIRST AMENDMENT: THE MANUSCRIPT IS PROTECTED BY THE JOURNALIST' PRIVILEGE UNDER THE FIRST AMENDMENT.**

Dr. Proctor's routine publication of investigative reportage in his books and other publications renders him a journalist for purposes of the journalist's privilege under the United States Constitution. The First Amendment provides a qualified privilege for journalists against the compelled disclosure of notes and other unpublished materials, because "ensuring the free flow of information to the public is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.'" *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993). In *Shoen*, the Ninth Circuit Court of Appeals held that an author of an investigative exposé was protected by the First Amendment journalist's privilege from disclosing unpublished materials and interviews for an upcoming book about a corporate scandal. The court specifically held that the author of an exposé-type book similar to that being prepared by Dr. Proctor fell within the privilege: "What makes journalism journalism is not its format but its content. . . . [T]he critical question for deciding whether a person may invoke the journalist's privilege is whether she is gathering news for dissemination to the public." *Id.* at 1293; see also *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) (software manufacturer could not compel disclosure of interviews used by university professors in preparing an unpublished manuscript for an investigative exposé because "[w]hether the creator of the materials is a member of the media or of the academy, the courts will make a measure of protection available to him as long as he intended 'at the inception of the newsgathering process' to use the fruits of his research 'to disseminate information to the public'").

The Shoen court held that because the journalist's privilege is a qualified privilege, a balancing test applies to determine whether, "in light of the surrounding facts," the "paramount interest" lies with the requesting party, which must show a "compelling need" for discovery, or with the individual resisting discovery by asserting his First Amendment rights and "society's interest in protecting the integrity of the newsgathering process." *Id.* at 1293, 1296.

The Florida Supreme Court holds that the First Amendment affords to journalists a privilege of nondisclosure of information gathered as journalists. *State v. Davis*, 720 So. 2d 220 (Fla. 1998) (privilege applies to nonconfidential information gathered by journalist); *Morgan v. State*, 337 So. 2d 951 (Fla. 1976) (holding First Amendment affords a privilege and adopting three-part test). In *Davis*, the Court clarified that the qualified reporter's privilege "extends to both confidential and nonconfidential information gathered in the course of a reporter's employment." *Davis*, 720 So. 2d at 227. Where the privilege attaches, the court must apply a three-part balancing test: the court must determine whether the movant has established that "(1) the reporter possesses relevant information; (2) the same information is not available from alternative sources; and (3) the movant has a compelling need for any information the reporter may have." 3

Even if it were assumed that the Defendant could satisfy the first two prongs of the test, it nevertheless cannot show a compelling need for the Manuscript. Its need is merely the generic interest in broad civil discovery.

On the other side of the balancing test, however, lies the risk of revealing the details of a nonparty's investigative exposé to the subject of that exposé – as well as the subject's criticisms and deep-pocketed teams of lawyers – before the exposé has been completed, verified, or error-checked. If an investigative journalist's work can be seized by the subject of the investigation before the work is even written, there could be significant chilling effect on the field of investigative journalism. *See Cusumano*, 162 F.3d at 714 ("Journalists are the personification of the free press, and to withhold [constitutional] protection would invite a 'chilling effect on speech' and thus destabilize the First Amendment. The same concerns suggest that courts ought to offer similar protection to academicians engaged in scholarly research.").

Further, compelling disclosure of an investigative journalist's unfinished investigative report threatens to diminish his profits from the book's eventual sale, because important revelations, let alone a leaked copy of the manuscript itself, might already have been made public. Compelling such disclosure also risks opening the author to criticism on sections of the book that were not yet ready for critical consumption. Indeed, the Ninth Circuit has joined the First Circuit in "not[ing] a 'lurking and subtle threat' to the vitality of a free press if disclosure of non-confidential information 'becomes routine and casually, if not cavalierly, compelled.'" *Shoen*, 5 F.3d at 1295 (quoting *United States v. La Rouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988)). Certainly, "[t]o the extent that compelled disclosure becomes commonplace, it seems likely indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be keyed to avoiding disclosure requests or compliance therewith rather than to the basic function of providing news and comment." *Id.* Also, the "frequency of subpoenas would not only preempt the otherwise productive time of journalists and other employees but measurably increase expenditures for legal fees." *Id.* Further, there is a substantial chance that newsworthy information, even if subject to a limited protective order, could make its way into the public domain. *See, e.g., Jimmy Golen, Court*

Ruling Small Consolation for Exposed Players, AP, Aug. 27, 2009 (discussing disastrous effect of leaks of names of baseball players who were on sealed list of positive steroid results).

