AVENATTI & ASSOCIATES, APC
Michael J. Avenatti, State Bar No. 206929
520 Newport Center Drive, Suite 1400
Newport Beach, CA 92660
Telephone: 949.706.7000
Facsimile: 949.706.7050

Attorneys for Defendant
Michael Avenatti

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

SHERA 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 for all purposes to the Hon. Samantha Jessner, Dept. 31 **FILED CONDITIONALLY UNDER SEAL PURSUANT TO COURT ORDER DATED JULY 6, 2018 PROVISIONALLY SEALING COMPLAINT AND ALL REFERENCES THERETO** **MAY NOT BE EXAMINED WITHOUT COURT ORDER-CONTAINS MATERIAL FROM CONDITIONALLY SEALED RECORD** **DEFENDANT MICHAEL J. AVENATTI'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT ELLIOTT BROIDY'S MOTION TO SEAL OR ALTERNATIVELY STRIKE SENSITIVE AND IMMATERIAL PORTIONS OF THE COMPLAINT** Hearing Date: TBD Hearing Time: TBD Hearing Dept.: 31

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

Defendant Elliott Broidy ("Broidy")'s Motion to Seal or Strike ("Motion") portions of Shera Bechard's ("Bechard") Complaint against Broidy, Keith Davidson ("Davidson"), Davidson & Associates, PLC, and Michael Avenatti ("Avenatti") must be denied. Broidy's Motion is without merit for at least the following reasons:

First, Broidy's Motion is at odds with the presumption of open court records and would violate the First Amendment.

Second, because of the immense media attention on this case and its close connection to matters of public concern and political importance, the public's interest in full access to the records of this case is particularly strong.

Third, Broidy has failed to meet his burden for a sealing order. Among other things, he failed comply with the requirement that he submit a declaration providing facts that support his Motion and failed to even supply the Court with a copy of the Settlement Agreement.

Fourth, Broidy has failed to provide facts that demonstrate he will suffer any injury from further disclosure of information that is already public.

Fifth, because Broidy has breached the Settlement Agreement by failing to make required payments, he cannot enforce the confidentiality provisions within it.

Sixth, the mere existence of a confidentiality provision within the Settlement Agreement is an insufficient basis to seal this complaint.

Finally, as explained below, the specific portions of the Complaint Broidy wishes to strike are relevant and therefore cannot be struck.

II. ARGUMENT

A. Broidy's Motion to Seal Conflicts With the Presumption of Open Court Records and Would Violate the First Amendment.

"Unless confidentiality is required by law, court records are presumed to be open." California Rules of Court Rule 2.550(c). A party seeking to file documents under seal faces a heavy burden, requiring him or her establish that:

(1) There exists an overriding interest that overcomes the right of public access to the record;

(2) The overriding interest supports sealing the record;

(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.

California Rules of Court Rule 2.550(d). These strict rules are necessary because of the First Amendment implications of sealing documents and depriving the public and the press access to court proceedings. See NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal.4th 1178, 1181 (explaining First Amendment implications); Huffy Corp. v. Superior Court (2003) ("[T]he Judicial Council promulgated rules [2.550 and 2.551] which govern sealing requests in the trial courts in order to comply with the constitutional standards set forth in the NBC Subsidiary decision."). "Nearly all jurisdictions, including California, have long recognized a common law right of access to public documents, including court records." Overstock.Com, Inc. v. Goldman Sachs Group, Inc. (2014) 231 Cal.App.4th 471, 483. Further, the practice of sealing records is at odds with the tradition of open courts codified into law as Code of Civil Procedure section 124.

For more than a century it has been the rule that "[i]n this country it is a first principle that the people have the right to know what is done in their courts." In re Shortridge (1893) 99 Cal. 526, 530. As the Supreme Court of California has recognized, "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." NBC, 20 Cal.4th at 1210 (emphasis in original). Public access to the courts and court records is the bedrock of the legitimacy of our legal system because "[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 tribunals." Estate of Hearst (1977) 67 Cal.App.3d 777, 784. That interest is particularly strong here. The California Supreme Court has also recognized the "important role of the press in monitoring the administration of justice on behalf of the public," something that will be hampered in this case if

portions of the Complaint are placed under seal. Brian W. v. Superior Court (1978) 20 Cal.3d 618, 626.

