

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 20801

DELHAIZE AMERICA, INC.,)
)
Plaintiff,)
)
v.)
)
REGINALD S. HINTON, Secretary of)
Revenue of the State of North Carolina,)
)
Defendant.)

BRIEF IN OPPOSITION TO
MOTION FOR PROTECTIVE ORDER

OVERVIEW

Plaintiff insists that it is entitled to litigate its corporate tax dispute with North Carolina under a veil of secrecy. This case is extremely important to the citizens of this State – both fiscally and as a matter of tax policy. Plaintiff’s effort to recoup millions of dollars from the State’s treasury through the use of abusive tax shelters should not escape public scrutiny. Plaintiff essentially asks this Court to treat the tax shelter it purchased from Coopers & Lybrand as a protectable trade secret.

Federal and State guarantees of public access loom large in this dispute and trump Plaintiff’s overreaching demands for a protective order. This is not a commercial dispute between two private litigants battling over patented processes or other trade secrets. It is a dispute over a tax shelter designed for the sole purpose of reducing Plaintiff’s North Carolina corporate tax liability and the revenues available to the citizens of this State. Given the fundamental public nature of this case, heightened – not lessened – scrutiny applies. Under the First Amendment to the United States Constitution and Article I, § 18 of the North Carolina Constitution, only the most compelling interest can justify limiting public access to judicial records. No such compelling interest exists here.

The claims made by Plaintiff are not unique to this litigation. Similarly-positioned litigants in similar cases involving abusive tax shelters have argued and lost similar motions. In *Wal-Mart Stores East, Inc. v. Hinton* – another high profile case – former Court of Appeals Judge Clarence Horton denied the very relief Plaintiff seeks in this case: a motion to seal relevant filings from public scrutiny. This case – like *Wal-Mart* – is a significant matter of public interest.

Senior Resident Superior Court Judge Donald Stephens also rebuffed a taxpayer's efforts to conduct its litigation in private in another recent corporate tax case, *DaimlerChrysler v. Tolson*. By these rulings, both judges recognized that a corporation waives any protections otherwise afforded by N.C. Gen. Stat. § 105-259 when it files a tax refund action. This Court should similarly reject Plaintiff's attempt to shield its tax sheltering activities from the public's eye. As the Court has recognized, "Plaintiff has chosen to file a refund [action] and has obviously put certain matters at issue which will require public disclosure."¹

Plaintiff maintains that it had a valid business purpose for the restructuring which, it argues, justifies all of its tax planning and renders the Secretary powerless to take any of the remedial actions authorized by the General Assembly. It asserts, for example, that the restructuring resulted in "economic benefits," "economies of scale," "lower labor and overhead costs," and that the tax savings "pale in comparison to [these other] savings."² To date, despite repeated requests, Plaintiff has been wholly unable to document any of these other purported

¹ Transcript of 28 March 2008 proceedings at 18.

² Letter dated 26 September 2006 from Plaintiff to Defendant at 5; *see also* Plaintiff's Responses to Defendant's Request for Production dated 4 May 2007 at 11 (admitting that the specific benefits of the restructuring have not been quantified and that no cost-benefit analysis was undertaken).

savings. Nonetheless, Plaintiff seems to argue in conclusory fashion that if they exist they necessarily must be secret.

To the extent this information does exist (and if so, Plaintiff appears to have violated its previous discovery obligations), it is directly relevant to the current dispute. Plaintiff has made this type of information the centerpiece of its claims in this litigation. Defendant's requests for production represent fundamental and legitimate areas of inquiry. Federal and state cases confirm this point: an economic substance, business purpose or sham transaction analysis necessarily requires delving into the taxpayer's business operations and examining the economic benefits and costs of the relevant transaction. Without this critical information, the Court would be unable to perform the necessary analysis.³

Plaintiff's desire to conduct its tax litigation in secret is diametrically opposed to fundamental guarantees of public access to the courts, especially in light of the inherently public nature of this lawsuit and its vital significance to North Carolina.

[C]ommon sense tells us the greater the motivation a corporation has to shield its operations, the greater the public's need to know. In such cases, a court should not seal records unless public access would reveal legitimate trade secrets, a recognized exception to the right of public access to judicial records.

Brown & Williamson Tobacco, Co. v. Federal Trade Commission, 710 F.2d 1165, 1180 (6th Cir. 1983). Plaintiff's conclusory allegations of confidentiality wholly fail to satisfy any standards for a protective order and its motion must be denied.

