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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SIERRA BECHARD,

Plaintiff,

vs.

ELLIOTT BROIDY, an individual, KEITH DAVIDSON, an individual; MICHAEL AVENATTI, an individual; DAVIDSON & ASSOCIATES, PLC, a professional limited liability company; and DOES 1 through 20, inclusive,

Defendants.

Case No. BC712913
Assigned to Hon. Elizabeth Allen White

OPPOSITION OF MEDIA INTERVENERS TO DEFENDANT ELLIOTT BROIDY'S MOTION TO SEAL

Hearing Date: September 7, 2018
Time: 8:30 a.m.
Department: 48

Action Filed: July 12, 2018

Non-party news organizations ABC, Inc., The Associated Press, Cable News Network, Inc., The Daily Beast Company LLC, Dow Jones & Company, Inc., Los Angeles Times Communications LLC, and The New York Post (collectively, "Media Interveners") respectfully submit this Opposition to the motion of defendant Elliot Broidy to seal or otherwise prevent public access to portions of the Complaint in this action.[1]

[1] On July 10, 2018, Judge Ernest M. Hiroshige held that the Media Interveners were permitted to intervene for the limited purpose of asserting the public's and the press' rights of access to court records and proceedings in this action, and directed that the Media Interveners be given the opportunity to respond to any motion to seal. See Mot. Ex. C (7/18/2018 Order at 3).

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

A party seeking to abrogate the public's presumptive right of access to court records bears the heavy burden: he must present "evidence of 'serious injury,' and the serious injury must be shown with specificity." Universal City Studios, Inc. v. Superior Court, 110 Cal. App. 4th 1273, 1282 (2003) (quotation omitted). Defendant Elliott Broidy ("Broidy") has not come close to meeting his burden to seal approximately 2 ½ pages of Plaintiff's Complaint. See Notice of Mot. at 1. Most notably, he failed to submit any evidence to substantiate his vague claims of harm, which are described only in an ambiguous and conclusory fashion.

Instead, Broidy effectively asks this Court to hold that any allegations involving intimate or embarrassing personal information are per se confidential. But such claims routinely are litigated in open court proceedings, even when the parties involved are not high-powered political figures whose conduct and motivations implicate significant public issues. Well-established law requires parties seeking to seal court records to demonstrate, with specific facts and admissible evidence: 1) that secrecy is necessary to protect an overriding interest; 2) that there is a substantial probability that that interest will be prejudiced absent sealing; 3) that the sealing order is narrowly tailored; and 4) that no less restrictive means exist to promote the overriding interest. NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 1208 (1999); Cal. R. Ct. 2.550, 2.551. Broidy has not met this strict constitutional burden.

First, Broidy improperly relies largely on inapposite authority involving discovery proceedings in an effort to minimize his burden. The constitutional requirements here are clear: as the party seeking to prevent public access to court records, he must make the necessary four-part showing to overcome the presumption of access. See Section II.B.

Second, Broidy's conclusory assertions that information contained in the operative pleading in this case is "embarrassing," "private," or "confidential" do not meet his burden. Id. Even in cases involving private sexual relationships and intimate family disputes, courts have held litigants to the same strict requirements to overcome the constitutional right of access. E.g., NBC Subsidiary, 20 Cal. 4th at 1187 n.4, 1210-11; Burkle v. Burkle, 135 Cal. App. 4th 1045, 1059

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(2006). In the absence of any particularized showing of actual harm -- which the Motion does not present Broidy's demand for privacy does not justify sealing. See Burkle, 135 Cal. App. 4th at 1059. Nor does a confidentiality agreement between Broidy and Plaintiff change these requirements; private parties cannot contract to defeat the public's constitutional right of access. See Cal. R. Ct. 2.551(a); McNair v. NCAA, 234 Cal. App. 4th 25, 35-36 (2015).

Third, Broidy cannot evade the First Amendment's public access requirements through procedural gamesmanship, by asking the Court to "strike" the allegations at issue. He erroneously relies on two cases that suggested this approach in specific, narrow circumstances involving **discovery materials** that were subject to a protective order. See Mercury Interactive v. Klein, 158 Cal. App. 4th 60, 104-05 (2007); Overstock.com v. Goldman Sachs Group, 231 Cal. App. 4th 471, 500 (2014). But as these cases made clear, this approach does not apply outside of the discovery context, and both decisions expressly discourage attempts (like Broidy's here) to extend this narrow exception to justify broad sealing. See Section II.B.

