Scott Michelman (*pro hac vice application pending*)
Paul Alan Levy
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
smichelman@citizen.org

Marian J. Furst, Utah Bar No. 11010
4956 W. 6200 S.
315
Kearns, UT 84118
(801) 967-5433
mfurst@furstpatent.com

Attorneys for Proposed Intervenor Rebecca L. Tushnet

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SANMEDICA INTERNATIONAL, LLC, a Utah limited liability company; WESTERN HOLDINGS, LLC, a Nevada limited liability company,

Plaintiffs,

v.

AMAZON.COM, INC., a Delaware corporation,

Defendant.

REBECCA L. TUSHNET'S MOTION TO UNSEAL PART OF THE SUMMARY JUDGMENT DECISION AND RECORD AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Case No. 2:13-cv-00169-DN

Honorable David Nuffer

STATEMENT OF PRECISE RELIEF SOUGHT AND SPECIFIC GROUNDS FOR MOTION

Pursuant to the First Amendment and the common law, intervenor Rebecca L. Tushnet moves the Court to unseal portions of the court record in this case — specifically, all redacted material from the opinion of the Court granting in part and denying in part the parties' cross-motions for summary judgment (Doc. 130), and from the filed summary judgment documents related to that opinion, *except* for material describing the functioning (not the outputs) of Amazon's ad purchasing system ("Hydra"). Should the Court decide not to remove all of the redactions that Tushnet challenges, Tushnet requests that the Court provide specific, on-the-record findings as to its reasons for maintaining portions of the summary judgment opinion and record under seal.

MEMORANDUM OF POINTS AND AUTHORITIES

The public has a right under the First Amendment and the common law to access court records, especially court decisions and summary judgment records. Here, the Court granted both parties' unopposed motions to file summary judgment documents under partial seal and issued its summary judgment opinion under partial seal, but the record includes no finding of an interest in confidentiality that outweighs the public's right of access to these judicial records. Public access to the sealed documents in this case is essential to enable the public to understand the rationale and significance of the Court's decision. The Court should grant the motion to unseal.

BACKGROUND

This case is an action for trademark infringement and related federal and state claims. *See generally* Memorandum Decision and Order of March 27, 2015, filed publicly on April 15 (Doc. 130). The plaintiffs are the owner and licensee of the trademark for the dietary supplement SeroVital. *Id.* at 2. Plaintiffs offered SeroVital for sale on the website of defendant Amazon.com for about a month in 2012, but Amazon then removed SeroVital from its marketplace for a policy violation. *Id.* Even though it was no longer selling SeroVital, Amazon continued for approximately nine months to publish ads representing that SeroVital could be purchased through Amazon. *Id.* at 2-3. The gravamen of plaintiffs' suit was that Amazon's use of the SeroVital mark in its ads diverted potential customers away from plaintiffs' website and to Amazon's website, where they purchased other products.

Both sides moved for summary judgment. They also moved to file their respective motions, oppositions, and replies under seal. *See* Docs. 50, 53, 72, 73, 77, 93, 94. Plaintiffs moved to file under seal because "[t]he parties have, during discovery, operated under the

Standard Protective Order established under DUCivR 26-2(a) and have exchanged . . . 'confidential documents' which include sensitive and proprietary business, financial, or technical information." Docs. 50, 77, 93 (parentheses omitted).[1] Defendant's requests for seal were based "on the ground that Amazon seeks to protect its proprietary business and trade secret information," Docs. 53, 73, 94, and "on the ground that Plaintiffs have designated certain information as protected information under the Standard Protective Order," Doc. 53.

The Court granted all motions to seal, all within five days of the filing of the motions. *See* Docs. 52, 55, 79, 96, 97. None of these orders contained findings justifying sealing: four of the motions were granted by orders stating that the Court found "good cause" to seal, Docs. 52, 55, 96, 97, and three of the motions were granted by summary docket entry, Doc. 79. The parties filed their summary judgment papers under seal; subsequently, they filed public versions with redactions. *See* Docs. 63, 64, 67, 69, 85, 86, 90, 103, 104, 105.