B. The Public Interest Supports an Order Denying Sealing This Action.

The presence of the media intervenors in this case demonstrates the great public interest in this action. This case has generated immense public interest because of its relation to matters of great public concern and political significance. And justifiably so. Details warranting the very serious interest of the press and the public in the details of this suit include the following. As reported by the *Wall Street Journal* when it first revealed the affair and hush agreement, Defendant Broidy served as the deputy finance chairman of the Republican National Committee. He was represented in connection with the hush agreement by Michael Cohen—the personal attorney and fixer to the President of the United States - the same personal attorney and fixer who also assisted with at least two other hush money deals shortly before the 2016 election for women claiming affairs with the President (i.e., Karen McDougal and Stephanie Clifford aka Stormy Daniels). [Avenatti Decl., Ex. 1.] Moreover, Bechard was represented by Defendant Davidson, who also represented McDougal and Clifford (aka Stormy Daniels), in negotiating their hush agreements to prevent them from discussing their affairs with Trump. [Id.] This article was published just days after the FBI raided Cohen's office as part of an extensive investigation concerning many topics, including the payment to Clifford. [Avenatti Decl., Ex. 2.]

After the story of Bechard's affair broke, speculation in the media arose that the purpose of the Settlement Agreement was actually to pay Bechard to keep quiet about an affair with *Trump* rather than Broidy. [Avenatti Decl. Ex., 3.] This ultimately culminated in media coverage of complaints filed with the Federal Election Commission and Justice Department alleging that the payment to Bechard was meant to cover up her affair with President Trump, intended to influence the 2020 presidential election, and therefore an in-kind campaign contribution in violation of federal law. [Avenatti Decl. Ex., 4.]

The Bechard Settlement Agreement has become linked to similar payments to McDougal and Clifford because women in all three cases were represented by Davidson and because Cohen

played a role in all three instances. Their individual circumstances have become inextricably intertwined. Coverage of Bechard's affair has thus become connected by this tangled web of intrigue to President Trump.

Indeed, Defendant Broidy and his counsel, who now want to shroud select allegations of this lawsuit in secrecy, elected to announce in a very public fashion that they would stop making payments under the Settlement Agreement that Bechard claims was breached in this case. In a Wall Street Journal article entitled "Top GOP Fundraiser to Stop Hush Payments Over Affair," Broidy's counsel is quoted as saying: "Elliott specifically was paying for confidentiality that would shield his family from the embarrassing mistake he made, . . . We can prove there was an intentional breach that renders the contract null and void." [Avenatti Decl., Ex. 5.] Broidy should not be permitted to use the media and public disclosure as a weapon when it suits his whims concerning the Settlement Agreement, but to then duck for cover when uncomfortable and unflattering details emerge by soliciting this Court to trample sacred First Amendment protections.

Compounding the public's justifiable interest in the allegations of this lawsuit are several other stories concerning Defendant Broidy and his ties to the White House and President Trump.

First, it was reported as early as March of this year that Broidy was "one of President Donald Trump's earliest campaign financiers and subsequently the vice chairman of his Presidential Inaugural Committee," and that since April 2017, he "has had incredible access to the president — and has reportedly taken full advantage of it to reap profits and advance the agendas of foreign actors." [Avenatti Decl., Ex. 6.]

Second, as revealed in an *Associated Press* story based on an "exhaustive review" of e-mails and documents, Broidy made efforts to lobby the White House, including in a previously unreported meeting with President Trump, to secure $1 Billion in consulting contracts from Saudi Arabia and the United Arab Emirates. [Avenatti Decl., Ex. 7.]

Third, in May of this year, Broidy filed suit against an American consulting firm and two influential Qataris on charges that Qatar had orchestrated the theft and leak of his emails to discredit him. [Avenatti Decl., Ex. 8.]

Finally, last Monday, Broidy made headlines in the *Wall Street Journal* and other outlets by suing a former high-ranking United Nations official, alleging he was an unregistered agent of Qatar who participated in a campaign against Mr. Broidy as part of an operation by Qatar to silence its critics and influence U.S. policy. [Avenatti Decl., Ex. 9.]