Finally, Broidy's conclusory assertions cannot overcome the especially strong interest in transparency here. This case involves a controversial transaction involving politically powerful individuals that closely parallels issues in a pending criminal investigation connected to the President of the United States. The presumptive public interest that justifies monitoring all civil cases is significantly heightened here, not only because of this subject matter, but also because the claims at issue involve the attempted use of financial payoffs and non-disclosure agreements to restrict discussion of matters of political concern. Courts have made clear that when such charges have been made, the need for public scrutiny is at its apex. See Section II.C. For all of these reasons, this Court should deny Broidy's Motion and unseal the Complaint in its entirety.

II. THE MOTION TO SEAL SHOULD BE DENIED.

A. Court Records Are Presumptively Open Under The First Amendment.

As the California Supreme Court unanimously recognized in 1999, the First Amendment provides a presumptive right of public access to civil court proceedings, including "civil litigation documents filed in court." NBC Subsidiary, 20 Cal. 4th at 120 & n.25; 1211 n.27, 1212-13, 1218-19. See also Savaglio v. Wal-Mart Stores, 149 Cal. App. 4th 588, 596-597 (2007) ("[t]he public

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has a First Amendment right of access to civil litigation documents filed in court and used at trial or submitted as a basis of adjudication"). The California Supreme Court's ruling reaffirmed the long-standing tradition of openness in California courts, even in the face of asserted "privacy" interests. As the Court explained, "[i]f public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism. For this reason, traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial proceedings." NBC Subsidiary, 20 Cal. 4th at 1211 n.28 (quotation omitted).

Applying these requirements, the Court held that sealing of court records requires findings that "(i) specifically set forth the facts that support the findings and (ii) direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file." Id. at 1225 (emphasis added).

Following NBC Subsidiary, the Judicial Council implemented Rules of Court 2.550 and 2.551, which were intended to codify the public's First Amendment right of access. See Advisory Committee Comment to Cal. R. Ct. 2.550. Rule 2.250(c) states that "[u]nless confidentiality is required by law, court records are presumed to be open." This rule reinforces the principle that "[s]ince court records are public records, the burden rests on the party seeking to deny public access to those records to establish compelling reasons why and to what extent those records should be made private." Mary R. v. B & R Corp., 149 Cal. App. 3d 308, 317 (1983).

A judicial record cannot be sealed unless and until the court "expressly finds" that:

> (1) There exists an overriding interest that overcomes the right of public access to the record;
>
> (2) The overriding interest supports sealing;
>
> (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
>
> (4) The proposed sealing is narrowly tailored; and,
>
> (5) No less restrictive means exist to achieve the overriding interest.

Cal. R. Ct. 2.550(d) (emphasis added). The court must identify "the factual findings that support [its sealing] order." Cal. R. Ct. 2.550(e)(1).

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As explained below, Broidy's attempt to seal portions of the Complaint does not satisfy the strict constitutional requirements, or the requirements set forth in the Rules of Court.

B. Broidy Has Not Substantiated Any Overriding Interest To Justify Sealing.

First, as a threshold matter, Broidy relies on an incorrect legal standard, in an improper attempt to shift the burden to parties opposing his secrecy request. E.g., Mot. at 13-14. This is backwards. It is well-established that "under the First Amendment, the party seeking access is entitled to a presumption of entitlement to disclosure and it is the burden of the party seeking closure to present facts supporting closure." Burkle, 135 Cal. App. 4th at 1069 (quotation omitted; emphasis added). Accord McNair v. NCAA, 234 Cal. App. 4th 25, 32 (2015) (recognizing that party moving for closure order has burden to justify sealing); In re Providian Credit Card Cases, 96 Cal. App. 4th 292, 301 (2002) (same); Mary R., 149 Cal. App. 3d at 317.[2]

Broidy's inaccurate argument to the contrary relies on language from Winfred D. v. Michelin North America, Inc., 165 Cal. App. 4th 1011 (2008) (Mot. at 13-14), but that case **did not involve public access to court records** - it concerned the admissibility of evidence at trial. 165 Cal. App. 4th at 1014. Moreover, the "heavy burden" language Broidy quotes comes from an **entirely different standard,** for compelling disclosure of private information from a litigant in discovery. Id. at 1040 (quoting Morales v. Superior Court, 99 Cal. App. 3d 283, 287 (1979)). It has no application to a request to seal a public court record, where the burden is on the proponent.