On March 27, 2015, the Court granted summary judgment to Amazon on plaintiffs' false advertising claim and limited statutory damages on plaintiffs' state-law claim to $2000; otherwise, the Court denied summary judgment to all parties on all claims, including on plaintiffs' lead claim of initial-interest-confusion trademark infringement. Doc. 130, at 30-31. The Court devoted eight pages of analysis to a "close decision" on the initial-interest-confusion trademark infringement claim. *Id.* at 17; *see id.* at 9-17. The Court applied both *King of the Mountain Sports v. Chrysler Corp.*, 185 F.3d 1084 (10th Cir. 1999), which set forth a number of factors to determine likelihood of confusion, and *1-800 Contacts v. Lens.com*, 722 F.3d 1229 (2013), which the Court found to be "instructive in the particular circumstance of this case."

[1] In addition, plaintiffs filed a second motion to seal Exhibit B attached to their Motion for Summary Judgment after inadvertently publicly filing an unsealed version. *See* Doc. 72.

Doc. 130 at 16. Like this case, *1-800 Contacts* was an initial-interest-confusion case involving online advertising. The *1-800 Contacts* court found that because only 1.5% of all the users who searched online for "1-800 Contacts" clicked a Lens.com advertisement, the number of confused users was too low to support an inference that customers were lured away by the ad. 722 F.3d at 1244. The Court suggested that a percentage between 7% and 15% might, under certain circumstances, be sufficient. *See id.* at 1247-49.

This Court's application of the *King of the Mountain* and *1-800 Contacts* analysis to reach its initial-interest-confusion decision relied on a series of facts that are redacted from the public version of the opinion: the number of ads generated, number of clicks on the ads, click to impression rate, number of clicks on the ad that led to a purchase on Amazon, total revenue generated by these purchases, and the click to purchase rate (collectively, "Click and Purchase Data"). *Id.* at 7, 9, 16-17. The redactions of the Click and Purchase Data inhibit public understanding of the Court's decision on initial-interest confusion. For example, one passage of the Court's decision states: "[T]he focus is . . . on the [redacted] percent rate that consumers were lured to Amazon's website. [Redacted] percent, although a relative small number, is not so insufficient to suggest that there was no likelihood of confusion." Doc. 130 at 17.

On April 15, the case was dismissed based on the parties' joint stipulation. Doc. 131.

Professor Rebecca L. Tushnet has moved to intervene for the limited purposes of unsealing portions of the court record. Professor Tushnet is a professor at Georgetown University Law Center specializing in intellectual property, consumer protection, and the First Amendment.

SPECIFIC INFORMATION SOUGHT TO BE UNSEALED

The Court's summary judgment opinion and records remain under seal. Intervenor Tushnet requests that this Court unseal the following information:[2]

1. Click and Purchase Data, along with means of determining that data. *See* Doc. 63 at 3, 9-12, 16-17, 26-31; Doc. 64 at 2-3; Doc. 64 Ex. G at 5-7, 11, 15-18, 20; Doc. 69 at 4, 9-12, 13-16, 18-19, 21-22, 25-26, 29-30; Doc. 85 at 7, 16, 24, 31-32; Doc. 90 at 3-5, 13-14, 18-20, 27, 29, 31, 35; Doc. 105 at 3, 6-7, 20-23, 35, 41-43; Doc. 130 at 7, 9, 16, 17.

2. Name of Amazon's ad purchasing system. *See* Doc. 69 at 4, 6, 10-11, 17-19, 21-23, 25-26, 30, 35-36.

3. Amount plaintiffs sought in damages, along with method of calculation. *See* Doc. 63 at 3-4, 24-34; Doc. 85 at 38, 44; Doc. 103 at 9-10.

4. Information about SeroVital, including its price as compared to its cost, and the amount of SeroVital an average customer buys. *See* Doc. 63 at 18, 31; Doc. 85 at 28.

5. Details concerning the relationship and licensing agreement between the two plaintiffs, which were matters of dispute. *See* Doc. 63 at 7; Doc. 64 Ex. G at 22-24.