³ Plaintiff, in fact, concedes the relevancy of the information sought: "that information [methods and cost-savings strategies related to its procurement and private label functions] may be useful or even necessary in order to help resolve this case." Brief at 6.

ARGUMENT

I. CONDUCTING TAX LITIGATION OF SIGNIFICANT PUBLIC INTEREST IN SECRET IS CONTRARY TO STATE AND FEDERAL GUARANTEES OF ACCESS TO THE COURTS

Plaintiff's attempt to cloak its tax refund litigation in a veil of secrecy violates the public's right of access under state and federal law. "There must be a strong presumption against sealing any document that is filed with the court. Our courts do not operate in secrecy. Except on rare occasions and for compelling reasons, everything that courts do is subject to direct public scrutiny." *City of Hartford v. Chase*, 942 F.2d 130, 137 (2nd Cir. 1991) (Pratt, J., concurring). "To hide from the public eye entire proceedings, or even particular documents or testimony forming a basis for judicial action that may directly and significantly affect public interests, would be contrary to the premises underlying a free, democratic society." *Id.* This admonition applies with special force here.

A. STATE LAW GUARANTEES OF PUBLIC ACCESS

State law guarantees of public access stymie Plaintiff's efforts to conduct its tax refund action out of the public's eye. First, N.C. Gen. Stat. § 7A-109(a) specifically grants the public the right to inspect court records in civil and criminal proceedings. This right may only be abrogated when "required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial." *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999).⁴ North Carolina has also recognized a common law right of the

⁴ In *Virmani*, the Court held that a statute that explicitly exempted medical peer review records from the definition of public records and specifically stated that they "shall not be subject to discovery or introduced into evidence at any civil action" represented a "legislative choice

public to inspect public records since at least 1887. *Id.* at 473, 515 S.E.2d at 691.

Additionally, Article I, § 18 of the North Carolina Constitution guarantees the public a qualified constitutional right of access to civil court proceedings. *Id.* at 476, 515 S.E.2d at 693. This right may only be limited “where there is a compelling countervailing public interest and closure of the court or sealing of the documents is required to protect such countervailing public interest.” *Id.* “Unless such an overriding interest exists, the civil court proceedings and records will be open to the public.” *Id.*

Here, Plaintiff can offer no compelling countervailing interest to justify denying North Carolina citizens the rights guaranteed by the State Constitution.

B. FEDERAL COMMON LAW AND FIRST AMENDMENT GUARANTEES OF PUBLIC ACCESS

The public also has a right of access to the courts and judicial documents under both the Federal common law and the First Amendment to the United States Constitution. *See Rushford v. The Washington Post Co.*, 846 F.2d 249, 253 (4th Cir. 1988). “While the common law presumption in favor of access attaches to all judicial records and documents, the First Amendment guarantee of access has been extended only to particular records and documents.” *Stone v. University of Maryland*, 855 F.2d 178, 180 (4th Cir. 1988) (internal quotations omitted). Significantly, the First Amendment right of access applies to documents filed in connection with dispositive motions in civil litigation. *Rushford*, 846 F.2d at 253.

Under the common law, the presumption of access can only be rebutted “if countervailing

between competing public concerns.” 350 N.C. at 463, 464, 515 S.E.2d at 685, 686. Here, there is no similar “legislative choice” exempting the information Plaintiff seeks to shield from the public.

interests heavily outweigh the public interests in access.” *Rushford*, 846 F.2d at 253. “The party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption.” *Id.*

“Under the First Amendment, on the other hand, the denial of access must be necessitated by a compelling governmental interest and narrowly tailored to meet that interest.” *Id.* (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). To limit the public’s right to access documents filed in connection with a dispositive motion, “there must be a showing . . . that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest.” *Id.* “The burden to overcome a First Amendment right of access rests on the party seeking to restrict access, and that party must present specific reasons in support of its position.” *Virginia Department of State Police*, 386 F.3d 567, 575 (4th Cir. 2004), *cert. denied*, 544 U.S. 949 (2005). “The First Amendment right of access cannot be overcome by [a] conclusory assertion.” *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1. 15 (1986).

“Regardless of whether the right of access arises from the First Amendment or the common law, it ‘may be abrogated only in unusual circumstances.’” *Virginia Department of State Police*, 386 F.3d at 576 (quoting *Stone*, 855 F.2d 182). There is no compelling governmental interest here that trumps the public right of access to this critical litigation concerning Plaintiff’s tax sheltering activities in North Carolina.