Second, Broidy failed to present "admissible evidence" demonstrating a "specific showing of serious injury" if the entire Complaint is unsealed. Universal City Studios, Inc. v. Superior Court, 110 Cal. App. 4th 1273, 1282, 1284-86 (2003) (ordering settlement agreement, financial and accounting records, and related legal pleadings to be unsealed because party failed to substantiate threatened harm). As the Court of Appeal noted, "[i]n delineating the injury to be

---

[2] The allocation of the burden in a sealing dispute stems from the constitutional presumption of public access, but it also reflects the practical consideration that the proponent of sealing is the "only [party that knows] the contents of the documents" and thus is the "the only participant that would be able to discuss the arguments with any particularity." Providian, 96 Cal. App. 4th at 301 n.7, 307. If the burden were on the Media Interveners – who do not have access to the sealed information – "the practical reality would appear to be that the party resisting disclosure would enjoy an advantage that virtually guarantees success." Id. at 301 n.7.

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prevented, specificity is essential. Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient." Id. at 1282. See also H.B. Fuller Co. v. Doe, 151 Cal. App. 4th 879, 891-892 (2007) ("contentions and conclusory averments" about "confidential" or "private" information in court records did not constitute actual facts supporting sealing).

Here, Broidy failed to submit any evidence to substantiate his vague and conclusory assertions of harm. Broidy relies solely on prior court orders from this case, a copy of the Complaint with proposed redactions (which was not served on Media Interveners), and his proposed motion to compel arbitration (which the Court declined to file). See Mot., Ex. D. Broidy did not submit his own declaration, or a declaration from any person who purportedly would be harmed by unsealing the Complaint. Instead, the only declaration in support of the Motion is from Broidy's counsel, discussing the procedural history and authenticating court records. See Declaration of Marvin Putnam. None of these materials are "evidence," let alone evidence of "serious injury," as the law requires. Universal City Studios, 110 Cal. App. 4th at 1282; see also People v. Rios, 193 Cal. App. 4th 584, 592 n.4 (2011) (motion is not evidence).

This fails to meet his burden. See Kamakana v. City & County of Honolulu, 447 F.3d 1172, 1182 (9th Cir. 2006) (defendant failed to meet burden required to seal court records where its "conclusory offerings" consisted only of declarations with "conclusory statements" that documents "are confidential and that, in general, their production would, amongst other things, hinder [a police unit's] future operations with other agencies, endanger informants' lives, and cast [police] officers in a false light"); Providian, 96 Cal. App. 4th at 301 (defendant failed to meet its burden to keep records sealed where the court "found [its] declarations conclusory or otherwise unpersuasive" to establish overriding harm).[3]

As in Kamakana, Broidy's Motion contains only generalized conclusions that the material he seeks to seal is "highly confidential and private" and would "embarrass and hurt" him if disclosed. Mot. at 9. He vaguely alludes to the information being "salacious" and "deeply personal" (Mot. at 13-14), but no explanation is offered about how the information would cause

[3] He cannot attempt to do so on reply. See Jay v. Mahaffey, 218 Cal. App. 4th 1522, 1537 (2013) (citing "general rule" that "new evidence is not permitted with reply papers").

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any concrete harm that is serious enough to overcome the presumptive right of access – particularly in light of the information that he admits is already public. Id. at 6-7. Such cursory and hypothetical claims, unsupported by any admissible evidence, does not come close to meeting the strict burden required to demonstrate an overriding interest in secrecy. See H.B. Fuller Co., 151 Cal. App. 4th at 898; Universal City Studios, 110 Cal. App. 4th at 1284-86. To the contrary, courts consistently have rejected this kind of "speculative and conclusory" argument as failing to justify infringement of constitutional access rights. See California ex rel. Lockyer v. Safeway, Inc., et al., 355 F. Supp. 2d 1111, 1118, 1123 (C.D. Cal. 2005) (companies failed to justify sealing of a revenue sharing agreement related to a labor action where they "made no specific, non-speculative showing" as to commercial or competitive harm from disclosure).

Third, Broidy's conclusory invocation of the right to privacy (e.g., Mot. at 9, 13-14), overlooks the principle that the "constitutional right to privacy has never been absolute; it is subject to a balancing of interests." Jacob B. v. County of Shasta, 40 Cal. 4th 948, 961 (2007). See also Int'l Fed. of Prof'l & Technical Eng'rs, Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319, 339 (2007) (state constitutional right to privacy is not violated "if the invasion is justified by a competing interest") (quoting Hill v. NCAA, 7 Cal. 4th 1, 38 (1994)). Consequently, courts considering sealing requests have made clear that "state constitutional privacy rights do not automatically 'trump' the First Amendment right of access under the United States Constitution." Burkle, 135 Cal. App. 4th at 1059. To the contrary, as the court found, "[n]o authority supports the notion that the constitutional right of privacy is to be treated differently from any other potentially overriding interest for purposes of First Amendment analysis." Id.

