UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

ELAINE CHAO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 78 C 342
	)	
ESTATE OF FRANK FITZSIMMONS, *et al.*	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DISCLOSURE OF THE QUARTERLY REPORTS OF THE INDEPENDENT SPECIAL COUNSEL

Three participants in the Central States Pension Fund have sought leave to intervene in this action for the limited purpose of seeking public disclosure of the quarterly reports of the Independent Special Counsel, and all attachments to those reports, that have been filed with the Court pursuant to paragraph V(G) of the Consent Decree. As explained in this memorandum, those documents are subject to public disclosure because they have been submitted to the Court to inform it in the course of administering the Consent Decree, because the Court has relied on the reports for that purpose, and because the parties have not provided any basis for keeping the documents confidential.

STATEMENT

This action has been pending for more than twenty-five years. In 1982, the case was settled through entry of a Consent Decree that required the Central States Southwest and Southeast Areas Pension Fund ("CSPF") to place the management of its assets and investments in the hands of a named fiduciary whose appointment was subject to Court approval. The Consent Decree further provided for judicial appointment of an Independent Special Counsel ("ISC"), Section V, at 16-17. The ISC was to "serve the Court by identifying and resolving any problems or issues that may

arise." *Id.* at 16. To that end, the ISC has broad-ranging power to examine the activities of CSPF and to oversee and report on CSPF's compliance with the Consent Decree. *Id.* ¶ V(A). For example, the ISC has full access to meetings, personnel, and documents connected with CSPF, *id.* ¶ V(C), and no attorney-client or any other privilege applies to any communication between the ISC and CSPF or its leadership, personnel or service providers. *Id.* ¶ V(H). The Court, meanwhile, retained jurisdiction to ensure compliance, *id.* ¶ VII, and the ISC was required to "file quarterly reports with the Court, with copies to the Secretary and the Pension Fund." *Id.* ¶ V(G).

Over the past 22 years, the Court has received the quarterly reports as required by the Decree, and it has been informed by those reports in the exercise of its judicial authority to supervise the implementation of the Consent Decree. The Court has regularly received and approved motions for the appointment of trustees, fiduciaries, and investment managers, for the adoption of investment policies, and for modifications of the Consent Decree. In November 2003, the Court broke a deadlock between employer and union trustees and approved certain benefit reductions to avoid funding deficiencies. In issuing this ruling, the Court specifically identified the "quarterly reports from the special counsel to the Court" as part of the basis for his information about CSPF affairs: "through these and other communications the Court has been regularly and thoroughly informed about the administration of the [Central States Pension and Health] Funds for many years." Docket Number 760.

The changes in benefit levels have caused widespread concern and criticism among the membership of the International Brotherhood of Teamsters ("IBT"), and the CSPF has published materials defending itself against charges of mismanagement, as well as defending the IBT leadership against charges that it knowingly or carelessly failed to negotiate sufficient contribution

levels to maintain current benefits. CSPF has pointed to the Court's supervision as proof that there has been no mismanagement, and in fact has attributed the benefit changes to the Court's orders. *See Teamwork: The Magazine of the [CSPF] and Health and Welfare Funds* (Spring 2004) at 4-10. This publication has been issued hand-in-hand with communications by the IBT leadership that attack critics of CSPF, and indicate that the Union has hired its own independent actuary to study the CSPF's financial situation and verify the need for benefit cuts. *Questions and Answers about the Central States Pension Fund*, http://www.teamster.org/03news/hn%5F030310%5F4.htm (updated 6/3/2004).

Movants and other members desire to scrutinize CSPF's claims for themselves. Funds have been raised to hire an independent actuary to study CSPF and determine whether there is any alternative to the current benefit reductions. Movants also want to determine whether irresponsible union leadership is responsible in whole or in part for current problems. And they seek to understand the basis on which the Court has authorized the benefit cuts put forward by representatives of the CSPF. Accordingly, they have attempted to gather as much information as possible. However, an actuary has informed them that there is insufficient information available publicly to conduct a proper study. Accordingly, movants sought to examine the ISC's quarterly reports and their attachments – the same documents on which the Court relied in ruling on the motion concerning benefit levels last fall – in order to reach their own conclusions, with the actuary's assistance.

