231 Cal.App.4th 471
Court of Appeal, First District, Division 1, California.

OVERSTOCK.COM, INC. et al., Plaintiffs and Appellants,

v.

The GOLDMAN SACHS GROUP, INC. et al., Defendants and Respondents;

The Economist Newspaper et al., Interveners and Appellants.

Overstock.Com Inc. et al., Plaintiffs and Respondents,

v.

Merrill Lynch, Pierce Fenner & Smith Inc. et al., Defendants and Appellants;

The Economist Newspaper et al., Interveners and Respondents.

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Filed November 13, 2014
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Synopsis

Background: Stock issuer brought action against brokerage firms for allegedly violating the Corporations Code, Unfair Competition Law (UCL), False Advertising Law (AL), and New Jersey's Racketeer Influenced and Corrupt Organizations Act (RICO) statute by intentionally depressing the price of issuer's stock through "naked short sales." The Superior Court, City and County of San Francisco, No. CGC07460147, John E. Munter, J., denied intervention to media companies, and struck the media companies' memorandum opposing sealing. Media companies appealed. The Superior Court granted summary judgment for brokerage firms, granted leave for media companies to intervene in opposition to sealing motions, and substantially denied motions by the brokerage houses to seal documents submitted in connection with defense motions for summary judgment. Brokerage firms appealed, and the Court of Appeal ordered the appeals consolidated.

Holdings: The Court of Appeal, Banke, J., held that:

[1] exhibits not mentioned in issuer's summary judgment opposition should have been sealed;

[2] materials that had been publicly disclosed did not have to be sealed; and

[3] irrelevant materials should have been sealed.

Affirmed in part, reversed in part, and remanded.

The alignment of the parties is a little wonky because the press intervened as a non-party, so the Court clerk called them "plaintiffs." They should just be called Intervenors. dumbass court clerk didn't even spell intervenor correctly.

West Headnotes (47)

[1] **Records** Review

Orders concerning the sealing and unsealing of documents are appealable as collateral orders.

You can skip the following pages until page 8, Introduction. I gotchu, fam

[2] **Records** Proceedings to seal or impound judicial records in general

Trial court properly applied a holistic, evolving view of the propriety of sealing in response to brokerage firms' motion to seal summary judgment materials after trial court granted summary judgment on stock issuer's claims based on alleged "naked short sales," in considering sealing issues "with respect to past and present and future motions at the same time" and reviewing the sealing of information that had already been sealed earlier in the litigation.

[3] **Records** Right of Access and Limitations Thereon in General

California recognizes a common law right of access to public documents, including court records.

3 Cases that cite this headnote

[4] **Records** Presumptions, inferences, and burden of proof

The common law right of access to court records is effectuated through a presumption of access, which means court records are open to the public unless they are specifically exempted from disclosure by statute or are protected by the court itself due to the necessity of confidentiality.

3 Cases that cite this headnote

[5] **Records** Presumptions, inferences, and burden of proof

The weight accorded to the common law presumption of access to court records depends, in any particular case, on the role of the material at issue in the exercise of judicial power and the resultant value of such information to those monitoring the courts, and generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance.

[6] **Records** Sealing and unsealing

When evaluating whether court records should be sealed under the common law, courts engage in a balancing analysis, weighing the presumption of access against a variety of competing interests.

[7] **Constitutional Law** Court documents or records

Records Records subject to right of access in general

Not all documents submitted or filed by the parties fall within the ambit of the First Amendment right of access to court documents. U.S. Const. Amend. 1.

[8] **Constitutional Law** Court documents or records

Records Right of Access and Limitations Thereon in General

Different levels of protection may attach to the various court records and documents involved in a given case, depending on whether access is predicated on the First Amendment or the common law. U.S. Const. Amend. 1.

[9] **Records** Filing

"Filing" a document makes it a part of the permanent court file, whereas "lodging" a document makes it only temporarily a court record.

1 Cases that cite this headnote

[10] **Records** Judgment, order, or decree

The findings supporting the sealing of a court record may be set forth in fairly cursory terms. Cal. R. Ct. 2.550(d), 2.550(e)(1)(A).

[11] **Records** Judgment, order, or decree

If the trial court fails to make the required findings supporting the sealing of a court record, the order is deficient and cannot support sealing. Cal. R. Ct. 2.550(d), 2.550(e)(1)(A).

6 Cases that cite this headnote

[12] **Records** Proceedings to seal or impound judicial records

If a party believes the findings supporting the sealing of a court record are insufficiently detailed, as opposed to totally nonexistent, the party must raise the asserted deficiency in the trial court to ensure preservation of the right to challenge the sufficiency of the findings on appeal. Cal. R. Ct. 2.550(d), 2.550(e)(1)(A).

[13] **Records** Judgment, order, or decree

An order to unseal a court record, as well as an order denying sealing, does not require express factual findings by the trial court. Cal. R. Ct. 2.550(e)(1)(A), 2.551(h)(4).

2 Cases that cite this headnote

[14] **Records** Persons entitled to seek relief; parties; standing

Intervention is not a means by which non-parties can participate in proceedings to seal or unseal court records. Cal. Civ. Proc. Code § 397.

[15] **Amicus Curiae** Right to appear and act in general

The courts have ample authority to allow media participation as amicus curiae in proceedings to seal court records.

[16] **Records** Review

When the common law right of access to court records applies, appellate courts generally employ the abuse of discretion standard in reviewing sealing orders.

[17] **Records** Proceedings to seal or impound judicial records

Trial court's order denying sealing of previously sealed court records under First Amendment was reviewed de novo to determine as a question of law whether the sealed records rules applied to a given set of discovery materials, and was reviewed for substantial evidence supporting the trial court's express or implied findings that the requirements for sealing were not met. U.S. Const. Amend. 1.

3 Cases that cite this headnote

[18] **Records** Material released in discovery

The category of discovery materials "submitted as a basis for adjudication of matters other than discovery motions or proceedings" subject to the sealed court records rules includes all discovery materials submitted to a court in support of and in opposition to a pending motion, subject to the caveat that irrelevant discovery materials or materials as to which evidentiary objections are sustained are not "submitted as a basis for adjudication." Cal. Const. art. 1, § 3(b)(1); Cal. R. Ct. 2.550(a)(3).

1 Cases that cite this headnote

[19] **Constitutional Law** Court documents or records

Records Material released in discovery

Irrelevant discovery materials or materials as to which evidentiary objections are sustained are not "submitted as a basis for adjudication" and thus are not within the ambit of the First Amendment right of access to court records. U.S. Const. Amend. 1.

[20] **Judgment** Documentary evidence or official record

Stock issuer should have submitted only the face sheets and handful of relevant pages of the confidential deposition transcripts, discovery responses, and other documents in opposition to brokerage firms' motion for summary judgment on issuer's stock price manipulation claims, where submitting the full versions of the materials resulted in inundating the trial court with a deluge of confidential materials.

[21] **Records** Judgment, order, or decree

Every protective order sealing court records should include language obligating the parties to be as sparing as possible in their use of protected materials, and courts should not hesitate to enforce such provisions through sanctions for egregious violations. Cal. Civ. Proc. Code § 128.5.

[22] **Courts** Records

Records Particular Judicial Records

Even where confidential materials are not connected with a pleading, making a statutory motion to strike a portion of a pleading unavailable, the court's files and records are subject to the court's control. Cal. Civ. Proc. Code §§ 435, 436.

[23] **Constitutional Law** Court documents or records

Records Records subject to right of access in general

The public's First Amendment right of access to court records exists only as to such materials relevant to the contentions advocated by the proffering party, and it does not extend to irrelevant materials submitted to the court out of laziness in reviewing and editing evidentiary submissions, or worse, out of a desire to overwhelm and harass an opponent. U.S. Const. Amend. 1.

[24] **Records** Material released in discovery

As a practical matter, "removal" of irrelevant confidential discovery materials from the court's file may need to be effectuated by an order sealing the material, which removes the material from the public record, but physically leaves it in the court file for future appellate review.

1 Cases that cite this headnote

[25] **Records** Sealing and unsealing

Trial courts can, and should, view overly inclusive efforts to seal court records with a jaundiced eye, and impose sanctions as appropriate.

[26] **Judgment** Personal knowledge or belief of affiant

Brokerage firms' attorneys' declarations about the competitive value and confidential nature of their clients' documents, in opposition to media companies' memorandum opposing sealing of discovery materials submitted in connection with firms' motions for summary judgment in stock issuer's lawsuit challenging firms' alleged strategy of intentionally depressing the price of issuer's stock, were supported by sufficient personal knowledge, where the clients' own declarations adopted the attorneys' assertions as their own. Cal. R. Ct. 2.550, 2.551.

[27] **Records** Pleading, petition, application, or motion

As a matter of practice, declarations in support of sealing of discovery materials should specifically reference the exhibits at issue. Cal. R. Ct. 2.550, 2.551.

[28] **Constitutional Law** Records or Information

The right to privacy under the state constitution extends to one's confidential financial affairs, and embraces confidential financial information in whatever form it takes, whether that form be tax returns, checks, statements, or other account information. Cal. Const. art. 1, § 1.

2 Cases that cite this headnote

[29] **Constitutional Law** Right to privacy

A financial institution, as custodian of relevant documents, has standing to assert the privacy interests of its customers in the identifying information they provide. Cal. Const. Art. 1, § 1.

[30] **Constitutional Law** Records or Information

Constitutional Law Court documents or records

In the context of a motion to seal court records containing financial information, the issue is whether the state recognized privacy interest in financial information overrides the First Amendment right of access to court records, which is necessarily a balancing inquiry, dependent on the facts and circumstances of

the particular case. U.S. Const. Amend. 1; Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

1 Cases that cite this headnote

[31] **Constitutional Law** Records or Information

Records Financial or commercial information in general

Under the right to privacy under the state constitution, exhibits consisting of brokerage firm's client's account statement and an e-mail with an attachment should have been struck and either removed from the record or sealed for good cause, in stock issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," where issuer made no specific mention of either exhibit in its summary judgment opposition. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[32] **Constitutional Law** Records or Information

Records Financial or commercial information in general

Under the right to privacy under the state constitution, all but the cover pages of exhibits consisting of brokerage firms' lengthy reports containing information about the trades of one or more clients should have been struck and either removed from the record or sealed for good cause, in stock issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," where issuer's summary judgment opposition cited and quoted only from the cover pages, and did not cite to or make any mention of the contents of the reports. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[33] **Constitutional Law** Records or Information

Records Financial or commercial information in general

The right to privacy under the state constitution did not require the trial court to seal an exhibit consisting of a 17–page spreadsheet reporting "trade information" pertaining to stock issuer's shares, in issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," where the spreadsheet referenced a particular account that swept in, but did not identify, multiple clients, and the spreadsheet did not represent the trades of any one client. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[34] **Constitutional Law** Records or Information

Records Financial or commercial information in general

The right to privacy under the state constitution did not require the trial court to seal exhibits consisting of brokerage firms' e-mails about a client, trading strategies already publicly associated with the client, and the client's interest in opening a new account, or three other exhibits referring to the rudiments of the publicly-known trading strategies, in issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," where the material in the exhibits had been publicly disclosed in lengthy Securities and Exchange Commission (SEC) orders sanctioning clients for these trading practices. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[35] **Constitutional Law** Records or Information