Given his cursory and generalized discussion of the purported harms, and the absence of any supporting evidence, Broidy effectively is asking this Court to hold that any information of a sexual or intimate nature must be kept secret. But that is not the law. To the contrary, many of the key decisions establishing the right of public access to court records in California have involved such "intimate" information. More than a century ago, the California Supreme Court rejected an attempt to close court proceedings in a divorce case, despite a party's concern that the case would reveal evidence "of a filthy nature." In re Shortridge, 99 Cal. 526, 528 (1893). There,

the Court declared that "[i]n this country it is a first principle that the people have the right to know what is done in their courts," even when a case involves tawdry allegations. Id. at 530.

The Court's landmark decision in NBC Subsidiary, which established the governing standard for public access to California court records and proceedings, arose from a palimony trial involving actor Clint Eastwood and actress Sondra Locke; the Court reiterated that civil court documents are presumptively open to the public, even where those documents involve "private facts." 20 Cal. 4th at 1208 & n.25, 1211 n.27, 1218-19. In that case, the trial court insisted that the public's right of access was diminished because the acrimonious proceedings between Eastwood and his former girlfriend involved a "purely private dispute" with intensely personal allegations, including Locke's charge that Eastwood forced her to have an abortion. Id. at 1187 n.4, 1210-11. But the Supreme Court disagreed, emphasizing that a "trial court is a public governmental institution." Id. at 1211. As the Court explained, "[l]itigants certainly anticipate, upon submitting their disputes for resolution in a public court, before a state-appointed or publicly elected judge, that the proceedings in their case will be adjudicated to the public." Id. at 1211. A litigants in a civil case is "entitled to a fair trial," the Court explained, "not a private one." Id. (emphasis added). The Court concluded, "the public has an interest, in all civil cases, in observing and assessing the performance of its public judicial system, and that interest strongly supports a general right of access in ordinary civil cases." Id. at 1210.

Subsequent decisions have held squarely that "[t]he First Amendment provides a right of access to court records in divorce proceedings, just as in other ordinary civil cases." Burkle, 135 Cal. App. 4th at 1070. The movant in Burkle argued that divorce proceedings should be subject to less rigid sealing standards because of the "intrusions into family privacy that accompany the dissolution of intimate relationships." Id. at 1060-61. The appeals court disagreed, noting that "the issues distinguishing divorce cases from other civil cases – such as psychological evaluations in child custody disputes and the like – are often the subject of statutory exceptions to the general rule of public access, in which the Legislature has already engaged in the necessary balancing of privacy rights and public access rights." Id. at 1061. "Nothing about these exceptions contradicts the conclusion that both historical tradition and the institutional value of open proceedings

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mandate a presumption of openness in divorce proceedings just as in other civil cases." Id. See also In re Marriage of Nicholas, 186 Cal. App. 4th 1566, 1568, 1570 (2010) (reaffirming that the presumptive right of access "applies with equal force to family law cases").[4]

Even in the context of settlement agreements related to claims of sexual harassment or sexual abuse, California and Ninth Circuit appellate courts have found that trial courts erred by sealing the court records. For example, in Copley Press, Inc. v. Superior Court, 63 Cal. App. 4th 367, 376-77 (1998), the Court held that a 15-year-old high school student's embarrassment from public disclosure of documents detailing a sexual assault against him did not outweigh the public's right of access to court documents. The Court held that records may be sealed only in "exceptional circumstances upon a showing of compelling reasons," a showing that the student and his family could not make. Id. at 376. Accordingly, the Court ordered the unsealing of the settlement agreement records, including the amount paid to finalize the settlement. Id.

Similarly, in Hagestad v. Tragesser, 49 F.3d 1430, 1434-35 (9th Cir. 1995), the Ninth Circuit overturned an order sealing the entire court record in a sexual abuse case involving a member of the Oregon State Bar, including the settlement agreement, because the plaintiff failed to offer, and the trial court failed to articulate, concrete interests justifying a sealing order. See also Hurvitz v. Hoefflin, 84 Cal. App. 4th 1232, 1244, 1246-47 (2000) (vacating order sealing declaration about doctor's alleged sexual harassment; "sparing citizens from embarrassment, shame, or even intrusions into their privacy has never been held to outweigh the guarantees of free speech in our federal and state Constitutions"); San Jose Mercury, 187 F.3d at 1102 (reversing order denying newspaper's challenge to blanket protective order in sexual harassment case).[5]

Broidy cannot justify sealing with vague claims that he would be embarrassed, or that

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[4] See also In re Marriage of Lechowick, 65 Cal. App. 4th 1406, 1408 (1998) (reversing denial of request to unseal records in marital dissolution proceeding); Estate of Hearst, 67 Cal. App. 3d 777, 785 n.3 (1977) (rejecting demand for secrecy of probate court files involving the Hearst family; holding "court records are public records").

