SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ANONYMOUS, Plaintiff, - against - ANONYMOUS, Defendant.	Index No. 655887/2018 **ORAL ARGUMENT REQUESTED**

AMICUS CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF JOURNALIST TERI BUHL

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INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press ("Reporters Committee") respectfully submits this memorandum of law as *amicus curiae* in support of journalist Teri Buhl, whom the Reporters Committee understands faces legal process in this matter seeking to force her to reveal a confidential source. The Reporters Committee is an unincorporated nonprofit association, founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Journalists rely on public access to court records and proceedings in criminal and civil matters, which are presumptively open under the First Amendment and common law, to gather facts and report the news. Further, journalists, like Ms. Buhl, depend upon the statutory and other protections afforded under New York law to shield their work product and sources from compelled disclosure. The Reporters Committee, accordingly, has a powerful interest in the resolution of this case, in which a litigant reportedly seeks disclosure of the identity of a journalist's confidential source under a cloak of secrecy.

PRELIMINARY STATEMENT

Ms. Buhl publishes articles on her news site *Smashmouth Investigative Journalism*. *See* About, www.teribuhl.com/about (describing herself as a "professional financial investigative journalist"). On January 18, Ms. Buhl reported that "the subject of one of [her] investigative stories is attempting to use" the within lawsuit "to force [her] to disclose a confidential source key to [her] reporting on the person's alleged wrongdoing."[1] According to Ms. Buhl, the Court

[1] *See* Teri Buhl, *NY Court Case Putting Journalist Source Protection At Risk*, Smashmouth Investigative Journalism (Jan. 18, 2019), http://www.teribuhl.com/2019/01/18/ny-court-case-putting-journalist-source-protection-at-risk/.

has, "at the subject's request, . . . temporarily allowed the lawsuit to be sealed[,]" apparently in its entirety. *Id.* Ms. Buhl reported that she plans to "fight" this action and seeks to unseal this matter and protect her source. *Id.*

The issues raised by this case strike at the core of the First Amendment and freedom of the press. Wholesale sealing—even temporarily—of all papers filed in connection with this action contravenes long-established rights of public access to court records and proceedings guaranteed by the First Amendment, the New York Constitution, common law, and the rules of this Court. Indeed, the strong First Amendment and common law presumptions of public access to court records and judicial proceedings apply with special force to matters of public concern, such as this one, which involves whether a journalist will be forced to reveal the identity of a source in violation of the New York Shield Law, N.Y. Civ. Rights Law § 79-h (the "Shield Law"). Accordingly, the Reporters Committee urges the Court to unseal all pleadings in this matter and to hold the hearing currently scheduled for January 31, 2019 in open court.

In addition, the Reporters Committee urges the Court to apply the Shield Law to Ms. Buhl, who is a journalist within the meaning of that law, and to reject any effort to compel her to reveal the identity of a source. The Shield Law safeguards journalists' ability to assure sources that their confidentiality will be maintained. When a subpoena (or other legal action) seeks to force a journalist to provide information about her sources or newsgathering activities, the specter of enforcing that subpoena has a chilling effect on all journalists' ability to gather news and report on matters of profound public concern. As the New York legislature recognized when it enacted the Shield Law, if journalists cannot provide sources with meaningful assurances of confidentiality, sources may never come forward, and the public will be deprived of vital information.

For the reasons herein, the Reporters Committee urges this Court to make the documents and proceedings in this matter open to the public, in accordance with the public's constitutional and common law rights of access, and to properly apply the Shield Law. Given the gravity of these matters, the Reporters Committee also seeks leave to be heard at the hearing on January 31, 2019.

ARGUMENT

I. The public and press have a constitutional and common law right of access to court records and proceedings in this matter.