Records Financial or commercial information in general

The right to privacy under the state constitution required the trial court to strike brokerage firm's client's account numbers, the size of a wire sent into client's account, and his net liquidity from an exhibit consisting of an e-mail and either to remove the exhibit from the record or to seal it, by redaction if appropriate, for good cause,

in issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," where the financial information about client was not publicly known, and the issuer did not cite to it. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[36] **Constitutional Law** Records or Information

Records Financial or commercial information in general

The right to privacy under the state constitution required the trial court to strike brokerage firms' client's overall short position and leverage from an exhibit consisting of an e-mail and either to remove the exhibit from the record or to seal it, by redaction if appropriate, for good cause, in issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," but did not require the trial court to strike client's leverage ratio, since client's overall short position and leverage were irrelevant, but client's leverage ratio had some colorable connection to firms' knowledge of the alleged price manipulation. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[37] **Constitutional Law** Records or Information

Records Financial or commercial information in general

The right to privacy under the state constitution required the trial court to strike brokerage firm's client's opening balance, estimated annual revenue, stock and option volumes, total combined equity, and affiliations with other financial firms from an exhibit consisting of firm's new client form and either to remove the exhibit from the record or to seal it, by redaction if appropriate, for good cause, in stock issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," since the information had no relevance to the summary judgment proceedings. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[38] **Constitutional Law** Records or Information

Records Financial or commercial information in general

The right to privacy under the state constitution did not require the trial court to seal brokerage firm's client's identity, trading strategies and use of certain computer software from an exhibit consisting of firm's new client form, in stock issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," since the information was relevant to the summary judgment proceedings, and the new client form was explicitly referenced at the summary judgment hearing. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[39] **Constitutional Law** Records or Information

Records Personal identifying information in general

The right to privacy under the state constitution required the trial court to strike brokerage firm's e-mails that identified numerous new clients and accounts and either to remove the exhibit from the record or to seal it, by redaction if appropriate, for good cause, in stock issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," where issuer made no mention at all of that exhibit in the proceedings where summary judgment was granted. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[40] **Records** Financial or commercial information in general

The right to privacy under the state constitution did not require the trial court to seal an exhibit consisting of a transcript of a telephone conversation between a brokerage firm and its

client, wherein an employee of the firm told client he needed to take action to meet federal Regulation SHO requirements, in stock issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," since the transcript simply showed the client's publicly known short selling trading strategy in action. 17 C.F.R. § 242.200; Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[41] **Records** Financial or commercial information in general

The right to privacy under the state constitution did not require the trial court to seal an exhibit consisting of a lengthy spreadsheet showing two clients' short positions in a stock issuer's shares over a year, in the issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," where the spreadsheet had been discussed in the summary judgment hearing. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[42] **Constitutional Law** Records or Information

Records Financial or commercial information in general

The right to privacy under the state constitution did not require the trial court to seal exhibits containing information about short sales and related "buy ins" or settlement obligations of numerous clients of brokerage firms, including stock names, quantities, and prices, to the extent that the exhibits related to two particular clients of the brokerage firms and one particular company's stock which had been linked to "naked short sales" in a news article, since extensive public information was available about the clients' trading of the stock. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[43] **Constitutional Law** Records or Information

Records Personal identifying information in general

The right to privacy under the state constitution required the trial court to seal third party client identifying information, by redaction if appropriate, from exhibits containing information about short sales and related "buy ins" or settlement obligations of numerous clients of brokerage firms, other than information related to two particular clients of the brokerage firms and one particular company's stock which had been linked to "naked short sales" in a news article, since other third party identifying information was of scant, if any, relevance to the issuer's summary judgment opposition, and the public's understanding of the adjudicative process was not enhanced by the disclosure of this confidential financial information. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[44] **Records** Personal identifying information in general

The right to privacy under the state constitution required the trial court to strike client-identifying information from an exhibit consisting of a lengthy spreadsheet reporting details about numerous client trades and either to remove it from the record or to seal it, by redaction if appropriate, for good cause, in stock issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," even though portions of the exhibit were relevant to issuer's summary judgment opposition because it demonstrated the great volume of "fails to deliver" and was used to highlight certain trades, since the client-identifying information in the exhibit was irrelevant. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[45] **Constitutional Law** Records or Information

Records Personal identifying information in general

The right to privacy under the state constitution required the trial court to strike client-identifying

information from an exhibit consisting of a list of five of brokerage firm's clients and their short positions in an issuer's stock, and either to remove it from the record or to seal it, by redaction if appropriate, for good cause, in stock issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," since the client-identifying information in the exhibit was irrelevant, where the issuer cited to the exhibit only to show the fees charged by one of the firms. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[46] **Constitutional Law** Records or Information

Records Personal identifying information in general

The right to privacy under the state constitution required the trial court to strike client-identifying information from an exhibit consisting of an e-mail chain, and either to remove it from the record or to seal it, by redaction if appropriate, for good cause, in stock issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," since the client-identifying information in the exhibit was irrelevant, where the issuer cited to the exhibit only to show that one client of one of the brokerage firms, who had been sanctioned for unlawful short selling, did not became a paying client; the particular identity of the client and the short positions listed were irrelevant to the issuer's point. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

[47] **Records** Personal identifying information in general

Brokerage firms' string citation to dozens of exhibits they contended should have been sealed was sufficient to require reversal and remand for the trial court to consider the motion to seal the exhibits further under the state constitution's privacy provision, in stock issuer's lawsuit challenging brokerage firms' alleged strategy of intentionally depressing the price of issuer's stock through "naked short sales," even though the firms did not provide any separate analysis about the exhibits, since the privacy interest at stake was significant, and the firms established as to many of the exhibits they separately discussed that much of the information was irrelevant to issuer's summary judgment opposition and therefore should have been struck or sealed for good cause. Cal. Const. art. 1, § 1; Cal. R. Ct. 2.550(d).

See 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, § 41 et seq.

West Codenotes

Recognized as Unconstitutional
Cal. Fam. Code § 2024.6.

****241** The Honorable John E. Munter, San Francisco County and City Superior Court (San Francisco City & County Super. Ct. No. CGC07460147)

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Banke, J.

***478 I. Introduction**

In this consolidated appeal, we address two "sealing" orders. The first granted motions by defendants to seal documents submitted in connection with plaintiffs' efforts to file a

This dynamic occasionally plays out. Overstock intentionally filed sensitive documents they knew the Defendants want kept quiet, prompting the motions to seal.

fifth amended complaint. The second denied, in substantial part, motions by defendants to seal documents submitted in connection with defense motions for summary judgment. The second order overlapped the first, since the materials underlying the proffered amended pleading resurfaced in opposition to the summary judgment motions. Accordingly, the second sealing order is the trial court's final call as to the propriety of sealing these discovery materials, and the parties have ultimately focused on this order, as do we.

This is an interesting little note. Reading between the lines, someone filed something for no apparent reason other than to smear someone, sling mud, or harass

We affirm most of the trial court's sealing decisions. But there are key exceptions, a principal one being thousands of pages of documentation plaintiffs submitted to the court, but which they never cited and which were irrelevant to the issues raised by the summary judgment motions. Under the plain terms of the protective order in place, these irrelevant materials never should have burdened the trial court or this court. Nor should they have been subjected to analysis under the sealing rules, since irrelevant materials have no bearing on the trial court's adjudicatory function and, thus, are not within the ambit of the public's right of access to court records. Rather, these discovery materials should have been struck from the record and remained confidential pursuant to the provisions of the protective order. As for the materials that were relevant to the summary judgment proceedings, some contain confidential financial information of third parties and should have been sealed under the "sealed records rules."

On our way to reaching these conclusions, we address several issues pertaining to sealing orders that have remained unsettled, including the reach of California Rules of Court, rules 2.550 and 2.551, and media participation in sealing hearings. We also discuss tools available to the trial courts to deal with abusive litigation tactics impacting the handling of sealing issues. Indeed, we are appalled at the burden the parties foisted on the trial court here and view this case as a companion to ****242** the decision of our brethren in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 289–290, [100 Cal.Rptr.3d 296], decrying unnecessary and oppressive summary judgment tactics.

*479 II. Background

Plaintiffs are Overstock.Com, Inc., an online retailer, and several of its investors. In their fourth amended complaint, plaintiffs alleged defendants, Merrill Lynch, Pierce Fenner & Smith Inc. and Merrill Lynch Professional Clearing Corp. (collectively Merrill) and Goldman Sachs & Co. and Goldman Sachs Execution & Clearing L.P. (collectively Goldman), intentionally depressed the price of Overstock stock by effecting "naked short sales"—that is, sales of shares the brokerage houses and their clients never actually owned or borrowed. This practice, plaintiffs claimed, artificially increased the supply and short sales of the stock, while decreasing its value. Plaintiffs alleged this conduct violated Corporations Code sections 25400 and 25500, Business and Professions Code sections 17200 and 17500, and New Jersey's RICO statute (N.J.Stat.2C:41–2(c)–(d)).

Read: Lots of Documents!

A. *The Protective Order*

The parties' discovery demands were extensive, and in May 2008, pursuant to a stipulation, the trial court issued a protective order. The order allowed the parties to designate certain produced materials as "Protected Material," and to further classify this material as either "Confidential" or "Highly Confidential." Paragraph 13 of the order specified: "If a party seeks to file Protected Material, the party must seek to do so under seal pursuant to California Rules of Court 2.550 and 2.551."[1] Paragraph 14 required the parties to "endeavor in good faith to restrict their ... submissions to Confidential Information ... reasonably necessary for the Court['s deliberations]." "Highly Confidential" typically is reserved for competitively sensitive documents that could be used to extract a competitive advantage unfairly, and is usually limited to "AEO"-- "Attorney's Eyes Only"

Two years later, in June 2010, the trial court entered a second protective order to "modif[y] and extend[ ] the [May 30, 2008]" order to confidential information pertaining to third parties. The parties acknowledged in this order that information identifying specific client transactions "may be protected by rights of privacy or other confidentiality rights." "[T]o avoid undue delay, burden, and expense in document production," the parties also agreed to "produce documents containing information of Third Parties without redaction of such information." We refer to both orders, collectively, as the protective order.

This would have worked out fine for Defendants, but the press's intervention threw a monkey wrench. Defendants probably regretted producing in this format.

B. *The Proposed Fifth Amended Complaint and Related Motions to Seal*

In February 2011, defendants successfully demurred to the New Jersey RICO cause of action in the fourth amended complaint. The trial court ***480** allowed plaintiffs to propose a fifth amended complaint with a reworked RICO claim, stating if they did so, the court would order an expedited briefing and hearing schedule. In May, plaintiffs submitted a proposed new pleading. The publicly filed document was heavily redacted; an unredacted version was conditionally lodged under seal.

RICO= Racketeer Influenced Corrupt Organizations act. This is what was used to take down the mafia families in the 1970s and 80s. When used appropriately in civil litigation and the claim at least gets past the initial motion to dismiss on legal grounds or sufficiency of pleading allegations grounds, which is to say EXCEEDINGLY rarely, it can have a devastating impact.

Defendants opposed allowing the fifth amended complaint on three grounds: a California court should not apply New Jersey RICO law; plaintiffs had not, in any event, stated a claim under that law; and granting leave to amend so late in the case would prejudice defendants. The publicly filed opposition papers were redacted; unredacted versions were conditionally lodged under seal. Plaintiffs then submitted ****243** papers in support of their proposed pleading, and defendants thereafter submitted reply papers. Again, the publicly filed documents were redacted; unredacted versions were conditionally lodged under seal.

