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SUPERIOR COURT OF THE STATE OF CALIFORNIA

14

IN AND FOR THE COUNTY OF LOS ANGELES

15

16 SEG, INC., a California corporation, )

Case No. BC 245328

17 Plaintiff, )

18 v. )

19 STACEY E. STILLMAN, )

20 Defendant. )

**BRIEF OF *AMICI CURIAE* THE  
REPORTERS COMMITTEE FOR  
FREEDOM OF THE PRESS AND THE  
CALIFORNIA FIRST AMENDMENT  
COALITION IN SUPPORT OF PETER A.  
LANCE'S MOTION TO UNSEAL  
PORTIONS OF THE TRIAL COURT  
RECORD PURSUANT TO CAL. RULE CT.  
243.2(h)**

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Date: May 17, 2001

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Time: 8:30 A.M.

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Dept: 57 (Honorable Ralph W. Dau)

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TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Page

INTERESTS OF *AMICI CURIAE* ..... 1

STATEMENT OF FACTS ..... 1

ARGUMENT ..... 2

    I.    Been’s Deposition should be open to the public ..... 2

        A.    California rules presume that court records will be open to the public ... 2

        B.    A deposition becomes a public record when it is filed in court and  
            used as evidence in a case ..... 5

        C.    Been has not established the existence of any “overriding interest”  
            sufficient to overcome the presumption of openness ..... 7

        D.    The deposition should not be sealed because sealing the deposition  
            is not a “narrowly tailored” remedy ..... 10

        E.    The parties’ confidentiality agreement does not bind this Court ..... 10

    II.   Public policy requires openness of court records, including Been’s  
          deposition transcript ..... 11

CONCLUSION ..... 12

**TABLE OF AUTHORITIES**

		<b>Page(s)</b>
2	<b>FEDERAL CASES</b>	
3	<i>Black v. U.S.</i> ,	
4	24 Cl.Ct. 461 (Cl.Ct. 1991) .....	9
5	<i>Brown &amp; Williamson Tobacco Corp. v. F.T.C.</i> ,	
6	710 F.2d 1165 (6th Cir. 1983) .....	5, 10
7	<i>Bryan v. The Pep Boys</i> ,	
8	2000 U.S. Dist. LEXIS 13499 (E.D. Pa. 2000) .....	11
9	<i>Davis v. Reynolds</i> ,	
10	890 F.2d 1105 (10th Cir. 1989) .....	9
11	<i>Doe v. Frank</i> ,	
12	951 F.2d 320 (11th Cir. 1992) .....	8
13	<i>El Vocero de Puerto Rico v. Puerto Rico</i> ,	
14	508 U.S. 147, 113 S.Ct. 2004, 124 L.Ed.2d 60 (1993) .....	3
15	<i>Globe Newspaper Co. v. Superior Court</i> ,	
16	457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) .....	3
17	<i>Grove Fresh Distributors, Inc. v. Everfresh Juice Co.</i> ,	
18	24 F.3d 893 (7th Cir. 1994) .....	6
19	<i>In re Mack</i> ,	
20	976 F.2d 746 (Fed. Cir. 1992) .....	8
21	<i>Joy v. North</i>	
22	692 F.2d 880 (2d Cir. 1982) .....	6
23	<i>Littlejohn v. Bic Corp.</i> ,	
24	851 F.2d 673 (3d Cir. 1988) .....	9
25	<i>Matter of Continental Illinois Securities Litigation</i> ,	
26	732 F.2d 1302 (7th Cir. 1984) .....	6
27	<i>Matter of Search of 1993 Jeep Grand Cherokee</i> ,	
28	958 F. Supp. 205 (D. Del. 1996) .....	9
	<i>Picard Chemical Inc. Profit Sharing Plan v. Perrigo Co.</i> ,	
	951 F. Supp. 679 (W.D.Mich. 1996) .....	9
	<i>Press Enterprise Co. v. Superior Court (Press Enterprise I)</i> ,	
	464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) .....	3, 4
	<i>Press Enterprise Co. v. Superior Court (Press Enterprise II)</i> ,	
	478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) .....	3
	<i>Richmond Newspapers, Inc. v. Virginia</i> ,	
	448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) .....	3

