IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PAUL McMANN, Plaintiff, v. JOHN DOE, Defendant.	No. 1:06-cv-11825-JLT

MEMORANDUM IN SUPPORT OF PUBLIC CITIZEN LITIGATION GROUP'S MOTION TO UNSEAL

Public Citizen Litigation Group ("PCLG") was denied access to copies of two motions filed by the plaintiff in this case (Docket Nos. 2 & 3) because the motions were filed under seal. No party requested that the motions be sealed, and the Court made no findings that any interest in secrecy outweighed the presumption that judicial records should be open. Instead, the motions were apparently sealed pursuant to the Clerk's policy of automatically and permanently sealing all ex parte motions filed in this Court. This policy fails to take into account, however, the public's right to inspect and copy government records guaranteed by the common law and the First Amendment. Accordingly, PCLG respectfully requests that the Court unseal Docket Numbers 2 and 3, along with any supporting papers.

BACKGROUND

Plaintiff Paul McMann sued John Doe, the anonymous defendant in this case, for defamation based on Doe's operation of a website criticizing McMann at

http://www.paulmcmann.com/. Mem. Op. at 1-3 (Oct. 31, 2006). At the time the complaint was filed, the website contained a picture of McMann, a statement that McMann had "turned lives upside down," and a warning to the reader to "Be afraid. Be very afraid." *Id.* at 1. Along with his complaint, McMann filed an ex parte motion for leave to subpoena GoDaddy.com and Domains by Proxy, Inc. (collectively, "GoDaddy"), two jointly operated companies that registered the paulmcmann.com domain name and hosted the website. *Id.* at 2-3.

This Court initially denied the motion sua sponte, holding that McMann would have to submit a sworn affidavit in support of his allegations before discovery would be allowed. *Id.* at 3. When McMann resubmitted his motion along with an affidavit swearing to the harm he had suffered and the measures he had already taken to reveal Doe's name, this Court responded by dismissing the case. *Id.* at 7. The Court initially held that it lacked subject-matter jurisdiction because McMann alleged no federal claims, and Doe's state citizenship could not be determined for purposes of diversity jurisdiction. *Id.* at 5-7. However, the Court then went on to examine whether a subpoena of GoDaddy would otherwise have been proper. *Id.* at 7-16. The Court noted that Doe's allegations on the website were bland, vague, subjective, and not provably true or false, and concluded that McMann had "not met the evidentiary burden required to remove John Doe's constitutional interest in his anonymity." *Id.* at 16. Based on its jurisdictional ruling, the Court dismissed the case without prejudice. *Id.* at 7.

Six days later, on November 6, 2006, McMann filed a new case in the Superior Court of Arizona, Maricopa County, alleging essentially the same facts as those alleged

in this case and omitting any mention of this Court's decision or the statements McMann had previously alleged to be defamatory. *See* Cmplt. in *McMann v. Does*, No. 2006-092226, filed Nov. 6, 2006 (Exh. 1). Without asking permission of the Arizona court or alerting it to the possible infringement of Doe's right to anonymous speech, McMann then sent a subpoena to GoDaddy seeking Doe's identity. Doe responded by retaining PCLG and filing a motion to quash in the Arizona court, on which oral argument is scheduled for January 17, 2007.

To support Doe's motion to quash the Arizona subpoena, PCLG attempted to obtain a copy of McMann's motions in this Court, but was unable to do so because the documents were filed under seal. The Clerk's office notified PCLG that all ex parte documents filed in the Court are automatically sealed and that, absent an order to the contrary, the documents would remain sealed indefinitely.

PCLG now requests that this Court order the motions unsealed. Doe has consented to this motion. McMann's counsel would not consent, but did confirm that McMann had never requested that the motions be filed under seal.

ARGUMENT

The public has a presumptive right of access to judicial records that can be overcome only by a strong showing of an important countervailing interest. The heavy burden of this showing is on the party opposing disclosure and must be made with specificity on a document-by-document basis. In this case, neither of the parties requested that the records be sealed or provided any reason to seal them. Because

important public interests mandate disclosure of the filings and no countervailing interests justify keeping them secret, the motions should be unsealed.

A. Both the Common Law and the First Amendment Create a Presumptive Right of Public Access to Court Filings.

The public has a presumptive right under the common law to "inspect and copy public records and documents, including judicial records and documents." *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987) (quoting *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978)). This right "allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system." *Id.* at 410 (quotation omitted). The presumption of openness applies to civil as well as criminal judicial records. *Id.* at 408 n.4.