Furthermore, an additional and not insignificant—reason why the public has a justifiable interest in the matters Broidy seeks to seal in this case is that they are relevant to the public discourse that has unfolded over the past year concerning the abuses of men of wealth, power, and authority relative to women under their control, otherwise referred to as the #MeToo movement. Although the facts of the present case arguably may not fit neatly within the parameters of the #MeToo discourse, there are at the very least elements that exist in this case that the public should be made aware of to make their own judgments.

In sum, the American public has a paramount interest in being able to observe justice in action here and attempting to restrict the public's access to this case will undermine the public's trust in the integrity of the judicial system and its attendant ability to reveal the truth.

C. Broidy Has Failed to Meet His Burden to Justify Sealing Because He Failed to Provide a Declaration Containing Facts Sufficient to Justify the Requested Relief.

1. Broidy Failed to File a Declaration Containing Facts Sufficient to Justify Sealing As Required by the Rules of Court.

"A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. **The motion or application must** be accompanied by a memorandum and **a declaration containing facts sufficient to justify the sealing.**" California Rules of Court Rule 2.551(b)(1) (emphasis added). However, Broidy failed to attach any declaration of this sort to his Motion. Instead, Broidy only attached a declaration from his counsel which attaches court filings, but not any facts in support of sealing. [See Putnam Decl.] Absent a declaration from Broidy (or anyone else with personal knowledge of the relevant facts), the Court *must* deny Broidy's motion. This ends the analysis.

Besides violating the express language of the California Rules of Court, Broidy's failure to submit a declaration providing the factual basis for his motion poses practical difficulties that

make it impossible for the Court to rule on his motion. "An order sealing the record must. . . [s]pecifically state the facts that support the [Rule 2.550(d)] findings." California Rules of Court Rule 2.550(e)(1). The Court cannot possibly state facts if it has been provided with none.

The absence of a declaration also leaves the reasons Broidy has identified for sealing unsupported by fact as well, as will be discussed below.

2. Because Broidy Has Failed to Attach the Settlement Agreement, the Court Cannot Rule on Whether the Settlement Agreement Provides a Basis to Seal the Complaint.

Broidy argues that the Settlement Agreement provides a basis to seal portions of the Complaint. [Motion at 15.] However, Broidy never provides the Court with the Settlement Agreement and Bechard failed to attach it to her Complaint. The Complaint itself does little to shed light on the contents of the Settlement Agreement, especially because the descriptions of the Settlement Agreement are framed as information Davidson told Bechard, with the implication that Davidson misled his client. [Complaint at ¶ 26.] As a consequence, it is unclear whether a confidentiality clause actually exists, what its scope might be, or whether Broidy's failure to pay Bechard has rendered the clause inoperative. Without a copy of the Settlement Agreement, the Court cannot possibly determine whether the Settlement Agreement requires some or all of the redactions Broidy wishes to make to the complaint. This is particularly problematic for, and prejudicial to, Defendant Avenatti because he must be able to prove that he was not a party to the Settlement Agreement (and thus has no liability), let alone any arbitration clause that allegedly exists.

For example, it is plausible that a confidentiality provision in the Settlement Agreement (if one in fact exists) would prohibit Bechard from discussing her sexual relationship with Broidy. But the agreement may also have a provision stating that Bechard was free to discuss information that had already been made public by third parties (such as the existence of the affair and her abortion). [Avenatti Decl. Ex. 1.] Bechard may be free to discuss the details of her abortion now that it is publicly known.

In addition, the Settlement Agreement may contain language to the effect that "if disclosure is required by a court order, the confidentiality provisions are no longer applicable." If so, Broidy would have no basis to argue that the Settlement Agreement forms the basis for sealing and thus Broidy would not be prejudiced by the Court declining to seal any part of the Complaint. Huffy Corp. v. Superior Court (2003) 112 Cal.App.4th 97, 107.

