Maria Crimi Speth (012574)
JABURG & WILK, P.C.
3200 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012
mcs@jaburgwilk.com
(602) 248-1000

Attorneys for Public Citizen, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

GEORGE F. BOBOLAS, a Greek individual, Plaintiff, v. JOHN DOES 1 – 100, Internet website bloggers; Defendants.	Case No. 2:10-cv-02056-DGC **MOTION TO UNSEAL**

Jaburg & Wilk, P.C.
Attorneys At Law
3200 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012
(602) 248-1000

Public Citizen, Inc., a District of Columbia corporation, hereby moves this Court pursuant to unseal the records in this matter. The documents are judicial records and thus subject to the strong presumption of public access. Movant seeks to enforce this strong presumption and wants to see the documents for the purpose of continuing to report on this case.

This motion seeks the following relief: an order unsealing the versions of the allegedly defamatory statements that Plaintiff submitted to the record to justify the TRO and unsealing the entire declarations of Bobolas and Ioannis Vekris.

This Motion is supported by the following Memorandum of Points and Authorities and the Court's entire file in this matter.

Counsel for proposed intervenor sought the consent of plaintiff's counsel to this motion, but counsel indicated the plaintiff will oppose the motion.

Jaburg & Wilk, P.C.
Attorneys At Law
3200 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012
(602) 248-1000

MEMORANDUM OF POINTS AND AUTHORITIES

Public Citizen files this motion to enforce the right to public access to court records, founded in both the common law and the First Amendment. After plaintiff George Bobolas brought defamation claims against a group of unnamed bloggers, he sought a temporary restraining order ("TRO") taking down the blog and concomitantly moved to seal the versions of the allegedly defamatory statements that he had submitted to the record to justify the TRO, and the entire declarations of Bobolas and Ioannis Vekris, to which the statements were attached but which sought to refute the alleged defamation. The Court denied the TRO but, without any explanation, granted the motion to seal. Because the sealed statements at issue in the case remain on the web site, and because Bobolas surrendered any privacy interest he may have once had regarding the statements when he filed suit, Public Citizen urges the Court to uphold the public's right to inspect judicial records and unseal the documents on which the motion for a TRO was predicated.

BACKGROUND

On September 24, 2010, Bobolas, a wealthy Greek businessman, sued a group of unnamed Internet web site bloggers for posting a series of critical statements about him to the Greek-language web site http://www.bobolasgate.info/. Bobolas, who is one of the ten wealthiest people in Greece[1] alleged that the blog postings were defamatory because they contained false and disparaging statements regarding his character, moral propensity, and legal conduct. He also brought claims for false light invasion of privacy, tortuous interference with economic advantage, and intentional and negligent infliction of emotional distress. Although the complaint was based solely on state law, Bobolas

[1] The Wealthiest Greeks of 2009, http://www.grreporter.info/en/wealthiest_greeks_2009/1697 (last visited Oct. 27, 2010)

claimed diversity jurisdiction on the ground that he conveniently believed that "some" of the posters on the blog live in the United States. He sought a TRO against the bloggers and non-party GoDaddy.com, Inc., the blog's host, as well as an order requiring preservation of documents. In addition, he moved to seal all of the evidence that he was submitting in support of the requested TRO – namely, the Bobolas and Vekris declarations, which reference and quote the allegedly defamatory statements, and exhibits containing the allegedly defamatory statements themselves, as excerpted from posts made on the blog, translated into English.

