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THE WASHINGTON POST

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ART COHEN, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

vs.

DONALD J. TRUMP,

Defendant.

Case No. **3:13-cv-02519-GPC-WVG**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF NON-PARTY PRESS ORGANIZATION FOR LIMITED PURPOSE INTERVENTION AND ORDER UNSEALING COURT RECORDS

Judge: Hon. Gonzalo P. Curiel
Date: May 27, 2016
Courtroom: 2D
Time: 1:30 p.m.

[Notice of Motion, Declaration of Dan Laidman with Exhibits A-D, and [Proposed] Order Filed and Lodged Concurrently]

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

This case focuses on allegedly deceptive commercial practices by a leading presidential candidate whose claim to be qualified for the presidency hinges on his business record. Defendant and his opponents both point to Trump University ("TU") as prime evidence of that record, for better or worse. Plaintiff's allegations in this case, and the lawsuit itself, have become prominent campaign issues. And Defendant has repeatedly questioned the fairness of these proceedings while on the campaign trail.

Given these extraordinary circumstances, the need for transparency is paramount. But important parts of the litigation have been conducted in secret. The parties filed more than 900 pages of records under seal in connection with Plaintiff's Motion for Class Certification. Dkt. # 39-2, 45-1. This was a crucial stage of the litigation, in which the Court permitted the lawsuit to proceed as a class action. Dkt. # 53. To reach this conclusion, the Court reviewed evidence that goes to the heart of Plaintiff's claims about Defendant's business practices, including:

- The 2007, 2008, 2009, and 2010 Trump University "Playbooks," described by Plaintiff as a "step-by-step guide" that "spelled out the advertising campaign" for TU and the plan for its live events. *See* Dkt. # 39-1 at 15; Dkt. # 39-2 at 2-4.
- Deposition testimony from Michael Sexton, Trump University's president. *See* Dkt. # 39-1 at 11-16; Dkt. # 39-2 at 3; Dkt. # 45-1 at 2.
- The Trump University Business Plan. *See* Dkt. # 45 at 11; Dkt. # 45-1 at 2.
- Declarations and evaluations from Trump University customers. *See* Dkt. # 45 at 12, 27-28, 33-35; Dkt. # 45-1 at 2-3.

These "judicial records are public documents almost by definition, and the public is entitled to access by default." *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006). But the parties filed these exhibits under seal, along with many others, and never made the rigorous showing required to overcome

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the public's presumptive right of access. Well-established authority permits the Post to intervene in this action for the limited purpose of asserting the public's – and its own – right of access and requesting that these records be unsealed. *See* Section II, *infra*. For the following reasons, its request should be granted in full.

First, under both the First Amendment and common law, there is a strong presumptive right of access to the exhibits filed in connection with Plaintiff's Motion for Class Certification. *See* Section III, *infra*. The Ninth Circuit held in January that the presumption of access 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). Courts subsequently have held that motions for class certification meet this standard. *E.g.*, *Opperman v. Path, Inc.*, 2016 U.S. Dist. LEXIS 17222, at *20 (N.D. Cal. Feb. 11, 2016); *Corvello v. Wells Fargo Bank N.A.*, 2016 U.S. Dist. LEXIS 11647, at *3 (N.D. Cal. Jan. 29, 2016). There is no serious question that the presumption applies here, as this Court necessarily addressed the merits of Plaintiff's case in ruling on the Motion for Class Certification. *See* Section III.B, *infra*.

Second, because the presumption of access applies, the parties "must meet the high threshold of showing that 'compelling reasons' support secrecy." *Kamakana*, 447 F.3d at 1180. They did not meet this exacting burden, nor could they. Their cursory sealing applications did no more than cite generally to a stipulated protective order; the Ninth Circuit has made clear that parties cannot rely on such blanket protective orders to file court records under seal. *See* Section IV.A.1, *infra*. Controlling case law also precludes Defendant from keeping these records under seal by claiming that disclosure would harm his reputation, or result in some vague or speculative commercial harm. *See* Section IV.A.2, *infra*.

Third, even if the parties could meet this threshold test, they could not override the exceptionally strong public interest in disclosure. *See* Section IV.B, *infra*. The Ninth Circuit already has recognized that the subject of this litigation is a matter of

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public concern, and that was *before* Defendant became a leading presidential candidate. Not only has the campaign focused on Defendant's business practices, but the lawsuit *itself* has become a hotly debated electoral issue. *Id.* On the campaign trail and in TV appearances, Defendant has criticized this Court's handling of the case. By choosing to turn the adjudication of this lawsuit into a campaign issue, Defendant has invited the utmost public scrutiny. *See In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 101 F.R.D. 34, 43 (C.D. Cal. 1984) (finding transparency necessary in litigation on matter of public concern to ensure "contemporaneous review by the public of judicial performance").

Fourth, any restrictions on the public's right of access must be narrowly tailored. *See* Section IV.C, *infra*. The blanket sealing order here does not meet this requirement. Any redactions to the exhibits submitted by the parties in connection with the Class Certification Motion should be limited to truly sensitive personally identifying information such as social security numbers, home addresses, phone numbers, and bank account numbers, which the Post does not seek to unseal.

Finally, the records also should be unsealed on the alternative basis that the parties have not shown "good cause" for secrecy under Federal Rule of Civil Procedure 26(c). This standard requires a specific showing, "for each particular document" that a party seeks to keep under seal, that harm from disclosure would outweigh the public interest. *Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). The parties have not attempted to make such a showing here, and they could not for the same reasons discussed above. *See* Section V, *infra*.