1	<i>Rushford v. New Yorker Magazine, Inc.</i> , 846 F.2d 249 (4th Cir. 1988) .....	5
2		
3	<i>Under Seal v. Under Seal</i> , 27 F.3d 564 (4th Cir. 1994) .....	8
4	<i>Waller v. Georgia</i> , 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) .....	3
5		
6	<i>Wilson v. American Motors Corp.</i> , 759 F.2d 1568 (11th Cir. 1985) .....	9
7		
	<b>STATE CASES</b>	
8		
9	<i>Copley Press, Inc. v. Superior Court</i> , 6 Cal.App.4th 106, 7 Cal.Rptr.2d 841 (1992) .....	6
10	<i>Estate of Hearst</i> , 67 Cal.App.3d 777, 136 Cal.Rptr. 821 (1977) .....	4
11		
12	<i>Hurvitz v. Hoefflin</i> , 84 Cal.App.4th 1322, 101 Cal.Rptr.2d 558 (2000) .....	7, 8
13	<i>NBC Subsidiary, Inc. v. Superior Court</i> , 20 Cal.4th 1178, 980 P.2d 337, 86 Cal.Rptr.2d 778 (1999) .....	2, 3, 4, 5
14		
15	<i>NBC Subsidiary, Inc. v. Superior Court</i> , 86 Cal.Rptr.2d 778, 980 P.2d 337 (Cal. 1999) .....	1
16	<i>State v. Cottman Transmission</i> , 542 A.2d 859 (Md. App. 1988) .....	4, 9
17		
18	<b>STATUTES</b>	
19	47 U.S.C. § 509 .....	11
20	California Rule of Court	
	Rule 243.1 .....	11
21	Rule 243.1(c) .....	5
22	Rule 243.1(d) .....	5, 7, 10
23		
24		
25		
26		
27		
28		

1 **INTERESTS OF AMICI CURIAE**

2 The Reporters Committee for Freedom of the Press is a voluntary, unincorporated  
3 association of reporters and editors that works to defend the First Amendment rights and freedom  
4 of information interests of the news media. The Reporters Committee has provided  
5 representation, guidance and research in First Amendment and Freedom of Information Act  
6 litigation since 1970.

7 The California First Amendment Coalition (“CFAC”) is a nonpartisan, nonprofit public  
8 benefit corporation organized under the law of California. Its mission is to educate and inform  
9 the public, the press and government officials concerning federal and state laws fostering  
10 freedom of information, open government, and free speech and press. To that end, CFAC  
11 provides free telephone access to a lawyer for information, and if need be a network of law firms  
12 experienced in litigating such matters; several special publications; a weekly news bulletin; an  
13 Internet Web site (cfac.org) with other resources; and a variety of conferences and training  
14 workshops.

15 The present case raises important issues regarding the sealing of court documents. The  
16 California judiciary enacted new rules, effective January 1, 2001, to govern the sealing of court  
17 records. The new rules were intended to require courts to conform to the First Amendment  
18 standards set by the Supreme Court of California in *NBC Subsidiary, Inc. v. Superior Court*, 86  
19 Cal.Rptr.2d 778, 980 P.2d 337 (Cal. 1999). The present case is one of the first cases to test the  
20 new rules, and the decision by this Court will likely be considered by other courts faced with  
21 similar issues. *Amici* therefore urge this Court to consider the significant and fundamental First  
22 Amendment issues raised by this case.

23 **STATEMENT OF FACTS**

24 This case involves a dispute between SEG, Inc., the producers of a popular television  
25 show, *Survivor*, and a former contestant on the show, Stacey Stillman. Stillman has alleged that  
26 *Survivor* is a game show subject to federal laws and that the producers violated those federal  
27 laws during the production of the show. SEG contends that Stillman violated her confidentiality  
28 agreement with SEG and libeled the producers.

1 During the course of discovery, a witness, Dirk Been, was deposed. Amici are informed  
2 that Been, also a former contestant on *Survivor*, asked that his deposition be kept confidential,  
3 and that the parties entered into a Stipulation regarding confidentiality.<sup>1</sup>

4 Because Stillman and her counsel apparently believed that some of the testimony  
5 provided substantive evidence to support her Special Motion to Strike, Stillman lodged the  
6 deposition “conditionally under seal” with this Court. SEG also cited to the deposition in its  
7 Opposition to Stillman’s Special Motion to Strike, relying on the deposition for adjudication.