Other information that Broidy seeks to redact, if it is subject to redaction on the basis of a confidentiality clause, would require an unusually broad clause. Some of the information Broidy seeks to redact does not directly relate to her relationship with Broidy, such as her feelings about abortion [Complaint ¶ 27] or her communications with her attorney Davidson. [Complaint ¶ 28.] If recounting Davidson's statement that Broidy "looks like a toad," is in fact something that must be redacted under the terms of the Settlement Agreement, then the agreement would seemingly have to contain either a clause forbidding Bechard from recounting her conversations with her own attorney or all comments about Broidy. [Id.] This seems implausible and only highlights why Broidy needed to attach the Settlement Agreement if he wished to rely on it as the basis for his Motion.

Finally, if Broidy has breached the Settlement Agreement by failing to continue to make payments to Bechard, it is entirely conceivable that Bechard is no longer under any obligation to maintain confidentiality under the express terms of the Settlement Agreement. This would certainly be an equitable way of drafting the contract, but absent Broidy submitting a copy with his Motion, it is impossible to know whether the terms of the Settlement Agreement contemplate such a result.

3. Broidy Has Failed to Provide Factual Support for Why the Specific Portions of the Complaint That He Has Identified Must be Sealed.

Broidy's failure to submit a declaration in support of his Motion also creates problems for the relief he seeks because much of the information he seeks to redact is already available to the public. "It should go without saying that there is no justification for sealing records that contain only facts already known or available to the public." H.B. Fuller Co. v. Doe (2007) 151 Cal.App.4th 879, 898 see also Universal City Studios, Inc. 110 Cal.App.4th at 1283-85

(explaining that information that is publically available should not be sealed); see also In re Providian Credit Card Cases (2002) 96 Cal.App.4th 292, 305-308 (explaining that purported trade secrets that had already been made public should not be sealed).

Therefore, if Broidy wished to seal the specific details of the affair, he must establish that he has an "overriding interest [that] supports sealing the record" and that a "substantial probability exists that the overriding interest will be prejudiced if the record is not sealed." California Rules of Court Rule 2.550(d). If Broidy truly believes that "[t]he publication of these salacious details will cause considerable damage to Mr. Broidy's reputation, work, and his family," he must explain how he would be further damaged if the additional information in the Complaint is disclosed. [Motion at 13.] "There must be a specific showing of serious injury. [S]pecificity is essential. Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient." McNair v. National Collegiate Athletic Association (2015) 234 Cal.App.4th 25, 35 (citation omitted).

But unsubstantiated broad allegations of harm is precisely what Broidy relies upon here. Broidy cites a general privacy interest without any degree of specificity as to how *he* will be harmed. "[W]ithout a clear enumeration of specific facts alleged to be worthy of the extraordinary measure of maintaining our records under seal, there is simply no basis to conclude that unsealing the records will actually infringe any interest of plaintiff's or inflict any harm on it." H.B. Fuller Co. v. Doe (2007) 151 Cal.App.4th 879, 898. If the public already knows that Broidy had an affair with Bechard, impregnated her, and that she got an abortion, Broidy fails to specify how his reputation will be further damaged. [Avenatti Decl. Ex. 1.] He also fails to describe what precisely is the additional harm he believes he will suffer if additional details about a matter that has already received widespread media coverage come out. Absent a declaration from Broidy providing insight into these unsubstantiated claims of harm, it is impossible to know.

Indeed, while Broidy focuses on a sexual privacy interest [Motion at 13], significant portions of the matters sought to be sealed have nothing to do with his sexual relationships at all, such as the allegation that he believes that Trump is an idiot [Complaint ¶ 20(e)] or that *Davidson* told Bechard that Broidy was broke. [Complaint ¶ 26(a).] In fact, it is unclear how Broidy could

have any privacy interest that would merit sealing with regards to information *Davidson* communicated to Bechard[1], which makes up a significant portion of the information he seeks to redact from the Complaint. [See Complaint Complaint ¶¶ 26(a), 27, 28, 31.] This lack of factual support only further demonstrates why the Motion must be denied.

D. Broidy's Breach of the Terms of the Settlement Agreement Releases Bechard from Keeping the Allegations of the Complaint Under Seal.