For all of these reasons, the Post respectfully requests that this Court grant its request for limited purpose intervention, and order the immediate unsealing of the following exhibits filed under seal in support of, and opposition to, Plaintiff's Motion for Class Certification: Dkt. # 39-2, Declaration of Jason A. Forge, Exhibits 6, 12, 14-21, 24, 27-34A, 36-38, 40, and 44; and Dkt. # 45-1, Declaration of Nancy L. Stagg, Exhibits 1-3, 7-22, 24-28, 33-34, and 36.

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II. THE POST SHOULD BE PERMITTED TO INTERVENE FOR THE LIMITED PURPOSE OF UNSEALING COURT RECORDS.

The press has standing to assert the right of public access to court records and proceedings. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) ("representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion" from court proceedings) (quotation omitted). The "media's right of access to judicial proceedings is essential not only to its own free expression, but also to the public's." *Courthouse News Service v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014). The "news media, when asserting the right of access, 'are surrogates for the public … The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press.'" *Id.* (quoting *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012)).

The Ninth Circuit has recognized a right of "limited intervention" for such purposes. *Beckman Industries, Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992) (allowing non-party to intervene to challenge protective order). Courts routinely permit non-party news organizations to intervene in civil cases for the limited purpose of requesting that records be unsealed. *See*, *e.g.*, *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1082 (9th Cir. 2014) (newspaper intervened in civil contempt proceeding to bring unsealing motion); *Kamakana v. City & County of Honolulu*, 447 F.3d at 1176 (newspaper intervened in civil lawsuit for limited purpose of unsealing judicial records); *San Jose Mercury News, Inc. v. District Court*, 187 F.3d 1096, 1101 (9th Cir. 1999) (same); *California ex rel. Lockyer v. Safeway*, 355 F. Supp. 2d 1111, 1112 (C.D. Cal. 2005) (same).

The Post has been reporting on the lawsuits concerning TU, as well as the role that the litigation has come to play in the presidential campaign. *See* Ex. C at 1-23. Access to the records at issue is critical for the Post to understand the basis of the Court's rulings, and to present readers with a full and accurate account of the proceedings. Consistent with the authorities discussed above, the Post respectfully

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requests leave to intervene for the limited purpose of asserting the public's (and its own) right of access and challenging the sealing of records in this matter.

III. THERE IS A STRONG PRESUMPTION THAT THE CLASS CERTIFICATION RECORDS ARE OPEN TO THE PUBLIC.

A. The Right Of Access Applies To Civil Court Records And Proceedings.

Both the Constitution and common law provide the public and the press with a presumptive right of access to court records and proceedings. The right of access is premised on "the common understanding that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Globe Newspaper*, 457 U.S. at 604 (quotation omitted). "This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1980). As far back as the 17th century, leading English jurists "saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Id.* More recently, the Ninth Circuit has observed that the "presumption of access is based on the need for federal courts, although independent – indeed, particularly because they are independent – to have a measure of accountability and for the public to have confidence in the administration of justice." *Center for Auto Safety*, 809 F.3d at 1096 (quotation omitted).

The First Amendment-based right of access "extends to civil proceedings and associated records and documents." *Courthouse News*, 750 F.3d at 786 (holding that federal court could not abstain from deciding news service's claim regarding access to state court civil complaints because it implicated First Amendment rights).[1]

[1] *See also Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984) (First Amendment right of access extends "to civil proceedings"); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983) (same); *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984) (same); *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 578 (4th Cir. 2004) (same). *See also NBC Subsidiary (KNBC-TV) v. Superior Court*, 20

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Federal courts have repeatedly and uniformly recognized that there is also a common law right of access that "extends to pretrial documents filed in civil cases." *Foltz*, 331 F.3d at 1134. "Unless a particular court record is one traditionally kept secret, a strong presumption in favor of access is the starting point." *Kamakana*, 447 F.3d at 1178 (quotation omitted). This "stringent standard" demonstrates a "strong preference for public access." *Center for Auto Safety*, 809 F.3d at 1096-97.

B. The Records Filed Under Seal In Connection With Plaintiff's Motion For Class Certification Are Presumptively Open To The Public.

The Ninth Circuit recently clarified the extremely broad scope of the common law presumptive right of access, leaving no doubt that it applies to the records filed under seal in connection with Plaintiff's Motion for Class Certification.

1. The Presumptive Right Of Access Applies If A Motion Is More Than Tangentially Related To The Merits Of A Case.

In *Center for Auto Safety*, a non-profit group moved to intervene in a putative class action lawsuit against Chrysler to unseal documents filed in connection with the plaintiffs' motion for a preliminary injunction. 809 F.3d at 1095. The district court found that the preliminary injunction motion was "non-dispositive," and therefore the presumption of access did not apply and Chrysler did not have to meet the rigorous "compelling reasons" standard to justify sealing. *Id.* at 1095-96. Instead, the district court applied the less demanding "good cause" standard from Federal Rule of Civil Procedure 26(c), and concluded that the records could remain sealed. *Id.*

The Ninth Circuit reversed, explaining that while some cases have used the words "dispositive" and "nondispositive" to evaluate the standard for public access, these are not "mechanical classifications." *Id.* at 1098. "Most litigation in a case is

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Cal. 4th 1178, 1208 (1999) ("every lower court opinion of which we are aware that has addressed the issue of First Amendment access to *civil* trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as criminal trials") (original emphasis). This is consistent with the Supreme Court's observation that "historically both civil and criminal trials have been presumptively open." *Richmond Newspapers*, 448 U.S. at 580 n.17.