Given Defendant's tenuous claim to a "compelling need" for Dr. Proctor's unpublished manuscript, as weighed against both Dr. Proctor's First Amendment rights and society's interest in the integrity of the newsgathering process, the Court should grant Dr. Proctor's motion for a protective order on First Amendment journalist's privilege grounds.

- **FIRST AMENDMENT: THE MANUSCRIPT IS PROTECTED BY THE ACADEMIC PRIVILEGE AFFORDED BY THE FIRST AMENDMENT.**

Overlapping with the journalist's privilege, but analytically distinct, is a separate doctrine courts have recognized that protects academic freedom and autonomy from interference or intrusion. The Supreme Court has made clear that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 312 (1978). That is because "[t]he essentiality of freedom in the community of American universities is almost self-evident. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); see also *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (expressly recognizing a First Amendment right of academic freedom).

In *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998), the First Circuit Court of Appeals held that Microsoft could not enforce a subpoena for university professors' unpublished notes, correspondence, and tapes of interviews related to a manuscript they prepared for an exposé of Microsoft's business practices because "[a]cademic freedom engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalism," for "scholars too are information gatherers and disseminators." *Id.* "If [scholars'] research materials were freely subject to subpoena, their sources likely would refuse to confide in them," and the "academician, stripped of sources, would be able to provide fewer, less cogent analyses." *Id.* The court then "balanced the scales" to conclude that, particularly because the professors were nonparties who "have no dog in that fight," permitting discovery of the unpublished notes would "hamstring not only the [professors'] future research efforts but also those of other similarly situated scholars," but would also "infring[e] the free flow of information to the public, thus denigrating a fundamental First Amendment value." *Id.* at 717.

Likewise, in *Dow Chemical Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982), the Seventh Circuit Court of Appeals afforded enhanced First Amendment protections to an academic's work when affirming a district court's order quashing subpoenas by a chemical manufacturer for a university professor's private notes, working papers, and unpublished research data related to a study of the toxicity of chemicals at issue in a government investigation. The *Dow Chemical* court found the information sought by the subpoenas came "within the First Amendment's protection of academic freedom," the contours of which "are difficult to define" but seem to consist of "the right of the individual faculty member to teach, carry on research, and publish without interference from the government" *Id.* at 1274-75 (emphasis added) (internal citations omitted).

The *Dow Chemical* court noted that “academic freedom, like other constitutional rights, is not absolute, and must on occasion be balanced against important competing interests.” *Id.* Even so, “what precedent there is at the Supreme Court level suggests that to prevail over academic freedom the interests of government must be strong and the extent of intrusion carefully limited.” *Id.* As Justice Frankfurter wrote in his concurrence to the majority opinion in *Sweezy v. New Hampshire*, 354 U.S. at 262, “[i]nsights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences” That is why, “[f]or society’s good . . . inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible except for reasons that are exigent and obviously compelling.” *Id.*; see also *In re Bextra and Celebrix Mktg. Sales Practices and Prod. Liab. Litig.*, 249 F.R.D. 8, 12 (D. Mass. 2008) (granting motion for protective order over unpublished articles in the possession of an academic journal after requiring “[t]he party who has served a subpoena seeking pre-publication information compiled by an academic researcher” to make a prima facie showing of the information’s “need and relevance” in light of the objector’s competing interests, and then balancing the requesting party’s assertions with the objector’s “interest in confidentiality,” status as a “non-party stranger” to the litigation, and “the potential injury to the free flow of information” by permitting discovery).