C. PLAINTIFF’S PROPOSED PROTECTIVE ORDER IS CONTRARY TO THE PUBLIC RECORDS ACT AND OTHER LAW

The North Carolina Supreme Court has recognized the “legislature’s mandate for open

government,” and that, “[b]y enacting the Public Records Act, the legislature intended to provide that, as a general rule, the public must have liberal access to public records.” *News & Observer Publishing Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992) (internal quotations omitted); *see also* N.C. Gen. Stat. § 132-1 (“The public records and public information compiled by the agencies of North Carolina government . . . are the property of the people.”).

Plaintiff cavalierly dismisses as “untenable” Defendant’s position that he must comply with the dictates of the Public Records Act and cannot enter into an agreement which contains contrary provisions. Brief at 8. It is Plaintiff’s position which is untenable.⁵ Defendant is neither authorized nor legally capable of entering into any agreement which is contrary to his statutory responsibilities and the expressed public policy of the General Assembly. *Cauble v. Trexler*, 227 N.C. 307, 311, 42 S.E. 77, 80 (1947) (agreements against public policy or which violate a provision of a statute are illegal and void); *National Medical Enterprises, Inc. v. Cumberland County*, 72 N.C. App. 245, 250, 324 S.E.2d 268, 271 (1985) (same).

Here, the proposed protective order is contrary to the Public Records Act and Defendant’s other statutory obligations in at least two ways. First, Defendant cannot voluntarily consent to withhold public records that the Public Records Act requires him to disclose. Remarkably, Plaintiff maintains that, although its protective order does not limit itself to “trade secrets” as defined under N.C. Gen. Stat. § 132-1.2(1), “the public records law clearly contemplates that

⁵ Plaintiff also mischaracterizes Defendant’s position. *See* Brief at 4. Defendant obviously does not argue that the Public Records Act “outlaws” all protective orders. The North Carolina Supreme Court resolved the tension between the Public Records Act and the judiciary’s right to control its records in *Virmani*, 350 N.C. 449, 515 S.E.2d 675; *see also supra* at 4-6 (discussing other statutory and constitutional limitations on a court’s authority to close proceedings and seal documents).

private parties may disclose confidential business information to an agency of the State without surrendering that information to the general public.” Brief at 9. The North Carolina Supreme Court has explicitly held to the contrary. “[I]n the absence of clear statutory exemption or exception, documents falling within the definition of ‘public records’ in the Public Records Law must be made available for public inspection.” *Poole*, 330 N.C. at 486, 412 S.E.2d at 19. Significantly, the Court emphasized: “We refuse to engraft upon our Public Records Law exceptions based on common-law privileges . . . to protect items otherwise subject to disclosure.” *Id.* at 486, 412 S.E.2d at 20; *see also Wilmington Star-News, Inc. v. The New Hanover Regional Medical Center*, 125 N.C. App. 174, 182, 480 S.E.2d 53, 57 (1997) (documents that did not meet the literal requirements of N.C. Gen. Stat. § 132-1.2(1) not entitled to statutory exemption from Public Records Act even though disclosure would be detrimental and could result in competitive disadvantage), *appeal dismissed*, 346 N.C. 557 (1997).

Second, the proposed protective order conflicts with Defendant’s statutory and contractual obligations. The proposed order states that all confidential information shall be used “solely in connection with this litigation . . . and not for any other purpose.” Proposed protective order at 4. The General Assembly has authorized Defendant to enter into agreements with other states or the United States for the purposes of coordinating the administration and collection of taxes. N.C. Gen. Stat. § 105-268.1. Defendant has done so. Plaintiff’s proposed restrictions on the use of information improperly impairs Defendant’s ability to comply with such agreements – agreements which the General Assembly anticipated would involve the exchange of information and, as a result, assist in the State’s collection of taxes. Plaintiff’s order would also restrict Defendant’s use of the information to its 2000 tax year despite its potential relevance to other tax

years. This is yet another impermissible and unwarranted restriction on Defendant's statutory responsibilities to collect North Carolina taxes.

D. PLAINTIFF WAIVED ANY STATUTORY RIGHTS OF CONFIDENTIALITY BY FILING THIS REFUND ACTION AND IS THEREFORE NOT ENTITLED TO A PROTECTIVE ORDER

Plaintiff maintains that it has a "statutory right" to maintain the privacy of its tax information in this litigation, and that the Secretary has a "duty" to refrain from disclosing that information. Brief at 7. Plaintiff is mistaken. Although N.C. Gen. Stat. § 105-259 generally prohibits the disclosure of "tax information," a taxpayer waives the protections of this provision when it files a tax refund action.