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not literally 'dispositive,' but nevertheless involves important issues and information to which our case law demands the public should have access." *Id.* "To only apply the compelling reasons test to the narrow category of 'dispositive motions' goes against the long held interest 'in ensuring the public's understanding of the judicial process and of significant public events.'" *Id.* (quoting *Kamakana*, 447 F.3d at 1179). "Such a reading also contradicts our precedent, which presumes that the 'compelling reasons standard applies to *most* judicial records.'" *Id.* (quoting *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 677-78 (9th Cir. 2010); original emphasis).

Courts have carved out a narrow exception allowing certain records to be filed under seal on a showing of "good cause" where they were "attached to a discovery motion unrelated to the merits of a case." *Id.* at 1097. But the Ninth Circuit made clear that it would not "permit the discovery 'exception' to swallow the public access rule." *Id.* at 1103. "[P]ermitting the public's right of access to turn on what *relief* a pleading seeks—rather than on the relevance of the pleading—elevates form too far beyond substance and over reads language in our case law." *Id.* (original emphasis).

Following a comprehensive review of Ninth Circuit authority and sister circuit case law, the court held that "public access to filed motions and their attachments does not merely depend on whether the motion is technically 'dispositive.' Rather, public access will turn on whether the motion is more than tangentially related to the merits of a case." *Id.* at 1101. Applying this rule, the court assumed for argument's sake that the preliminary injunction motion at issue was "technically nondispositive," but found it "[p]articularly relevant" that "a motion for preliminary injunction frequently requires the court to address the merits of a case, which often includes the presentation of substantial evidence." *Id.* Consequently, Chrysler had to meet the "compelling reasons standard" to justify sealing. *Id.* at 1102.

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2. The "Compelling Reasons" Standard Applies In This Case.

Under the broad standard set forth in *Center for Auto Safety*, the parties must meet the stringent "compelling reasons" standard to justify continued sealing of the records filed in connection with Plaintiff's Motion for Class Certification.

The Supreme Court and Ninth Circuit both have emphasized that "the '[e]valuation of many of the questions entering into determination of class action questions is *intimately involved with the merits of the claims*. The typicality of the representative's claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact are obvious examples.'" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978); emphasis added).

As the Supreme Court recently explained,

> certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied …. Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation.

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-52 (2011) (quotations and alterations omitted). *See also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1422-23 (2013) (reversing class certification order where court of appeals refused to consider arguments that "would also be pertinent to the merits determination," as that "ran afoul of our precedents requiring precisely that inquiry"); *Z-Seven Fund, Inc. v. Motorcar Parts & Accessories*, 231 F.3d 1215, 1219 (9th Cir. 2000) (holding class certification motions are not immediately appealable because they "involve questions that are intimately involved with the merits of the claims") (quotation omitted).

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Moreover, motions for class certification are literally dispositive of a fundamental issue in any such action – whether a claim may be stated on behalf of a class. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1089 (9th Cir. 2011) (recognizing that class actions present "two separate issues for judicial resolution" – the claim on the merits and "the claim that [plaintiff] is entitled to represent a class"). Federal law recognizes the dispositive nature of a class certification motion by listing it among the proceedings which cannot be decided by a magistrate judge. *See* 28 U.S.C. § 636(b)(1)(A) (magistrate judge may not hear and determine motion "to dismiss or to permit maintenance of a class action"). The Ninth Circuit has held that the "matters listed in 28 U.S.C. § 636(b)(1)(A) *are dispositive*." *Flam v. Flam*, 788 F.3d 1043, 1046 (9th Cir. 2015) (emphasis added). In *Center for Auto Safety*, the court looked to this provision, which also precludes magistrate judges from deciding motions for injunctive relief, and held that it supported extending the presumptive right of access to motions for preliminary injunctions. 809 F.3d at 1101 n.8.

Recognizing these principles, and following the Ninth Circuit's decision in *Center for Auto Safety*, two courts in the Northern District recently have held that "a motion for class certification involves issues that are 'more than tangentially related to the merits of the case,' thereby requiring the Court to apply the compelling reasons standard." *Opperman v. Path, Inc.*, 2016 U.S. Dist. LEXIS 17222, at *20 (N.D. Cal. Feb. 11, 2016). *See also Corvello v. Wells Fargo Bank N.A.*, 2016 U.S. Dist. LEXIS 11647, at *3 (N.D. Cal. Jan. 29, 2016). Both courts ordered exhibits filed in connection with class certification motions unsealed, determining that the parties failed to meet the compelling reasons standard. *Opperman*, 2016 U.S. Dist. LEXIS 17222, at *22-24; *Corvello*, 2016 U.S. Dist. LEXIS 11647, at *3-5.

Even before *Center for Auto Safety*, many district courts applied the presumption of access to class certification-related filings. For example, in *Labrador v. Seattle Mortg. Co.*, 2010 U.S. Dist. LEXIS 95763 (N.D. Cal. Sept. 1, 2010), the court denied a sealing motion, observing "that many of the concerns the Ninth

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Circuit identified in *Kamakana* for applying the 'compelling reasons' test to dispositive motions are present" in the class certification context. *Id.* at *6. *See also Holak v. Kmart Corp.*, 2014 WL 496903, at *2 (E.D. Cal. Feb. 6, 2014) ("[t]he Court finds that the compelling reason standard should also apply to the class certification motions"); *Davis v. Devanlay Retail Group, Inc.*, 2012 U.S. Dist. LEXIS 109798, *4 (E.D. Cal. Aug. 6, 2012) ("where, as with the pending motion for class certification, the motion is one that will affect whether or not the litigation proceeds, the motion is considered dispositive and subject to the compelling reasons standard"); *Joint Equity Cmte of Investors of Real Estate Partners, Inc. v. Coldwell Banker Real Estate Corp.*, 2012 U.S. Dist LEXIS 12964, at *2 (C.D. Cal. Jan. 24, 2012) (chastising defendants for filing opposition materials to class certification motion under seal, admonishing that "parties seeking to seal court documents must establish 'compelling reasons' for doing so"); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2007 U.S. Dist. LEXIS 20570, at *31-32 (N.D. Cal. Mar. 6, 2007) (applying "compelling reasons" test because class certification motion is "akin to a dispositive motion").[2]