[5] In 2004, a judge of this Court granted a media request to unseal records in a divorce case involving then-Republican U.S. Senate nominee Jack Ryan and actress Jeri Ryan, over their objections that the material was salacious and private. See Ryan v. Ryan, LASC No. BD290382; see also Liam Ford & Rudolph Bush, "Ryan quits race," Chicago Tribune (June 26, 2004), http://www.chicagotribune.com/chi-0406260116jun26,story.html.

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disclosure would damage his reputation. E.g., Mot. at 6, 9, 13. Courts consistently have held that a litigant's potential embarrassment is insufficient to justify keeping court files secret. See McNair, 234 Cal. App. 4th at 37 (NCAA failed to justify sealing records of enforcement activities by arguing that "[p]ublic disclosure will embarrass those who had relied on confidentiality"); Procter & Gamble v. Bankers Trust, 78 F.3d 219, 225 (6th Cir. 1996) (interest of corporation or its executives "in protecting their vanity or their commercial self-interest does not qualify as grounds ... for keeping the information under seal"); Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1073 (3d Cir. 1984) (presumption of open access to court records is "not overcome by the proprietary interest of present stockholders in not losing stock value or the interest of upper-level management in escaping embarrassment"); Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982) (information embarrassing to bank could not be kept sealed).[6]

Fourth, the existence of a confidentiality agreement between Broidy and Plaintiff cannot overcome the public's right of access, or alter the rigorous constitutional requirements for sealing any portion of a judicial record. Rule of Court 2.551(a) expressly states that a "court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties." (Emphasis added.) See also San Jose Mercury News v. District Court, 187 F.3d 1096, 1098 (9th Cir. 1999) (the "right of access to court documents belongs to the public" and parties are "in no position to bargain that right away"); Champion v. Superior Court, 201 Cal. App. 3d 777, 787 (1988) (court should "resist[]" temptation to accept stipulation to seal court records).

Broidy cites Universal City Studios and Publicker Industries for the proposition that

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[6] The few cases Broidy cites where sealing was upheld involved extreme, inapposite circumstances. In Oiye v. Fox, 211 Cal. App. 4th 1036, 1068-70 (2012), the defendant tried to publicly file "private medical records" of the plaintiff, whom he was accused of sexually molesting when she was a child. Id. at 1045, 1047. Similarly, in People v. Jackson, 128 Cal. App. 4th 1009 (2005), the court sealed search warrant affidavits because they contained "graphic and detailed descriptions" of Michael Jackson's alleged molestation of two children, reasoning that disclosure "would likely be embarrassing, if not devastating, to the minors." Id. at 1023-1024. The court cautioned that its decision was "sui generis." Id. at 1014. And in Doe v. Blue Cross & Blue Shield United of Wisconsin, 112 F.3d 869 (7th Cir. 1997), the court rejected a litigant's request to proceed as "John Doe," holding that "the fact that a case involves a medical issue is not a sufficient reason for allowing the use of a fictitious name ...." Id. at 872. In the passage Broidy quotes, the court noted the possibility of sealing portions of the plaintiff's "psychiatric records" if they were submitted as exhibits, but held he could not be anonymous. Id.

private confidentiality agreements justify secrecy (Mot. at 15), but the Court of Appeal has expressly rejected this interpretation. Huffy Corp. v. Superior Court, 112 Cal. App. 4th 97, 106-07 (2003). In Huffy, the court explained that "[i]n Universal City Studios, citing Publicker and NBC Subsidiary, we held that a settlement agreement which had a confidentiality provision could not be sealed unless there was a showing of serious injury which would result from public disclosure." Id. at 106. The courts in Huffy and Universal City Studios both rejected the sealing requests despite the parties' private secrecy agreements. Id. at 107; Universal City Studios, 110 Cal. App. 4th at 1283-84. See also McNair, 234 Cal. App. 4th at 35-36 (same; "mere agreement of the parties alone is insufficient to constitute an overriding interest to justify sealing").

Broidy then claims that, absent sealing, he "will be forced to choose between publicly defending himself against plaintiff's malicious and false allegations, or exercising his contractual right to privately arbitrate his dispute – potentially thereby foregoing any opportunity to defend himself from public attack." Mot. at 15. But this argument applies to the sealing of the entire Complaint, a remedy which Broidy does not seek. See Notice of Mot. at 1. He does not even attempt to explain how he would be prejudiced by having to decide whether to respond to the specific allegations that he seeks to seal, given the information that already is public, and his response to information that is contained in the rest of the Complaint.