In connection with these substantive filings, defendants made ten separate motions to seal. Plaintiffs opposed five of the motions, including two motions to seal certain allegations of the proposed fifth amended complaint based on discovery materials designated "Confidential" or "Highly Confidential" under the parties' protective order. Plaintiffs contended the allegations did not reveal trade secrets or implicate significant privacy interests. The media also filed, without court permission, opposition to the sealing motions, including requesting the court to unveil the "88 paragraphs of the proposed Fifth Amended Complaint" defendants wished to seal in whole or in part.

After a lengthy hearing, the trial court ruled from the bench and denied leave to file the proposed fifth amended complaint on two grounds: (1) granting leave to add a new, complex RICO claim would prejudice defendants on the eve of trial and (2) the RICO claim "would be futile because the facts as alleged ... do not warrant the application of New Jersey RICO [law] to this case under California choice-of-law principles."

[1] Two days later, on August 3, 2011, the court issued a written order granting the motions to seal. It first determined the sealed records rules applied, and then made the express findings required under the rules and ordered the clerk to file, under seal, the unredacted materials that had been conditionally lodged with the court. The court also ruled the media had not sought to intervene in conformance with Code of Civil Procedure section 387 or under ***481** rule 2.551 and therefore denied intervention and struck the media's memorandum opposing sealing. The court noted, however, it had allowed the media to participate in the hearing. Plaintiffs and the media appealed (appeal No. A133487).[2]

C. *The Summary Judgment Motions and Related Motions to Seal*

The following month, defendants moved for summary judgment on the remainder of plaintiffs' causes of action (under Corp. Code, §§ 25400 and 25500 and Bus. and Prof. Code, §§ 17200, 17500) on multiple grounds.

Plaintiffs' opposition would eventually fill 38 banker's boxes and included thousands of pages of discovery materials that had been designated "Confidential" or "Highly Confidential" pursuant to the protective order. The materials were ostensibly proffered to show defendants knowingly employed a strategy of naked short sales to devalue Overstock, and did so in California. The trial court, at the parties' urging, approved lodging all of these confidential materials conditionally under seal and deferring disposition of any sealing motions until after it ruled on the summary judgment motions.

The trial court heard three days of argument on evidentiary objections to the materials filed in connection with the summary judgment motions and a full day of argument on the merits of the motions. In an order dated January 10, 2012, the trial court granted the motions. As to the Corporations Code claim, the court ruled only conduct in California was actionable and plaintiffs "failed to raise [any] triable ****244** issue of material fact supportive of a finding that any act by any defendant foundational to liability, causation, or damages occurred in California." The court declined to reach any of the other grounds for judgment defendants had urged in connection with this claim. As to the Business and Professions Code claim, the court noted plaintiffs sought only injunctive relief and ruled such relief was unavailable since defendants had ceased the complained-of conduct as of 2008, and it was not likely to recur given new Securities and Exchange Commission rules prohibiting it. Again, the court did not consider other grounds urged by defendants. The court issued a final, comprehensive order on April 11, 2012, setting forth, as required by Code of Civil Procedure section 437c, subdivision (g), "the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists."

Shortly after the initial summary judgment order in January, Merrill and Goldman each filed a motion to seal copious amounts of the materials ***482** plaintiffs had submitted in opposition to the summary judgment motions.[3] Plaintiffs opposed both motions. The media also sought, and was granted leave, to intervene in opposition to the motions.

After a lengthy hearing, the trial court largely denied the motions by written order filed March 6, 2012. The court again determined the sealed records rules applied. It also concluded the rules applied to all of the discovery materials submitted in connection with the summary judgment motions, not just those materials related to the limited grounds on which the court ultimately ruled. The court next concluded, as to a significant number of the materials, defendants' declarations were "conclusory" and "unpersuasive," and lacked the "specific facts" necessary to support sealing. The court additionally concluded plaintiffs had "persuasively show[n]" many of the documents no longer had sufficient indicia of confidentiality to warrant sealing. In sum, "[g]iven (1) that this case was filed in February 2007, more than five years ago, (2) that most, if not all, of the transactions reflected in the documents are at least four years old, (3) that many of the allegedly confidential business practices and trading strategies are outdated due to changes in federal law, and (4) that much of the material at issue was publicly disclosed at the January 5, 2012 hearing on the motions for summary judgment," the trial court observed, "defendants' failure to present specific facts to justify sealing the documents at issue is understandable."

Still, the trial court ordered a significant number of the discovery materials sealed. These generally fell into three categories: (1) documents "laced with identifying information about hundreds of thousands of financial transactions of third parties who have no connection to this litigation"; (2) nonpublic regulatory documents having no direct connection to this action, the sealing of which plaintiffs did not oppose; and (3) approximately 200 exhibits plaintiffs submitted, but never cited.

[2] While the March 2012 sealing order did not expressly revisit the 2011 order, when the trial court and parties discussed sealing the summary judgment materials at a December 8, 2011, case management conference, they agreed to a "holistic hearing that would apply not only to the [summary judgment sealing motions], but also would involve reconsideration of the court's previous sealing rulings." As the court observed, the "overlap is inseparable." ****245** At a later case management conference, on December 23, 2011, the court reiterated it was "prepared holistically to consider these sealing issues with respect to past and present and future motions at the same time" and again noted "the information that is sought to be sealed in the currently pending motions overlaps largely with the previous rulings." This holistic, ***483** evolving view of the propriety of sealing was well taken. (See *In re Marriage of Nicholas* (2010) 186 Cal.App.4th 1566, 1569, [113 Cal.Rptr.3d 629] ["well-established constitutional, case, and statutory authority subject[s] sealing orders to continuing review and modification by the trial judge..."].)

Merrill and Goldman filed notices of appeal to the extent the March 2012 order denied their motions to seal and allowed the media to intervene (appeal No. A135180), and we subsequently ordered the appeals consolidated. As we noted at the outset, the parties have focused on the 2012 order.[4]

Because freedom of the press and avoidance of censorship are core Constitutional-- "fundamental--" rights, you have to show evidence as to why sealing is necessary beyond vague desires for confidentiality. Note here, the Court is also alluding to another concept-- Confidential documents may become not confidential due to lapse of time and them becoming stale, or disclosed elsewhere

III. Discussion

A. *Background: Access to Records in Civil Cases*

1. *Common Law Right of Access*

[3] Nearly all jurisdictions, including California, have long recognized a common law right of access to public documents, including court records. (See *Nixon v. Warner Communications, Inc.* (1978) 435 U.S. 589, 597, [98 S.Ct. 1306, 55 L.Ed.2d 570] (*Nixon*) [it "is clear that the courts of this country recognize a general right to inspect and copy public records and documents"]; *IDT Corp. v. eBay, Inc.* (8th Cir.2013) 709 F.3d 1220, 1222 (*IDT Corp.*) [noting most federal circuits have embraced a common law right of access to court records]; *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 220, fn. 3, [71 Cal.Rptr. 193] ["right of a citizen to inspect public writings has its origin in the common law"].)

Which is exactly why I am able to share this with you!

[4] This common law right is effectuated through a presumption of access. (See *Nixon, supra,* 435 U.S. at p. 602, 98 S.Ct. 1306 ["on respondents' side is the presumption—however gauged—in favor of public access to judicial records"].) As articulated by California's courts, this presumption means court records are "open to the public unless they are specifically exempted from disclosure by statute or are protected by the court itself due to the necessity of confidentiality." (*McGuire v. Superior Court* (1993) 12 Cal.App.4th 1685, 1687, [16 Cal.Rptr.2d 726]; accord, *Estate of Hearst* (1977) 67 Cal.App.3d 777, 782–783, [136 Cal.Rptr. 821].)

Meaning, the party seeking sealing automatically has the deck stacked against them.

***484** **[5]** **[6]** The weight accorded to the common law presumption of access depends, in any particular case, on the

Note here, the Court is basically saying the presumptive right to access court records diminishes as the sensitivity and secrecy of the document at issue increases.

"role of the material at issue in the exercise of ... judicial power and the resultant value of such information to those monitoring the ... courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." (****246** *Lugosch v. Pyramid Co. of Onondaga* (2d Cir.2006) 435 F.3d 110, 119 (*Lugosch*).) Accordingly, when evaluating whether records should be sealed under the common law, courts engage in a balancing analysis, weighing the presumption of access against a variety of competing interests. (See *H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 894, [60 Cal.Rptr.3d 501] (*H.B. Fuller*) [weighing harm of disclosing confidential information against any countervailing considerations].)

As a practical matter, this has meant documents subject to a protective order often remain outside public purview on a "good cause" showing akin to that which supported issuance of the protective order in the first place. (See *Phillips v. General Motors Corp.* (9th Cir.2002) 307 F.3d 1206, 1213 ["When a court grants a protective order for information produced during discovery, it already has determined that 'good cause' exists to protect this information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality."]; *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.* (11th Cir.2001) 263 F.3d 1304, 1313 ["the Press's common-law right to the Firestone documents filed in connection with the motion for summary judgment may be resolved by the [Federal Rules of Civil Procedure, r]ule 26 good cause balancing test"]; *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 107–108, 70 Cal.Rptr.3d 88 (*Mercury*) [concluding discovery material was not protected by constitutional right of access and remanding for determination of whether documents should remain confidential under protective order].)

2. *First Amendment Right of Access*

More recently, many jurisdictions, including California, have recognized a constitutional right of access to certain court documents grounded in the First Amendment. (*NBC Subsidiary (KNBC–TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1208, fn. 25, [86 Cal.Rptr.2d 778, 980 P.2d 337] (*NBC Subsidiary*).)

NBC Subsidiary addressed the outright closure of court proceedings and concluded the trial court infringed on First Amendment rights by barring the media from the courtroom in the absence of explicit findings of an overriding interest that was likely to be prejudiced and could not be protected by less restrictive means. (*NBC Subsidiary, supra,* 20 Cal.4th at pp. 1222–1223, 86 Cal.Rptr.2d 778, 980 P.2d 337.) However, the Supreme Court additionally observed, in what is now an ***485** oft-cited footnote, that: "Numerous reviewing courts likewise have found a First Amendment right of access to civil litigation documents filed in court as a basis for adjudication. (See *Brown & Williamson Tobacco Corp. v. F.T.C.* (6th Cir.1983) 710 F.2d 1165, 1179 (*Brown & Williamson*) [documents filed in civil litigation; '[i]n either the civil or criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption']; *Rushford v. New Yorker Magazine, Inc.* (4th Cir.1988) 846 F.2d 249 (*Rushford*) [summary judgment pleadings]; *Matter of Continental Illinois Securities Litigation* (7th Cir.1984) 732 F.2d 1302 (*Continental Illinois Securities*) [records related to 'hybrid summary judgment motion']; cf. *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.* (7th Cir.1994) 24 F.3d 893 [assuming both a First Amendment and a common law right of access to civil litigation documents].)" (*NBC Subsidiary, supra,* 20 Cal.4th at p. 1208, fn. 25, 86 Cal.Rptr.2d 778, 980 P.2d 337.)

"Sunshine is the best disinfectant" This is a key consideration. Courts don't like for fraudsters to be able to conceal their crimes.