Two recent North Carolina superior court rulings forcefully illustrate this point. *Wal-Mart Stores East, Inc. v. Hinton*, Wake County Superior Court Civil File No. 06-CVS-3929 (21 November 2007); *DaimlerChrysler North American Holding Co. v. Tolson*, Wake County Superior Court Civil File No. 06-CVS-5110 (17 July 2006). In both of these corporate tax cases, the court refused to enter the plaintiffs' requested protective orders. In *Wal-Mart*, former Court of Appeals Judge Clarence Horton, sitting as a specially-designated judge, denied the taxpayer's motion for a protective order. See Exhibit A attached hereto. In *DaimlerChrysler*, the taxpayer advanced the exact same argument as Plaintiff makes here – that disclosure of its corporate tax information would violate N.C. Gen. Stat. § 105-259. Wake County Senior Resident Superior Court Judge Donald Stephens rejected this argument and refused to enter a protective order. See Exhibit B attached hereto.

Plaintiff makes much of the fact that a protective order was entered in *Directv, Inc. v. State*, 178 N.C. App. 659, 632 S.E.2d 543 (2006), a sales tax case. Brief at 1, 10. As an initial

matter, Plaintiff incorrectly states that Exhibit B to its motion (which is unsigned) was the protective order entered in *Directv*; Exhibit B was not the actual order entered. More importantly, however, the protective order in *Directv* is an anomaly. There has never been, to the best of Defendant's knowledge, a protective order entered in a North Carolina corporate tax case.

Plaintiff's contention that the court in *Directv* rejected the "same arguments advanced here" is patently false. There, the State did not voice any First Amendment or public access concerns or argue that the taxpayer had waived any privilege by filing the lawsuit. Significantly, when the Secretary did raise First Amendment issues in opposition to Wal-Mart's motion for a protective order, Judge Horton (who had previously granted the motion for a protective order in *Directv*) denied the motion. Plaintiff's motion should likewise be denied here.

Plaintiff complains that, under Defendant's view, a taxpayer is "forced to choose either to give up its rights under N.C. Gen. Stat. § 105-256 [sic] in order to litigate against improperly assessed taxes or else simply submit to whatever the Secretary has assessed in order to maintain the confidentiality of its business records." Brief at 7. This, however, is precisely the state of the law. The issue is often framed as follows: "[P]laintiff can either maintain her lawsuit or the confidentiality of her returns, but not both." *Wilson v. Superior Court*, 63 Cal. App. 3d 825, 830, 134 Cal Rptr. 130, 133 (1976). "The plaintiff must choose whether he or she will assert the tax return privilege or pursue the lawsuit." *Young v. U.S.*, 149 F.R.D. 199, 205 (S.D. Cal. 1993).

Federal courts regularly hold that a taxpayer waives any right to confidentiality under federal statutes comparable to N.C. Gen. Stat. § 105-259 when it initiates a lawsuit and makes its

tax return or tax attributes a component of the litigation.⁶ State courts have similarly held that taxpayers waive any confidentiality of their tax return when they seek to litigate questions regarding their income.⁷ By initiating this refund action, Plaintiff has placed its tax information directly in issue and thereby waived any privilege otherwise afforded by N.C. Gen. Stat. § 105-