The entire record in this action is sealed, including the names of the litigants. Such extreme secrecy violates the presumptions of openness guaranteed under the First Amendment to the U.S. Constitution, the New York Constitution, and common law. Public access to court records and proceedings is a bedrock principle of the American court system and one of the most fundamental rights in our democracy. Transparency "tend[s] to insure that the truth will be told and the secrecy of inquisition-like proceedings will not occur." *Danco Labs. v. Chem. Works of Gedeon Richter*, 274 A.D.2d 1, 7, 711 N.Y.S.2d 419 (1st Dep't 2000) (citations omitted).

The First Amendment and article I, section 8 of the New York State Constitution recognize the presumptive right of the public and press to access court records and attend court proceedings. *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1 (1986); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596 (1982); *N.Y. Civ. Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012); *Coopersmith v. Gold*, 156 Misc. 2d 594, 601, 594 N.Y.S.2d 521, 526 (Sup. Ct. Rockland Cty. 1992) (collecting cases). These strong constitutional rights of public access require "the most compelling circumstances" to justify sealing or closure. *In re Application of Nat'l Broad. Co.*, 635 F.2d 945, 952 (2d Cir. 1980); *see also Maxim, Inc. v. Feifer*, 145 A.D.3d 516, 571, 43 N.Y.S.3d 313, 315 (1st Dep't 2016). Where the First Amendment right of access

applies, any sealing of court records must be justified by specific, on-the-record factual findings demonstrating that (1) nondisclosure is essential to preserve a compelling interest; (2) there is no less restrictive alternative to sealing that will protect the demonstrated compelling interest; (3) the requested sealing will be effective in protecting the specific compelling interest at issue; and (4) the order limiting public access is drawn as narrowly and surgically as possible. *Press-Enter. Co.*, 478 U.S. 9–10; *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120–21 (2d Cir. 2006); *Danco Labs.*, 274 A.D.2d at 8, 711 N.Y.S.2d 419; *Doe v. N.Y. Univ.*, 6 Misc. 3d 866, 877, 786 N.Y.S.2d 892, 901 (Sup. Ct. N.Y. Cty. 2004).

The presumption of public access to court records "is also firmly grounded in common-law principles." *Danco*, 274 A.D.2d at 6, 711 N.Y.S.2d at 423 (citing *inter alia Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)); *see also People v. Burton*, 189 A.D.2d 532, 535–36, 597 N.Y.S.2d 488, 491–92 (3d Dep't 1993) ("a common-law presumption" favors public access to court records); *In re Application of Nat'l Broad. Co.*, 635 F.2d at 949 ("[T]he common law right to inspect and copy judicial records is beyond dispute.") (citation omitted). To overcome that common law presumption, the proponent of sealing must demonstrate "that the public's right of access is outweighed by competing interests. Specificity of proof and of judicial findings are required, and a trial court must also consider less drastic alternatives to sealing the records which would adequately serve the competing interests." *Burton*, 189 A.D.2d at 536, 597 N.Y.S.2d at 491 (reversing sealing order).

Lastly, the Uniform Rules for Trial Courts in New York expressly codify the public's right of access to court records, establishing minimum requirements that a court must satisfy before sealing any court records. *See* Uniform Rule 216.1(a) ("Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court

records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof."). That rule further provides that, "[i]n determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties." *Id.*

II. There are no "compelling circumstances" that justify the blanket sealing of this case.

There can be no sufficient justification for concealing the entire record in this case from public scrutiny. Indiscriminate sealing of every document filed on the public docket has been held to be reversible error. *Maxim, Inc.*, 145 A.D.3d at 518, 43 N.Y.S.3d at 316 (reversing lower court decision granting blanket sealing order, recognizing "that it may be easier for the parties and the motion court to seal an entire court record, rather than make a determination on a document by document basis about sealing," but explaining that "administrative convenience is not a compelling reason to justify sealing"). And, even assuming that a party to this action could justify the entry of a sealing order as to a particularly sensitive document or portion of a document, the law requires the parties to redact and publicly file what remains. The Court's sealing determinations must be made on a "document by document basis," with on-the-record findings, rather than the wholesale sealing of the case file at the very outset of litigation. *Id.*