These authorities require the same result here. In granting Plaintiff's Motion for Class Certification, this Court addressed the underlying merits of Plaintiff's claim in detail to determine that the requirements of Rule 23 were met. For example, with respect to Rule 23(a)'s commonality requirement, this Court reviewed Plaintiff's "evidence that Defendant's marketing campaign repeatedly made … representations that Defendant was integrally involved in Trump University and that Trump University was an 'actual university,'" and determined that "common questions exist

[2] As this Court noted in its June 29, 2015 Order, some other district courts had previously treated class certification motions as non-dispositive and applied the "good cause" standard if denial of the motion would not "constitute the death knell of the case." Dkt. # 100, Order at 2 (quoting *Algarin v. Maybelline*, LLC, 2014 WL 690410, at *2 (S.D. Cal. Feb. 21, 2014)). To the extent that these pre-*Center for Auto Safety* decisions focused on whether the motion was "technically 'dispositive'" rather than "whether the motion is more than tangentially related to the merits of a case," they are no longer good law. *Center for Auto Safety*, 809 F.3d at 1101.

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as to all members of the putative class regarding whether Defendant made these representations and whether these representations were false and materially misleading." Dkt. # 53, 10/27/14 Order at 7. As to the typicality requirement, this Court examined Plaintiff's evidence and found that "Plaintiff's description of his experience with Trump University matches the allegations alleged on behalf of the putative class … regarding a common fraudulent 'scheme' to which all class members were allegedly exposed." *Id.* at 9.

Similarly, this Court found that Rule 23(b)'s predominance requirement was satisfied by scrutinizing evidence on the merits of the case presented by both sides and considering "Plaintiff's theory of liability under RICO." *Id.* at 12. This Court concluded that the evidence – including records filed under seal such as the Trump University "Playbook" – "provides a method for Plaintiff to establish proximate causation on a classwide basis without resort to individualized inquiries." *Id.* at 13. The Court gave similarly extensive consideration to Defendant's potentially dispositive merits defense that Plaintiff's RICO claim is barred by the statute of limitations. *Id.* at 16-19. It is readily apparent that Plaintiff's Motion for Class Certification was "more than tangentially related to the merits of [this] case." *Center for Auto Safety*, 809 F.3d at 1101. The parties therefore "must demonstrate compelling reasons to keep the documents under seal." *Id.*

3. The First Amendment Right Of Access Also Applies.

The First Amendment right of access attaches if "the particular proceeding in question passes … tests of experience and logic." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986) ("*Press-Enterprise II*").[3] "[L]ogic alone, even without experience, may be enough to establish the right." *In re Copley Press*, 518 F.3d

[3] While the Supreme Court first established this test in the criminal context, the Ninth Circuit has made clear that it applies to civil records and proceedings as well. *See Courthouse News*, 750 F.3d at 784-86 ("*Press-Enterprise II* framework" applicable to accessing civil court complaints); *Leigh*, 677 F.3d at 900 ("the *Press-Enterprise II* right of access test is not limited to criminal judicial proceedings").

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1022, 1026 (9th Cir. 2008). *See also Phoenix Newspapers v. District Court*, 156 F.3d 940, 948 (9th Cir. 1998) ("[e]ven if the historic right of post-trial access were not dispositive, the 'logic' prong of the *Press-Enterprise II* formulation would be").[4]

The "logic" test is satisfied where public access "would further the public's interest in understanding" the judicial system. *Phoenix Newspapers*, 156 F.3d at 948. In *Seattle Times Co. v. District Court*, 845 F.2d 1513 (9th Cir. 1988), the court held that the constitutional right of access applied to records of bail proceedings because it furthered "policy concerns of a public educated in the workings of the justice system and a system subjected to healthy public scrutiny." *Id.* at 1516. "Openness of the proceedings will help to ensure this important decision is properly reached and enhance public confidence in the process and result." *Id.* at 1517.

For the reasons discussed above, the same is true of public access to class certification proceedings and records. *See* Section III.B.1-2, *supra*. Just as with criminal proceedings, access to civil pre-trial records promotes "a measure of accountability" for courts and allows "the public to have confidence in the administration of justice.'" *Center for Auto Safety*, 809 F.3d at 1096. And in the specific context of class certification, courts have held that sealing records "would not only hinder the public's understanding of the judicial process, it would also slow the development of the law on class certification." *Labrador*, 2010 U.S. Dist. LEXIS 95763, at *5-6. Therefore, the constitutional right of access applies to these records.[5]

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[4] The modern class action certification process dates to the 1966 Amendments of the Federal Rules of Civil Procedure. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1997). Where, as here, a type of proceeding is relatively new, it is especially appropriate to focus on the "logic" prong of the test from *Press-Enterprise II*. *See Copley Press*, 518 F.3d at 1026. But to the extent that historical practice is relevant it favors applying the constitutional right of access, given that class certification is part of a civil trial process that "historically [has] been presumptively open." *Richmond Newspapers*, 448 U.S. at 580 n.17. *See also NBC Subsidiary*, 20 Cal. 4th at 1213-14 ("history does suggest … a general right of access to civil trials and related proceedings" but even "the absence of explicit historical support would not … negate such a right of access").