Since *NBC Subsidiary,* the California Courts of Appeal have regularly employed a constitutional analysis in resolving disputes over public access to court documents. ****247** (E.g., *In re Marriage of Nicholas, supra,* 186 Cal.App.4th at p. 1575, 113 Cal.Rptr.3d 629 [sealing orders implicate public's right of access under the 1st Amend.]; *Savaglio v. Wal–Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 596, [57 Cal.Rptr.3d 215] (*Savaglio*) [public has 1st Amend. right to access civil litigation documents filed in court and used at trial or submitted as basis for adjudication].)[5]

[7] Not all documents submitted or filed by the parties, however, fall within the ambit of the constitutional right of access. *NBC Subsidiary* hastened to add the courts have held "the First Amendment does not compel public access to discovery materials that are neither used at trial nor submitted as a basis for adjudication." (*NBC Subsidiary, supra,* 20 Cal.4th at p. 1208 fn. 25, 86 Cal.Rptr.2d 778, 980 P.2d 337; see *Mercury, supra,* 158 Cal.App.4th at p. 84, 70 Cal.Rptr.3d 88 ["our high court enunciated a rule under which a certain class of court-filed documents is subject to a presumption of a First Amendment right of public access"].)

[8] Thus, "different levels of protection may attach to the various records and documents involved in [a given] case," depending on whether access is predicated on the First Amendment or the common law. (*Stone v. University of Maryland Medical System Corp.* (4th Cir.1988) 855 F.2d 178, 180; see *United States v. McVeigh* (10th Cir.1997) 119 F.3d 806, 812 ["both the common law and ***486** First Amendment standards ultimately involve a balancing test, and the First Amendment right of access receives more protection than the common law right. Thus, if we find the district court orders satisfy the First Amendment standard, as we do, we will necessarily find that the orders satisfy the common law standard as well."]; *Mercury, supra,* 158 Cal.App.4th at pp. 91, 106–107, 70 Cal.Rptr.3d 88 [1st Amend. applies to a "narrower class of filed documents," while "good cause" Civil Discovery Act[6] standard applies to discovery materials not subject to sealed records rules].)

3. *The Sealed Records Rules* not super important, just skip this.

In response to *NBC Subsidiary,* the Judicial Council promulgated "the sealed records rules," rules 2.550, 2.551.[7] (*Mercury, supra,* 158 Cal.App.4th at p. 84, 70 Cal.Rptr.3d 88.) The rules expressly implement the First Amendment principles espoused in *NBC Subsidiary* and establish a presumption that "court records ... be open" unless the law requires confidentiality. (Rule 2.550(c); see Advisory Com. com. to rule 2.550; *In re Marriage of Nicholas, supra,* 186 Cal.App.4th at p. 1575, 113 Cal.Rptr.3d 629.)

The rules "apply to records sealed or proposed to be sealed by court order" (rule 2.550(a)(1)) and, more specifically, to "discovery materials that are used at trial or submitted as a basis for adjudication of ****248** matters other than discovery motions or proceedings." (Rule 2.550(a)(3).) The rules are inapplicable to "discovery motions and records filed or lodged in connection with discovery motions or proceedings." (*Ibid.*) Nor do they apply "to records that are required to be kept confidential by law." (Rule 2.550(a)(2).)

a. *Sealing Records*

"[S]ubject to certain exceptions ... a court 'record must not be filed under seal without a court order.' (Rule 2.551(a).) Further, a 'court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties.' (Rule 2.551(a).)" (*Mercury, supra,* 158 Cal.App.4th at p. 84, 70 Cal.Rptr.3d 88.)

[9] "A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing." (Rule 2.551(b)(1).) In so doing, the moving party must lodge with the court the record for which the ***487** sealing order is sought.[8] The court holds the record "conditionally under seal" until it rules on the motion or application. (Rule 2.551(b)(4).)

Often a party will want to file documents obtained during discovery that an adversary or third party has designated as confidential pursuant to a protective order. (See rule 2.551(b)(3).) In such a case, the party seeking to file the confidential documents must lodge them with the court in unredacted form, as well as lodge, in unredacted form, any pleadings, motions, memoranda or other court documents disclosing their contents. (Rule 2.551(b)(3)(A)(i), (d).) The party must also publicly file redacted copies of the documents and other court materials. (Rule 2.551(b)(3)(A)(ii).) In addition, the party must give written notice to whoever produced the confidential documents that the lodged, unredacted documents "will be placed in the public court file unless that party files a timely motion or application to seal the records under this rule." (Rule 2.551(b)(3)(A)(iii).) If the producing party is properly served with notice and fails to request sealing within 10 days, or fails to request an extension of time to seek sealing, "the clerk must promptly ... place the [unredacted documents] in the public file." (Rule 2.551(b)(3)(B).)

[10] **[11]** **[12]** The court may order a record sealed only upon making express findings that: "(1) There exists an overriding interest that overcomes the right of public access to the record; [¶] (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." (Rule 2.550(d).) In its order, the court must identify the facts supporting its issuance. (Rule 2.550(e)(1)(A); *Mercury, supra,* 158 Cal.App.4th at p. 84, 70 Cal.Rptr.3d 88.) The findings themselves, however, may be set forth in fairly cursory terms. (See, e.g., *McGuan v. Endovascular Technologies, Inc.* (2010) 182 Cal.App.4th 974, 988, [106 Cal.Rptr.3d 277] (*McGuan*).) If the trial court fails to make the required findings, the order is deficient

and cannot support ****249** sealing.[9] (See *Providian,* 96 Cal.App.4th at pp. 301–302, 116 Cal.Rptr.2d 833.)

"If the court denies the motion or application to seal, the clerk must return the lodged record to the submitting party and must not place it in the case file ***488** unless that party notifies the clerk in writing within 10 days after the order denying the motion or application that the record is to be filed." (Rule 2.551(b)(6).)[10]

b. *Unsealing Records* Otherwise the interested members of the public would have no "standing"-- legal right to file a claim.

The sealing rules also allow a party, members of the public, or even the court on its own initiative, to seek the unsealing of documents under seal. (Rule 2.551(h)(2).) "Notice of any motion, application, or petition to unseal must be filed and served on all parties in the case." (*Ibid.*) "The motion, application, or petition and any opposition, reply, and supporting documents must be filed in a public redacted version and a sealed complete version if necessary" if such documentation reveals the content of the sealed documents. (*Ibid.*) YOU CAN SKIP TO PAGE 16

[13] While the court must consider the same criteria pertinent to a motion to seal when ruling on a request to unseal (rule 2.551(h)(4)), an order to unseal—as well as an order denying sealing—does not require express factual findings by the trial court. (*Providian, supra,* 96 Cal.App.4th at p. 302, 116 Cal.Rptr.2d 833.) The order must specify, however, whether the records are unsealed in whole or in part. (Rule 2.551(h)(5).)

c. *Media's Involvement*

The sealed records rules expressly permit the public, which includes members of the press, to seek the un-sealing of court records. (Rule 2.551(h)(2).) Rule 2.551 "provides procedural flexibility to third parties seeking to unseal court records, including"—in addition to noticed proceedings in the trial court—"the vehicle of initiating an original proceeding in the reviewing court by way of a petition for writ of mandate to compel the lower court to unseal records that were improperly sealed." (*Savaglio, supra,* 149 Cal.App.4th at pp. 601–603, 57 Cal.Rptr.3d 215.) Rule 2.551(h)(2), thus, reflects the Judicial Council's implementation of *NBC Subsidiary's* admonition that " 'representatives of the press and general public "must be given an opportunity to be heard on the question of their exclusion." ' " (*NBC Subsidiary, supra,* 20 Cal.4th at p. 1217, fn. 36, 86 Cal.Rptr.2d 778, 980 P.2d 337.)

Here the media asserts, as it has in other cases, that it also has a right to participate in proceedings to *seal* court records and further contends it is entitled to do so as an intervener. And some cases have noted in passing the media was allowed to intervene to oppose a motion to seal. (E.g., ***489** *In re Marriage of Burkle* (2006) 135 Cal.App.4th 1045, 1050, [37 Cal.Rptr.3d 805] (*Burkle*); ****250** *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 611, [4 Cal.Rptr.3d 239].)

However, after examining the nature and parameters of intervention, *Savaglio* concluded it was not the proper procedure for media participation, even in connection with the unsealing of court records. (*Savaglio, supra,* 149 Cal.App.4th at p. 602, 57 Cal.Rptr.3d 215.) The newspaper seeking leave to intervene in that case "mistakenly equate[d] intervention with pursuing a motion to seal. They are not the same. The right to intervene, whether conditional or unconditional, is the right to become a party to pending litigation. As applied to matters of law, 'to intervene' means ' "[t]o interpose in a lawsuit so as to become a party to it." ' (*Estate of Ghio* (1910) 157 Cal. 552, 559–560 [108 P. 516].) In civil law intervention is ' "[t]he act by which a third party becomes a party in a suit pending between other persons." ' (*Id.* at p. 560 [108 P. 516].) By allowing a member of the public to file a motion to unseal records, rule 2.551(h) provides a mechanism for third parties to correct overbroad or unsubstantiated sealing orders, but it does not transform that member of the public into a party to the lawsuit." (*Savaglio,* at pp. 602–603, 57 Cal.Rptr.3d 215.)

[14] **[15]** We agree with *Savaglio* that intervention pursuant to Code of Civil Procedure section 397 is not a means by which nonparties can participate in proceedings to seal or unseal court records. This does not mean, however, media participation in proceedings to seal court records is improper, even though the sealing rules provide for participation only in proceedings to unseal court records. The courts have ample authority to allow media participation as amici curiae. (See, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 791, [76 Cal.Rptr.3d 683, 183 P.3d 384] [superior courts retain "broad discretion over the conduct of pending litigation" and have "the authority to determine the manner and extent of ... entities' participation as amici curiae that would be of most assistance to the court"]; *Cromer v. Superior Court* (1980) 109 Cal.App.3d 728, 731, [167 Cal.Rptr. 671] [court "aided by briefs of amici curiae representing interests of the news media

and the public generally"]; *Apple Inc. v. Samsung Electronics Co., Ltd.* (Fed.Cir.2013) 727 F.3d 1214, 1220 (*Apple Inc.*) [trial court denied motion to intervene on sealing issues, but both it and appellate court granted media leave to appear as amici curiae].)

Here, the trial court rejected the media's attempt to intervene in connection with the sealing motions pertaining to plaintiffs' effort to file a fifth amended complaint on the ground the media had not properly applied to intervene, but granted applications to intervene in connection with the sealing motions pertaining to defendants' summary judgment motions. Allowing the media to intervene in connection with the second round of sealing motions was, for the ***490** reasons we have explained, improper. For the same reason, there is no merit to the media's claim the court erred in not allowing them to intervene in connection with the first round of sealing motions filed in connection with the proposed fifth amended complaint. As to the initial motions, however, the media were essentially allowed to participate as amici curiae, and they were not entitled to any other status.

B. *Standard of Review*

1. *If Common Law Right of Access Applies*

[16] When the common law right of access applies, appellate courts generally employ the abuse of discretion standard in reviewing sealing orders. (E.g., *Nixon, supra,* 435 U.S. at p. 599, 98 S.Ct. 1306; ****251** *Ameziane v. Obama* (D.C.Cir.2012) [699 F.3d 488, 494] ["we review a district court's decision to seal or unseal documents, or to issue or refuse to issue a protective order, for abuse of discretion" but "review de novo any errors of law upon which the court relied in exercising its discretion"]; *Media General Operations, Inc. v. Buchanan* (4th Cir.2005) 417 F.3d 424, 429 ["Common law rights provide the press and the public with less access than First Amendment rights," and decision to seal or grant access to warrant papers " 'is committed to the sound discretion of the judicial officer who issued the warrant' " and "reviewed for abuse of discretion."].)