Although the Consent Decree provides that quarterly reports are "filed" with the Court, the reports have not been reflected on the docket, and are not maintained in the Clerk's office. Accordingly, on March 26, 2004, movants' counsel wrote to CSPF, the Department of Labor, and

the ISC, citing Seventh Circuit cases guaranteeing the right to examine judicial records and asking that copies of all quarterly reports, and all attachments to those reports, be placed in the Clerk's office so that his clients could review them. On April 16, 2004, counsel for CSPF indicated that his staff was researching the issue, and promised a substantive response no later than April 30, 2004. On April 26, 2004, ISC Frank McGarr responded that his status as an assistant to Judge Moran and to the Department of Labor in their respective oversight functions made his role "unique," and that, "without an expectation of privacy," he would have to curtail his reports in a way that would undercut their purpose. He contended that the Consent Decree's requirement that his reports be "filed with the Court" required "delivery to Judge Moran, and nothing more." A copy of this exchange of correspondence is attached. CSPF later informed movants' counsel that CSPF endorsed Judge McGarr's position and would not be sending any further response. The Labor Department has never responded formally, but its counsel has told movants' counsel that the Department is not willing to disclose its copies of the quarterly reports.

Accordingly, movants have moved for leave to intervene and now submit this motion to challenge the practice of keeping the ISC's reports secret.

ARGUMENT

THE QUARTERLY REPORTS AND THEIR ATTACHMENTS ARE JUDICIAL RECORDS THAT MUST BE DISCLOSED PURSUANT TO THE FIRST AMENDMENT AND THE COMMON LAW REQUIREMENT OF PUBLIC ACCESS.

The Supreme Court and the United States Court of Appeals for the Seventh Circuit have repeatedly upheld the public right of access to judicial records. *E.g.*, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978); *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002); *Union Oil Co. v. Leavell*, 220 F.3d 562 (7th Cir.

2000); *Grove Fresh Distributors v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir.1994); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir.1984).

> The general rule is that the record of a judicial proceeding is public . . .. Not only do such records often concern issues in which the public has an interest . . . but also the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret.
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> *Jessup*, 277 F.3d at 927.

Only if the party wishing the document to remain private can show a "compelling interest in secrecy" will the court seal portions or the entirety of court records. *Id.* at 928.

> The First Amendment presumes that there is a right of access to proceedings and documents which have "historically been open to the public" and where the disclosure of which would serve a significant role in the functioning of the process in question. . . . The difficulties inherent in quantifying the First Amendment interests . . . require that we be firmly convinced that disclosure is inappropriate before arriving at a decision limiting access. Any doubts must be resolved in favor of disclosure.
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> *Grove Fresh*, 24 F.3d at 897.

A. The Quarterly Reports Are Judicial Records.

First, the ISC's quarterly reports are "judicial records" subject to scrutiny under the *Grove Fresh* rule. In this regard, movants rely first and foremost on the language of the Consent Decree, which requires that the quarterly reports be "filed with the Court." Moreover, the purpose of the filings is to aid the Court in the performance of its ongoing oversight responsibilities under the Consent Decree, and, in fact, the Court has said publicly that it relies on those reports in the performance of its judicial oversight duties. Docket Item No. 760, Memorandum and Order (November 17, 2003), at 2. The Seventh Circuit has applied the common law right of access to "those records of a proceeding that are filed in court or that, while not filed, are relied upon by a judicial officer in making a ruling or decision." *Smith v. U.S. District Court Officers*, 203 F.3d 440,

442 (7th Cir. 2000), *citing Grove Fresh*, 24 F.3d at 897. Likewise, the Third Circuit has held that "[w]hether or not a document or record is subject to the right of access turns on whether that item is considered to be a 'judicial record.' The status of a document as a 'judicial record,' in turn, depends on whether a document has been filed with the court or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings." *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001). The ISC's reports easily satisfy this test.

Nor does the fact that the current and past ISC's have been sending their reports to chambers instead of the Clerk's office affect their status as judicial records, because the Federal Rules of Civil Procedure, Rules 5(d) and (e), require such papers to be transmitted to the Clerk's office. Under Rule 5(d), "[a]ll papers required to be served upon a party . . . must be filed with the court within a reasonable time after service." Although Rule 5(e) allows such papers to be filed with the judge, "in [that] event the judge shall . . . forthwith transmit them to the office of the Clerk." Thus, receipt by the Court's staff, or by a district judge, is sufficient to constitute "filing," even if the document is not noted in the docket. *Houston v. Lack*, 487 U.S. 266, 274 (1988); *Forgy v. Norris*, 64 F.3d 399, 401 (8th Cir. 1995); *United States v. Solly*, 545 F.2d 874, 876 (3d Cir.1976). Indeed, the ISC's position is most analogous to that of a special master, and Rule 53(f) expressly requires a master's report to be filed with the Court and his reports made available to all parties. Any provision for ex parte communications with the Court must be set forth expressly in the order of appointment, Rule 53(b)(2)(B), and the 2003 Advisory Committee Notes state that ex parte communications should be the exception and not the rule.