[5] "If the party seeking disclosure relies on both grounds [the common law and First Amendment rights of access], the withholding of information must survive both

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IV. THE PARTIES DID NOT AND CANNOT MEET THEIR BURDEN OF OVERCOMING THE PRESUMPTIVE RIGHT OF ACCESS.

Where the presumptive right of access applies, the party seeking to keep documents sealed must meet rigorous constitutional and common law requirements. Under the First Amendment standard, the proponent of sealing must demonstrate "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Leigh*, 677 F.3d at 899-900 (quoting *Press-Enterprise II*, 478 U.S. at 8).

Similarly, under the common law test, the party seeking to keep a record under seal "bears the burden of overcoming this strong presumption" in favor of access by articulating "compelling reasons supported by specific factual findings, that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process." *Kamakana*, 447 F.3d at 1178-79 (quotations omitted). The "court must conscientiously balance the competing interests of the public and the party who seeks to keep certain judicial records secret," and "base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Id.* at 1179 (quotations and alterations omitted).

As the Ninth Circuit has emphasized, "the party seeking access is entitled to a presumption of entitlement to disclosure. It is the burden on the party seeking closure … to present facts supporting closure and to demonstrate that available alternatives will not protect his rights." *Oregonian Publishing Co. v. District Court*, 920 F.2d 1462, 1466-67 (9th Cir. 1990). This is an onerous standard; any sealing order must be based on "evidentiary support," *id.* at 1467, not on "hypothesis or

– in other words, a party that asserts both grounds for disclosure will prevail if it succeeds on either one." *United States v. Kaczynski*, 154 F.3d 930, 932 (9th Cir. 1998) (Reinhardt, J., concurring).

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conjecture." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). The parties did not, and cannot, meet these extremely strict requirements here.

A. No Compelling Reason Or Overriding Interest Justifies Sealing.

When they sought leave to file exhibits under seal along with Plaintiff's Motion for Class Certification, the parties simply cited their stipulated protective order without any elaboration. *See* Dkt. # 37 (Plaintiff's Application to File Under Seal); Dkt. # 43 (Defendant's Application to File Under Seal); Dkt. # 47 (Order Granting Applications). They made no particularized showing of good cause to seal any specific document, and made no effort to show compelling reasons or an overriding interest to overcome the public's right of access. *Id.* This did not demonstrate good cause for sealing; rather, a "'good cause' showing will not, without more, satisfy a 'compelling reasons' test." *Kamakana*, 447 F.3d at 1180 (quoting *Foltz*, 331 F.3d at 1135-36). No such reasons have been shown.

1. The Parties' Stipulated Protective Order Does Not Support Sealing.

The "right of access to court documents belongs to the public" and parties are "in no position to bargain that right away." *San Jose Mercury News*, 187 F.3d at 1098. Stipulated protective orders are "subject to challenge and modification, as the party resisting disclosure generally has not made a particularized showing of good cause with respect to any individual document," and therefore only "compelling reasons" supported by "specific factual findings" can justify sealing of judicial records subject to the presumptive right of access. *Id.*at 1103.

Consequently, a party's reliance on a stipulated protective order does not constitute a compelling reason or overriding interest to justify sealing judicial records. *See Center for Auto Safety*, 809 F.3d at 1095 n.2 (rejecting argument that a party "should have been able to 'confidently rely on the district court's protective order' to shield these documents from public scrutiny"); *Kamakana*, 447 F.3d at 1183 ("reliance on a blanket protective order is unreasonable and is not a 'compelling reason' that rebuts the presumption of access"); *Foltz*, 331 F.3d at 1133 (because

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blanket protective orders are "by nature overinclusive," a party's "reliance on a blanket protective order in granting discovery and settling a case, without more, will not justify" sealing); *Safeway*, 355 F. Supp. 2d at 1121 ("[d]efendants should have known that they could not rely on the discovery protective order to bar the public's access to the summary judgment record … any such reliance was unreasonable").[6]

The stipulated protective order that the parties rely on here – the First Amended Protective Order in the *Makaeff* case – is a classic blanket order, entered into solely to expedite discovery. *See Makaeff*, Dkt. # 316. It permits the parties to designate an extremely broad range of materials as confidential, without any particularized showing. *Id.* at 2-3. And it expressly contemplates that materials designated as "confidential" in discovery may be publicly disclosed if filed with the court, stating that "[n]o document shall be filed under seal unless counsel secures a court order," and setting forth a procedure for other parties to oppose sealing applications. *Id.* at 5. It also provides that "[a]t any stage of these proceedings, any party may object to a designation" of materials as confidential, and that "[n]othing within this order will be construed to prevent disclosure of Confidential Information if such disclosure is required by law or by order of the court." *Id.* at 5, 7. The order further provides that its restrictions on disclosure will not apply if the Court determines that information already is, or has become, public knowledge. *Id.* at 8. And it permits the Court to modify its terms "for good cause, or in the interest of justice, or on its own order at any time in these proceedings." *Id.*

Controlling case law bars the parties from relying on such a protective order to

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[6] *See also Rushford v. The New Yorker Magazine*, 846 F.2d 249, 252 (4th Cir. 1988); *Citizens F.N.B., Princeton v. Cincinnati Ins.*, 178 F.3d 943, 944 (7th Cir. 1999) (rejecting stipulated protective order as a basis for restricting access, noting that "[t]he parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding"); *H.B. Fuller Co. v. Doe*, 151 Cal. App. 4th 879, 891-892 (2007) (unsealing records that had been sealed pursuant to stipulated protective order); *In re Providian Credit Card Cases*, 96 Cal. App. 4th 292, 309-310 (2002) (same).