6. Summary judgment exhibits: Many of the exhibits submitted by the parties in support of their various motions for summary judgment remain sealed in their entirety. *See* Doc. 64 Exs. D, E, F, O, Q, S, T, U, V; Doc. 104 Ex. 8; Doc. 105 Exs. A, B, D, E. Others contain many redactions that make significant portions of the document unreadable. *See* Doc. 64 Ex. B; Doc. 69 Exs. F, J; Doc. 105 Ex. C.

Additionally, it appears that a portion of the sealed material describes the functioning of Amazon's ad purchasing system ("Hydra"). *See, e.g.,* Doc. 130 at 5-6. Tushnet *does not* seek this information because it is unrelated to the substance of the Court's decision.

[2] Because Profressor Tushnet cannot identify information that she cannot see, she has identified these categories of redacted information based on inferences from information surrounding the redactions.

ARGUMENT

The Court has authority to "loosen or eliminate any restrictions" on documents under seal even when "the case in which the documents were sealed has ended." *United States v. Pickard*, 733 F.3d 1297, 1300 (10th Cir. 2013). Under the First Amendment and the common law right of access to judicial documents, unsealing is warranted here.

I. In Considering Whether To Unseal, the Court Must Place the Burden on Proponents of Sealing and Make Specific Findings on the Record.

Court records "are presumptively available to the public," *United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997) (citing *Nixon v. Warner Comm'ns*, 435 U.S. 589, 602 (1978)); D. Utah Civ. R. 5-2(a) (same), and the interest of the public in accessing those records is "'presumptively paramount,'" *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011) (quoting *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980)). Therefore, "parties should not routinely or reflexively seek to seal materials upon which they predicate their arguments for relief, particularly dispositive relief such as summary judgment." *Lucero v. Sandia Corp.*, 495 Fed. App'x 903, 913 (10th Cir. 2012) (unpublished). The proponent of sealing bears the burden of overcoming the presumption of public access, even if a court has previously ordered sealing. *Pickard*, 733 F.3d at 1302.

The prevailing view among the federal appellate courts is that when a party moves to seal court records, the court should provide public notice of the motion (for instance, on the public docket sheet) and offer a reasonable opportunity for the public to object. *Company Doe v. Public Citizen*, 749 F.3d 246, 268 (4th Cir. 2014); *see generally Globe Newspaper v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982) ("[R]epresentatives of the press and general public must be given an opportunity to be heard on the question of their exclusion." (citation and internal quotation marks

omitted)); *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 182 (5th Cir. 2011) ("The courts of appeals that have addressed the question of whether notice and an opportunity to be heard must be given before closure of a proceeding or sealing of documents to which there is a First Amendment right of access, have uniformly required adherence to such procedural safeguards." (discussing cases from the Second, Third, Fourth, Ninth, and Eleventh Circuits)). The Court may then seal court records only upon "'specific, on the record findings'" that explain its reasons for sealing. *McVeigh*, 119 F.3d at 814 (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986)); *accord Company Doe*, 749 F.3d at 272; *Hagestad v. Tragesser*, 49 F.3d 1430, 1435 (9th Cir. 1995); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1176 (6th Cir. 1983).

II. The Redactions at Issue Should Be Removed Under the Public's First Amendment Right To Access Summary Judgment Opinions and Records.

A. The Public Has a First Amendment Right To Access Judicial Decisions and Summary Judgment Records.

The Supreme Court has recognized that the public has a First Amendment right of access to judicial proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). Although the Tenth Circuit has not yet decided the issue, most courts of appeals have extended *Richmond Newspapers*, which concerned criminal proceedings, to recognize a First Amendment right of public access to civil proceedings. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006); *Publicker*, 733 F.2d at 1070 (3d Cir.); *Company Doe*, 749 F.3d at 267 (4th Cir.); *Brown & Williamson*, 710 F.2d at 1178-79 (6th Cir.); *Cont'l Ill. Sec. Litig.*, 732 F.2d at 1308 (7th Cir.); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 785-86 (9th Cir. 2014);

Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983); *see also Richmond Newspapers*, 448 U.S. at 599 (Stewart, J., concurring in the judgment) ("[T]he First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal."). The public's First Amendment right to access court records in civil proceedings "enhances the quality and safeguards the integrity of the factfinding process," "fosters an appearance of fairness," and "heighten[s] public respect for the judicial process." *Publicker*, 733 F.2d at 1069-70 (citing *Globe Newspaper*, 457 U.S. at 606).