Despite being required to maintain confidentiality [Complaint ¶ 26(c)], Broidy waived the confidentiality clause of the Settlement Agreement by discussing the affair himself. [Avenatti Decl., Ex. 1.] "Although waiver is frequently said to be the intentional relinquishment of a known right, waiver may also result from conduct which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished." Rubin v. Los Angeles Fed. Sav. & Loan Assn. (1984) 159 Cal.App.3d 292, 298 (citation and quotation omitted).

Here, Broidy could not possibly have valued keeping his affair with Bechard confidential when he made statements to the media about his affair. [Avenatti Decl., Ex. 1.] Regardless of whether or not Broidy specifically intended to waive any confidentiality clause in the Settlement Agreement by discussing the affair, his conduct constitutes waiver. The alternative would be perverse: Broidy would be free to speak out about the affair while Bechard would be prohibited from doing the same, including filing this lawsuit in its unredacted form. Similarly, by refusing to maintain confidentiality and announcing that he would no longer pay Bechard [Avenatti Decl., Ex. 5.], Broidy repudiated the Settlement Agreement and Bechard is therefore no longer required to perform her obligations under the contract and maintain confidentiality. See Ferguson v. City of Cathedral City (2011) 197 Cal.App.4th 1161, 1169. Because Bechard is no longer under any

---

[1] Broidy never alleges that Davidson had some sort of preexisting confidentiality agreement with Broidy. Nor does he even allege that Davidson was bound by the Settlement Agreement. Broidy's attempt to redact Davidson's communications with Bechard is simply inexplicable and unsupported by any authority.

obligation to maintain confidentiality under the Settlement Agreement, the Settlement Agreement cannot provide a basis for sealing the Complaint.

E. Even if Bechard Did Breach a Confidentiality Clause in the Settlement Agreement, the Existence of the Clause is Not a Sufficient Reason to Seal.

California courts have repeatedly held that the fact a confidentiality agreement exists is not a sufficient basis to seal a complaint. Significantly, while "a binding contractual agreement not to disclose" is "a potential overriding interest," "[t]he second element of the overriding interest analysis is there must be a substantial probability that it will be prejudiced absent closure or sealing." Universal City Studios, Inc. v. Superior Court (2003) 110 Cal.App.4th 1273, 1283; Huffy Corp. v. Superior Court (2003) 112 Cal.App.4th 97, 106 (stating same). Therefore, even if a confidentiality clause exists in the Settlement Agreement, Broidy must still present "admissible evidence" showing that he will be harmed if the confidential information is disclosed. Universal City Studios, Inc. 110 Cal.App.4th at 1283. California Courts have explicitly emphasized that courts following the rule of Publicker Industries, Inc. v. Cohen (3d Cir. 1984) 733 F.2d 1059, cited by Broidy, hold that "closure or sealing can only occur under the Third Circuit rule when there has been a specific showing of serious injury." Huffy Corp. 112 Cal.App.4th at 106 (quoting Universal City Studios, Inc. 110 Cal.App.4th at 1282).

But, as was already explained, Broidy has submitted no admissible evidence at all, so he cannot meet this burden. All that Broidy argues is that the purpose of the Settlement Agreement is to keep information private and to ensure that disputes would be resolved in private. [Motion at 15.] This is not a sufficient showing. *All* lawsuits involving confidentiality clauses would be sealed if this were all that was required and the second element of substantial probability of prejudice would be unnecessary in such circumstances. However Universal City Studios, Inc. and Huffy Corp. demonstrate that this is not the rule.

Finally, facts that already are public, even if they are also subject to a confidentiality agreement, cannot be sealed. Broidy thus cannot simply claim that the disclosure of his affair is inherently harmful and will prejudice him when that information is already public. Universal City Studios, Inc. 110 Cal.App.4th at 1284.

F. **The Specific Portions of the Complaint that Broidy Has Identified Are Relevant to the Lawsuit and Should Not be Struck or Sealed.**

Broidy argues that the Court should strike portions of Bechard's complaint on the basis that they are extraneous and irrelevant. [Motion at 10-12.] As a preliminary matter, Broidy's motion to strike should be summarily denied because he appears to be attempting to bypass Judge Hiroshige's order stating that he would not accept any other motions for hearing until he determined which portions of the Complaint should be sealed. Broidy thus also attempts to bypass the meet and confer requirements of Code of Civil Procedure section 435.5. For these reasons alone, Broidy's motion to strike should be denied.