8 Been has filed a motion for a protective order, asking the court to seal his testimony, even  
9 if it is used as substantive evidence in this case. Peter Lance, an investigative reporter, has filed a  
10 motion to “unseal” the deposition.<sup>2</sup> Amici file this brief in support of Lance’s motion to unseal  
11 the deposition.

12 Amici understand that Stillman has filed a motion to unseal the deposition and that  
13 Stillman’s interest in unsealing the deposition may coincide with Lance’s and Amici’s interest in  
14 unsealing the deposition. Nevertheless, Amici do not take a position, nor do they intend to lend  
15 support to either party, with regard to the substantive merits of the case.

## 16 ARGUMENT

### 17 **I. Been’s Deposition should be open to the public.**

#### 18 **A. California rules presume that court records will be open to the public.**

19 California law clearly presumes that court records and proceedings shall be open to the  
20 public. In *NBC Subsidiary, Inc. v. Superior Court*, 20 Cal.4th 1178, 980 P.2d 337, 86  
21 Cal.Rptr.2d 778 (1999), the Supreme Court of California carefully considered the issue of access  
22 to judicial proceedings and judicial records. *NBC Subsidiary* involved a civil lawsuit between  
23 two celebrities, Clint Eastwood and Sondra Locke. The trial court closed the courtroom to the  
24

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25 <sup>1/</sup> The Stipulation, on file with this Court, speaks for itself, and its terms will not be recited  
26 herein.

27 <sup>2/</sup> Amici note that the deposition has not yet been formally sealed by this Court, but it was filed  
28 conditionally under seal by Stillman. We therefore refer to “unsealing” the deposition, even  
though no sealing order has formally been entered.

1 public and press, and it also ordered that transcripts of the proceedings would be withheld from  
2 the public until after the trial. Various media organizations, including an NBC affiliate and the  
3 Los Angeles Times, intervened to oppose the closure and sealing order. The Court of Appeal  
4 issued a peremptory writ of mandate, ordering the trial court to vacate its closure order, and the  
5 Supreme Court of California affirmed.

6 The court examined the competing interests: the public’s interest in an open court system  
7 and the parties’ interest in a fair trial. After a lengthy discussion, the appeals court held that the  
8 judge’s decision to close the courtroom and seal the transcript was subject to strict constitutional  
9 scrutiny. *NBC Subsidiary*, 20 Cal.4th at 1216-18. After evaluating the constitutional rights of  
10 the public and the parties’ interests, the court concluded that closing the courtroom and sealing  
11 the transcript was improper. *Id.* at 1221-25.

12 The court looked to several U.S. Supreme Court decisions bearing on the issue of public  
13 access to judicial proceedings, including *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555,  
14 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (finding a public right of access to criminal trials), *Globe*  
15 *Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (holding  
16 that statute mandating closure of courtrooms during minor victims’ testimony was  
17 unconstitutional), *Press Enterprise Co. v. Superior Court (Press Enterprise I)*, 464 U.S. 501, 104  
18 S.Ct. 819, 78 L.Ed.2d 629 (1984) (reversing California state court’s closure of voir dire), *Waller*  
19 *v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (closure of criminal suppression  
20 hearing was overbroad and unconstitutional), *Press Enterprise Co. v. Superior Court (Press*  
21 *Enterprise II)*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (finding qualified right of access  
22 to pretrial hearings, and noting that First Amendment scrutiny must be applied), and *El Vocero*  
23 *de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 113 S.Ct. 2004, 124 L.Ed.2d 60 (1993) (closure of  
24 preliminary hearing was unconstitutional). *NBC Subsidiary*, 20 Cal.4th at 1198-1207.