On October 1, after a hearing on the issues, the Court denied the TRO motion, finding that Bobolas had not shown a probability of success on the merits, in part because he failed to present sufficient evidence establishing the element of fault. The Court properly began its analysis by noting, *sua sponte*, possible questions about whether the case was properly before it pursuant to diversity jurisdiction. Bobolas was unable to affirmatively plead the states in which any of the anonymous bloggers live, which is why courts generally forbid diversity suits against Doe defendants. *E.g., Howell by Goerdt v. Tribune Entertainment Co*., 106 F.3d 215, 218 (7th Cir. 1997). However, the Court upheld the presence of diversity jurisdiction based on the vague allegation that **some** of the bloggers live in the United States, and Bobolas only intended to sue those bloggers. DN 12, at 2-3. Yet it denied the TRO, in part, because it could not be certain which statements had been posted by bloggers whose citizenship was possibly diverse from Bobolas and who were, therefore, defendants in the case. As the Court noted, "some of [the allegedly false statements] appear to be non-actionable opinions . . .." *Id.* at 6. Thus, although Bobolas implicitly conceded that some of the statements on the blog had been posted by Greek citizens, the Court could not be certain that the bloggers' whose material was at issue on the TRO were diverse in citizenship from Bobolas. *Id.* at 5. Moreover, the Court found that Bobolas had not offered a sufficient basis for granting a prior restraint against publication of the criticisms. *Id.* at 9-10. However, the Court granted Bobolas' motion to seal, although it provided no basis for its ruling.

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As a result of the order, members of the public, including Public Citizen, are now precluded from accessing the records and thus are unable to determine what was posted to the web site that Bobolas, a prominent Greek businessman, found objectionable, and how he explained that the postings were false and defamatory.

The case was voluntarily dismissed on October 13, and the web site remains in operation today. All previous posts can be accessed on the web site, and the web site's bloggers continue to post critical commentary regarding Bobolas.

ARGUMENT

It is well established that 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. In this case, no compelling reason supports keeping the declarations and allegedly defamatory statements under seal. To begin with, the statements remain accessible on the web site, thus severely diminishing whatever privacy interest Bobolas may have in the documents. More fundamentally, Bobolas has *no* privacy interest in the documents because he abandoned any interest he may have once had regarding the allegedly defamatory material when he filed this suit. The strong presumption of openness therefore decides the issue, and the documents should be unsealed. But the Court's order granting the motion to unseal does not even mention the public's presumptive right of access, much less articulate why the right is outweighed by a compelling interest in this case. At the very least, the Court should provide a specific explanation for why it granted Bobolas' motion to seal.

I. Both The Common Law And The First Amendment Create A Presumptive Right Of Public Access To Court Filings.

The public has a presumptive common law right "to inspect and copy public records and documents, including judicial records and documents." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (quoting *Nixon v. Warner Commc'ns*, 435

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Attorneys At Law
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Phoenix, Arizona 85012
(602) 248-1000

U.S. 589, 597 (1978)). Because this right allows citizens "to keep a watchful eye on the workings of [government]," *In re McClatchy Newspapers*, 288 F.3d 369 (9th Cir. 2001) (quoting *Nixon*, 435 U.S. at 598), it is "an essential component of our system of justice" and is "instrumental in securing the integrity of the [judicial] process," *Chicago Tribune Co. v. Bridgestone/Firestone*, 263 F.3d 1304, 1311 (11th Cir. 2001) (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555, 564-74 (1980)). The common-law presumption of openness applies to civil as well as criminal judicial records. *Hagestad*, 49 F.3d at 1434.

The common law right of access is not absolute, and may in certain circumstances yield to other interests. However, the strong presumption in favor of access "can be overcome [only] by sufficiently important countervailing interests," *San Jose Mercury News v. U.S. Dist. Court – Northern Dist. (San Jose)*, 187 F.3d 1096, 1102 (9th Cir. 1999), and "only on the basis of articulated facts known to the court, not on the basis of unsupported hypothesis or conjecture," *Valley Broadcasting Co. v. U.S. Dist. Court for Dist. of Nevada*, 798 F.2d 1289, 1294 (9th Cir. 1986) (citation omitted). Thus, if a court cannot "base its decision on a compelling reason and articulate the factual basis for its ruling," "the public interest in understanding the judicial process" will require public access to the judicial records. *Hagestad*, 49 F.3d at 1434. Furthermore, the heavy burden of overcoming the presumption of public accessibility is on the party seeking to seal a judicial record and must be made with specificity on a document-by-document basis. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006).