In addition, as discussed below, the Court should decline to strike the allegations because they are in fact relevant.

1. **Because Broidy Only Objects to a Few Paragraphs of the Complaint, Striking These Paragraphs is Inappropriate.**

While Broidy has cited cases that suggest that striking may be a suitable alternative to sealing in certain circumstances, the cases he has cited involve parties that filed large volumes of irrelevant material and would therefore require extensive effort by the Court in determining whether the documents should be sealed. See Overstock.com, Inc. v. Goldman Sachs Group, Inc. (2014) 231 Cal.App.4th 471, 506 (exhibits that were uncited or scarcely cited); Mercury Interactive Corp. v. Klein (2007) 158 Cal.App.4th 60, 104 (complaint attached unnecessary exhibits).

Here, Broidy only seeks to strike isolated sentences in the Complaint that total a few pages. The Court should be especially cautious in striking Bechard's allegations given the difficulty in determining which sentences are in fact essential to Bechard's causes of action given the complicated facts of this case.

2. **The Allegations Broidy Seeks to Strike Are in Fact Relevant to the Claims Against Davidson.**

Contrary to Broidy's claims, the allegations that he seeks to seal or strike appear to be relevant to Bechard's claims against Davidson. For example, the main paragraph Broidy seeks to strike or redact, Paragraph 20, is framed as the confidential information Bechard shared with her

attorney Davidson. [Complaint ¶ 20.] Bechard also alleges that Davidson insisted that she get an abortion because "that is how these deals work," that she would be unable to move out of California because of Broidy's visitation rights if she did have a child, and that Broidy would sue her for child-support payments. [Complaint ¶¶ 27-28.] These threats resulted in her terminating her pregnancy. [Complaint ¶ 31.] Clearly, these allegations are directly relevant to Bechard's causes of action against Davidson, including the legal malpractice cause of action. [Complaint ¶¶ 89-92.] They appear to be intended to address the "failing to perform legal services with the care and competence of a reasonable attorney" portion of the legal malpractice cause of action, implicitly alleging that Bechard terminated her pregnancy because Davidson misled her on family law issues pertaining to child custody and child support. [Complaint ¶ 91.]

3. Many of the Allegations Broidy Seeks to Strike Serve to Plead Around Defenses or Are Themselves Facts Supporting a Defense.

Relatedly, while it is unclear what the actual terms of the contract were, Bechard alleges that she was told the $1.6 Million payment "represented the net present value of child-support payments Mr. Broidy would be expected to make over the 18-year support term of their child." [Complaint ¶ 25.] However, attempts by parents to waive or limit child support "obviate the clear and strong policy of this state that a parent must support his children." In re Marriage of Ayo (1987) 190 Cal.App.3d 442, 451. Besides the professional malpractice implications, Bechard may be concerned that the Court will find her contract with Broidy unconscionable or void as contrary to public policy. See, e.g., Cal. Civ. Code §1670.5 (unconsionability); Cal. Civ. Code § 1667-1668 (contracts contrary to public policy). Given that Bechard's allegations at times imply that the Settlement Agreement was either an attempt by Broidy to pay a lump sum in exchange for Bechard waiving child support payments or a contract where Broidy was paying Bechard to terminate her pregnancy, Bechard may intend to use some of her allegations to avoid alleging a contract that is unconscionable or void as contrary to public policy. For example, alleging that "[n]ot being paid to have an abortion was important to Bechard" may be intended to indicate that her contract was truly a contract to buy her silence, and not something else. [Complaint ¶ 27.] Bechard may have therefore intended to plead around defenses. "Where the complaint's

allegations or judicially noticeable facts reveal the existence of an affirmative defense, the plaintiff must 'plead around' the defense, by alleging specific facts that would avoid the apparent defense. Absent such allegations, the complaint is subject to demurrer for failure to state a cause of action." Gentry v. eBay, Inc. (2002) 99 Cal.App.4th 816, 824 (citation and quotation omitted).