25 The court in *NBC Subsidiary* noted a clear and specific trend towards court openness.  
26 The U.S. Supreme Court has consistently ruled that courts should be open to the public and  
27 press, and if closure could possibly be warranted, it would be only after a court has undertaken a  
28 rigorous First Amendment analysis, subjecting closure to strict scrutiny. “The presumption of

1 openness may be overcome only by an overriding interest based on findings that closure is  
2 essential to preserve higher values and is narrowly tailored to serve that interest. The interest is  
3 to be articulated along with findings specific enough that a reviewing court can determine  
4 whether the closure order was properly entered.” *Id.* at 1204 (*quoting Press-Enterprise I*, 464  
5 U.S. at 510).

6 The court also noted that the principle of openness has been held to apply to civil as well  
7 as criminal proceedings. *Id.* at 1207-09 (*citing Publicker Industries, Inc. v. Cohen*, 733 F.2d  
8 1059 (3d Cir. 1984); *Westmoreland v. CBS, Inc.*, 752 F.2d 16 (2d Cir. 1984); *In re Iowa Freedom*  
9 *of Information Council*, 724 F.2d 658 (8th Cir. 1984); *Newman v. Graddick*, 696 F.2d 796 (11th  
10 Cir. 1983); *Del Papa v. Steffen*, 915 P.2d 245 (Nev. 1996); *State v. Cottman Transmission*, 542  
11 A.2d 859 (Md. App. 1988)).

12 The court rejected the argument that the public did not have a real interest in the case, as  
13 it was merely a dispute between two private parties. Instead, the court recognized the interest of  
14 the public in all litigation:

15 We believe that the public has an interest, in all civil cases, in observing and  
16 assessing the performance of its public judicial system, and that interest strongly  
supports a general right of access in ordinary civil cases.

17 *NBC Subsidiary*, 20 Cal.4th at 1210. The court noted that “a trial court is a public government  
18 institution. Litigants certainly anticipate, upon submitting their disputes for resolution in a public  
19 court, before a state-appointed or publicly elected judge, that the proceedings in their case will be  
20 adjudicated in public.” *Id.* at 1211. “An individual or corporate entity involved as a party to a  
21 civil case is entitled to a fair trial, not a private one.” *Id.* (*quoting State v. Cottman Transmission*,  
22 542 A.2d 859 (Md. App. 1988)).<sup>3</sup>

23 After careful consideration of the issues, the California Supreme Court held that civil  
24 cases were presumptively open to the public. *Id.* at 1217. Additionally, the court held that

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25  
26 <sup>3/</sup> The court also quoted from *Estate of Hearst*, 67 Cal.App.3d 777, 136 Cal.Rptr. 821 (1977):  
27 “when individuals employ the public powers of state courts to accomplish private ends, . . . they  
28 do so in full knowledge of the possibly disadvantageous circumstance that the documents and  
records filed . . . will be open to public inspection. . . . In a sense [such civil litigants] take the  
good with the bad, knowing that with public protection comes public knowledge.”

1 before a courtroom is closed *or evidentiary matter is sealed*, a court must hold a hearing and  
2 expressly find (1) that there is an overriding interest supporting closure or sealing, (2) that there  
3 is a substantial probability that the interest will be prejudiced absent closure or sealing, (3) that  
4 the proposed closure or sealing is narrowly tailored to serve the overriding interest, and (4) that  
5 there is no less restrictive means of achieving the overriding interest. *Id.* at 1217-18 (*emphasis*  
6 *supplied*).

7 In response to the *NBC Subsidiary* case, the California judiciary enacted new Rules of  
8 Court to conform to the strict constitutional standard set forth in the case. The Rules, which went  
9 into effect on January 1, 2001, presume that court records are open to the public. Specifically,  
10 Cal. Rule of Court 243.1(c) provides that “[u]nless confidentiality is required by law, court  
11 records are presumed to be open.” Cal. Rule of Court 243.1(d) further provides:

- 12 The court may order that a record be filed under seal only if it expressly finds that:  
13 (1) There exists an overriding interest that overcomes the right of public access to  
14 the record;  
15 (2) The overriding interest supports sealing the record;  
16 (3) A substantial probability exists that the overriding interest will be prejudiced if  
17 the record is not sealed;  
18 (4) The proposed sealing is narrowly tailored; and  
19 (5) No less restrictive means exist to achieve the overriding interest.

20 As discussed below, the requirements of Rule 243.1(d) cannot be met in the present case and  
21 therefore, the deposition of Dirk Been should not be sealed.