In addition to the common-law right of access, the Supreme Court has held that the First Amendment provides a presumptive right of public access to criminal proceedings. *Richmond Newspapers*, 448 U.S. at 580; *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-13 (1984) (*Press-Enterprise I*); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986) (*Press-Enterprise II*). The Ninth Circuit, albeit in a criminal case, has extended this right to judicial records, noting that "[u]nder the first amendment, the press and the public have a presumed right of access to court proceedings and documents." *Oregonian Publ'g Co. v. U.S. Dist. Court for Dist. of Oregon*, 920 F.2d 1462, 1465 (9th

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Cir. 1990). Courts of appeals in other circuits have applied the First Amendment right of public access to judicial records in civil cases. *See, e.g., Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988) (applying the right to documents submitted in support of a summary judgment motion); *Lugosch v. Pyramid Co. v. Onondaga*, 435 F.3d 110, 119, 120 n. 4, 124 (2d Cir. 2006) (same); *see also Brown & Williamson Tobacco Corp. v. Fed. Trade. Comm'n*, 710 F.2d 1165, 1177-79 (6th Cir. 1983) (civil action against administrative agency); *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir.1984) (civil trial); *Newman v. Graddick*, 696 F.2d 796, 801-02 (11th Cir. 1983) (class action).

The Ninth Circuit has yet to address explicitly whether the First Amendment provides a right of access to records in civil cases. S*ee Hagestad*, 49 F.3d at 1434 n. 6 ("Because we dispose of the right of access issue on common law grounds, it is unnecessary to reach the State Bar's argument that it also has a First Amendment right of access."); *San Jose Mercury News*, 187 F.3d at 1101-02 (finding that the public has a right of access to judicial records in civil cases under the federal common law and the Federal Rules of Civil Procedure, but "leav[ing] for another day the question of whether the First Amendment also bestows on the public a prejudgment right of access to civil court records"). However, district courts in this Circuit have applied the First Amendment presumption to records in civil as well criminal cases. *See, e.g., Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co.*, 340 F.Supp.2d 1118, 1122 (D. Or. 2003) (citing *Oregonian Publ'g Co.*, 920 F.2d at 1465, and finding that even in a civil case the First Amendment "bears upon the decision to seal or unseal a document").[2] This makes good sense, because the policy considerations that the Supreme Court set forth to justify the right of access in criminal proceedings—such as providing a check on the judiciary, assuring fairness and accuracy in the judicial process, and promoting public confidence in

[2] *See also Ballew v. Matrixx Initiatives*, 2008 WL 2035605, at *2 (W.D. Wash. May 12, 2008); *Best v. BNSF Ry. Co.*, 2007 WL 2005577, at *2 (W.D. Wash. July 9, 2007); *U.S. v. Barer*, 2007 WL 445538, at *3 (D. Or. Feb. 2, 2007); *United States v. State of Oregon*, 1991 WL 331673, at *2-*3 (D. Or. Sep. 19, 1991).

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the judiciary—apply with equal force to civil proceedings and documents. *Brown & Williamson*, 710 F.2d at 1178; *see also Matter of Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984).

As with the common-law presumption, the First Amendment presumption of access is not absolute. When a court is "confronted with legitimate competing interests, [it] must carefully balance those interests." *Phoenix Newspapers v. U.S. Dist. Court for the Dist. of Ariz.*, 156 F.3d 940, 949 (9th Cir. 1998). But when the First Amendment right applies, the presumption of access is even stronger than the common-law presumption. *Oregonian Publ'g Co.*, 920 F.2d at 1465. The First Amendment presumption "can be overcome only by an overriding right or interest 'based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Id.* (quoting *Press-Enterprise I*, 478 U.S. at 510). Before a court orders that judicial records be sealed, the court must articulate the compelling interest at stake "along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.*

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II. No Compelling Interests Support Keeping The Statements And Declarations Under Seal.

Despite the public's strong interest in access to judicial records, Bobolas argued that compelling reasons exist to keep the declarations and allegedly defamatory blog postings under seal. Specifically, in his Motion to Seal Declarations (at 2), Bobolas argued that allowing access to the records would "cause serious damage to [his] reputation, standing, and goodwill within Greek society, in the construction and media industries in which [he] does business, and among [his] current and/or prospective business relationships and those of [his] family members." As a result, Bobolas claimed that disclosure of the records would allow this Court's files to "become a vehicle for improper purposes" because the records would be used to "gratify private spite or promote

public scandal" and to circulate "libelous statements for press consumption." *Nixon*, 435 U.S. at 598. This fear is misplaced for two key reasons.