Although the reasoning for sealing is itself not public, it is highly doubtful that any "compelling circumstances" justify litigating any portion of this case in private, even temporarily. To the extent Ms. Buhl has been targeted for reporting on embarrassing information about one of the litigants to this action, it is well settled that "neither the potential for embarrassment or damage to reputation, nor the general desire for privacy, constitutes good cause to seal court records." *Mosallem v. Berenson*, 76 A.D.3d 345, 351, 905 N.Y.S.2d 575, 580 (1st Dep't 2010); *see also In re Hofmann*, 284 A.D.2d 92, 94, 727 N.Y.S.2d 84, 86 (1st Dep't

2001) ("[T]he mere fact that embarrassing allegations may be made . . . even if [those allegations are] ultimately found to be without merit, is not a sufficient basis for a sealing order."). Moreover, any argument based in privacy may be fatally undermined to the extent that Ms. Buhl has already reported on the relevant conduct.[2] But even if additional sensitive details were to emerge in litigation, it is not the duty of courts "to accommodate the public relations interests of litigants." *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 40 (C.D. Cal. 1984).

Nor is it possible to justify the issuance of a wholesale sealing order on the potential disclosure of sensitive financial information relating to a litigant's business. *See Littlejohn v. BIC Corp.*, 851 F.2d 673, 685 (3d Cir. 1988) (rejecting the placement of a seal for "confidential business information" where the "commercial interest stems primarily from a desire to preserve corporate reputation"); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983) ("Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records."); *Republic of Philippines v. Westinghouse Elec. Co.*, 949 F.2d 653, 663 (3d Cir. 1991) (where "the company's public image . . . is at stake" this is "not enough to rebut the presumption of access"). Indeed, even assuming that a party may at some point seek to file sensitive financial information that may be legitimately sealed, the party must still justify sealing on a document-by-document, redaction-by-redaction basis, and provide interested members of the public, including members of the media, an opportunity to object.

To the extent a party seeks to seal the record to preserve its reputation and privacy against what that party claims are false allegations, these justifications lack merit. In every lawsuit,

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[2] *See* Buhl, *supra* ("The subject of one of my investigative stories is attempting to use the New York State court system to force me to disclose a confidential source key to my reporting on the person's alleged wrongdoing.")

courts adjudicate the truth and falsity of allegations, but do not (and should not) condition access to court documents on the court's ultimate determination of the merits. Explaining why the principle of open justice governs cases even when the defendant may be wrongly accused, the U.S. Supreme Court noted that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). Indeed, a party would be incorrect to second-guess the ability of the public to distinguish between an accusation and litigation to establish the truth or falsity of that accusation. This apparent mistrust of the people is antithetical to the principles that underlie American principles of self-government. The First Amendment thus reflects a "belie[f] in the power of reason as applied through public discussion," not the selective withholding of information from the populace. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled on other grounds*, *Bradenburg v. Ohio*, 385 U.S. 444 (1969).

Moreover, courts have long recognized that when the right of access to court records applies, as it does here, access must be "immediate and contemporaneous." *In re Associated Press*, 162 F.3d 503, 506–07 (7th Cir. 1998) (internal citation omitted); *see also Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (holding that a 48-hour delay in unsealing judicial records is improper, because the effect of the delay acts as a "total restraint on the public's first amendment right of access" during that time). Courts must therefore act "expeditiously" in adjudicating motions to unseal. *Lugosch*, 435 F.3d at 126 (finding that district court erred in delaying ruling on motion to intervene and unseal court records). A loss of First Amendment rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Indeed, "each passing day

may constitute a separate and cognizable infringement of the First Amendment." *Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, Circuit Justice).

III. Transparency is particularly essential in this case.

Openness helps "the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Globe Newspaper Co.*, 457 U.S. at 606. As courts have recognized time and again, "[w]ithout access to the proceedings, the public cannot analyze and critique the reasoning of the court." *Brown & Williamson Tobacco*, 710 F.2d at 1178. Thus, "[o]penness . . . enhances both the basic fairness of trial and the appearance of fairness so essential to public confidence in the system." *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 508 (1984) (citing *Richmond Newspapers*, 448 U.S. 569–71).