22 **B. A deposition becomes a public record when it is filed in court and used as**  
23 **evidence in a case.**

24 All documents filed in court become part of the public record. Although discovery  
25 materials are generally not considered part of the public record, they become part of the public  
26 record when filed in support of a substantive motion in the case.

27 Numerous courts have found a First Amendment right of access to discovery documents  
28 filed during the course of civil litigation when those documents are used as evidence or a basis  
for any adjudication. *See Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179  
(6th Cir. 1983) (documents filed in civil litigation should be open because secrecy insulates the  
participants, masks impropriety, obscures incompetence, and conceals corruption); *Rushford v.*  
*New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988) (summary judgment pleadings and

1 evidentiary documents should be open); *Matter of Continental Illinois Securities Litigation*, 732  
2 F.2d 1302 (7th Cir. 1984) (records submitted with summary judgment motion should be open);  
3 *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994) (assuming  
4 both a First Amendment and a common law right of access to civil litigation documents). *See*  
5 *also, Copley Press, Inc. v. Superior Court*, 6 Cal.App.4th 106, 111, 7 Cal.Rptr.2d 841 (1992)  
6 (holding that the press had a right to inspect the clerk’s “rough minute” books of a trial court;  
7 First Amendment provides “broad access rights to judicial hearings and records . . . both in  
8 criminal and civil cases.”).

9         In *Brown & Williamson Tobacco Corp.*, the court considered whether to permit public  
10 access to evidentiary documents that had been filed as part of the court record, but that were  
11 subject to a confidentiality agreement between the parties. The case involved allegations that the  
12 tobacco company had engaged in fraudulent and improper conduct. The trial court sealed certain  
13 documents that were used as evidence in the case, but the Sixth Circuit reversed and unsealed the  
14 documents. The court found that the company failed to provide a sufficient justification for  
15 keeping the record secret. The court held that “[s]imply showing that the information would  
16 harm the company’s reputation is not sufficient to overcome the strong common law presumption  
17 in favor of public access to court proceedings and records.” *Brown & Williamson*, 710 F.2d at  
18 1179.

19         The court noted that the standard for sealing a court record was quite high, and vague  
20 assertions that disclosure might result in some harm were insufficient to overcome the  
21 presumption of openness. The court relied upon the analysis in *Joy v. North*, where the court  
22 stated:

23             [A] naked conclusory statement that publication of the Report will injure the bank  
24 in the industry and local community falls woefully short of the kind of showing  
25 which raises even an arguable issue as to whether it may be kept under seal. The  
26 Report is no longer a private document. It is part of a court record. Since it is the  
27 basis for the adjudication, only the most compelling reasons can justify the total  
28 foreclosure of public and professional scrutiny.

*Brown & Williamson*, 710 F.2d at 1180 (quoting *Joy v. North*, 692 F.2d 880 (2d Cir.1982)). The  
court further noted that, in cases where wrongdoing has been alleged, there is a “natural desire

1 . . . to shield prejudicial information contained in judicial records from competitors and the  
2 public.” The court concluded that:

3 This desire, however, cannot be accommodated by courts without seriously  
4 undermining the tradition of an open judicial system. Indeed, common sense tells  
5 us that the greater the motivation a corporation has to shield its operations, the  
6 greater the public’s need to know.

7 *Id.*

8 The court also clarified that a confidentiality agreement between the parties does *not*  
9 justify sealing a court record:

10 Brown & Williamson seeks to justify the imposition of the court-ordered seal on  
11 the FTC documents in this case by pointing to the confidentiality agreement  
12 between the five cigarette companies and the FTC. . . . Brown & Williamson  
13 maintains that the understanding between the agency and the companies entered  
14 into at the time when the documents were submitted and which is sanctioned by  
15 the FTC Act should override the presumption of public access. . . . The  
16 confidentiality agreement between the parties does not bind the court in any way.

17 *Id.* The court subsequently held that the sealing order was improper. *Id.* at 1176.

18 In the present case, the transcript of the deposition of Dirk Been was lodged with the  
19 court and relied upon by the parties in arguing the merits of this case. As a consequence, and  
20 under the authorities cited above, the transcript is presumed to be available to the public unless  
21 the exacting standards set forth in *NBC Subsidiary* are met. As discussed below, Been has not  
22 met his burden.