First, as Bobolas acknowledged, the allegedly defamatory statements at issue were posted on a web site, available for anyone with an internet connection to see. Although, if the Court had granted the requested TRO, the statements would have been removed from the website, the TRO was denied, and hence the very basis for sealing that Bobolas offered at the time he was seeking at TRO has been undercut. It is therefore hard to imagine how unsealing the statements and declarations—which simply quote portions of the statements, presumably provide Bobolas' explanation as to why the statements are defamatory, and then rebut the allegedly false charges by explaining what the truth is — would cause Bobolas serious harm. In his motion for sealing, Bobolas claimed that release of the documents would provide occasion for posters to republish the statements and by doing so would "promote public scandal," DN 4, at 3, but this argument ignores the fact that the posters, as the authors of the statements, need no such occasion: if they wanted to republish the statements, they could easily do so, regardless of whether the documents at issue here are released. Furthermore, although Bobolas contended that release of the statements would seriously damage his reputation, he offers no explanation, nor can he, of how releasing **English** translations of excerpts of statements already accessible on a Greek-language web site would greatly harm his reputation and standing in **Greek** society.

The only new information contained in the documents is the information contained in the declarations that has not already been posted on the web site. But because this information is provided by Bobolas himself, it likely does not include additional libelous statements but rather an explanation of why the original statements are false and defamatory. It is thus difficult to see how its disclosure would harm Bobolas at all, much less cause the kind of serious harm necessary to overcome the strong presumption of access. At the very least, the continued publication of the allegedly defamatory materials

Jaburg & Wilk, P.C.
Attorneys At Law
3200 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012
(602) 248-1000

substantially weakens the private interest at stake and militates strongly against keeping the documents sealed.

Second, and more broadly, Bobolas' concern that "disclosure of the material would result in improper use of the material for scandalous or libelous purposes," *Hagestad*, 49 F.3d at 1434, has very little place in a defamation case. Simply put, a plaintiff in a defamation case abandons any privacy interest he may once have had regarding the allegedly defamatory material when he files suit. Once he files suit, his 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 at 1180. As Judge Easterbrook has observed, "[m]any a litigant would prefer that the subject of the case . . . be kept from the curious . . ., 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." *Union Oil Co. v. Leavell*, 220 F.3d 562, 567-68 (7th Cir. 2000) (internal citations omitted). For this reason, "when courts have afforded protection in other cases, such protection was to third parties rather than litigants to the suit." *Blades v. Gitt*, 2006 WL 726893, at *1 (D. Ariz. Mar. 17, 2006) (citing *Republic of the Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653, 662 (3d Cir.1991)).

Nevertheless, Bobolas claims that preventing the circulation of libelous statements is a sufficiently compelling reason to justify prohibiting public access in this case. He cites several cases in support of this proposition, none of which is a defamation case.[3] Of course, in the non-defamation context, it perhaps makes sense for courts to be concerned with preventing publication of material that might otherwise constitute libel because a

[3] *See Alward v. Burrelle's Info. Servs.*, 2001 WL 1708779 (D. Ariz. Dec. 5, 2001) (civil rights action); *Kamakana v. City & County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006) (civil rights action); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003) (fraud action); *San Jose Mercury News v. U.S. Dist. Court – N. Dist.*, 187 F.3d 1096 (9th Cir. 1999) (sexual harassment suit); *Hagestad v. Tragesser*, 49 F.3d 1430 (9th Cir. 1995) (civil action arising out of alleged sexual relationship between attorney and minor).

Jaburg & Wilk, P.C.
Attorneys At Law
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party could obtain damaging information in discovery that is only tangentially relevant to the litigation, make defamatory statements based on that information in a brief or affidavit, and then avoid liability completely when those charges are later obtained from the court's records and disseminated by a third party. Under such circumstances, a court might rightly "refuse[] to permit [its] files to serve as reservoirs of libelous statements for press consumption." *Nixon* 435 U.S. at 598 (citing *Park v. Detroit Free Press Co.*, 72 Mich. 560, 568 (1888) ("If pleadings and other documents can be published to the world by any one who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news.")).