Notably, the court in McNair rejected a very similar argument. In that case, the NCAA argued that "if the records here are not sealed, it must decide whether to publicly reveal the contents of the conditionally lodged documents," or else forgo the opportunity to rely on them in the litigation, and thus not be able to "fully defend itself against plaintiff's lawsuit." McNair, 234 Cal. App. 4th at 39. But the court was not persuaded, noting that "all parties unable to show the NBC Subsidiary factors face this choice when a request to seal documents is before the court; the NCAA is no different." Id. The same is true here.

Finally, Broidy cannot defeat public access with the procedural gambit of asking this Court to "strike" portions of the Complaint that he considers "irrelevant" or "extraneous." Mot. at 9-12, 14. His request is based on a misreading of Mercury Interactive v. Klein, 158 Cal. App. 4th 60 (2007), and Overstock.com v. Goldman Sachs Group, 231 Cal. App. 4th 471 (2014), which

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narrowly addressed a very different type of situation. E.g., Mot. at 11-12. Broidy relies on a footnote from Mercury Interactive which raised the possibility of a motion to strike exhibits "**where they consisted of discovery material** that was not admitted at trial or used as a basis of the court's adjudication of a substantive matter." 158 Cal. App. 4th at 105 (emphasis added). He disregards the court's cautionary language, which clearly limited its decision to discovery material, and which discouraged litigants from attempting to expand the exception further:

> We stress that the issue we decide here is a rather narrow one: the applicability of the sealed records rules to discovery material designated confidential pursuant to a protective order and later filed with the court and not used at trial or submitted as a basis for adjudication. The case … does not concern the sealing of the Complaint or the propriety of the order unsealing the Complaint itself. Our holding is not meant to encourage the filing of complaints or other pleadings under seal, nor is it intended to suggest that pleadings should not, as a general rule, be open to public inspection.

Id. at 104 (emphasis added).[7]

Broidy's reliance on Overstock.com is similarly misplaced: that case also addressed the narrow issue of when "discovery materials" can remain confidential. 231 Cal. App. 4th at 478, 492 (emphasis added). The court's discussion of "relevance" was limited to that context. E.g., id. at 497 ("the right of access applies only to discovery materials that are relevant to the matters before the trial court") (original emphasis). The same limit applies to the court's reference to motions to strike. Id. at 500 (noting motion to strike could be used "when a party submits a tsunami of discovery materials subject to a protective order") (emphasis added).

In short, the cases relied on by Broidy in support of his Orwellian proposal that portions of the Complaint be "stricken" from the public record are limited to the context of discovery materials subject to protective orders. They do not create an alternative procedural mechanism to evade public access by "striking" any portions of a court record that a litigant considers irrelevant. Based on his misguided reading of these two cases, Broidy misstates the applicable legal standard here, claiming that "the public right of access attaches ***only*** to those materials that are necessary

[7] The Mercury Interactive court's warning about its "narrow" holding reflects the case's "unusual procedural path," in which the exhibits at issue were allegedly filed with a complaint that was a "legal nullity" designed to evade a discovery stay in another matter. Id. at 74, 104.

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for the adjudication of a case." Mot. at 16 (original emphasis). That is flatly wrong. The First Amendment presumption of access attaches "to civil litigation documents filed in court as a basis for adjudication." NBC Subsidiary, 20 Cal. 4th at 1208, n. 25 (emphasis added). Accord Cal. R. Ct. 2.550(a)(3); Savaglio, 149 Cal. App. 4th at 596-97 (right attaches to records "submitted as a basis of adjudication"); McNair, 234 Cal. App. 4th at 31 (same).[8]

This distinction is crucial: if the presumption of openness applied only to records that were deemed "necessary" to the Court's resolution of a controversy, the public's right of access would be subsumed by the merits, and could be limited by the outcome of a particular case. This would defeat the central purpose of the right of access: ensuring that "citizens are entitled to observe, monitor, understand and critique their courts ..." Safeway, 355 F. Supp. 2d at 1125. Consequently, California courts have held that the right attaches to all items "submitted as a basis for adjudication," because that ensures that the public can scrutinize what went into the Court's decision-making process, regardless of the end result. Savaglio, 149 Cal. App. 4th at 596-97; McNair, 234 Cal. App. 4th at 31.