The Tenth Circuit looks to "experience and logic" to determine whether access is afforded to particular categories of records under the First Amendment. *See McVeigh*, 119 F.3d at 812 (citing *Press-Enterprise*, 478 U.S. at 8-9). Under that test, a court considers "(1) whether the document is one which has historically been open to inspection by the press and the public; and (2) 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* (quoting *Press-Enterprise*, 478 U.S. at 8). A summary judgment opinion and summary judgment motion papers easily meet the test.

First, because summary judgment "serves as a substitute for a trial," *Company Doe*, 749 F.3d at 267 (citation and internal quotation marks omitted); *accord Lugosch*, 435 F.3d at 122, our nation's long history of open access to trials demonstrates that summary judgment opinions and records must be available to the public. *Richmond Newspapers*, 448 U.S. at 580 n.17 ("[H]istorically both civil and criminal trials have been presumptively open[.]"); *see also Publicker*, 733 F.2d at 1067-70 (describing history of public access to civil trials and citing the view of Wigmore, Blackstone, and Justice Holmes in support).

Second, public access to judicial opinions and summary judgment records is critical to the functioning of the legal system as a whole. Dissemination of judicial opinions is necessary for the public to understand what the law is. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("[J]udicial precedents are . . . valuable to the legal community as a whole. They are not merely the property of private litigants."); *Lowenschuss v. West Publ'g Co.*, 542 F.2d 180, 185 (3d Cir. 1976) ("As ours is a common-law system based on the 'directive force' of precedents, its effective and efficient functioning demands wide dissemination of judicial decisions."). Furthermore, public access to judicial opinions and the moving papers that gave rise to them enables the public to "understand[] disputes that are presented to a public forum for resolution" and to see "that the courts are fairly run." *Crystal Grower's*, 616 F.2d at 461; *see also Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (Easterbrook, J.) ("What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.").

Accordingly, other appellate courts have recognized that public access to summary judgment materials is protected by the First Amendment. *See Lugosch*, 435 F.3d at 121; *Company Doe*, 749 F.3d at 267; *see also Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (holding, albeit without invoking the First Amendment, that "'compelling reasons' must be shown to seal judicial records attached to a dispositive motion"). The Fourth Circuit has applied this same reasoning to a First Amendment right to a court's summary

judgment opinion. *Company Doe*, 749 F.3d at 267-68 (finding that "it would be anomalous" for the First Amendment to apply to summary judgment records "but not the court's opinion itself"); *see also Union Oil*, 220 F.3d at 568 ("[I]t should go without saying that the judge's opinions and orders belong in the public domain."); *United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (denying motion to file opinion under seal "because the decisions of the court are a matter of public record"). The degree of protection afforded the right of access to summary judgment motions and opinions does not depend on whether the motion is ultimately granted or denied. *See Lugosch*, 435 F.3d at 121-22; *Republic of the Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653, 660-61 (3d Cir. 1991).

B. There Is No Compelling Interest To Seal.

To satisfy the First Amendment, the sealing of judicial records must be narrowly tailored to further a compelling interest. *Globe Newspaper*, 457 U.S. at 607; *accord McVeigh*, 119 F.3d at 814. Yet the Court has made no "'specific, on the record findings,'" *McVeigh*, 119 F.3d at 814 (quoting *Press-Enterprise*, 478 U.S. at 13), of a compelling interest that could justify sealing the opinion or summary judgment records here. *See* Docs. 52, 55, 79, 96, 97. Additionally, the Court did not provide meaningful opportunity for public comment when considering the initial motions to seal, allowing no more than five days before granting the motions to seal and in three instances granting sealing motions the day after or the same day they were filed. *See* Doc. 55 (granting motion at Doc. 53); Docs. 96 & 97 (granting motions at Doc. 93 & 94). The parties, apparently finding the terms of their discovery confidentiality agreement mutually advantageous, did not oppose each other's sealing requests, so the Court received no adversary presentation on the question of sealing. *See supra* page *iii*.