ISC McGarr asserts that his situation is unique and unprecedented, but courts have appointed monitors a number of cases to assist in the implementation of complex consent decrees, and in each

such case where the issue has arisen, the monitor's written reports to the Court have been treated as judicial records, subject to the general rule of public access. In *B.H. v. Ryder*, 856 F. Supp. 1285 (N.D. Ill. 1994), *aff'd sub nom B.H. v. McDonald*, 49 F.3d 294 (7th Cir. 1995), the court described the terms of a consent decree entered into between a class of neglected children and the Illinois Department of Children and Family Services (DCFS). A copy of the relevant portions of the consent decree in *B.H.* is attached. That consent decree, like the agreement here, involved a court-appointed monitor, highly analogous to the ISC, who was required to oversee the implementation of the *B.H.* consent decree and report periodically to the court. ¶ 66. Unlike the Consent Decree here, the decree in *B.H.* made specific provision for the monitor to communicate ex parte with the Court. ¶ 73(b). However, the periodic reports of the court-appointed monitor for which that decree provided were filed publicly, appeared on the docket, and were available to the public. *Id.* at 1291. In affirming a district court order excluding the public from in-chambers conferences held to negotiate resolution of certain disputes under the decree, the Seventh Circuit emphasized that "the public had access to all of the monitor's reports, the DCFS's responses to the reports, and the plaintiff's written replies to both of these submissions." 49 F.3d at 301.

Similarly, in the Southern District of New York, a court officer was appointed pursuant to a consent decree between the United States and Local 100 of the Hotel and Restaurant Employees to investigate allegations of corruption. *See United States v. Amodeo*, 71 F.3d 1044, 1047 (2d Cir. 1995) (describing mechanics of court officer's role in implementing the consent decree). In *Amodeo*, the court-appointed monitor was not required to file reports with the court, but did so anyway. These reports – both those she intended to be publicly available and those she believed should be kept confidential – are reflected in the docket. See S.D.N.Y Docket No. 1:92-cv-07744RPP

("*Amodeo* Docket"). The docket reflects her public reports as "letters" and also includes a record of material she preferred remain confidential. *Amodeo*, 71 F.3d at 1044. The confidential reports were delivered directly to the district court judge in separate reports, *id.*, but nonetheless appear in the docket as "sealed" documents. *See Amodeo* Docket. In an initial decision, the Second Circuit held that the monitor's report, although delivered directly to chambers, was nevertheless a judicial record presumptively subject to public inspection. *United States v. Amodeo*, 44 F.3d 141, 146 (2d Cir. 1995). A second decision following the district court's decision on remand held that one part of the report was to be released with redactions, but another part must be withheld in its entirety. 71 F.3d at 1052-1053.

Like the reports of the court-appointed monitors in *B.H.* and *Amodeo*, the ISC reports and their attachments are judicial records and hence are subject to the common law and constitutional mandates of presumptive public access.

B. The Law Presumes That the ISC Reports Should Be Public, Absent Proof to the Contrary.

Once it is established that the documents in question are judicial records, a strong presumption of openness requires "compelling justification" to keep a particular record secret:

> People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. . . . Judges deliberate in private but issue public decisions after public arguments based on public records. . . . Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.
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> *Union Oil Co. v. Leavell*, 220 F3d 562, 568 (7th Cir. 2000).

The factors weighing in favor of the presumption of public access include the following:

> First is the general interest in understanding disputes that are presented in a public forum for resolution. Second is the public's interest in assuring that courts are fairly

> run and judges are honest. . . . We add to this side of the balance the public's right of access, guaranteed by the first amendment, to information before the court relating to matters of public interest.
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> *In re Continental Illinois Securities Litigation*, 732 F.2d at 1314.

Accordingly, once it is established that documents have been made part of the court's decision making process, the Court must be "firmly convinced that disclosure is inappropriate if [the Court is to reject demands for access[, and] doubts must be resolved in [movants'] favor. *Id.* at 1313.

Moreover, the presumption in favor of public access is bolstered when the government is a party to the suit, as is the Secretary of Labor here: "The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch." *Smith v v. U.S. District Court Officers*, 203 F. 3d 440, 650 (7th Cir. 2000), *quoting FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987).

The ISC's quarterly reports are the sort of records that are subject to this strong presumption favoring public access. The Consent Decree provides that the ISC's function is to assist the Court in performing its judicial oversight role in ensuring that the Decree is being followed, "by assisting in identifying and resolving any problems or issues that may arise in connection with [compliance with the] Decree." ISC McGarr's own letter, which CSPF has endorsed as stating its own position, reaffirms the ISC's capacity as an assistant to the Court's pursuit of its oversight jurisdiction. The Decree required the quarterly reports to be "filed with the Court" to aid in that process. And the Court has previously made clear its reliance on the information that it regularly gleans from the reports in coming to conclusions about what orders should be issued in its oversight capacity. Docket Number 760, at 2. In sum, the strong presumption of public access applies.

C. Because the Parties Have Not Established a Compelling Justification for Keeping Specific Records Secret, the Reports and Their Attachments Must Be Disclosed.