Some of Bechard's allegations appear to be intended to plead a defense of duress or menace. See Cal. Civ. Code §§1565-1570. For example, Bechard alleges that "Mr. Broidy told her that he had connections who could make people disappear" and that she "had grave fears that something might happen to her." [Complaint ¶ 22.] She also alleges that Davidson relayed Broidy's veiled threat that that "she had better sign the Settlement Agreement and have an abortion." [Complaint ¶ 31.]

4. Many of the Allegations Broidy Seeks to Strike Involve Elements of Bechard's Breach of Contract Claim.

Bechard implies that the Settlement Agreement involved a release of her claims against Broidy. For example, she states that "Davidson treated Ms. Bechard's claims as a commodity to be traded for his own financial gain." [Complaint ¶ 5.] Her equitable cause of action alleges that "she retained Mr. Davidson to represent her in connection with her claims." [Complaint ¶ 95.] While Bechard never explicitly identifies what her claims against Broidy are, many of the allegations Brody seeks to redact are in a paragraph of the Complaint that discuss what Mr. Davidson learned when he spoke to his client Bechard. [Complaint ¶ 20.] The allegations of physical and psychological abuse in this paragraph likely form the basis for the claims for which Davidson was supposed to help his client obtain a settlement. This information is relevant to her claims against Davidson. It is also relevant in establishing that the Settlement Agreement was not just a confidentiality agreement, but also a release of claims, a distinction Bechard may intend to use to argue that, even if she breached the nondisclosure portions of the Settlement Agreement, she is still entitled to some portion of the unpaid balance she is still owed.

Independent of whether this information constitutes the factual basis for the claims she had against Broidy, the allegations of Paragraph 20 also establish that she had valuable information that she could keep confidential in exchange for compensation. Consideration is one of the

elements "essential to the existence of a contract." Civ. Code, § 1550. "A cause of action for breach of contract requires proof of the following elements: (1) existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach." Miles v. Deutsche Bank National Trust Co. (2015) 236 Cal.App.4th 394, 402. Therefore, it was necessary for Bechard to allege that she in fact had confidential information that she would agree to not disclose, allegations constituting consideration in her contract with Broidy, so that she could properly allege a breach of contract against him. Bechard's detailed allegations may also be necessary because she has opted to plead the legal effect of her contract. See 4 Witkin, Cal. Proc. 5th Plead § 519 (2008) (explaining how legal effect of contract should be pled). As the Supreme Court has recognized, the difficulty is that when "a party relies upon a contract in writing, and it affirmatively appears that all the terms of the contract are not set forth in *hæc verba*, nor stated in their legal effect, but that a portion which may be material has been omitted, the complaint is insufficient." Gilmore v. Lycoming Fire Ins. Co. (1880) 55 Cal. 123, 124.

5. Even if Bechard's Claims Against Broidy are Sent to Arbitration, the Same Allegations Will Need to Remain in the Complaint for the Claims Against Other Defendants.

Broidy at one point argues that "the most appropriate way to address plaintiff's claims against Mr. Broidy would be to order the agreed-upon arbitration, and to strike *all* allegations relating to Mr. Broidy from the operative complaint." [Motion at 8 (emphasis in original).] Elsewhere, he claims that "[n]one of these vicious accusations [that Broidy seeks to redact] have ***anything*** to do with plaintiff's legal claims in this case, against Mr. Broidy or anyone else." [Motion at 10 (emphasis in original).] Broidy would also prefer that the redacted portions of the Complaint be sealed until Bechard's case is sent to arbitration. [Motion at 17.] This argument is fatally flawed, however, because Broidy is not the only defendant in this lawsuit. Even if Bechard's claims against Broidy are sent to arbitration, the other defendants, including Avenatti, will still need to defend themselves in court. At a bare minimum, Avenatti cannot be forced into arbitration. See Suh v. Superior Court (2010) 181 Cal.App.4th 1504, 1512 ("[T]he strong public

policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement or who have not authorized anyone to act for them in executing such an agreement"). Bechard's tortious interference with contract and interference with prospective economic advantage cause of action is explicitly premised on Bechard's contention that there is a valid contract between Broidy and Bechard. [Complaint ¶64.] While Bechard does not have a valid cause of action against Avenatti that would survive a demurrer regardless of whether or not Bechard has in fact alleged a valid contract, the details of the contract and its surrounding circumstances are relevant to that cause of action. One way the tortious interference defendants may choose to defend themselves is by making arguments relating to the validity of the contract or its monetary value to Bechard.