That the parties' requests to seal their summary judgment papers were based in part on preexisting protective orders, *see* Docs. 50, 53, 77, 93, cannot justify sealing: Local Civil Rule 5-2(a) makes clear that a "protective order that allows a party to designate documents as sealable[] will not suffice to allow the filing of documents under seal," and courts have consistently held that "the parties cannot overcome the presumption against sealing judicial records simply by pointing out that the records are subject to a protective order." *Helm*, 656 F.3d at 1292; *accord Kamakana*, 447 F.3d at 1179; *Lugosch*, 435 F.3d at 126.

The parties also sought to justify sealing based on the "proprietary" nature of the information. Docs. 50, 53, 73, 77, 93, 94. However, businesses have no generalized right to keep business information secret, even when its release may lead to adverse consequences. *See Hunstman-Christensen Corp. v. Entrada Indus.*, 639 F. Supp. 733, 738 (D. Utah 1986) (rejecting "possible diminution in the value of stock in a publicly traded corporation, and possible adverse impact upon the ability of [the business] to retain or attract investors" as a reason for seal); *accord Company Doe*, 749 F.3d at 269 ("Adjudicating claims that carry the potential for embarrassing or injurious revelations about a corporation's image . . . are part of the day-to-day operations of federal courts."); *Union Oil*, 220 F.3d at 567-68 ("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 . . . [w]hen [litigants] call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.").

Amazon also asserted that its documents contain trade secrets. *See* Docs. 53, 73, 94. Although protection of trade secrets may justify sealing, a party may not meet its burden of

showing a compelling interest in sealing court documents by offering a blanket assertion that documents contain trade secrets. Instead, the party must show, and the Court must find on the record, that the specific information at issue is a trade secret. *See Jetaway Aviation, LLC v. Board of County Comm'rs*, 754 F.3d 824, 827 (10th Cir. 2014) (per curiam) ("[A] generalized allusion to confidential information is woefully inadequate to meet [the] heavy burden [of justifying sealing]." (citation and internal quotation marks omitted)). Because Amazon made no specific showing that trade secrets would be revealed in its papers, and the Court made no such finding, Amazon failed to carry its burden to show that a compelling interest justified sealing.

C. The Redactions Are Not Narrowly Tailored, and the Strong Public Interest in Accessing These Documents Outweighs Any Countervailing Interest in Secrecy.

Any denial of a First Amendment right to access court records must be "narrowly tailored" to the compelling interest that the secrecy serves. *McVeigh*, 119 F.3d at 814 (quoting *Press-Enterprise*, 478 U.S. at 14). Even if the Court were to make specific, on-the-record findings of a compelling interest, the narrow tailoring requirement does not permit the sealing of the information that Tushnet seeks.

The First Amendment inquiry "ultimately involve[s] a balancing test." *McVeigh*, 119 F.3d at 812. Even where a compelling private interest is directly implicated, the Court must weigh the public interest in access against the private interest asserted. The public has a strong interest in accessing court records to understand a court's decision, how it was reached, and the arguments and evidence on which it was based. Courts adjudicating First Amendment claims have identified three distinct interests that weigh in favor of public disclosure: (1) the "'general interest in understanding disputes that are presented in a public forum for resolution,'" (2) "'the public's interest in assuring that the courts are fairly run and judges are honest,'" and (3) "the

public's right of access, guaranteed by the first amendment, to information before the court relating to matters of public interest." *Cont'l Ill. Secs. Litig.*, 732 F.2d 1302, 1314 (7th Cir. 1984) (quoting *Crystal Grower's*, 616 F.2d at 461).