2. *If the Sealed Records Rules Apply (Constitutional Right of Access)*

When the constitutionally based sealed records rules apply, the California courts have taken varying approaches to the standard of review.

In *Providian,* one of the early watershed cases applying the sealed records rules, the court reviewed an order *un*sealing documents, which it characterized as the "functional equivalent" of an order denying sealing. (*Providian, supra,* 96 Cal.App.4th at p. 302, 116 Cal.Rptr.2d 833.) The court nevertheless addressed the standard of review both for orders sealing and unsealing records. (*Id.* at pp. 299–303, 116 Cal.Rptr.2d 833.) Noting that an order sealing records is proper only if the trial court expressly finds facts that establish the five findings required by rule 2.550(d)(1)–(5), *Providian* concluded the first task in reviewing an order to seal is to "examine the express findings of fact required by [the] rule ... to determine if they are supported by substantial evidence." (*Providian,* at p. 302, 116 Cal.Rptr.2d 833.) Next, because the language of the rule is permissive (the "court may order that a record be filed under seal" if the factual requisites are met (rule 2.550(d))), the appellate court must ask "whether, in light of and on the basis of [the] findings, the trial court abused its discretion in ordering a record ***491** sealed." (*Providian,* at p. 302, 116 Cal.Rptr.2d 833.) As for an order to unseal, which differs from an order to seal because the trial court need not make express findings, *Providian* concluded the reviewing court examines the record for substantial evidence supporting the trial court's implied findings that the requirements for sealing are not met. (*Id.* at pp. 301–303, 116 Cal.Rptr.2d 833.)[11]

However, in *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1019–1020, [27 Cal.Rptr.3d 596] (*Jackson*), the court took a different approach as to orders *sealing* court records, pointing out *Providian* actually dealt with an order unsealing records. *Jackson* concluded an order sealing records is subject to "independent review" because it implicates First Amendment rights.[12] (****252** *Jackson,* at p. 1020, 27 Cal.Rptr.3d 596; see *U.S. v. Doe* (2d Cir.2009) 356 Fed.Appx. 488, 489 [distinguishing between orders sealing and unsealing records; "where, as here, we review a district court decision denying sealing, the decision presents no First Amendment concerns, and we will affirm unless the district court 'based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence' "].) As to orders *un*sealing court records, the court considered *Providian* 's standard of review discussion "arguably ... persuasive." (*Jackson,* at p. 1020, 27 Cal.Rptr.3d 596.)

In *Oiye,* the court declined to follow *Jackson* 's view on the standard of review applicable to orders sealing court records and adopted the approach laid out in *Providian,* stating it would " 'review the trial court's decision to order the documents sealed under the abuse of discretion standard, and any factual determinations made in connection with that decision will be upheld if they are supported by substantial evidence.' " (*Oiye, supra,* 211 Cal.App.4th at p. 1067, 151 Cal.Rptr.3d 65.) *Oiye* distinguished *Jackson* as involving an uncontested record. (*Oiye,* at p. 1067, 151 Cal.Rptr.3d 65.) We do not agree *Jackson* employed independent review ***492** because the record was uncontradicted. Rather, it seems apparent the court did so because the sealed records rules are grounded in the First Amendment right of access.

[17] We need not, however, resolve whether *Providian* or *Jackson* most accurately sets forth the standard of review for orders sealing court records. Although the trial court's first order granted defendants' motions to seal, its second order, embracing the same discovery materials, largely denied defendants' motions to seal, and only defendants have appealed from that order. Accordingly, the ultimate record status of the discovery materials at issue here is subject to review in the context of an order denying sealing. In this context, the courts have consistently employed the approach articulated in *Providian.* We therefore review de novo whether the sealed records rules apply to a given set of discovery materials (a question of law). And when they do, we review the ultimately discretionary decision to deny sealing by inquiring whether substantial evidence supports the trial court's express or implied findings that the requirements for sealing are not met. (*Providian, supra,* 96 Cal.App.4th at pp. 301–303, 116 Cal.Rptr.2d 833.)

C. *Applicability of the Sealed Records Rules to the Documents at Issue*

[18] **[19]** The sealed records rules apply, as we have discussed, to "discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings." (Rule 2.550(a)(3); *NBC Subsidiary, supra,* 20 Cal.4th at p. 1208, fn. 25, 86 Cal.Rptr.2d 778, 980 P.2d 337.) While the first category of materials, discovery materials "used at trial," might be relatively straightforward, the second category, discovery materials "submitted as a basis for adjudication," is ****253** not. Defendants contend the latter category embraces only materials relevant to the ground or grounds on which a trial court ultimately rules. Plaintiffs maintain it includes all discovery materials submitted to a court in support of and in opposition to a pending motion. We conclude the broader view is correct—with the important caveat that irrelevant discovery materials or materials as to which evidentiary objections are sustained, are not "submitted as a basis for adjudication" and thus are not within the ambit of the constitutional right of access and, concomitantly, not subject to the sealed records rules.

1. *Discovery Materials "Submitted as a Basis for Adjudication"*

Defendants base their narrow reading of the phrase "submitted as a basis for adjudication" on *Mercury.* The issue in that case was whether exhibits to a complaint (obtained through discovery and subject to a protective order) were subject to the sealed records rules and properly ordered *un*sealed by the trial court. (*Mercury, supra,* 158 Cal.App.4th at pp. 68, 103, 70 Cal.Rptr.3d 88.) After the defendants ***493** successfully demurred to the complaint solely on standing grounds, the media successfully urged that the complaint and exhibits be unsealed. (*Id.* at p. 71, 70 Cal.Rptr.3d 88.) The Court of Appeal reversed, concluding the exhibits had not been submitted as a basis for adjudication and therefore were not subject to the sealed records rules. Accordingly, the materials should have remained sealed pending further proceedings to determine whether they were properly classified as confidential under the protective order. (*Id.* at pp. 105–108, 70 Cal.Rptr.3d 88.)

Mercury posited two plausible meanings of the phrase "submitted as a basis for adjudication." (*Mercury, supra,* 158 Cal.App.4th at pp. 89–90, 70 Cal.Rptr.3d 88.) Under a broad interpretation, "the right of access would apply to any discovery material filed with the court, with the sole exception under rule 2.550(a)(3) of documents filed in connection with discovery motions or proceedings. Public access would be inherent in the mere filing of the discovery material because the placing of the document in the court file would make it potentially something that would be used 'as a basis for adjudication.' " (*Id.* at p. 89, 70 Cal.Rptr.3d 88, fn. omitted.) Under a narrower view, discovery material would be "subject to public access (and therefore governed by the rules) when ... filed with the court *and* ... used in some manner by the court 'as a basis for adjudication' of a material controversy." (*Id.* at pp. 89–90, 70 Cal.Rptr.3d 88, italics added;[13] see *Rosado v. Bridgeport Roman Catholic Diocesan Corp.* (2009) 292 Conn. 1, 38–40, [970 A.2d 656] (*Rosado*) [postulating three views: a narrow approach that presumes

access only to documents relevant to adjudication of a litigant's "substantive right," a middle approach that presumes access to all documents relevant to a court's adjudicatory function, and a broad approach that presumes access to all documents filed in connection with a pending matter].)

Mercury rejected the broader interpretation, stating "[i]t cannot be said that public access to *any* court-filed civil discovery documents—regardless of their relevance to the issues in the case, the circumstances ****254** of their filing, or the extent of their use in the proceedings—promotes" the objective of public access. (*Mercury, supra,* 158 Cal.App.4th at pp. 96–97, 70 Cal.Rptr.3d 88.) "Public access to a discovery document that is not considered or relied on by the court in adjudicating any substantive controversy does nothing to (1) establish the fairness of the proceedings, (2) increase public confidence in the judicial process, (3) provide useful scrutiny of the performance of judicial functions, or (4) improve the quality of the truth-finding process." (*Ibid.*)

***494** Thus, while recognizing "the importance of a complaint in framing the claims and issues presented in civil litigation," *Mercury* "disagree[d] that any material attached to it—such as the discovery material designated confidential pursuant to a duly entered protective order here—necessarily is 'submitted as a basis for adjudication.' The pleadings, including complaints, are not typically evidentiary matters that are submitted to a jury in adjudicating a controversy." (*Mercury, supra,* 158 Cal.App.4th at p. 103, 70 Cal.Rptr.3d 88.) The demurrer only addressed the threshold question of standing and "in no sense dealt with the underlying factual claims of stock options backdating alleged in the Complaint or concerned the exhibits appended to that pleading." (*Id.* at p. 104, 70 Cal.Rptr.3d 88.) The court observed, however, "there may exist instances in which an attachment to a complaint to which a demurrer is interposed may constitute a document submitted as a basis for adjudication and thereby fall within the presumption of public access discussed in *NBC Subsidiary.* For instance, a challenged complaint in which a contract is attached and in which the demurrer concerns the viability of the contract would probably pose such a case." (*Id.* at p. 104, fn. 34, 70 Cal.Rptr.3d 88.)

Defendants maintain *Mercury* sets forth a bright-line standard: confidential discovery material merely filed (or, more accurately, lodged) with the court, but not actually "considered or relied on" by the court in connection with the basis on which it rules, is not "submitted as a basis for adjudication" and, thus, is not subject to the sealed records rules. We do not agree *Mercury* can or should be boiled down to such a limited view.

Mercury involved the unsealing of exhibits to a complaint, challenged at the outset on a single, threshold procedural ground. While the complaint identified the claims to be tried, neither its substantive allegations, nor its exhibits, had been submitted to the court as a basis for adjudicating the merits of the case. Given these circumstances, *Mercury* 's discussion of the scope of the sealed records rules is on solid ground. However, the court was not confronted with, nor did it discuss, any other context, including discovery materials submitted in connection with a summary judgment motion seeking judgment on multiple, alternative grounds. Accordingly, *Mercury* does not answer the issue presented here.

We therefore turn to the language of the sealed records rules. Rule 2.550 applies to "discovery materials that are *used* at trial or *submitted* as a basis for adjudication of matters other than discovery motions or proceedings." (Rule 2.550(a)(3), italics & underscoring added.) The plain language thus distinguishes between documents that are "used" at trial and documents that are "submitted" as a basis for adjudication of pretrial motions. Had the drafters intended to limit the applicability of the sealed records rules to only discovery materials "used by the court" in its ultimate disposition of substantive pretrial motions, they could have, and undoubtedly would have, said so. ***495** But they did not. Further, both ****255** the words "used" and "submitted," in context, most reasonably refer to the *parties* ' conduct—that is, "used at trial" by the parties and "submitted as a basis for adjudication" by the parties. These words do not reasonably refer to the trial court's conduct deciding on which ground, of several, to base its decision. In short, defendants' proffered construction of "discovery materials that are used at trial or submitted as a basis for adjudication" would require us to effectively delete the word "submitted" from the rule and insert in its place the phrase "by the court," an exercise in redrafting we decline to undertake. (See *Providian, supra,* 96 Cal.App.4th at p. 302, 116 Cal.Rptr.2d 833 ["it is not our function to rewrite the rules..."].)