⁶ See, e.g., *Kingsley v. Delaware, Lackawanna & Western R.R. Co.*, 20 F.R.D. 156, 158 (S.D.N.Y. 1957) (“once a person has made the amount of his income an issue in litigation, it becomes a legitimate subject of inquiry and he can no longer claim that the information contained in the returns is confidential” under federal statutory provisions comparable to N.C. Gen. Stat. § 105-259); *Tollefsen v. Phillips*, 16 F.R.D. 348, 349 (D. Mass. 1954) (“[t]he plaintiff, having made his earnings an issue, can scarcely say that [his federal tax returns] are confidential information in this case” under former version of federal non-disclosure statute); *Northeast Women’s Center, Inc. v. McMonagle*, No. 85-4845, 1987 U.S. Dist. LEXIS 10587 at *10 (E. D. Pa. Nov. 7, 1987) (taxpayer waived confidentiality of tax returns under IRC § 6103 by placing income at issue in litigation), *aff’d in part, rev’d in part*, 868 F.2d 342 (3rd Cir.), *cert. denied*, 493 U.S. 901 (1989); see also *Heathman v. U.S. Dist. Court for Cent. Dist. of Cal.*, 503 F.2d 1032, 1037 (9th Cir. 1974) (Chambers, J., dissenting) (once taxpayer chooses to litigate issues concerning his income, he waives the protections of IRC §§ 6103 and 7213 and consents to all legitimate inquiries into his income; because taxpayer did not seek to litigate any issue concerning income, federal tax returns should remain privileged) (majority held returns were not privileged under IRC § 6103); see also *Biliske v. American Live Stock Ins. Co.*, 73 F.R.D. 124, 126 n.1 (W.D. Okla. 1977) (“Where the litigant himself tenders an issue as to the amount of his income, there is no privilege against disclosure of his tax returns.”); *Beach v. Morris*, 281 B.R. 917 (B.A.P. 10th Cir. 2002) (affirming bankruptcy court’s order that when a debtor files Chapter 7, it waives its right to the confidentiality of its tax documents).

⁷ See, e.g., *Schnabel v. Superior Court*, 5 Cal. 4th 704, 721, 854 P.2d 1117, 1127 (1993) (recognizing that California’s judicially created privilege against disclosure of tax returns is waived when gravamen of lawsuit is so inconsistent with continued assertion of taxpayer’s privilege as to compel conclusion that privilege has been waived); *Wilson*, 63 Cal. App. 3d at 831, 134 Cal Rptr. at 134 (plaintiff waived California’s judicially created privilege of confidentiality of federal and state tax returns by filing complaint placing contents of those returns directly in issue); *In re Umbach*, 350 P.2d 299, 301, 1960 Okla. LEXIS 303, at *6-7 (1960) (recognizing that where a litigant himself tenders an issue as to the amount of his income, there is no privilege against the disclosure of his tax returns); *Kine v. Forman*, 205 Pa. Super. 305, 311, 209 A.2d 1, at *4 (1965) (copies of federal income tax returns are not privileged especially where taxpayer has put his earning capacity in issue); *Davis v. Atlantic Coast Line R.R. Co.*, 227 N.C. 561, 566, 42 S.E.2d 905, 909 (1947) (plaintiff’s federal income tax return properly introduced to contradict his testimony regarding his income).

259.

Corporate tax information is routinely filed without restriction as a matter of course in North Carolina tax litigation. For example, in each of the eight most recent corporate income tax cases that have reached the appellate level, the Secretary introduced, and the court received into evidence, corporate tax information which became part of the publicly-accessible record. None of this information was made subject to a protective order. *See Lenox, Inc. v. Tolson*, 353 N.C. 659, 548 S.E.2d 513 (2001);⁸ *Union Carbide Corp. v. Offerman*, 351 N.C. 310, 526 S.E.2d 167 (2000);⁹ *Polaroid Corp. v. Offerman*, 349 N.C. 290, 507 S.E.2d 284 (1998), *cert. denied*, 526 U.S. 1098 (1999);¹⁰ *Philip Morris USA Inc. v. Tolson*, 176 N.C. App. 509, 626 S.E.2d 853 (2006), *rev. denied, appeal dismissed*, 362 N.C. 356, 644 S.E.2d 231 (2007);¹¹ *Central Telephone Co. v. Tolson*, 174 N.C. App. 554, 621 S.E.2d 186 (2005), *rev. denied*, 360 N.C. 532,

⁸ The taxpayer's North Carolina corporate income and franchise tax return, pro forma federal corporate income tax return and Schedule M-1 from its federal corporate income tax were included as Exhibits D-1 and D-9 of the Transmittal of Exhibits as stated in the Record on Appeal at pages 4 and 5.

⁹ The taxpayer's North Carolina corporate income and franchise tax returns were included as Exhibits 1 through 9 of the Transmittal of Exhibits as stated in the Record on Appeal at page 248.

¹⁰ The taxpayer's North Carolina corporate income and franchise tax returns and pro forma federal corporate income tax returns were included at pages 162 through 228 of the Record on Appeal.

¹¹ The taxpayer's petition to the augmented Tax Review Board, the decisions of the augmented Tax Review Board, the taxpayer's North Carolina corporate income and franchise tax returns and pro forma federal income tax returns were included as Exhibits M-1, M-9, M-10, M-11, M-12, M-13 and M-14 of the Transmittal of Exhibits as stated in the Record on Appeal at pages 81 and 82.