But this concern is not present in a defamation case such as this one, which necessarily involves judicial records containing allegedly defamatory statements, and where such statements will be a key piece of evidence before the court. A plaintiff will not be able to prosecute a defamation claim without including the statements in his filings, and the court will not be able to decide the case without discussing them. Thus, under Bobolas' logic, **any** plaintiff in a defamation case should be able to have court documents sealed on the ground that allowing public access to the documents is "further publication and dissemination" of libelous statements.

It is therefore unsurprising that Bobolas can point to no case where a party bringing a defamation action successfully moved to have the defamatory materials and its own declarations sealed because they contained or refuted allegedly libelous statements. To be sure, Bobolas may be embarrassed by release of the statements, many of which the Court thought to be non-actionable opinions, but "[t]he mere fact that the production of records may lead to a litigant's embarrassment . . . will not, without more, compel the court to seal its records." *Kamakana*, 447 F.3d at 1179; *see also Mitchell v. United States*, 2009 WL 4694010, at *2 (D. Ariz. Dec. 4, 2009) (rejecting "Petitioner's conclusory assertion that the materials are damaging and could be used to his detriment in the future if not filed under seal" and finding that "Petitioner has failed to articulate a specific factual basis

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Attorneys At Law
3200 N. Central Avenue, Suite 2000
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supporting a compelling reason to overcome the presumption in favor of public access"). "Here the information is substantial in size, extremely relevant to the suit, and related directly to both parties to the litigation." *Blades v. Gitt*, *supra*, at * 2. As in *Blades*, the allegedly defamatory material here should be in the public record.

III. The Court Provided Neither A Compelling Reason Nor Any Articulable Facts In Its Order Granting Bobolas' Motion To Seal.

When granting a motion to seal judicial records, "it is vital for a court clearly to state the basis of its ruling, so as to permit appellate review of whether relevant factors were considered and given appropriate weight." *Hagestad*, 49 F.3d at 1434 (quotations omitted). "An order that fails to articulate its reasoning must be vacated and remanded because 'meaningful appellate review is impossible.'" *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 679 (9th Cir. 2010) (quoting *Hagestad*, 49 F.3d at 1435). Thus, the Ninth Circuit has reversed a district court's order to seal judicial records and remanded where the court failed "to articulate any reasoning or findings underlying its decision to seal the decree." *Equal Employment Opportunity Comm'n v. Erection Co.*, 900 F.2d 168, 169 (9th Cir. 1990). *See also Hagestad*, 49 F.3d at 1435.

Here, the Court's order granting Bobolas' motion to seal failed to articulate the reasons underlying its decision. In fact, the order gives no explanation *at all*, does not mention the public's presumptive right of access, and does not articulate why that right is outweighed by a compelling interest; it simply states, "Plaintiff's motion to seal is granted." At a minimum, the Court should provide a specific explanation for why it granted Bobolas' motion to seal. But because the necessary findings cannot be made, and because the presumption of public access "disallows the routine and perfunctory closing of judicial records," *In re Cendant Corp.*, 260 F.3d 183, 193-94 (3d Cir. 2001), the Court should grant this motion to unseal.

Jaburg & Wilk, P.C.
Attorneys At Law
3200 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012
(602) 248-1000

CONCLUSION

All declarations and other filings currently under seal in this case should be unsealed.[4]

DATED this 19th day of November, 2010.

JABURG & WILK, P.C.

/s/ Maria Crimi Speth
Maria Crimi Speth

Paul Alan Levy
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
plevy@citizen.org
(202) 588-1000

Attorneys for Public Citizen, Inc.

Jaburg & Wilk, P.C.
Attorneys At Law
3200 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012
(602) 248-1000

Certificate of Service

I hereby certify that on 19th day of November, 2010, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Allison Leigh Kierman
Cynthia Ann Ricketts
DLA Piper US LLP
2525 East Camelback Road
Suite 1000
Phoenix, Arizona 85016
Allison.kierman@dlapiper.com
Cindy.ricketts@dlapiper.com

L. Matlack

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