As we have discussed, the language of rule 2.550 derives directly from *NBC Subsidiary's* footnote 25, which states "the First Amendment does not compel public access to discovery materials that are neither used at trial nor submitted as a basis for adjudication." (*NBC Subsidiary, supra,* 20 Cal.4th

at pp. 1208–1209, fn. 25, 86 Cal.Rptr.2d 778, 980 P.2d 337.) The Supreme Court cited several cases in support of this proposition; none suggests the constitutional right of access to court records is limited to discovery materials relevant to the ground or grounds on which a court ultimately rules. (E.g., *Rushford, supra,* 846 F.2d at p. 253 ["the more rigorous First Amendment standard should also apply to documents filed *in connection with* a summary judgment motion in a civil case" italics added.)].)

Additionally, we must heed the mandate of article I, section 3, subdivision (b)(1), of the California Constitution, which provides: "The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." (*Ibid.*) Subdivision (b)(2) expressly states, "[a] statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b)(2).) Thus, unless we discern a clear requirement otherwise, we must interpret the sealed records rules broadly to further the public's right of access. (See *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 166, [158 Cal.Rptr.3d 639, 302 P.3d 1026] [citing the constitutional provision and noting "our usual approach to statutory construction is supplemented by a rule of interpretation that is specific to the issue before us"]; *Savaglio, supra,* 149 Cal.App.4th at p. 600, 57 Cal.Rptr.3d 215 ["Lest there be any question, Proposition 59 *requires us to broadly construe a statute or court rule* 'if it furthers the people's right of access.' "].)

Finally, defendants' narrow construction would necessarily mean sealing decisions would be made after the-fact—that is, after the trial court issues its ***496** substantive ruling—because only then would the ground or grounds on which the court rules be known. This, in turn, would mean that until the court rules, documents would remain lodged and out of the purview of the public, and the public would necessarily have a constricted opportunity to observe the judicial process as it unfolded.

The plain language of the sealed records rules indicates, however, the drafters did not envision an inherently delayed resolution of sealing issues. The rules provide that upon notice by a party seeking to use confidential discovery materials, a party opposing disclosure must, within 10 days, file a motion or application to seal or obtain an extension of time to do so. (Rule 2.551(b)(3)(B).) Thus, the rules provide ****256** for prompt disposition of sealing issues in the first instance, while providing the flexibility to delay motions to seal through the granting of an extension. Given the short timeframe that governs absent an extension, we cannot read other language, and specifically the phrase "submitted as a basis for adjudication," in a way that necessarily delays the resolution of sealing issues until after a trial court rules on the merits.

Indeed, the courts have expressed concern about delayed rulings on sealing issues. (See *Mercury, supra,* 158 Cal.App.4th at p. 92, 70 Cal.Rptr.3d 88 [approving of Seventh Circuit case stating " 'access should be immediate and contemporaneous' "]; *Savaglio, supra,* 149 Cal.App.4th at p. 601, 57 Cal.Rptr.3d 215 ["any reading of rules 2.550 and 2.551 that encourages an open-ended timeframe for filing a motion to seal records long after the underlying substantive matter has been decided would defeat the purpose of the rules"]; see also *Lugosch, supra,* 435 F.3d at p. 121 [concluding district court erred when it postponed sealing decision "until it had ruled on the underlying summary judgment motion"].)

We recognize some courts have adopted the view defendants urge—that the right of access pertains only to discovery materials relevant to the ground or grounds on which a court actually rules. (E.g., *In re Policy Management Systems Corp.* (4th Cir.1995) 67 F.3d 296 (unpublished table case) [documents filed in connection with motion to dismiss "did not play *any* role in the district court's adjudication of the motion" and court "did not convert the motion into a motion for summary judgment, and thus excluded the documents from consideration"]; *Verona v. U.S. Bancorp* (E.D.N.C., Mar. 29, 2011, No. 7:09–CV–057–BR) 2011 WL 1252935 *1, *21 ["Although these documents were filed in support of the motions for summary judgment and reviewed by the court, the court did not rely upon them in reaching its decision. Accordingly, the court will not presume a public right of access to the documents and will allow the motion to seal."].) However, these courts did not engage in an extensive analysis of the issue. Nor were they required to heed our Supreme Court's discussion in *NBC Subsidiary's* footnote 25, ***497** bound by the language of the sealed records rules, or bound by article I, section 3, subdivision (b)(1) of the California Constitution.

We therefore reject the narrow definition of the phrase "submitted as a basis for adjudication" defendants urge and conclude it embraces discovery materials submitted in support of and in opposition to substantive pretrial motions, regardless of the ground on which the trial court ultimately rules.

2. *Irrelevant Materials Are Not "Submitted As a Basis for Adjudication"*

This does not mean the mere act of submitting discovery materials in support of or in opposition to a pretrial motion imbues the materials with constitutional import, triggering the sealed records rules. As every court to consider the question has observed, the right of access applies only to discovery materials that are *relevant* to the matters before the trial court. (See *Mercury, supra,* 158 Cal.App.4th at p. 96, 70 Cal.Rptr.3d 88 [access to irrelevant documents does not promote goals of public access]; see also *United States v. Kravetz* (1st Cir.2013) 706 F.3d 47, 59, fn. 9 [no presumptive access to "an irrelevant document, that neither was nor should have been relied on"]; *Apple, supra,* 727 F.3d at pp. 1222–1223 ["evidence which a trial court rules inadmissible—either as irrelevant or inappropriate—seems particularly ****257** unnecessary to the public's understanding of the court's judgment"]; *E.E.O.C. v. Dial Corp.* (N.D. Ill., Nov. 29, 2000, No. 99 C 3356) 2000 WL 33912746 *1, *1 ["public has no interest in gaining access to information that has failed to pass the threshold tests of relevance and admissibility"].)[14]

This is exactly what I was alluding to earlier. Someone filed something just to take a potshot

***498** 3. *Curbing Abusive Litigation Tactics Impacting Sealing Proceedings*

We are compelled at this juncture to address the negative impact abusive litigation practices have on sealing issues, a problem that is heightened, we acknowledge, by a broad reading of the phrase "discovery materials ... submitted as a basis for adjudication." (Rule 2.550(a); see *Rosado, supra,* 292 Conn. at p. 48, 970 A.2d 656 [broad presumptive access to documents "creates the potential for parties to harass others by attaching private material with little to no relevance to the issues to underlying motions, thus rendering that material public"].)

The problem is twofold—parties that fail to exercise any discipline as to the confidential documents with which they inundate the courts, and parties that indiscriminately insist every document satisfies the rigorous requirements of the sealed records rules. This case exemplifies both.

[20] Plaintiffs submitted a veritable mountain of confidential materials in opposition to defendants' motions for summary judgment.[15] Entire documents were submitted, when only a page or two were identified as containing matter relevant to the issues.[16] Multiple documents were ****258** submitted to support a claim, when one would have sufficed.[17] The parties made no mention at all of ***499** *hundreds* of the exhibits. Inundating the trial court with this deluge of confidential materials was brute litigation overkill. (See *Nazir v. United Airlines, Inc., supra,* 178 Cal.App.4th at pp. 289–290, 100 Cal.Rptr.3d 296.)

While defendants' umbrage at plaintiffs' "shock and awe" document strategy was understandable, their motions to seal were, in turn, breathtaking in scope.

[21] The courts need not, and should not, put up with this kind of abuse. Every protective order should include language obligating the parties to be as sparing as possible in their use of protected materials. Paragraph 14 of the protective order in this case specifically required the parties to "endeavor in good faith to restrict their ... submissions to Confidential Information ... reasonably necessary for the Court['s]" deliberations. Courts should not hesitate to enforce such provisions through sanctions for egregious violations. (Code Civ. Proc., § 128.5 [sanctions available for "bad-faith actions or tactics that are frivolous"]; see, e.g., *Wallis v. PHL Associates, Inc.* (2008) 168 Cal.App.4th 882, 900, [86 Cal.Rptr.3d 297] [affirming sanctions for violation of protective order]; see also *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, [113 Cal.Rptr.3d 327, 235 P.3d 988] [in making evidentiary objections to summary judgment materials, litigants should focus on objections "that really count" rather than swamping the trial court with hundreds of stock objections; "[o]therwise, they may face informal reprimands or formal sanctions for engaging in abusive practices"].)

[22] Motions to strike can also be of utility. The court in *Mercury* observed, for example, that because the exhibits to the complaint appeared "to have been entirely unnecessary to the pleading," the "sealing controversy could have been avoided by either a stipulation or an order amending the Complaint to strike the exhibits...." (*Mercury, supra,* 158 Cal.App.4th at p. 104, fn. 35, 70 Cal.Rptr.3d 88.) In fact, "the attached exhibits, as well as the quotes and references

to them in the body of the Complaint, could have been stricken by the court either upon a motion by defendant or on its own motion. [Citations.]" (*Ibid.;* see *Oiye, supra,* 211 Cal.App.4th at p. 1070, 151 Cal.Rptr.3d 65 [courts "have inherent authority to strike scandalous and abusive statements in pleadings"].) Even where materials are not connected with a pleading (making a statutory motion to strike under Code Civ. Proc., §§ 435 and 436 unavailable), "[t]he court's files and records are ... subject to the court's control." (*Oiye,* at p. 1070, 151 Cal.Rptr.3d 65; see *Nazir, supra,* 178 Cal.App.4th at p. 290, 100 Cal.Rptr.3d 296 [urging courts to use their inherent power to deal with unduly burdensome evidentiary materials and objections in connection with summary ****259** judgment motions]; *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 106, [16 Cal.Rptr.3d 717] [trial courts "have the inherent power to strike proposed 'undisputed facts' that fail to comply with the statutory requirements and that are formulated so as to impede rather than aid an orderly determination whether the case presents ***500** triable material issues of fact"]; *Warner v. Warner* (1955) 135 Cal.App.2d 302, 303, [287 P.2d 174] [affirming striking and sealing of scurrilous affidavit].)

[23] Thus, when a party submits a tsunami of discovery materials subject to a protective order, the trial court should welcome a well-honed motion to strike to winnow down the material to that which is *relevant* to the contentions advocated by the proffering party. The public's right of access to court records exists only as to such materials. It does not extend to irrelevant materials submitted to the court out of laziness in reviewing and editing evidentiary submissions, or worse, out of a desire to overwhelm and harass an opponent. (See discussion & cases cited, *ante,* at p. 497; *Roman Catholic Diocese of Lexington v. Noble* (Ky.2002) 92 S.W.3d 724, 733 ["there is nothing to indicate that the public and the press historically have had access to sham, immaterial, impertinent, redundant or scandalous material that is without 'legal effect;' " in fact, "allowing access to such material serves a negative rather than a positive role..."].)

[24] Here, the trial court could have stricken *thousands* of pages of the confidential discovery materials plaintiffs submitted but never referenced in their opposing papers (or during the hearing on the motions). Had it done so, these irrelevant materials would have effectively been removed from the court's file, eliminating the need to address any sealing issues as to these materials.[18] (See *Mercury, supra,* 158 Cal.App.4th at p. 104, 70 Cal.Rptr.3d 88.)