633 S.E.2d 676, *cert. denied*, 127 S. Ct. 564 (2006); (“*Central Telephone IP*”);¹² *A&F Trademark, Inc. v. Tolson*, 167 N.C. App. 150, 605 S.E.2d 187 (2004), *appeal dismissed*, 359 N.C. 320, *cert. denied*, 546 U.S. 821 (2005);¹³ *In re Central Telephone Co.*, 167 N.C. App. 14, 604 S.E.2d 680 (2004), *rev. denied, appeal dismissed*, 359 N.C. App. 281, 610 S.E.2d 203 (2005) (*Central Telephone P*’);¹⁴ *Bellsouth Telecommunications, Inc. v. North Carolina Dep’t of Revenue*, 126 N.C. App. 409, 485 S.E.2d 333 (1997), *rev. denied*, 347 N.C. 135, 492 S.E.2d 18 (1997);¹⁵ *see also Navistar Financial Corp. v. Tolson*, 176 N.C. App. 217, 625 S.E.2d 852, *rev. denied, appeal dismissed*, 360 N.C. 482, 632 S.E.2d 176 (2006).¹⁶ Without restriction, the tax information was included in the records on appeal, the briefs of the parties, discussed at oral

¹² The taxpayer’s North Carolina corporate income tax returns and pro forma federal corporate income tax returns, the record from the augmented Tax Review Board including the taxpayer’s petition to the Board and a letter from the Corporate Tax Division Director to the Secretary regarding the taxpayer’s petition, and the decision of the augmented Tax Review Board were included as Exhibits D-1 and D-2, Exhibit 1 to Exhibit D-40 and Exhibit D-14 of the Transmittal of Exhibits as stated in the Record on Appeal at pages 71, 72 and 74.

¹³ The pro forma federal tax returns for the taxpayers, the pro forma federal tax returns for the taxpayers’ affiliates, and the consolidated federal corporate income tax return for the taxpayers’ parent and its subsidiaries were included as Exhibits D-83(c)(1) through D-83(c)(19) of the Transmittal of Exhibits as stated in the Record on Appeal at pages 208-09.

¹⁴ The taxpayer’s petition to the augmented Tax Review Board, a letter from the Corporate Tax Division Director to the Secretary regarding the taxpayer’s petition, and a portion of the taxpayer’s North Carolina corporate income tax return, specifically pages 1 and 3 and schedule H, were included at pages 2 through 29 of the Record on Appeal and as Exhibits 11 and 15 of the Transmittal of Exhibits as stated in the Record on Appeal at page 104.

¹⁵ The taxpayer’s North Carolina corporate income tax returns and pro forma federal corporate income tax returns were included as Exhibits 7 through 9 of the Transmittal of Exhibits as stated in the Record on Appeal at page 59.

¹⁶ The taxpayer’s North Carolina corporate and franchise tax returns and pro forma federal corporate income tax returns were introduced in this installment paper dealer tax case and were included at pages 186 through 282 of the Record on Appeal.

argument and included in the appellate decisions. *See, e.g., A&F Trademark*, 167 N.C. App. at 153 n.3, 605 S.E.2d at 190 n.3 (stating that for years 1992 through 1994, Limco's total expenses were \$729,175 or 0.2% of its total accrued income of \$311,952,574 during the same period).

The unrestricted introduction of tax returns and other tax information is the rule, not the exception, in corporate tax litigation. It constitutes an accepted course of practice sanctioned by the courts of this State and acquiesced in by the legislature. *See Polaroid*, 349 N.C. at 303, 507 S.E.2d at 294 (acquiescence in practical interpretation of statute entitled to great weight in arriving at its meaning). This Court should not deviate from this practice and create an exception for Plaintiff, especially since Plaintiff could have chosen to pursue alternative administrative relief and thereby maintained the secrecy of its tax information.¹⁷ Any exception carved out for Plaintiff would place Defendant at a distinct disadvantage and would deprive the public of its right to an open judicial system. Plaintiff is simply not entitled to a protective order sealing the very tax information it has made an issue of in this tax refund litigation.