The public's oversight of this litigation is of paramount importance. Yet, blanket sealing of the record prevents the public from overseeing a case involving matters of significant public interest and concern, specifically an attempt to compel a journalist to disclose the identity of a source. *See In re Krynicki v. Falk II*, 983 F.2d 74, 76 (7th Cir. 1992) (Easterbrook, Circuit Justice) (denying motion to seal appellate briefs and noting that "[p]ublic argument is the norm even, perhaps especially, when the case is about the right to suppress publication of information"); *Danco Labs.*, 274 A.D.2d at 7 ("The public interest in openness is particularly important on matters of public concern, even if the issues arise in the context of a private dispute[.]").

Accordingly, the Court should immediately unseal this matter and permit the public to observe this litigation. To the extent any sealing is necessary, it must be narrowly tailored to serve a compelling interest and supported by specific, on-the-record findings.

IV. The Shield Law—which has long protected a journalist's confidential sources and nonconfidential, unpublished information—applies here.

"New York has a long tradition, with roots dating back to the colonial era, of providing the utmost protection of freedom of the press." *Holmes v. Winter*, 22 N.Y.3d 300, 307 (2013). In recognition of "the critical role that the press would play in our democratic society," New York has created "a hospitable environment for journalists and other purveyors of the written word, leading the burgeoning publishing industry to establish a home in our state during the early years of our nation's history." *Id.* at 307.

New York's strong tradition of protecting freedom of the press is embodied in the free speech and free press guarantees of the New York Constitution, adopted in 1821. *Id.* at 307. These guarantees, which begin "with the ringing declaration that '[e]very citizen may freely speak, write and publish . . . sentiments on all subjects,'" *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991) (quoting N.Y. Const. art. I, § 8), are far more expansive than those of the First Amendment. *Holmes*, 22 N.Y.3d at 307. As such, they are "in keeping with 'the consistent tradition in this State of providing the broadest possible protection to the sensitive role of gathering and disseminating news of public events.'" *Id.* at 308 (quoting *O'Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 529 (1988) (internal quotation marks omitted)).

Reflecting its commitment to freedom of the press, the New York legislature enacted the Shield Law in 1970 "to provide the highest level of protection in the nation" for those who gather and report the news and to promote the free flow of newsworthy information to the public. *Id.* at 308–09 ("It is clear from the legislative history of [the Shield Law] that the legislature believed that [its] protections were essential to maintenance of our free and democratic society.").

The Shield Law provides absolute protection from forced disclosure of materials received in confidence by a "professional journalist," including the identity of a source, and qualified protection for unpublished nonconfidential information. N.Y. Civ. Rights Law § 79-h(b)-(c). Yet regardless of the status of information as confidential or not, the Court of Appeals has recognized that the "autonomy of the press would be jeopardized if resort to its resource materials" were to become a regular occurrence. *O'Neill*, 71 N.Y.2d at 526–27. And absent a privilege, this result is unavoidable because "journalists typically gather information about . . . crimes . . . that often give rise to ligation," so subpoenas to journalists "would be widespread if not restricted on a routine basis." *Id.* Indeed, routine subpoenas would throw the newsgathering process into disarray due to the "practical burdens on time and resources, as well as the consequent diversion of journalistic effort and disruption of newsgathering activity[.]" *Id.*

Consistent with its purpose, the Shield Law applies broadly to "professional journalists," like Ms. Buhl, "who, for gain or livelihood" are "engaged in gathering, preparing, collecting, writing, [or] editing . . . news intended for a . . . professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public[.]" N.Y. Civ. Rights Law § 79-h(a)(6). A "professional journalist" includes not only a "regular employee" of a covered news outlet but also someone "otherwise professionally affiliated for gain or livelihood with such medium of communication." *Id.*