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keep the records at issue under seal. *San Jose Mercury News*, 187 F.3d at 1103.

2. The Parties Have Not Shown Any Commercial Interest That Overcomes The Right Of Access.

The records filed under seal in connection with Plaintiff's Class Certification Motion relate to the business operations of Trump University. *See* Dkt. ## 39-2, 45-1. Plaintiff introduced these exhibits to show Defendant's involvement in the development and marketing of the enterprise. *See* Dkt. # 39-1 (Plaintiff's Class Certification Motion, Memorandum at 4-5, 7-9, 11, 13). Defendant cited sealed exhibits in his Opposition to try to counter Plaintiff's arguments about TU customers relying on his representations, and to argue that different customers derived different value from their experience at TU. *See* Dkt. # 45 (Defendant's Opposition at 2-3, 17-19, 24-26). There is nothing in the description of these exhibits, or in the sealing motions and orders themselves, to suggest that any commercial interests require withholding any part of these records, let alone sealing them in their entirety.

To the contrary, in analogous cases courts routinely find that parties' asserted commercial interests are insufficient to overcome the presumptive right of access. In *Safeway*, for example, the defendant grocery chains argued that sealing was necessary because disclosure of their business records would put them at a "competitive disadvantage," and harm their future negotiating position with labor unions. 355 F. Supp. 2d at 1121. The court rejected these arguments, explaining that it would not "speculate" about how the companies might be affected "at some point in the future in an unidentified labor dispute." *Id.* at 1117.

The Northern District's recent *Opperman* decision is instructive. There, Apple argued that exhibits filed in connection with a class certification motion should be sealed because they "reflect internal Apple processes and deliberations that Apple regards as highly confidential," and that secrecy was required "'to protect the integrity' of the process by which Apple reviews and approves apps." 2016 U.S. Dist. LEXIS 17222, at 23. But the court found that "the documents in question

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resemble those in myriad other cases in which one company seeks to make a determination about the conduct of another company." *Id.* at 24.

Another defendant in the *Opperman* putative class action, Path, tried to keep exhibits sealed that it claimed would disclose trade secrets including "features, algorithms, and concepts that have not yet been implemented or publically released." *Id.* at *21-22. But as the court explained, this was merely a technical way of characterizing "Path's uploading and further use of users' contact information," which, as the central subject of the litigation, was referred to in the complaint and other court documents. *Id.* at *22-23. The court rejected both companies' sealing requests, adding that "the mere fact that the publication of records may lead to a litigant's embarrassment or exposure to further litigation is not sufficient to meet the 'compelling reasons' standard." *Id.* at 24 (quoting *Kamakana*, 447 F.3d at 1179).

The court reached the same conclusion in *Corvello*, in which Wells Fargo argued that exhibits to a class certification motion should be filed under seal "because they contain confidential, commercially sensitive information" and "publication of the information 'could pose significant commercial harm to Wells Fargo.'" 2016 U.S. Dist. LEXIS 11647, at *3. The court rejected these speculative assertions, observing that "[p]erhaps Wells Fargo is concerned that these materials make it look bad" because they supported the plaintiffs' allegations, "but a litigant's embarrassment is not enough to justify concealing material from the public." *Id.*

Many courts have found that litigants who try to seal records because of concerns about "trade secrets" and commercial harm are really worried about negative publicity. As the Central District aptly noted in a case where companies sought to keep records under seal to protect "allegedly commercially sensitive information," it "is not the duty of federal courts to accommodate the public relations interests of litigants." *Petroleum Prod. Antitrust Litig.*, 101 F.R.D. at 40. *See also Oliner v. Kontrabecki*, 745 F.3d 1024, 1026 (9th Cir. 2014) ("[t]he only reasons provided for sealing the records—to avoid embarrassment or annoyance to [a party to

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bankruptcy proceedings] and to prevent an undue burden on his professional endeavors – are not 'compelling'"); *Procter & Gamble Co. v. Bankers Trust Co.*, 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"); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983) ("[s]imply showing that the information would harm the company's reputation is not sufficient to overcome the strong … presumption in favor of public access to court proceedings and records."); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1073 (3d Cir. 1984) (presumption of access "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) (holding that information embarrassing to bank may not be kept under seal); *State v. Cottman Transmission Systems*, 75 Md. App. 647, 658 (1988) ("[p]ossible harm to a corporate reputation does not serve to surmount the strong presumption in favor of public access to court proceedings and records").

These authorities are directly on point. Defendant's business practices lie at the heart of this action, and he cannot keep records under seal that "resemble those in myriad other cases in which one company seeks to make a determination about the conduct of another company." *Opperman*, 2016 U.S. Dist. LEXIS 17222, at 24. In the course of this case and the long-running *Makaeff* action, extensive information about the management, finances, and operational strategy of Trump University has emerged, casting serious doubt on any claim by Defendant that he would suffer concrete commercial harm from the disclosure of additional, related details. *See Safeway*, 355 F. Supp. 2d at 1119 (rejecting attempt to seal records disclosing firms' revenue sharing formula because they "offered no explanation, much less presented any evidence, as to how knowledge of the specific formula would benefit the unions when the fact of revenue sharing is already known").