II. PLAINTIFF IS NOT ENTITLED TO ANY PROTECTIVE ORDER UNDER RULE 26(c)

Plaintiff cannot satisfy the rigorous requirements of N.C.R. Civ. P. 26(c) and is therefore not entitled to any protective order for this additional and alternative reason. Rule 26(c)

¹⁷ Plaintiff requested an administrative hearing before the Assistant Secretary under N.C. Gen. Stat. § 105-241.1 regarding its 2000 tax liability. Had Plaintiff proceeded to a hearing before the Secretary, it could have preserved the confidentiality of its tax information. Plaintiff, however, opted instead to pay the tax and file a lawsuit under N.C. Gen. Stat. § 105-267. As yet a third option, Plaintiff could have requested an administrative hearing under N.C. Gen. Stat. § 105-266.1, which also would have been confidential. If Plaintiff had pursued either of its two alternative administrative remedies, it could have maintained the secrecy it desires in this litigation. Plaintiff did not do so, however, and is now "bound by the limitations fixed for that route." *Kirkpatrick v. Currie*, 250 N.C. 213, 216, 108 S.E.2d 209, 211 (1959) (recognizing distinction between proceedings under N.C. Gen. Stat. §§ 105-266.1 and 105-267).

provides, in pertinent part:

[F]or good cause shown, the judge . . . may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense, including . . . (vii) that a trade secret or other confidential research, development, or commercial information not be disclose or be disclosed only in a designated way.

The North Carolina rule is identical to its federal counterpart. *See* Fed. R. Civ. P. 26(c). North Carolina courts routinely look to federal decisions interpreting the Federal Rules of Civil Procedure, especially where the rules contain identical language. *See, e.g., Alford v. Shaw*, 327 N.C. 526, 532, 398 S.E.2d 445, 448 (1990) (“[b]ecause the present federal rule . . . [has] been interpreted and discussed widely, we turn to federal cases”).

**A. PLAINTIFF HAS FAILED TO MEET ITS BURDEN TO ESTABLISH
“GOOD CAUSE”**

Plaintiff has the burden of demonstrating “good cause” for the protective order it seeks in this case. *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 412 (M.D.N.C. 1991). “The ‘good cause’ requirement is strict.” Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 433 (1991). “Good cause” must be “based on a particular factual demonstration of potential harm, not conclusory statements.” *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986) (holding that protective orders under Rule 26(c) are subject to First Amendment scrutiny); *see also General Dynamics Corp. v. Selb Manufacturing Corp.*, 481 F.2d 1204, 1212 (8th Cir. 1973) (burden is on the movant to establish “a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements”), *cert. denied*, 414 U.S. 1162 (1974); *Brittain*, 136 F.R.D. at 412 (party must make “a specific demonstration of facts in support of the request as opposed to conclusory or speculative

statements about the need for a protective order and the harm that would be suffered without one”).

Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing. The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the order.

Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786-87 (3rd Cir. 1994) (internal quotations and citations omitted); *see also The Bank of New York v. Meridien Biao Bank Tanzania Ltd.*, 171 F.R.D. 135, 143 (S.D.N.Y. 1997) (party seeking the protective order “must prove that disclosure of the confidential information will result in a clearly defined and very serious injury to its business”). Here, Plaintiff has woefully failed to meet its burden.

Plaintiff erroneously maintains that “[t]he regularity in which parties in commercial litigation consent to protective orders . . . is *per se* good cause for a confidentiality and protective order.” Brief at 5. Plaintiff offers no justification for this proposition which is, in fact, contrary to the weight of authority. As the Court of Appeals for the Seventh Circuit has recognized:

We are . . . mindful of the school of thought that blanket protective orders (‘umbrella orders’), entered by stipulation of the parties without judicial review and allowing each litigant to seal all documents that it produces in pretrial discovery, are unproblematic aids to the expeditious processing of complex commercial litigation because there is no tradition of public access to discovery materials. The weight of authority, however, is to the contrary. Most cases endorse a presumption of public access to discovery materials, and therefore require the district court to make a determination of good cause before he may enter the order.

Citizens First National Bank v. Cincinnati Insurance Co., 178 F.3d 943, 945-46 (7th Cir. 1999) (internal citations omitted); *see also Pansy*, 23 F.3d at 785 (“Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such

orders, or the countervailing public interests which are sacrificed by the orders.”); *City of Hartford*, 942 F.2d at 137 (Pratt, J., concurring) (“A . . . troubling tendency accompanies the increasing frequency and scope of confidentiality agreements that are ordered by the court.”).

As the Court in *Citizens First National Bank* explained:

The determination of good cause cannot be elided by allowing the parties to seal whatever they want, for then the interest in publicity will go unprotected unless the media are interested in the case and move to unseal. The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it). He may not rubber stamp a stipulation to seal the record.