According to her online news site, *Smashmouth Investigative Journalism*, Ms. Buhl is "a professional financial investigative journalist" who has written for numerous publications, including Forbes Magazine, Fortune.com, TheAtlantic.com, *New York Magazine*, and *New York Post*, among others. *See* About, http://www.teribuhl.com/about/. She is also a reporter for *Growth Capitalist*, a subscription-based financial trade publication. *Id.* In connection with her

reporting, she engages in the "gathering, preparing, collecting, writing, [and] editing" of her news stories. N.Y. Civ. Rights Law § 79-h(a)(6). Both her news site—which she identifies as a "news publication"[3]—and *Growth Capitalist* qualify as a "professional medium or agency" which processes and researches news "intended for dissemination to the public." N.Y. Civ. Rights Law § 79-h(a)(6).

The First Department's recent holding in *Murray Energy Corp. v. Reorg Research, Inc.* is instructive here. 152 A.D.3d 445, 447, 58 N.Y.S.3d 369, 371 (1st Dep't 2017), *leave to appeal den'd*, 30 N.Y.3d 913, 94 N.E.3d 489 (2018). There, the Supreme Court granted a petition for pre-action disclosure from an organization that provides subscribers with real-time information about debt-distressed companies via daily emails. The First Department unanimously reversed, finding that the organization was protected "from having to disclose the names of its confidential sources by New York's Shield Law" because it was a "professional medium or agency which has as one of its main functions the dissemination of news to the public." *Id.* at 446. The First Department stressed the "publication's independence and editorial control," noting that its editorial staff was "solely responsible for deciding what to report on" and did not "accept compensation for writing about specific topics or permit its subscribers to dictate the content of its reporting." *Id.* at 447. The court cautioned that "[t]o condition coverage on a fact-intensive inquiry analyzing a publication's number of subscribers, subscription fees, and the extent to which it allows further dissemination of information is unworkable and would create substantial prospective uncertainty, leading to a potential 'chilling' effect." *Id.* at 447.

The Reporters Committee urges this Court to apply the Shield Law to Ms. Buhl in accordance with the First Department's recent guidance in *Murray Energy Corp.* and "New

[3] *See* About, www.teribuhl.com/about.

York's 'long tradition . . . of providing the utmost protection of freedom of the press'—protection that has been recognized as 'the strongest in the nation.'" *Id.* at 447.

V. The Reporters Committee should be permitted an opportunity to be heard at the hearing on January 31, 2019.

The Reporters Committee also respectfully requests to be heard at oral argument, currently scheduled for January 31, 2019, alongside the parties to this action. As explained above, that hearing should be open to the public. And closure of court proceedings may occur "only upon a motion heard on the record in open court, with affected members of the media given an opportunity to participate." *In re Capital Newspapers Div. v. Moynihan*, 71 N.Y.2d 263, 272, 525 N.Y.S.2d 24, 29 (1988); *see also Globe Newspaper Co.*, 457 U.S. at 609 n.25 ("[R]epresentatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'") (citation omitted); *In re Herald Co. v. Weisenberg*, 59 N.Y.2d 378, 383, 465 N.Y.S.2d 862, 864 (1982) ("[N]o hearing should be closed before affected members of the news media are given an opportunity to be heard 'in a preliminary proceeding adequate to determine the magnitude of any genuine public interest' in the matter.") (citation omitted). And it is particularly important for the Reporters Committee, as an interested member of the public, to be given an opportunity to address and counter any arguments in favor of sealing.

CONCLUSION

For the reasons set forth above, the Reporters Committee respectfully requests that the Court unseal the court record in this matter, conduct all proceedings in open court, and apply the New York Shield Law to Ms. Buhl. The Reporters Committee further requests that its counsel be provided an opportunity to be heard at the hearing scheduled for January 31, 2019.

Dated: New York, New York
January 28, 2019

Respectfully submitted,

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