III. CONCLUSION

For the reasons stated above, Avenatti respectfully requests that Broidy's Motion be denied in its entirety.

Dated: July 30, 2018

AVENATTI & ASSOCIATES, APC

By: _____
Michael J. Avenatti
Attorneys for Defendant Michael Avenatti

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 520 Newport Center Drive, Suite 1400, Newport Beach, CA 92660.

On July 30, 2018, I served the foregoing document described as: **DEFENDANT MICHAEL J. AVENATTI'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT ELLIOTT BROIDY'S MOTION TO SEAL OR ALTERNATIVELY STRIKE SENSITIVE AND IMMATERIAL PORTIONS OF THE COMPLAINT - FILED CONDITIONALLY UNDER SEAL PURSUANT TO COURT ORDER DATED JULY 6, 2018 PROVISIONALLY SEALING COMPLAINT AND ALL REFERENCES THERETO** on the following person(s) in the manner indicated:

SEE ATTACHED

[ ] (BY MAIL) I am familiar with the practice of Eagan Avenatti for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope, with postage fully prepaid, addressed as set forth herein, and such envelope was placed for collection and mailing at Eagan Avenatti, Newport Beach, California, following ordinary business practices.

[X] (BY FEDEX/OVERNITE) I am familiar with the practice of Eagan Avenatti for collection and processing of correspondence for delivery by overnight courier. Correspondence so collected and processed is deposited in a box or other facility regularly maintained by FedEx/Overnite that same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope designated by FedEx/Overnite with delivery fees paid or provided for, addressed as set forth herein, and such envelope was placed for delivery by FedEx/Overnite at Eagan Avenatti, Newport Beach, California, following ordinary business practices.

[X] (BY ELECTRONIC MAIL) On this date, I caused a copy of said document to be transmitted via electronic mail to the e-mail addresses listed on the attached service list.

[ ] (BY MESSENGER SERVICE) I caused the documents to be served by placing them in an envelope or package addressed to the person at the addresses listed above and providing them to a professional messenger service for service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 30, 2018, at Newport Beach, California.

Suzy Garcia

Shera Bechard v. Elliott Broidy, *et al*
Case No. BC712913

Peter K. Stris, Esq.
Elizabeth R. Brannen, Esq.
Dana Berkowitz, Esq.
Kenneth J. Halpern, Esq.
John Stokes, Esq.
STRIS & MAHER LLP
725 South Figueroa Street, Suite 1830
Los Angeles, CA 90017
Peter.stris@strismaher.com
Elizabeth.brannen@strismaher.com
dana.berkowitz@strismaher.com
ken.halpern@strismaher.com
john.stokes@strismaher.com

Shaun P. Martin
5998 Alcala Park
Warren Hall 109C
San Diego, CA 92110
smartin@sandiego.edu

Christopher J. Clark, Esq.
LATHAM & WATKINS LLP
885 Third Avenue
New York, NY 10022-4834
chris.clark@lw.com

Marvin S. Putnam, Esq.
Jessica Stebbins Bina, Esq.
LATHAM & WATKINS LLP
10250 Constellation Blvd., Suite 1100
Lost Angeles, CA 90067
Marvin.putnam@lw.com
Jessica.stebbinsbina@lw.com

Paul S. Berra
Berra Law
5806 Waring Ave., #5
Los Angeles, CA 90038
Bus.: (323) 461-9500
Cell: (310) 463-3641
Email: paul@berralaw.com

Attorneys for Keith Davidson and Davidson & Associates, PLC

Kelli L. Sager, Esq.
Dan Laidman, Esq.

DAVIS WRIGHT TREMAINE LLP
865 South Figueroa Street, Suite 2400
Los Angeles, CA 90017-2566
kellisager@dwt.com
danlaidman@dwt.com