> In order to override the common law right of access, the party seeking the closure of a hearing or the sealing of part of the judicial record "bears the burden of showing that the material is the kind of information that courts will protect" and that "disclosure will work a clearly defined and serious injury to the party seeking closure." In delineating the injury to be prevented, specificity is essential. Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient. . . . "[T]he strong common law presumption of access must be balanced against the factors militating against access. The burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption."
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> *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001) (citations omitted).

Similarly, the Second Circuit has admonished those seeking to seal court records that "a naked conclusory statement statement [of possible injury] falls woefully short of the kind of showing which raises even an arguable issue" in support of sealing. *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982). The burden rests on the person favoring secrecy to "rebut" this presumption through a "demonstration that suppression is essential." *Grove Fresh*, 24 F.3d at 897. The justification must "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." *Baxter Int'l v. Abbott Laboratories*, 297 F.3d 544, 548 (7th Cir. 2002). Individual documents must be redacted to protect only the most sensitive portions while making the remainder public. *United States v. Amodeo*, 71 F.3d at 1047. *See also Jessup*, 277 F.3d at 928 (suggesting that when confidentiality is required, only "portions" of documents should be sealed); *Leavell*, 220 F.3 at 568 (same); *Citizens First Nat. Bank v. Cincinnati Ins. Co.*, 178 F3d 943, 945 (7th Cir. 1999) (same).

After it receives these purported justifications for keeping secret records to which the First Amendment presumption of access applies, the Court must: (1) determine, in specific findings made

on the record, if there is a substantial probability of prejudice to a compelling interest; (2) if such a substantial probability is found, consider reasonable alternatives to sealing; (3) if reasonable alternatives are not available, determine whether the prejudice to the compelling interest overrides the qualified First Amendment right; and (4) if sealing is warranted, devise an order that is narrowly tailored to its purposes. *United States v. Doe*, 63 F.3d 121, 128 (2d Cir. 1995).

To date, however, only conclusory statements regarding the need for confidentiality have been presented, based on apparent assertions of privilege that were waived more than twenty years ago in the Consent Decree. The ISC has simply asserted that he needs to keep his reports confidential because he has access to meetings of the CSPF trustees and to a variety of other persons, including "management, union, fund administration or government." But there is no showing that specific reports disclose those communications, and in any event the Consent Decree specifically waives the attorney-client privilege and every other privilege that might otherwise attach to the ISC's communications with the Pension Fund or its leadership, personnel or service providers. Consent Decree ¶ V(h). Accordingly, as in *United States v. Amodeo*, 71 F.3d at 1052, this waiver of privilege bars reliance on privilege to protect the reports from disclosure. Nor, indeed, can any valid claim of privilege be made based on communications with the government or the union, since the reports were provided to all parties to the litigation. It is our understanding that CSPF circulates the quarterly reports to members of the Board of Trustees, and that a Trustee, in turn, can then decide to share a report with union officers whom the Trustee believes needs to see it. It is only the membership and politically disfavored officers who are kept in the dark absent a "leak."

Moreover, any expectation of privacy is diminished insofar as information is gleaned from "representative institutions with legal and ethical obligations to the membership at large." *Id.* at

1053. There is no showing that the reports contain "unverifiable hearsay [or] material that might be described as scandalous, unfounded or speculative." *Id.* at 1052. Counsel have been able to review one of the ISC's quarterly reports (copy attached), and nothing in that report reflects communications of information derived from privileged sources, or suggests the reports generally contain the sort of personally embarrassing information that would entitle private individuals to protection from unwarranted disclosure.

Indeed, it is arguable that, under the Local Rules, the ISC waived any objections to disclosure when he failed to invoke processes provided by Local Rules 5.8 and 26.2 to ensure that documents were kept under seal. Under Local Rule 5.8, any document that is intended to be maintained under seal **must** be submitted with a cover sheet setting forth that status and identifying the pre-existing court order that authorizes such filings. If the cover sheet is absent, the paper "shall not be treated as a restricted or sealed document." Had this procedure been followed, movants and any other interested parties would have been placed on notice that secrecy was being invoked and thus would have been accorded the proper opportunity to object. *See Hartford-Courant v. Pellegrino*, 371 F.3d 49, 60 (2d Cir. 2004) (First Amendment guarantees right of access to docket sheets as means to exercise First Amendment right of access to underlying documents and hearings). There is no indication that this procedure was followed when the ISC's reports were submitted to chambers, and for this reason, as well as the absence of any concrete justification for continued confidentiality, each of the reports and all of their attachments should promptly be filed with the Clerk so that members of the public can inspect and copy them.

CONCLUSION

The motion for disclosure of quarterly reports and their attachments should be granted.

Respectfully submitted,

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July 14, 2004