All three factors weigh heavily in support of unsealing the Click and Purchase Data described on page *iv*. Public access to the Click and Purchase Data is critical to understanding the resolution of this dispute by the Court. With the current redactions to the Click and Purchase Data, it is impossible for a layperson, a potential litigant, an attorney, or a law professor to understand why the Court decided to deny summary judgment on plaintiffs' initial-interest-confusion claim and accordingly how courts may apply *King of the Mountain* and *1-800 Contacts* to initial-interest-confusion claims in the future. As a teacher and scholar of trademark law, Tushnet will benefit, and she believes her students, fellow scholars in the development of trademark law, and the public will benefit, from public access to the Court's full reasoning in this developing area of the law. Finally, the lack of knowledge about how the Court applied the law in this instance creates a risk of inconsistent decisions in the future, thereby undermining predictability and fairness to litigants.

This significant public interest in understanding the law applied and created by the Court's decision outweighs any potential compelling private interest in secrecy offered by the parties. *See, e.g., Crystal Grower's*, 616 F.2d at 461 (citing interest in "understanding disputes that are presented to a public forum for resolution" and seeing "that the courts are fairly run"); *see also Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co*., 203 F.3d 291, 303 (4th Cir. 2000) ("Publicity of such records, of course, is necessary . . . so that the public can judge the product of the courts in a given case."); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir.

1987) ("Public access to judicial records and documents allows the citizenry to monitor the functioning of our courts, thereby [e]nsuring quality, honesty and respect for our legal system." (citation and internal quotation marks omitted)); *cf. McVeigh*, 119 F.3d at 813 (permitting seal because "[a]ccess to the redacted information is not needed for a full understanding of the court's decision"). Moreover, the first two factors — general interest in understanding public disputes and maintaining confidence in the judiciary — weigh in favor of unsealing *all* of the records that Tushnet seeks.

III. The Public Has a Common-Law Right To Access the Court's Decision and Summary Judgment Records.

Courts have long recognized a common law right of access to judicial records. *See, e.g.*, *Eugene S. v. Horizon Blue Cross Blue Shield of N.J.*, 663 F.3d 1124, 1135 (10th Cir. 2011); *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007). The presumptive right of access to court records can be overcome only if a "real and substantial interest" in secrecy, *Eugene S.*, 663 F.3d at 1135 (quoting *Helm*, 656 F.3d at 1292), "'heavily outweigh[s]'" the public interest in access, *Mann*, 477 F.3d at 1149 (quoting *Rushford*, 846 F.2d at 253). The public interest in access is particularly strong where (as here) "'documents are used to determine litigants' substantive legal rights,'" *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1242 (10th Cir. 2012) (quoting *Lugosch*, 435 F.3d at 121). Even when a Court finds a real and substantial interest that heavily outweighs the public interest in transparency, sealing should be no more extensive than necessary to protect the interest in secrecy. *See Pickard*, 733 F.3d at 1304 (finding error where court failed to consider whether partial, as opposed to wholesale, sealing would "adequately serve" the interest in secrecy); *United States v. Approximately up to $15,253,826 in Funds*

Contained in Thirteen Bank Accounts, 844 F. Supp. 2d 1218, 1220 n.4 (D. Utah 2012) ("least restrictive means available" should be used).

Although the First Amendment right of access receives more protection than does the common-law right, *McVeigh*, 119 F.3d at 812, under the common law the strength of the public interest in accessing a court's opinion and the materials on which it was based outweigh any countervailing interest (and none has been offered), for the reasons explained in the previous section. Even if a party were to offer such an interest now, the sealing may be no more extensive than necessary. Under the common law as well as the First Amendment, the material Tushnet seeks should be unsealed.

CONCLUSION

For the foregoing reasons, the Court should grant Tushnet's motion to unseal. Should the Court decide not to remove all of the redactions that Tushnet challenges, the Court should provide specific, on-the-record findings as to its reasons for maintaining portions of the summary judgment opinion and record under seal.

Dated: May 26, 2015

Respectfully submitted,

/s/ Marian J. Furst

Marian J. Furst, Utah Bar No. 11010
4956 W. 6200 S.
315
Kearns, UT 84118
(801) 967-5433
mfurst@furstpatent.com

Scott Michelman *(pro hac vice application pending)*
Paul Alan Levy
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
smichelman@citizen.org

Attorneys for Proposed Intervenor Rebecca L. Tushnet