[25] Finally, on the other side of the equation, the trial courts can, and should, view overly inclusive sealing efforts with a jaundiced eye, and impose sanctions as appropriate. (See *Providian, supra,* 96 Cal.App.4th at p. 309, 116 Cal.Rptr.2d 833 ["In light of defendants' history of defining confidential material as broadly as possible, it would not be improper for the trial court to view their latest effort with considerable skepticism and conclude that the scope of their proposed record sealing was neither 'narrowly tailored' nor the least restrictive means to protect any interest against disclosure"]; *Williams v. U.S. Bank Nat. Assn.* (E.D.Cal.2013) 290 F.R.D. 600, 606, fn. 9, italics omitted [threatening sanctions when "defendant made no effort at all to seal only those portions of the substantive exhibits that it actually wanted to protect as confidential"]; *Young v. Actions Semiconductor Co., Ltd., supra,* 2007 WL 2177028 at *6 ["Should either party again file a motion to seal which is inadequate or overbroad ... the court may impose sanctions."].)

501 D.** ***Evidentiary Requirements for Sealing [**]

E. ***The 2012 Sealing Order: Discovery Materials Submitted in Opposition to the Summary Judgment Motions***

1. ***Overview of the Parties' Evidentiary Showing***

Goldman submitted declarations by two individuals in support of its sealing motion—Joseph ****260** Floren, its litigation attorney, and Beverly Dunphy, a vice-president in its Global Compliance Department. Floren's declaration included a chart, exhibit A, of which the first 11 pages discussed the bases for sealing by category (e.g., "The Strategies of the Hedging Strategies Group Are Non–Public and Represent Trade Secrets of Goldman Sachs," "Client Information and Communications"). The remaining 143 pages, in chart form, identified each exhibit at issue as to Goldman and referenced the claimed bases for sealing discussed in the first 11 pages, as well as identified additional bases, such as irrelevancy. Dunphy averred the importance of safeguarding various confidences of the firm and its clients, and outlined procedures for keeping client information from leaving the firm and from spreading broadly within it. She also stated the materials "identified in Exhibit A to the Floren Declaration ... include confidential client and firm proprietary information and related communications, which are confidential for the reasons detailed therein." She supplied a supplemental declaration discussing policies and

procedures still in use at Goldman and reflected in plaintiffs' opposition exhibits.

Merrill similarly submitted declarations by two individuals—Flora Vigo, its litigation attorney, and Peter Melz, a managing director at the Merrill entities and president and chief operating officer of Merrill Lynch Professional Clearing Corporation (Merrill Pro.). The pivotal component of Vigo's declaration, like that of Floren's declaration, was a chart, exhibit A, setting forth, for each exhibit at issue, the claimed basis for sealing. Melz, in turn, stated Merrill considers its internal policies and procedures to be proprietary confidential information. "Safeguarding the confidentiality" of its client business plans and financial transactions "is critically important" and a competitive advantage to the firm. The firm implements safeguards and ethical codes meant to keep this information from leaving Merrill and even from being widely disseminated within the firm. Melz also asserted the materials "[a]s described in detail in the chart attached as Exhibit A to the Vigo Declaration ... reflect competitively sensitive information concerning [Merrill's] ***502** business, processes, procedures, systems, plans, strategies, clients, and transactions ... not intended to be known to [Merrill's] competitors, is subject to reasonable efforts to maintain its confidentiality, and has actual or potential competitive value." In addition, Melz supplied a supplemental declaration clarifying the materials he reviewed, and a second supplemental declaration related to the confidentiality of Merrill's policies and procedures.

[26] **[27]** Plaintiffs maintain defendants' declarations are lacking in specifics and most of the information defendants want sealed is already in the public domain or lacks indicia of protectable information.[19] ****261** They also submitted an opposing declaration by Michael Manzino, a former employee of Morgan Stanley with over 20 years of Wall Street and securities lending experience. At Morgan Stanley, Manzino worked for almost 14 years at the securities lending desk, eventually becoming an executive director and the desk's second in command. His responsibilities included ensuring "an adequate supply of stock to support short selling by Morgan Stanley clients," and he developed "experience in all facets of the securities lending business." The security lending desks at Morgan Stanley, Merrill, and Goldman were direct competitors. Manzino opined some of the information defendants sought to seal was stale and of no present economic value, including information concerning opportunities for profitable shorting of stocks from 2005 to 2006; trading strategies employed by two former clients of defendants—Scott Arenstein and Steven Hazan—disclosed in public sanctions orders issued by the Securities and Exchange Commission (SEC) and several exchanges; strategies related to naked short selling as part of "conversions" and strategies for "failing trades" that were no longer possible in light of 2008 changes to a federal securities regulation (called Regulation SHO); and compliance policies from 2005 to 2006 that were outdated because of significant changes in the regulatory environment. He also opined the identities of employees within securities lending desks at clearing firms such as defendants were well known and not confidential.[20] In addition, plaintiffs provided the trial court with a number of publicly available documents to show the extent to which information contained in their opposition papers was already in the public domain.

503** ***2. The Discovery Materials at Issue

THESE are the documents that I need to find.

Most of the discovery materials at issue were attached as exhibits to the declarations of Jonathan Sommer or Ellen Cirangle, two of plaintiffs' attorneys. For ease of reference, we refer to materials by declaration name and exhibit number. As a further aid to the trial court and parties, we identify in bold those exhibits, or portions thereof, we conclude should have been sealed.

a.–c.[***]

d. *Documents Containing Client Financial Information*

Goldman and Merrill contend numerous exhibits should have been sealed because they contain confidential client financial information, such as trades, positions, and account data.

[28] **[29]** The right to privacy under article I, section 1 of the California Constitution "extends to one's confidential financial affairs...." (****262** *Valley Bank, supra,* 15 Cal.3d at p. 657, [125 Cal.Rptr. 553, 542 P.2d 977].) This right embraces confidential financial information in "whatever form it takes, whether that form be tax returns, checks, statements, or other account information." (*Fortunato v. Superior Court* (2003) 114 Cal.App.4th 475, 481, [8 Cal.Rptr.3d 82], italics omitted (*Fortunato*).) Thus, in *Valley Bank,* the Supreme Court held that before a bank discloses customer financial information in civil *discovery* proceedings, it "must take reasonable steps to notify its

customer of the pendency and nature of the proceedings and to afford the customer a fair opportunity to assert his interests by objecting to disclosure, by seeking an appropriate protective order, or by instituting other legal proceedings to limit the scope or nature of the matters sought to be discovered." (*Valley Bank, supra,* 15 Cal.3d at p. 658, 125 Cal.Rptr. 553, 542 P.2d 977; see *Fortunato, supra,* 114 Cal.App.4th at pp. 480–481, 8 Cal.Rptr.3d 82 [protective order should have issued as to tax returns submitted to bank as part of loan application].) A financial institution, "as custodian of ... relevant documents," has "standing to assert the privacy interests of its customers in the identifying information they" provide. (*Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 368, [53 Cal.Rptr.3d 513, 150 P.3d 198]; see also Gov.Code, §§ 7461, subd. (b), 7465, subd. (a) [regulating state-run investigations of customers of banks, savings associations, trust companies, industrial loan companies, and credit unions, and recognizing the "confidential relationships between [such] financial institutions and their customers are built on trust and must be preserved and protected"] see also Gov. Code, § 7465, subd. (a).)

***504** **[30]** *Valley Bank* made only passing reference to the *sealing* of financial information as a tool to protect privacy interests, and the case predates *NBC Subsidiary* and the sealed records rules. Thus, the question in the context of sealing is whether the state-recognized privacy interest in financial information overrides the federal constitutional right of access to court records. This is necessarily a balancing inquiry, dependent on the facts and circumstances of the particular case. (See *NBC Subsidiary, supra,* 20 Cal.4th at pp. 1201, 1206, 86 Cal.Rptr.2d 778, 980 P.2d 337; rule 2.550(d).)

Two Court of Appeal opinions have considered the sealing of financial information under the *NBC Subsidiary* rubric. In *Burkle, supra,* 135 Cal.App.4th at page 1045, 37 Cal.Rptr.3d 805, the court considered the validity of Family Code section 2024.6, which required, at the request of either party, the sealing of any pleading in a divorce case listing information about the financial assets and liabilities of the parties and providing the location or identifying information about such assets and liabilities. (*Burkle,* at pp. 1052–1070, 37 Cal.Rptr.3d 805.) Focusing on the Legislature's stated finding the statute was necessary to protect parties from identity theft and other economic crimes, the court concluded the statute was not narrowly tailored to achieve that compelling objective. (*Id.* at pp. 1069–1070, 37 Cal.Rptr.3d 805.) The court drew a distinction, for example, between highly sensitive identifying information, such as account and Social Security numbers or asset locations, that can facilitate criminal activity, and more general information, such as the mere existence and stated value of an asset or liability, which does not create such a risk but which was nevertheless subject to mandatory sealing under the statute. (*Id.* at pp. 1065–1066, 37 Cal.Rptr.3d 805.) As to the latter sort of information, the court concluded mandatory sealing at the request of a party was at odds with the statute's stated purpose and with the analysis required to support sealing under ****263** *NBC Subsidiary,* and so invalidated the statute. (*Id.* at pp. 1066, 1070, 37 Cal.Rptr.3d 805.)

In *Universal City Studios, supra,* 110 Cal.App.4th at page 1275, [2 Cal.Rptr.3d 484], the appellate court addressed the petitioner's motion to seal two groups of documents in the appellate court record, a settlement agreement (*id.* at p. 1283, 2 Cal.Rptr.3d 484) and papers related to a motion to dismiss (*id.* at p. 1284, 2 Cal.Rptr.3d 484). As to the settlement agreement, the financial information in that document had been redacted, and the petitioner failed to present any evidence it would be damaged by the disclosure of the document in that form. (*Id.* at pp. 1283–1284, 2 Cal.Rptr.3d 484.) Turning to the motion to dismiss papers, the petitioner similarly failed to justify sealing the lion's share of them. (*Id.* at pp. 1284–1285, 2 Cal.Rptr.3d 484.) As to "20 pages of financial and accounting data" within those papers, however, the court concluded petitioner had made a sufficient showing. (*Id.* at pp. 1285–1286, 2 Cal.Rptr.3d 484.) These pages contained the "proceeds in different markets for 25 different films" and the defendant submitted ***505** a "fact-specific" declaration by its controller and senior vice-president that disclosure of this data would cause " 'competitive harm' " to the petitioner in "negotiations with competitors and customers." (*Ibid.*) Even though the court "ordinarily would order sealing" given the facts, it ultimately denied sealing because the financial data had already been loosed into the public domain in another case. (*Id.* at p. 1286, 2 Cal.Rptr.3d 484.)

Here, defendants made a showing of injury from the disclosure of client financial information at least as strong as that made in *Universal City Studios.* Melz, a managing director of Merrill entities and President and COO of Merrill Pro, stated "safeguarding the confidentiality of client information is critically important to Merrill Lynch, and Merrill Lynch has several policies in place to protect" information such as "clients' identities, trading activity, trading or business strategies or plans, account information,

policies, procedures, practices, ... and their confidential communications." Merrill considers client information to be "proprietary and confidential." This policy is expressed in the firm's written code of ethics, confidentiality training is required for all employees, and Merrill has procedures—such as "systematic information barriers"—so information is shared only on a "need to know" basis. Dunphy, a vice-president of Goldman's Global Compliance Department, similarly stated Goldman derives a competitive advantage and reputational benefit from its "strong commitment to confidentiality" with respect to client identities and trade data. "Protecting the confidentiality of client information," stated Dunphy, "is a matter of fundamental importance" and also a matter of SEC regulations. Numerous written policy documents implement protection of client data and breaches would be "unthinkable." We also observe that, unlike in *Universal City Studios* and *Burkle,* the confidential financial information at issue here is that of *third parties.*

Thus, the confidential financial information in question in this case implicates significant privacy interests. Plaintiffs, in fact, acknowledged in the protective order that client transaction data "may be protected by rights of privacy or other confidentiality rights" and agreed not to contact any third party disclosed in produced documents without consent. The parties thus agreed to forgo redactions "to avoid undue delay, burden, and expense in document production." Relying on this stipulation, defendants produced "millions of pages" "in unredacted form."