23 **C. Been has not established the existence of any “overriding interest” sufficient**  
24 **to overcome the presumption of openness.**

25 The court may order that a record be filed under seal only if it expressly finds that:

- 26 (1) There exists an overriding interest that overcomes the right of public access to  
27 the record;
- 28 (2) The overriding interest supports sealing the record;
- (3) A substantial probability exists that the overriding interest will be prejudiced if  
the record is not sealed;
- (4) The proposed sealing is narrowly tailored; and
- (5) No less restrictive means exist to achieve the overriding interest.

Cal. Rule of Ct. 243.1(d). Been argues that his privacy interests are sufficient to overcome the  
presumption of openness. However, the California Court of Appeals recently ruled that privacy  
interests, including the potential for embarrassment, are insufficient to overcome the presumption  
of openness. *Hurvitz v. Hoefflin*, 84 Cal.App.4th 1322, 101 Cal.Rptr.2d 558 (2000).

1           The dispute in *Hurvitz* arose from allegations that Hoefflin, a plastic surgeon, exposed  
2 and mocked his patients’ physical characteristics while they were under anesthesia. Many of the  
3 patients were well-known celebrities. *Id.* at 561-62. The trial court entered an order to seal  
4 declarations that had been filed with the court because it felt that the patients, who were not  
5 parties to the lawsuit, should not be subjected to any embarrassment or prejudice, and because  
6 the information in question was protected by “the physician-patient privilege and [the patients’]  
7 rights to privacy and dignity.” *Id.* at 562-63.

8           The Court of Appeal held that the order sealing the declarations and barring further  
9 disclosure of patient information was unconstitutional. *Id.* at 561. The court’s analysis is fully  
10 applicable here:

11           The things Hoefflin is alleged to have done to his anaesthetized patients are vulgar  
12 and crude in the extreme, and we do not doubt those patients, if identified, would  
13 suffer embarrassment and shame. However, sparing citizens from embarrassment,  
14 shame, or even intrusions into their privacy has never been held to outweigh the  
guarantees of free speech in our federal and state constitutions. . . . Indeed, we are  
aware of no case in any jurisdiction in which a prior restraint has been imposed to  
prevent an intrusion into privacy.

15 *Id.* at 567.

16           The court also ruled that the sealing order was unjustified because “[c]ourt records are  
17 public records, available to the public in general, including news reporters, unless a specific  
18 exception makes specific records nonpublic.” *Id.* at 569 (*quoting Gilbert v. National Enquirer,*  
19 *Inc.*, 43 Cal.App.4th 1135, 1149, 51 Cal.Rptr.2d 91 (1996) *and citing NBC Subsidiary, Inc.*).

20           There are many other cases that have held that potential embarrassment or injury to  
21 reputation is insufficient to overcome the presumption of public access to court records. *See,*  
22 *e.g., Under Seal v. Under Seal*, 27 F.3d 564 (4th Cir. 1994) (the party seeking to overcome the  
23 presumption of public access “bears the burden of showing some significant interest that  
24 outweighs the presumption” and potential harm to reputation is insufficient to overcome  
25 presumption of access to court records); *Mack v. Derwinski*, 2 Vet.App. 345 (CVA 1992), *writ*  
26 *denied*, 976 F.2d 746 (Fed. Cir.) (court refused to seal records showing petitioner’s history of  
27 mental illness because his vague concerns of damage to privacy or possible future discrimination  
28 were insufficient to overcome the presumption of access to court records); *Doe v. Frank*, 951