A federal judge in Los Angeles squarely rejected an argument very similar to Broidy's here, that the right of access should "not attach until, essentially, the judge makes a ruling based upon the subject documents." Petroleum Prod. Antitrust Litig., 101 F.R.D. 34, 42 (1984). The district court noted that "[i]f the rationale behind access is to allow the public an opportunity to assess the correctness of the judge's decision, documents that the judge should have considered or relied upon, but did not, are just as deserving of disclosure as those that actually entered into the judge's decision." Id. (original emphasis). Consequently, the court rejected the notion that

[8] The broad public access standard encompasses more than just dispositive records. E.g., Providian, 96 Cal. App. 4th at 295-96 (unsealing exhibits to class certification motion); H.B. Fuller Co., 151 Cal. App. 4th at 893-94 (presumption of access may attach to discovery motions involving "questions of great significance to members of the public"). In the analogous context of the common law right of access, the Ninth Circuit recognized that a presumption of openness applies to records attached to any motion that "is more than tangentially related to the merits of a case." Center for Auto Safety v. Chrysler Group, LLC, 809 F.3d 1092, 1101 (9th Cir. 2016). As the court explained, "[n]othing in our precedent suggests that the right of access turns on any particular result"; rather, "[m]ost litigation in a case is not literally 'dispositive,' but nevertheless involves important issues and information to which our case law demands the public should have access." Id. at 1098, 1102.

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"whether the information will be relevant at trial" was a proper consideration for limiting public access, explaining that, "for the presumptive right to be suspended or nonexistent until after the judge has ruled on a motion, would be to impair the important interest in contemporaneous review by the public of judicial performance." Id.

The same reasoning squarely applies here. Broidy seeks to seal portions of the Complaint based on his assertions about "whether the information will be relevant," and whether the particular allegations are "necessary" to the resolution of the case. Mot. at 16. But the Court's determination of relevance is itself an act of adjudication that the public has an interest in monitoring. See Petroleum Prod. Antitrust Litig., 101 F.R.D. at 42; Safeway, 355 F. Supp. 2d at 1125. Broidy cannot evade his constitutional burden by asking the Court to "strike" allegations.

Moreover, as with his generalized claims of harm, Broidy does not offer any specific argument as to why these allegations are irrelevant. He simply repeats, mantra-like, the conclusory assertion that the portions he wishes to seal have "no bearing on *any* cause of action in this matter." Mot. at 9 (original emphasis). But he does not even identify the causes of action at issue, let alone explain why the allegations that he is trying to suppress are irrelevant to them.[9]

Because of the information asymmetry noted above, the Media Interveners are necessarily limited in their ability to address the relevance issue. See Providian, 96 Cal. App. 4th at 301 n.7, 307. But it is noteworthy that Broidy acknowledges that he "seeks to seal" portions of the Complaint "relating *directly* to his intimate relationship with plaintiff." Mot. at 16 (original emphasis). Elsewhere, he admits that this case arises out of the purported breach of a settlement agreement that "relates to a relationship Mr. Broidy had with plaintiff, during which she claimed to be pregnant with his child, a pregnancy she claims to have subsequently terminated." Mot. at 6-7. Broidy thus effectively acknowledges that the portions of the Complaint that he seeks to seal relate "directly" to the very subject matter at the heart of the action: his "intimate relationship with plaintiff." Id. at 16. Far from establishing that these excerpts are "irrelevant" or

[9] Broidy's suggestion that he could not identify the claims because of the sealing order (e.g., Mot. at 6 n.2), is belied by his proposed motion to compel arbitration, which he attached as an exhibit; it states that Plaintiff has sued him for breach of contract. See Ex. D at p. 2. Plainly, Broidy does not feel constrained to discuss what he believes is beneficial to his argument.

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"extraneous," Broidy's own pleading shows why they are related to the claims asserted by Plaintiff as a "basis for adjudication," and thus are subject to the presumptive right of access.

C. None Of Broidy's Asserted Interests Can Override The Strong Public Interest Here.

Even assuming, for the sake of argument, that Broidy had presented evidence to substantiate an interest in secrecy (which he has not), he failed to show that any such interest overrides the strong public interest in access. As courts repeatedly have recognized, the right of access ensures that members of the public and their surrogates in the press are able to monitor and scrutinize the justice system. See NBC Subsidiary, 20 Cal. 4th at 1210 ("the public has an interest in all civil cases in observing and assessing the performance of its public judicial system") (original emphasis); Estate of Hearst, 67 Cal. App. 3d at 784 ("[i]f public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism"); Petroleum Prod. Antitrust Litig., 101 F.R.D. at 43 (recognizing "the important interest in contemporaneous review by the public of judicial performance").[10]

These inherent matters of public concern are heightened in this action, which directly involves the attempted use of the legal system to restrict the dissemination of information with potential political and public policy ramifications. E.g., Mot. at 6-7. Courts have rejected sealing in such cases. See H.B. Fuller Co., 151 Cal. App. 4th at 894 (recognizing strong public interest that supported unsealing in subpoena matter where "the information sought is invested with a substantial constitutional interest, i.e., the First Amendment right to speak anonymously," noting the positive effect of "[p]ublic scrutiny" on "judicial actors," and noting that the "deeper the public's understanding of judicial treatment of these issues, the better equipped the public will be to, for instance, seek legislative modification of the governing rules and procedures").