In *Dow Chemical*, the court balanced, on the one hand, Dow’s interest in notes and unpublished information that was “not particularly probative” of the underlying case, with, on the other hand, recognition that “enforcement of the subpoenas would leave the researchers with the knowledge throughout continuation of their studies that the fruits of their labors had been appropriated by and were being scrutinized by a not-unbiased third party whose interests were arguably antithetical to theirs.” 672 F.2d at 1276. The court explained, “[i]t is not difficult to imagine that that realization might well be both unnerving and discouraging. Indeed, it is probably fair to say that the character and extent of intervention would be such that, regardless of its purpose, it would ‘inevitably tend to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.’” *Id.* (quoting *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring)). Additionally, the court observed that “the researchers could reasonably fear that additional demands for disclosure would be made in the future. If a private corporation can subpoena the entire work product of months of study, what is to say further down the line the company will not seek other subpoenas to determine how the research is coming along?” *Id.* Additionally, “[t]o these factors must be added the knowledge of the researchers that even inadvertent disclosure of the subpoenaed data,” particularly without prior peer review, “could jeopardize both the studies and their careers.” *Id.* Given this balancing of interests, and lack of any “obviously compelling” ground for breach of the academic’s privilege, the *Dow Chemical* court affirmed the lower courts decision to quash the subpoenas. See also *Richards of Rockford, Inc. v. Pac. Gas & Elec. Co.*, 71 F.R.D. 388 (N.D. Cal. 1976) (denying motion to compel third-party university professor to produce notes and drafts from interviews with individuals injured by faulty gas company modules, as part of breach of contract action against gas company, on the ground that “society has a profound interest in the research of its scholars, work which has the unique potential to facilitate change through knowledge,” and in a civil proceeding where documents not created for litigation are requested from a nonparty professor, that interest “weigh[s] the balance toward non-disclosure”).

The factors and logic present in the *Dow Chemical* case are each present here. A large hostile corporation is seeking to force, for a tangential and secondary purpose, a nonparty university

professor to reveal the unpublished, unedited, incomplete results from his investigation into that very corporation. His work has not yet been peer reviewed, spell checked, or self-edited, and at points contains notes and outlines. Proctor Decl. ¶ 10. Release of the work into the public sphere before it is ready, even by accident, would open Dr. Proctor to academic criticisms he has not yet had an opportunity to address in the book and could otherwise jeopardize his standing and his career. Id. ¶ 12. Accordingly, as in *Dow Chemical*, this Court should grant the motion for protective order to prevent Defendant from compelling Dr. Proctor to disclose his manuscript under the academic's privilege.

CONCLUSION

Plaintiffs pray that the Court will issue an order protecting Dr. Proctor from being compelled to produce the Manuscript for Defendant.

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1 The Prior Order is an interlocutory order which the Court has unfettered authority to reconsider and modify so long as final judgment in this cause has not been entered. See *AC Holdings 2006, Inc. v. McCarty*, 985 So.2d 1123, 1125 (Fla. 3d DCA 2008) (holding “a trial court has inherent authority to reconsider and modify its interlocutory orders”); accord, *Arnold v. Massebeau*, 493 So. 2d 91, 92 (Fla. 5th DCA 1986). Plaintiffs have standing to prosecute this motion to assert the interests of the witness in nondisclosure of the work in question. See *Sunrise Shopping Center, Inc. v. Allied Stores Corporation*, 270 So. 2d 32, 33-34 (Fla. 4th DCA 1972) (holding that the defendants had standing to file a motion for protective order to quash a subpoena duces tecum on the grounds that it was unreasonable and oppressive as to the witness); *Department of Highway Safety and Motor Vehicles v. Career Service Commission*, 322 So. 2d 64, 67 (Fla. 1st DCA 1975) (citing *Sunrise Shopping Center, Inc.*, 270 So. 2d at 33-34).

2 This is highlighted by Nimmer's analysis of the use of copyrighted materials in the litigation context. Melville Nimmer, *Nimmer on Copyright* § 13.05[D][2]. Nimmer assesses several cases and concludes that in most cases, use of documents in litigation constitutes "fair use." Of course, each of the cases cited by Nimmer is distinguishable from the instant case in that (1) the copyrighted material at issue was central to the case (as opposed to the ancillary nature of the Manuscript); (2) none of the cases clearly dealt with unpublished material; and (3) the copyrighted material at issue was owned by a party rather than a third party expert.

3 Shortly before the decision in *Davis* came down, the Florida Legislature adopted a statutory “shield” law now codified at Fla. Stat., § 90.5015. The Court observed that its decision is consistent with the statute. However, the statute affords the privilege only to “journalists” as specifically defined therein, and that definition excludes “book authors.” See Fla. Stat., § 90.5015(1)(a). Plaintiffs do not rely on the statutory shield but on the constitutional privilege as articulated in the case law.