Before prohibiting public access to records, a court must "weigh the presumptively paramount right of the public to know against the competing private interests at stake." *Id.* at 410. The presumption of public access is a strong one, and therefore "only the most compelling reasons can justify non-disclosure of judicial records." *Id.* (quotation and alteration omitted). The party advocating secrecy bears "the heavy burden of exhibiting the existence of special circumstances adequate to overcome the presumption of public accessibility." *Id.* at 413.

In addition to the common-law right of access, the Supreme Court has also held that the First Amendment provides a presumptive right of public access to criminal trials, *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980), voir dire proceedings in criminal trials, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-13 (1984)

(*Press-Enterprise I*), and preliminary hearings in criminal prosecutions. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986) (*Press-Enterprise II*). Courts of appeals in other circuits have applied the First Amendment right of public access to judicial records, and to civil, as well as criminal, cases. *See, e.g., Grove Fresh Distribs. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (applying the First Amendment right of access to disclosure of civil discovery documents); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (applying the right to documents submitted in support of a summary judgment motion); *see also Westmoreland v. CBS, Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983).

When the First Amendment right of access applies, the presumption of openness is even stronger than the common-law presumption. *In re Providence Journal Co.*, 293 F.3d 1, 11 (1st Cir. 2002). The First Amendment presumption can be overcome only by showing "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 10-11. The First Circuit has characterized this required showing as a "stringent" one. *Id.* at 11. The Court must make specific, on-the-record findings to justify the sealing on a document-by-document basis. *Id.* at 15.

The First Circuit has suggested, but never explicitly held, that it would follow other circuits in extending the First Amendment right of access to filings in civil proceedings. In *Anderson v. Cryovac, Inc.*, the First Circuit considered whether the public has a First Amendment right of access to civil discovery documents. 805 F.2d 1,

11-12 (1st Cir. 1986). The court analyzed the question by applying the test set forth by the Supreme Court in *Richmond Newspapers*, 448 U.S. 555, which asks "whether the proceedings in question historically have been open to the public, and whether access plays a particularly significant role in the functioning of the judicial process." *Anderson*, 805 F.2d at 12. Although the court rejected a First Amendment right of access to civil discovery materials, it explicitly distinguished cases from other circuits granting a First Amendment right of access to civil filings on "pretrial motions that were dispositive of the litigants' substantive rights." *Id.* at 11. The First Circuit's analysis suggests that First Amendment rights may attach to certain civil filings that are important to the judicial process, such as "where the material is important and the decision to which it is relevant amounts to an adjudication of an important substantive right." *Id.*; *see also Gitto Global Corp. v. Worcester Tel. & Gazette Corp.*, 422 F.3d 1, 6 n.3 (1st Cir. 2005) (leaving open the question whether the First Amendment right of access extends to bankruptcy proceedings).

B. The Interests of PCLG and the Public in General Mandate Disclosure of the Filings in This Case.

A document becomes part of the public record whenever "a court relies [on the document] in determining the litigants' substantive rights." *Providence Journal Co.*, 293 F.3d at 16 (quotation omitted); *see also Grove Fresh*, 24 F.3d at 898 (recognizing that documents become part of the public record when either "the court has relied on them" or when "the litigants have offered them as evidentiary support"). In this case, the Court must have relied on McMann's two motions and affidavit in reaching its decision to deny

McMann's request for leave to subpoena GoDaddy because they were the only items in the record that would have described the basis for the relief that McMann sought. Indeed, the Court at several points in its Memorandum Opinion specifically referred to the motions and the affidavit. *See* Mem. Op. at 3, 8, 9 & n.32, 14-15 n.58, 15.

The Court initially noted that McMann's first motion included no affidavit and "cited no law and no justification authorizing this court to allow this subpoena power." *Id.* at 3. According to this Court's opinion, McMann then submitted a second motion along with an affidavit "swearing to the harm he had suffered and the measures he had already taken to reveal John Doe's name." *Id.* In his affidavit, McMann "assert[ed] that he is losing business, has trouble with financing, and is suffering irreparable reputational harm because of this website." *Id.* at 9. Based on the affidavit—the only piece of evidence before it—the Court concluded that McMann "ha[d] not met the evidentiary burden required to remove John Doe's constitutional interest in his anonymity." *Id.* at 16. The Court's decision was therefore explicitly based on the sealed filings.