1 F.2d 320 (11th Cir. 1992) (denying request to sue under fictitious name; embarrassment to  
2 plaintiff of having to admit his alcoholism was not sufficient to outweigh presumption of  
3 openness); *Black v. U.S.*, 24 Cl.Ct. 461 (Cl.Ct. 1991) (potential for embarrassment or injury to  
4 reputation is insufficient to overcome presumption of access to court records); *Davis v. Reynolds*,  
5 890 F.2d 1105 (10th Cir. 1989) (holding that witness' interest in preserving privacy and  
6 preventing embarrassment was not an "overriding interest" to justify closure); *Littlejohn v. Bic*  
7 *Corp.*, 851 F.2d 673 (3d Cir. 1988) (newspaper entitled to access evidentiary materials submitted  
8 to court; party's desire for privacy was insufficient to overcome presumption of access); *Wilson*  
9 *v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) (court should not seal record merely  
10 because company did not want it to be used against it in other cases); *Matter of Search of 1993*  
11 *Jeep Grand Cherokee*, 958 F.Supp. 205 (D. Del. 1996) (although court records contained  
12 personal information, it was not of such an "intimate" nature to justify denial of public access;  
13 potential for embarrassment or adverse impact on reputation did not justify sealing records);  
14 *Picard Chemical Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F.Supp. 679 (W.D.Mich. 1996)  
15 (once report was submitted to court it became part of public record and subject to public access;  
16 harm to reputation was insufficient to deny public access); *State v. Cottman Transmission*, 542  
17 A.2d 859 (Md. App. 1988) (First Amendment and state constitutional right of access apply to  
18 proceedings and documents in civil lawsuit; closure not justified merely to minimize damage to  
19 corporate reputation).

20 In the present case, Been's purported privacy interest does not outweigh the important  
21 First Amendment issues at stake. Been's declaration in support of his motion for a protective  
22 order mentions only one concern that he believes justifies confidentiality:

23 I am pursuing a career as a performer, and I desire to maintain the confidentiality  
24 of my deposition testimony in order to protect my reputation in the entertainment  
25 field. I believe it would create significant professional embarrassment and  
26 hardship to reveal my private impressions on a production company and its  
27 production methods, and it would also create an impression in the industry that I  
28 am uncooperative and cannot be trusted.

Declaration of Dirk Henry Been in Support of his Motion for a Protective Order, ¶ 13. As noted  
above, courts have held that potential injury to reputation is insufficient to overcome the

1 presumption of public access to court records, and thus Been does not present an “overriding  
2 interest” that would justify sealing his deposition. Further, the Declaration does not explain why  
3 Been thinks he might be embarrassed or why he might be perceived as uncooperative or  
4 untrustworthy. In short, there is no evidence at all that Been will, in fact, suffer *any* hardship.  
5 His conclusory statement that he is concerned that he might suffer some “professional  
6 embarrassment” if the contents of his (presumably truthful) deposition transcript are disclosed is  
7 insufficient to overcome the presumption of openness.<sup>4</sup> Thus, *Hurvitz* and *NBC Subsidiary*  
8 mandate here that Been’s motion be denied, that Lance’s motion be granted and the deposition be  
9 unsealed.

10 **D. The deposition should not be sealed because sealing the deposition is not a**  
11 **“narrowly tailored” remedy.**

12 Even if this Court were to conclude that Been’s vague concern regarding his professional  
13 reputation constituted an interest worthy of protection, the sealing of an entire deposition is not a  
14 “narrowly tailored” remedy. Cal. Rule of Ct. 243.1(d) requires the Court to consider less  
15 restrictive alternatives and, if none exist, to ensure that the selected remedy is narrowly tailored,  
16 such as redacting a specific word or line. Under no circumstance would the sealing of Been’s  
17 entire deposition transcript be considered “narrowly tailored.” In any event, BEEN has failed to  
18 establish any overriding interest sufficient to overcome the presumption of access to court  
19 records in this case.

20 **E. The parties’ confidentiality agreement does not bind this Court.**

21 The fact that the parties in this matter may have entered into a confidentiality agreement  
22 does not bind the court and is not a legitimate justification for sealing Been’s deposition. *See*

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23  
24 <sup>4/</sup> Been also asserts that he “has consistently maintained that his impressions and his thoughts  
25 on his involvement in *Survivor* are confidential” and that “Been has consistently refused to  
26 answer questions when faced with the numerous encounters with reporters and authors . . . .”  
27 *See* Been’s Motion for a Protective Order at p.4. However, Been has been interviewed on *The*  
28 *Early Show*, *Late Night With David Letterman*, and *E! True Hollywood Story* about his  
experience on the show. He has also given interviews that appeared on various websites such  
as christianity.com and maxpages.com. In any event, his own belief that his recitation of events  
as a “survivor” is confidential is a wholly inadequate basis for a sealing order.