Broidy challenges the very legitimacy of this lawsuit, and his Motion is critical of the

[10] Broidy incorrectly asserts that the Media Interveners must make a "showing of specific utility of public access." Mot. at 14. As discussed above, this quote from Mercury Interactive is limited to discovery materials subject to a protective order. See Section II, supra. Broidy's attempt to export that language to these circumstances "erroneously reverses the burden by seeking to require an evidentiary showing of the public interest." Safeway, 355 F. Supp. 2d at 1125. The Court "strongly presume[s] the public's interest in access and require[s] a showing of compelling reasons to rebut it." Id. (emphasis added).

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Court's handling of the case so far. E.g., Mot. at 6 (alleging Plaintiff sued to "avoid the strictures" of her settlement agreement with Broidy); id. at 8 (asserting this Court "did not provide a reason for its decision" not to accept his proposed motion to compel arbitration and to delay consideration of further motions). Because the right of access is designed to ensure that the public can scrutinize courts' handling of contested issues, Broidy's assertions magnify the need for transparency here. E.g., Cohen v. Trump, 2016 U.S. Dist. LEXIS 69985, at *18-19 (S.D. Cal. May 27, 2016) ("the public interest in understanding the judicial process is heightened in this case" where defendant had "placed the integrity of these court proceedings at issue").

Finally, as Broidy acknowledges, the circumstances surrounding the negotiation of the settlement agreement at the center of this litigation is a matter of substantial public interest. Broidy is a prominent political fundraiser and former deputy finance chairman for the Republican National Committee; his connections with President Trump and his former attorney and aide, Michael Cohen -- including the mechanism by which Cohen negotiated the settlement agreement and payment at issue in this case on Broidy's behalf - have been subject to extensive public discussion and press coverage. See Declaration of Michael J. Avenatti re: Ex Parte Application, Exs. 1-2 (filed July 10, 2018). Moreover, this matter relates to an ongoing criminal investigation connected to the President of the United States and Mr. Cohen, which has garnered extensive attention in the national media. See Mot. at 7 n.4.[11] Although the public always has an interest in monitoring the judicial system, the bar for sealing is even higher in cases like this one, which directly concern such matters of intense public interest.[12] Broidy's Motion should be denied.

DATED: August 24, 2018 By: Kelli L. Sager
Kelli L. Sager

[11] U.S. District Judge Kimba Wood refused to let Cohen keep the names of his clients (including Broidy) confidential, despite claims that disclosure would be embarrassing and an invasion of privacy, stating that was "not enough under the law." See "Associated Press (Apr. 17, 2018), https://apnews.com/8c7ec70c7a8b4e1f9c04fda010a4f6fe/Trump-lawyer-forced-to-reveal-another-client:-Sean-Hannity.

[12] See Providian, 96 Cal. App. 4th at 309-10 (unsealing court records reflecting private company's business practices where court recognized "great and legitimate public interest" in "how Providian went about trying to sell its various products and services to the public"); Petroleum Prod. Antitrust Litig., 101 F.R.D. at 38 (public's access rights "may be asserted more forcefully when the litigation involves matters of significant public concern"); Valley Broadcasting Co. v. U.S. Dist. Ct., 798 F.2d 1289, 1294 (9th Cir. 1986) (recognizing that access to court records is vital to informing citizens of "significant public events")

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 865 S. Figueroa Street, Suite 2400, Los Angeles, CA 90017.

On August 24, 2018, I served the following document(s): OPPOSITION OF MEDIA INTERVENERS TO DEFENDANT ELLIOTT BROIDY'S MOTION TO SEAL by placing a true copy in a separate sealed envelope for each addressee named below, with the name and address of the person served shown on the envelope as follows:

SEE ATTACHED SERVICE LIST

by sealing the envelope and placing it for collection and delivery by Federal Express with delivery fees paid or provided for in accordance with ordinary business practices.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on August 24, 2018, at Los Angeles, California.

Vicky Isensee
Print Name

Vicky Isensee
Signature

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