Disclosure is particularly important here, given that the motions filed by McMann were dispositive of the case. Because McMann needed Doe's name in order to serve him with process, failure to prevail on the motion for leave to subpoena GoDaddy meant that, in effect, the litigation was over. *See id.* at 3. As the Court noted in its Memorandum Opinion, "[w]ithout the ability to issue a subpoena, John Doe's true name would remain unknown, this civil suit could not proceed, and Plaintiff McMann could receive no remedy." *Id.* at 8-9. The public's interest in disclosure of court records is at its peak as to potentially dispositive motions that may have influenced the case's outcome. *See*

Rushford, 846 F.2d at 252-53 (holding that once a party submits or incorporates discovery documents as part of a motion for summary judgment, they should be disclosed to the public absent compelling, overriding interests); *Brown & Williamson*, 710 F.2d at 1180 ("Since [the document] is the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional scrutiny."). Access to these filings is essential because "court records often provide important, sometimes the only, bases or explanations for a court's decision." *Brown & Williamson*, 710 F.2d at 1177; *see also Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 547 (7th Cir. 2002). In this case, for example, disclosure of the motions is necessary to understand the strength of McMann's showing and thus to comprehend fully this Court's reasons for deciding that McMann failed to satisfy his burden.[1]

Although the strong presumption of public access means that PCLG need not make any particular showing to justify the public's interest in access to the filings, the public interest in disclosure here is strong because the case involves a matter of public concern. *See Standard Fin. Mgmt*, 830 F.2d at 412. Internet anonymity is an issue of

[1] The First Circuit held in *Anderson* that the public right of access does not extend to discovery proceedings. 805 F.2d 1. Although a motion for leave to subpoena GoDaddy is, in a sense, a discovery motion, this Court also required McMann to make a showing that his substantial rights had been violated before it would allow the case to proceed. Mem. Op. at 8. Thus, McMann's motion presented much more than a peripheral discovery dispute; it is "material[] on which a court relie[d] in determining the litigants' substantive rights." *Anderson*, 805 F.2d at 13. In any event, even for discovery materials, "Rule 26(c)'s good cause requirement means that, as a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789-90 (1st Cir. 1988).

significant public interest that potentially affects everyone who uses the Internet. Both mainstream news stories and scholarly law review articles have in recent years examined the question addressed by the Court in this case: what evidentiary showing a plaintiff must make prior to gaining access to the identity of an anonymous Internet critic. *See, e.g.*, Laura Smitherman, *Internet Postings Targeted in Court: At Stake is Anonymity of Those Who Make Disparaging Remarks*, *Baltimore Sun*, Nov. 2, 2005, at A1; Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 Comm. L. & Pol'y 405 (2003). Moreover, other courts have recently struggled with the proper standard to apply in these cases. *See, e.g.*, *Best Western Int'l, Inc. v. Doe*, No. 06-1537, 2006 WL 2091695 (D. Ariz. July 25, 2006); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). Access to the filings in this case will enable courts and legal scholars who are working to develop the appropriate legal standard to understand the nature of this Court's decision.

Aside from the public's interest, PCLG has a particular interest in gaining access to these filings because it is defending a second lawsuit against Doe in Arizona based on an almost identical complaint as the one filed in this case. *See* Exh. 1. Access to the arguments and evidence submitted by McMann in this Court would reveal the strength of McMann's likely showing in the Arizona litigation and may create a basis for impeachment of McMann's evidence there. Access to McMann's filings here may also support a motion for attorneys' fees under Arizona Rule of Civil Procedure 11 and Arizona Revised Statutes § 12-349 against McMann for bringing repeated litigation based on evidence already rejected as baseless by this Court.

C. No Countervailing Interests Support Keeping the Motions Under Seal.

Under certain circumstances, the public's right to access judicial records must give way to the privacy rights of participants or third parties. *Standard Fin. Mgmt.*, 830 F.2d at 411-12. In this case, however, no party even requested that the motions be sealed, much less made any showing of special circumstances that would justify sealing them. Instead, the motions were apparently sealed pursuant to the Clerk's policy of automatically sealing all ex parte motions. This policy, however, disregards the required individualized determination that must be made prior to sealing judicial records.

Courts "disfavor[] blanket rules which fail[] to account for individual circumstances." *In re Boston Herald, Inc.*, 321 F.3d 174, 181 (1st Cir. 2003). In *Globe Newspaper Co. v. Superior Court*, for example, the Supreme Court held that even the compelling interest in protecting a minor's well-being did "not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest." 457 U.S. 596, 608 (1982). And in *Providence Journal*, the First Circuit struck down the District of Rhode Island's practice of storing legal memoranda in the judges' chambers, where they were inaccessible to the public, rather than in the clerk's public files. 293 F.3d at 12-13. The court held that this policy, which "place[d] on persons desiring access the onus of initiating action[,] . . . reverse[d] the constitutional presumption of public access to documents submitted in conjunction with

criminal proceedings." *Id.* at 11;[2] *cf. Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (holding that restricting access to judicial records in criminal cases and "plac[ing] on the public the burden of overcoming inertia" was impermissible).