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Finally, apparently there is no dispute that Trump University has not been enrolling new students or holding classes for more than five years. *See* Dkt. # 45, Defendant's Opposition to Class Certification Motion at 12 (acknowledging that TU's "'live' programs ended in about 2010" and it is merely providing "support" for existing customers). This further undermines any purported commercial harm from disclosure. *See Petroleum Prod. Antitrust Litig.*, 101 F.R.D. at 40 (recognizing that "[i]t is quite likely that most of the other sealed documents have lost their character as commercially sensitive due to the passage of time").

3. Any Personal Privacy Interests Can Be Protected With Narrowly Tailored Redactions.

While consistently rejecting attempts to seal court records on the basis of purported commercial harm, courts have appropriately required the redaction of certain sensitive personal information. For example, in *Corvello*, the court rejected Wells Fargo's argument that unsealing class certification exhibits would cause commercial harm, and ordered it "to refile all the material publicly – with only loan numbers, financial account numbers, and social security numbers redacted." 2016 U.S. Dist. LEXIS 11647, at *5. The Post does not seek the unsealing of any social security numbers, home addresses or phone numbers, or sensitive personal financial information of any individual TU customers. Such information can be redacted, and the remainder of the records unsealed. *See* Section III.C, *infra*.

B. The Public Interest Strongly Supports Unsealing.

Because the right of access is based on the "courts' legitimacy in our system of government" and the need for scrutiny of *all* judicial proceedings, the Post does not need to establish any particular public interest to support unsealing. *Safeway*, 355 F. Supp. 2d at 1124. Instead, the court must "strongly presume the public's interest in access and require a showing of compelling reasons to rebut it." *Id.* (companies opposing newspaper's unsealing request sought to "erroneously reverse[] the burden by seeking to require an evidentiary showing of the public interest").

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But while the level of public interest in a particular case cannot be used to justify secrecy, it can work in the other direction to support transparency. As courts have made clear, the "interest in access to court proceedings in general may be asserted more forcefully when the litigation involves matters of significant public concern." *Petroleum Prod. Antitrust Litig.*, 101 F.R.D. at 38. In such instances, the proponents of secrecy must meet an even stricter burden to overcome the more substantial public interest. *Id.* at 39 (recognizing strong public interest in access to records of civil antitrust action alleging conspiracy to raise gasoline prices).

The Ninth Circuit recognized the strong public interest in the subject of this litigation even before Defendant's presidential bid. In holding that TU was a public figure for purposes of defamation law in the *Makaeff* case, the court explained that:

> any general interest in Trump University stemming from its celebrity founder soon ripened into an actual dispute over Trump University's business and educational practices … [B]y Fall 2009, the 'specific question' of Trump University's legitimacy had become a public controversy.
>
> …
>
> Trump University's business model involved offering seminars that encouraged members of the public to participate in the market for foreclosed properties, which had grown substantially in the wake of the 2007 financial and mortgage crisis. These activities, carried out by Trump University and other purveyors of real estate investment advice, had the potential to affect local housing markets by increasing or decreasing real estate speculation in the market for foreclosed homes. The debate over Trump University's business practices thus held ramifications not just for Trump University and its customers, but for all participants in the local housing markets.

Makaeff v. Trump Univ., LLC, 715 F.3d 254, 267 (9th Cir. 2013).

As this Court noted in ruling on Plaintiff's Motion for Class Certification, Plaintiff's allegations and evidence focus on "Defendant's marketing campaign," and representations that were made to persuade members of the public to become TU customers. Dkt. 53 (Class Certification Order at 7). In the analogous *Providian* case, the California Court of Appeal ordered the unsealing of class certification

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records over the defendants' trade secrets objections, noting that the business' "methods of soliciting its credit card customers were at the heart of that dispute," and there was a "great and legitimate public interest in precisely how Providian went about trying to sell its various products and services to the public." 96 Cal. App. 4th at 309-10. "When that interest is augmented by the strong presumption in favor of public access reflecting a first principle that the people have the right to know what is done in their courts, a decision by the trial court that defendants had not made out the case for an overriding interest that overcomes the right of public access was no abuse of discretion." *Id.* at 310 (quotations and citations omitted).

As these authorities demonstrate, there already was a strong public interest in this action before the 2016 presidential campaign. Defendant subsequently has become the front-runner for the Republican nomination for the presidency of the United States. *See* Exs. A-C. As the Ninth Circuit has held, courts weighing the public disclosure of litigation materials must consider "whether a party benefitting from the order of confidentiality is a public entity or official," and "whether the case involves issues important to the public." *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 424 n.5 (9th Cir. 2011). Here, not only does the case involve "issues important to the public," but Defendant is seeking to become the most powerful public official in the country, if not the world. *Id.*

A "right of access claim" such as this one "implicates the same fundamental First Amendment interests as a free expression claim." *Courthouse News*, 750 F.3d at 786. The First Amendment "has its fullest and most urgent application … to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). There is a "paramount public interest in a free flow of information to the people concerning public officials [and] anything which might touch on an official's fitness for office is relevant." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). "Public discussion about the qualifications of those who hold or who wish to hold positions of public trust presents the strongest possible case for application of the

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safeguards afforded by the First Amendment." *Aisenson v. ABC*, 220 Cal. App. 3d 146, 154 (1990) (citing *Ocala Star-Banner v. Damron*, 401 U.S. 295, 300 (1971)).[7]

Defendant has emphasized his business experience in his campaign, touting it as his leading qualification to serve as president. *See* Ex. A. His rivals have focused their critiques accordingly, and Defendant's business record has become a subject of intense public debate as voters make their decisions in primary contests and prepare for the general election in November. *See* Ex. B.