1 *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983) (parties’ agreement  
2 does not bind the court); *Bryan v. The Pep Boys*, 2000 U.S. Dist. Lexis 13499 (E.D. Pa. 2000)  
3 (sealing orders should not be entered merely because the parties agree to seal the records.).

4 In *Bryan*, the parties to a contentious lawsuit agreed to seal numerous court records.  
5 However, the federal district court refused to seal the records merely because the parties agreed  
6 to do so. The court ruled that the parties’ agreement to seal the records was insufficient to  
7 counter the general rule of open access to information. The judge stated that the parties would  
8 have to demonstrate a specific and serious need for confidentiality if they wanted to overcome  
9 the presumption of openness. *Id.*

10 It is also important to note that the Stipulation itself does not automatically require the  
11 deposition transcript to be confidential, because it states that disputed materials are subject to a  
12 court decision. *See* Stipulation Regarding Confidential Information Related to Deposition of  
13 Dirk Been at para. 11 (noting that a court order would overrule the agreement of the parties).  
14 Thus, regardless of the existence of a confidentiality agreement, Been must still meet the  
15 standards set out in *NBC Subsidiary* and in Rule 243.1. He has not done so.

16 **II. Public policy requires openness of court records, including Been’s deposition**  
17 **transcript.**

18 Courts have consistently noted that access to courts and court records is important for  
19 public education, public trust, and the integrity of the court system. In this case, access to court  
20 records, including Been’s deposition, is particularly important because the case involves  
21 allegations of game show-fixing in violation of federal law. *See* 47 U.S.C. § 509 (prohibited  
22 practices in contests of knowledge, skill, or chance).<sup>5</sup>

23 *Survivor* is a wildly popular television program. It is presented to the public as a hybrid  
24 game show/reality show. Ordinary Americans are sent to remote places with little or no survival

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25  
26 <sup>5</sup> Section 509 prohibits “any special and secret assistance; “ any “persuasion, bribery,  
27 intimidation, or otherwise;” or “any artifice or scheme” for the purpose of “prearranging or  
28 predetermining in whole or in part the outcome of a purportedly bona fide contest of intellectual  
knowledge, intellectual skill, or chance.” It imposes liability on both producers and any  
conspirators.

1 gear and must endure the elements, compete in “challenges” and vote each other out of the game  
2 every few days. The winner of the game receives one million dollars.

3 Contestants on the show were well aware that they were thrusting themselves voluntarily  
4 into the public eye and that their every action would be subject to public observation and  
5 discussion. Many of them, including Been, have used their appearance on the show to pursue a  
6 career as a performer. Far from retreating from public view, Been has sought it out.

7 The public believes - and is led to believe - that the events shown are actual events, that  
8 the people who win “challenges” are the true winners, and that the show accurately portrays the  
9 interpersonal relationships of the contestants. In fact, the great lure of the program is the  
10 dynamics of those relationships and the alliances that form or fall as events unfold. Many of the  
11 contestants have won a large fan base who admire them for their character or their efforts  
12 competing in the game. Been himself has attempted to cultivate a fan base of those who admired  
13 him as a “castaway.” It goes without saying that the public would be gravely disappointed if the  
14 show’s results had been manipulated in some way.

15 Thus, this case does not present an ordinary dispute between two private parties. As in  
16 *NBC Subsidiary*, the case is of great interest to the public. *Amici* do not know whether Been has  
17 any information regarding the alleged manipulation of *Survivor*’s results. But because Been’s  
18 deposition transcript has been relied upon by the parties, the public’s right of access to that  
19 information, whatever it may be, must prevail.

## 20 CONCLUSION

21 California rules presume that judicial proceedings and records will be open to the public.  
22 Because Been has not met his burden of establishing an “overriding interest” that would  
23 overcome the presumption of openness, Been’s deposition transcript, lodged with the court and  
24 used as evidence in this case, should be open to the public. *Amici* therefore request that the Court  
25  
26  
27  
28

1 deny Been's motion for a protective order and order that the Court's file in this matter be  
2 unsealed.

3 DATED: May 7, 2001

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

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By: \_\_\_\_\_  
Steven M. Perry

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