To accommodate the public's right of access, privacy interests thus must be "implemented on a case-specific basis," *Providence Journal*, 293 F.3d at 12, and the party opposing disclosure must make a "particular factual demonstration of potential harm." *Standard Fin. Mgmt.*, 830 F.2d at 412. Broad generalizations and conclusory assertions of privacy interests are not sufficient. *Id.*; *cf. Liggett Group*, 858 F.2d at 790 (rejecting a blanket protective order that "extend[ed] broad protection to all documents . . . without a showing of good cause for confidentiality as to any individual documents"). Only specific and identifiable privacy interests, such as genuine trade secrets, privileges, or interests created by statute or court rule, justify sealing the record in civil cases. *Baxter Int'l*, 297 F.3d at 546-47; *Brown & Williamson*, 710 F.2d at 1180. The First Circuit in *Standard Financial Management*, for example, rejected general claims by parties about privacy interests in personal financial affidavits, noting that they "were wholly unable to point . . . to a single particularized harm which might befall them, or to any sufficiently unique reason to warrant special treatment." 830 F.2d at 412.

To be sure, some ex parte filings may present compelling circumstances that justify allowing them to be filed under seal, such as cases where knowledge of the filing would cause an opposing party to flee the jurisdiction or dispose of disputed assets. But

[2] The court also struck down the policy as it applied to civil filings. *Providence Journal*, 293 F.3d at 13 n.5.

this case presents a good example of why these circumstances will not always be present. McMann's ex parte motions requested leave to subpoena GoDaddy so that the anonymous defendant could be identified and served with process. Mem. Op. at 3. Given that the professed intent of the motions was to notify the defendant of the action against him, there was no reason to keep the existence of the motions secret.

Moreover, even in those cases where special circumstances justify sealing an ex parte motion, those circumstances may disappear after the court rules on the motion or the case is dismissed. *Cf. Liggett Group, Inc.*, 858 F.2d at 790 (noting that a dismissal of a case on the merits is a significant change in circumstances calling into question the further need for a protective order). Once disputed assets have been seized, for example, the reasons supporting sealing an ex parte motion may no longer exist. In this case, the relevant motions remain sealed even though the case has been dismissed and apparently will remain sealed indefinitely absent an order by this Court.

McMann may argue that the motions should remain sealed because they contain allegedly defamatory material that he does not want on the public record. This Court, however, has already concluded that nothing on Doe's website is defamatory. Mem. Op. at 15-16. Even if the material were defamatory, the potential of public embarrassment is not a sufficient reason to block public access to court filings. *Siedle v. Putnam Invs., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998); *see also Cent. Nat'l Bank of Mattoon v. U.S. Dep't of Treasury*, 912 F.2d 897, 900 (7th Cir. 1990); *Brown & Williamson*, 710 F.2d 1165 at 1179-80. Moreover, McMann abandoned any privacy interest he may once have had regarding the allegedly defamatory material when he filed suit against Doe. Once a party

has filed suit, that party's desire to shield information from the public "cannot be accommodated by courts without seriously undermining the tradition of an open judicial system." *Brown & Williamson*, 710 F.2d 1165 at 1180. As the Seventh Circuit observed in *Union Oil Co. v. Leavell*:

> Many a litigant would prefer that the subject of the case—how much it agreed to pay for the construction of a pipeline, how many tons of coal its plant uses per day, and so on—be kept from the curious (including its business rivals and customers), but the tradition that litigation is open to the public is of very long standing. People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.

220 F.3d 562 (7th Cir. 2000).

In any defamation case, the actual text of the allegedly defamatory statement will be a key piece of evidence before the court. A plaintiff will not be able to prosecute such a claim without including the statement in his filings, and the court will not be able to decide the case without discussing it. Here, for example, the allegedly defamatory statements were both included in McMann's complaint and quoted in this Court's Memorandum Opinion. Cmplt. ¶ 31; Mem. Op. at 1. McMann can therefore claim no remaining interest in keeping the material secret.

CONCLUSION

The motions and supporting papers in Docket Numbers 2 and 3 should be unsealed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on December 23, 2006, I electronically filed this Memorandum in Support of Public Citizen Litigation Group's Motion to Unseal with the Clerk of the Court by using the CM/ECF system, which will automatically serve notice of electronic filing on the following:

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