178 F.3d at 945 (internal citations omitted).

Plaintiff’s assertion that, because blanket protective orders are common, this *ipso facto* establishes good cause is therefore incorrect. Plaintiff has not shouldered its burden to make the requisite showing.

B. PLAINTIFF’S TRACK RECORD BELIES GOOD CAUSE

In evaluating Plaintiff’s request for a protective order, two relevant considerations are: “the danger of abuse if the protective order is granted [and] the good faith of the various parties’ positions.” *Brittain*, 136 F.D.R. at 415; *see also Citizens First National Bank*, 178 F.3d at 946 (judge must “satisf[y] himself that the parties know what a trade secret is and are acting in good faith in deciding what parts of the record are trade secrets”).

Plaintiff’s track record on this issue evidences a very real danger of abuse and therefore mitigates against granting its protective order. During the parties’ previous exchange of documents in connection with the anticipated administrative hearing, Plaintiff designated numerous documents as “confidential” which were clearly not. For example: blank Florida Food

Lion stock certificates, administrative rules of the Florida Department of Revenue, newspaper articles, other published articles, judicial opinions, correspondence to third parties, a transcript of *PrimeTime Live* and press releases.¹⁸ Plaintiff's over-zealous use of the "confidential" designation constitutes additional grounds to deny the protective order.

CONCLUSION

Federal and state law do not allow Plaintiff to litigate its corporate income tax dispute with the State of North Carolina in secret. The public has constitutionally-guaranteed rights of access which cannot be abrogated. For its relief, Defendant requests the Court to deny Plaintiff's motion for a protective order.

Respectfully submitted, this the 23rd day of May, 2008.

ROY COOPER
Attorney General

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¹⁸ Defendant will make copies of these documents available for the Court's review at the June 3 hearing.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *Brief in Opposition to Motion for Protective Order* upon the persons indicated below by depositing said copy in the United States mail, postage prepaid, addressed as follows:

Reid L. Phillips
William G. McNairy
Andrew J. Haile
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
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Washington D.C. 20036

I also hereby certify that I have filed the foregoing *Brief in Support of Defendant's Motion to Stay* with the Wake County Clerk of Superior Court at the Wake County Courthouse as follows:

Wake County Courthouse
316 Fayetteville Street Mall
Raleigh, N.C. 27601

This the 23rd day of May, 2008.

ROY COOPER
Attorney General

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**BRIEF IN OPPOSITION TO
MOTION FOR PROTECTIVE ORDER**

Exhibit A

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

06 CVS 3928 - 3929

2007 NOV 21 P 2:04

WAKE COUNTY, CSC

WAL-MART STORES EAST, INC.,)
a/k/a WAL-MART STORES EAST I,)
INC. AND SAM'S EAST, INC.,)

Plaintiffs,)

v.)

REGINALD S. HINTON, SECRETARY)
OF REVENUE OF THE STATE OF)
NORTH CAROLINA,)

Defendant.)

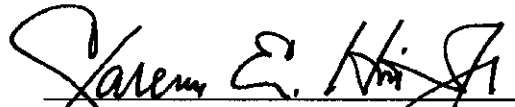
ORDER

THIS MATTER came on for consideration before the undersigned upon the Motion for Protective Order filed by Plaintiffs Wal-Mart Stores East, Inc. and Sam's East, Inc. ("Plaintiffs") on 29 October 2007.

The COURT, having reviewed the Motion and Response thereto and other matters of record, concludes in its discretion that Plaintiffs' Motion should be denied.

WHEREFORE, it is hereby ORDERED that Plaintiffs' 29 October Motion for Protective Order is DENIED.

This the 20th day of November, 2007.



Clarence E. Horton, Jr.
Emergency Special Judge of Superior Court

**BRIEF IN OPPOSITION TO
MOTION FOR PROTECTIVE ORDER**

Exhibit B

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
06-CVS-5110


DAIMLERCHRYSLER NORTH)
AMERICAN HOLDING)
CORPORATION,)
)
Plaintiff,)
v.)
)
E. NORRIS TOLSON, SECRETARY)
OF REVENUE OF THE STATE OF)
NORTH CAROLINA,)
)
Defendant.)

ORDER

FILED
2006 JUL 17 P 12:08
WAKE COUNTY, CSC

Plaintiff's motion for a temporary protective order requesting that attachments filed with Defendant's answer be placed under seal is hereby denied.

This the 17 day of ^{July}~~June~~ 2006.



Superior Court Judge