This lawsuit itself has become a prominent issue in the presidential campaign. Florida Senator Marco Rubio and Texas Senator Ted Cruz both discussed the litigation during the February 25 Republican presidential debate to try to show that Defendant's business record is flawed and that he is unfit to be president. *See* Ex. C at 20-21, 32-33, 42-44. Political observers noted that Google searches for "Trump University" spiked during the debate compared with other topics, suggesting that the issue resonated with the public. *Id.* at 20-21. A nonprofit organization, American Future Fund, launched a multi-million dollar television ad campaign focused on TU that criticized Defendant by echoing Plaintiff's allegations in this action. *Id.* at 22-27. The Post and other news outlets have reported on this case and the allegations about TU to evaluate Defendant's claims about his record and qualifications to be president, and to test the veracity of his opponents' attacks. *Id*. at 1-19, 32-55.[8]

Defendant has responded aggressively, seeking to portray TU as emblematic of the successful business record that qualifies him to be president. *E.g.*, Ex. C at 45-46. Defendant has argued publicly that this litigation lacks merit, while sharply criticizing Plaintiff's counsel and the original plaintiff in the *Makaeff* case. *Id*. at 28-

[7] *Accord Phoenix Newspapers, Inc. v. U.S. District Court*, 156 F.3d 940, 948 (9th Cir. 1998) (strong public interest in access to trial of a public official); *In re National Broadcasting Co., Inc.*, 635 F.2d 945, 948 (2d Cir. 1980) (access granted to court records in trial of public officials).

[8] While the presidential campaign has taken the public interest in TU to new heights, the Post reported on it as early as 2009. *See* Ex. D.

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31, 45-46. Defendant even has launched a racially charged attack on the Court, telling a crowd at a February campaign rally in Arkansas that "there's a hostility toward me by the judge – tremendous hostility – beyond belief," adding that "I believe he happens to be Spanish, which is fine. He's Hispanic — which is fine." *Id.* at 30. Defendant similarly claimed on NBC's "Meet the Press" that, "because of the wall and because of everything that's going on with Mexico … this is a judge who I believe has treated me very, very unfairly," and "[t]his is a case that should have been thrown out a long time ago, in the opinion of many great lawyers." *Id.* at 28.

Not only has this litigation become a key topic of debate in the presidential race, but Defendant has chosen to make the Court's adjudication of the case a campaign issue of its own. This only heightens "the important interest in contemporaneous review by the public of judicial performance." *Petroleum Prod. Antitrust Litig.*, 101 F.R.D. at 43. "[P]ublic access to court proceedings is one of the numerous checks and balances of our system, because contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring) (quotations omitted). Defendant's public criticism about the fairness of the proceedings and his insertion of the issue into the presidential campaign only strengthens the case for maximum transparency.

C. The Sealing Order Is Not Narrowly Tailored.

Even if the parties could successfully demonstrate a compelling justification for sealing some specific portion of the records submitted in connection with the Class Certification Motion, this still would not warrant the blanket approach under which more than 900 pages of records have been filed under seal. Instead, the constitutional and common law rights of access require that any sealing order be "narrowly tailored." *Leigh*, 677 F.3d at 899-900

In *Kaczynski*, the Ninth Circuit redacted small portions of a psychiatric report about the Unabomber to protect the privacy of third parties, but granted the public

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access to the "vast bulk" of the report. 154 F.3d at 932. Here, too, assuming that any portion of the records can justifiably be sealed, the Court should order the remainder released. *See also Corvello*, 2016 U.S. Dist. LEXIS 11647, at *5.

V. THE PARTIES HAVE NOT SHOWN GOOD CAUSE TO SEAL RECORDS RELATED TO THE CLASS CERTIFICATION MOTION.

In the alternative, the exhibits should be unsealed because the parties have not met their burden of showing good cause for secrecy. Under Federal Rule of Civil Procedure 26(c), a "party asserting good cause bears the burden, *for each particular document it seeks to protect*, of showing that specific prejudice or harm will result if no protective order is granted." *Foltz*, 331 F.3d at 1138 (emphasis added). "[B]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *In re Roman Catholic Archbishop*, 661 F.3d at 424 (quotation omitted). "Rather, the person seeking protection from disclosure must allege specific prejudice or harm," and "if the court concludes that such harm will result from disclosure … then it must proceed to balance the public and private interests to decide whether [maintaining] a protective order is necessary." *Id.* (quotations omitted). This balancing of interests requires consideration of "whether a party benefitting from the order of confidentiality is a public entity or official," and "whether the case involves issues important to the public." *Id.* at 424 n.5.

For the same reasons discussed above with respect to the constitutional and common law standards, there are no private interests here that could possibly override the substantial public interest in disclosure of records that have served as a basis for this Court's adjudication of Plaintiff's Class Certification Motion. These records must therefore be unsealed under any standard. *See Rahman v. Mott's L.L.P.*, 2014 U.S. Dist. LEXIS 117180, at *4-5 (N.D. Cal. Aug. 21, 2014) (denying motion to file class certification records under seal under "good cause" standard).

VI. CONCLUSION

For all of these reasons, the Post respectfully requests that this Court grant its

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request for limited purpose intervention, and order the immediate unsealing of the following exhibits filed under seal in support of, and opposition to, Plaintiff's Motion for Class Certification: Dkt. # 39-2, Declaration of Jason A. Forge, Exhibits 6, 12, 14-21, 24, 27-34A, 36-38, 40, and 44; and Dkt. # 45-1, Declaration of Nancy L. Stagg, Exhibits 1-3, 7-22, 24-28, 33-34, and 36.

DATED: April 1, 2016

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