Maybe they can ask for a do-over

****264** During the sealing proceedings, plaintiffs argued clients who had been sanctioned for their trading behavior, including Arenstein and Hazan, had no remaining privacy interest. They conceded, however, "to the extent any ***506** remaining customer information exists in the documents Defendants seek to seal, any privacy concerns could easily be addressed through simple redaction of any such information." Thus, "if an email string ... makes mention of unrelated client confidential information, that portion of the email could be redacted." On appeal, plaintiffs reiterate redaction would have been the "simple solution" and do not suggest anything would be lost in terms of the public's understanding of the summary judgment proceedings if information linking individuals to their private financial data (other than that already publicly known) were redacted. Nevertheless, they claim defendants failed to preserve the right to redact by seeking the sealing of entire exhibits. Not so. Goldman and Merrill made sufficient offers to redact the documents and, at the hearing on their sealing motions, made clear an "all-or-nothing" approach "is absolutely not our position." Thus, this is not a case like *Providian,* in which the party seeking to seal documents "actually opposed redacting when the subject was raised," "spurned" a more nuanced approach, and led the trial court to ignore the issue of redactions—conduct which led the appellate court to conclude the option to redact had been waived. (*Providian, supra,* 96 Cal.App.4th at p. 309, 116 Cal.Rptr.2d 833.) We also question whether waiver of redaction predicated solely on a financial institution's conduct could ever be appropriate where *third party* confidential financial information is at issue.

With this background, we turn to the exhibits assertedly containing confidential client financial information, and for ease of discussion, have grouped like exhibits. We conclude the trial court should have ordered much of this confidential third party financial information sealed—largely because it was irrelevant to plaintiffs' summary judgment opposition.

(i) *Documents Not Cited and Lengthy Documents of Which Only Scant Portions Were Cited*

[31] *Exhibits 48 and 139 to the Sommer Declaration.* These exhibits consist, respectively, of a client account statement and an e-mail with an attachment. In the trial court, defendants objected to these exhibits as uncited and irrelevant. Further, Goldman, in Floren's exhibit A, asserted exhibit 48 had no relation to Overstock. Plaintiffs, as best we can glean from the record, made no response to these relevance issues in the trial court, and they have made no response on appeal. Moreover, our review of the record confirms plaintiffs made no specific mention of either exhibit in their summary judgment opposition. Accordingly, these exhibits were **irrelevant and should have been struck and either removed from the record or **265 sealed for good cause.** (See *Apple, supra,* 727 F.3d at pp. 1226–1228.)

[32] *Exhibits 25 and 86 to the Cirangle Declaration.* These exhibits each consist of a cover page followed by a lengthy report containing information ***507** about the trades of one or more clients. In their summary judgment opposition, plaintiffs cited and quoted only from the cover pages, and did not cite to or make any mention of the contents of the reports. The trial court correctly refused to order the cover pages sealed since they reveal no client confidential financial information. However, the rest of pages were **irrelevant and should have been struck and either removed from the**

record or sealed for good cause. (See *Apple, supra,* 727 F.3d at pp. 1226–1228.)

(ii) *Document with No Client–identifying Information*

[33] *Exhibit 164 to the Cirangle Declaration.* This exhibit is a 17–page spreadsheet reporting "trade information" pertaining to Overstock shares. Merrill contends it contains "client account numbers and short stock positions." However, the spreadsheet was discussed at the summary judgment hearing, without objection, and it is clear it does not represent the trades of any one client. Rather, it references a particular *Merrill* account that sweeps in, *but does not identify,* multiple Merrill clients. Accordingly, the exhibit does not contain client identifiable confidential financial information, and the trial court correctly refused to order it sealed.

(iii) *Documents Concerning Publicly Known Clients*

As we have observed, Scott Arenstein and Steven Hazan have been publicly identified in connection with defendants, and their trading methods—naked short selling, flex options, conversions—were discussed numerous times during the leave to amend and summary judgment hearings. Even the parties' public, redacted trial court briefing connects these clients and their trading activities to defendants. Additionally, the SEC and other regulatory entities discussed Arenstein's and Hazan's trading methods in detail in lengthy orders sanctioning these clients for these trading practices. Manzino thus stated in his opposing declaration "there is no economic value to Merrill Lynch or Goldman Sachs in any emails and other communications involving [these clients] that I reviewed."

[34] *Exhibits 4 and 18 to the Sommer Declaration, and Exhibit 4 to the Cirangle Declaration.* Exhibit 4 to the Sommer declaration is a one-page Goldman e-mail chain concerning a supposed "market maker" client of both defendants, Arenstein, and a trading strategy already publicly associated with him. Exhibit 18 is a two-page Goldman e-mail chain, also discussing Arenstein and his publicly known trading strategies. Exhibit 4 to the Cirangle declaration is a one-page Merrill e-mail discussing Arenstein and his interest in opening an account with Merrill. In light of the public disclosures concerning Arenstein and the Manzino declaration, the trial court's refusal to seal these exhibits is amply supported. Indeed, defendants' continued requests to seal them obdurately ignores the realities of the state of public record. These would be good to get ahold of in particular

***508** *Exhibits 8, 15 and 16 to the Sommer Declaration and Exhibit 88 to the Cirangle Declaration.* Exhibits 8, 15 and 16 also refer to Arenstein and Hazan and the rudiments of their now publicly known trading strategies. For the reasons we have just discussed, the trial court's refusal to seal these documents is supported by substantial evidence.

[35] *Exhibit 46 to the Sommer Declaration.* This exhibit is an e-mail string that references Arenstein's Merrill Lynch account numbers, the size of a wire sent into that account, and his net liquidity. Although much information about Arenstein is publicly known, this financial information is not. Nor did plaintiffs cite to it. Instead, they cited to other parts of the e-mail. Accordingly, this financial information was **irrelevant and should have been ordered struck and either removed from the record or sealed (by redaction if appropriate) for good cause**. (See *Apple, supra,* 727 F.3d at pp. 1226–1228.)

[36] This exhibit additionally discloses Arenstein's overall short position and ****266** leverage in January 2005, which plaintiffs did mention in their opposition papers. They claim these numbers relate to whether defendants were merely following customer instructions on certain Overstock related trades, or acting willfully. The trade numbers, themselves, have no demonstrable relation to Overstock trades, particularly, or to the issue of "instruction following," and were therefore **irrelevant and should have been struck and either removed from the record or sealed (by redaction if appropriate) for good cause**. (See *Apple, supra,* 727 F.3d at pp. 1226–1228.) The leverage ratio, however, does appear to have some colorable connection to defendants' knowledge. That 2005 figure also reflects the already-known trading strategy of Arenstein, and the trial court properly refused to order this information sealed.

[37] **[38]** **[39]** *Exhibit 8 to the Cirangle Declaration.* This is a two-part document. Part 2 is Merrill's new client form for Arenstein, which divulges his opening balance, estimated annual revenue, stock and option volumes, total combined equity, and affiliations with other financial firms. Again, while considerable information about Arenstein is publicly known, the items just listed are not. Nor did this information have any relevance to the summary judgment proceedings. Accordingly, this **irrelevant information should have been struck and either removed from the record or sealed (by redaction if appropriate) for good cause.** On the other

hand, Arenstein's identity, trading strategies and use of certain computer software were discussed at the summary judgment hearing, where this document was explicitly referenced. Accordingly, the trial court correctly refused to order this information sealed. As for the first part of the exhibit—e-mails that identify numerous new clients and accounts—plaintiffs made no mention of it at all. Accordingly, this part of the exhibit was also **irrelevant and should have been struck and either removed from the record or sealed (by redaction if appropriate) for good cause**. (See *Apple, supra,* 727 F.3d at pp. 1226–1228.)

***509** **[40]** *Exhibit 88 to the Cirangle Declaration.* This exhibit is a transcript of a telephone conversation between Arenstein and Merrill, wherein a Merrill employee tells Arenstein he needs to take action to meet Regulation SHO requirements. On the whole, the transcript simply shows Arenstein's publicly known trading strategy in action, and the trial court properly refused to seal this information.

[41] *Exhibit 161 to the Cirangle Declaration.* This exhibit is a lengthy spreadsheet showing trades in Overstock by Arenstein and Hazan. At the summary judgment hearing, the salient features of the spreadsheet with respect to Hazan were discussed, namely that he had a short position of 2,500 shares on August 2, 2005, 415,000 shares on August 15, 2005, 515,000 shares a day later, and stayed over six figures in shares for a year, occasionally topping a million shares. Accordingly, this can no longer be considered confidential financial information, and the trial court correctly refused to order it sealed. Given that such information as to Hazan was not treated as confidential, we see no reason why the court should have treated the same information as to Arenstein any differently, particularly given all the other publicly disclosed information about Arenstein's trading. Accordingly, the trial court also correctly refused to order this information sealed.

Is this slang for the expected payments prompted by FTDs?

[42] *Exhibits 59, 105, 106, 137 and 233 to 236 to the Sommer Declaration.* These exhibits all contain information about short sales and related "buy ins" or ****267** settlement obligations of numerous clients, including Arenstein and Hazan. The documents mention stock names, quantities, and prices. Some, such as exhibits 105 and 106, concern trades in Overstock. Many of the documents are voluminous and recount many trades. Although the SEC sanctions orders reveal the overall scope of some clients' short selling practices by noting total profits gained (in the millions of dollars) and explaining the per-share profit the clients derived (in one example, $1.40 per share), the orders do not reveal the stocks in which the clients traded or the amount of trading in any one stock. Outside of the sanctions orders, only one security, Overstock stock, has been publicly linked to just two clients, Arenstein and Hazan. (Gullo, *Goldman, Merrill E–Mails Show Naked Shorting, Filing Says,* Bloomberg (May 16, 2012), available at <http://www.bloomberg.com/news/2012–05–15/goldman–merrill–e–mails–show–naked–shorting–filing–says.html> [as of Nov. 13, 2014] ["fails to deliver in Overstock shares correspond to market-makers Scott Arenstein and Steven Hazan, Overstock's lawyers said in the filing"].)

Now THIS is interesting. They are talking about discovering the identity of market actors through essentially forensic accounting principles.

[43] To the extent these exhibits concern Arenstein, Hazan and Overstock, the trial court properly refused to seal this information, given the extent of the public information about Arenstein's and Hazan's trading. However, other third-party-identifying information was of scant, if any, relevance to plaintiffs' summary judgment opposition, and the public's understanding of the ***510** adjudicative process is not enhanced by the disclosure of this confidential financial information. Accordingly, *client-identifying information (other than as to Arenstein and Hazan) in these exhibits should have been sealed (by redaction if appropriate) under the sealed records rules.*

GEE, NEVER SEEN THE STUFF HIGHLIGHTED TO THE LEFT BEFORE... ;)

(iv) ***Documents with Irrelevant Client–identifying Information***

[44] *Exhibit 140 to the Sommer Declaration.* This exhibit is a lengthy spreadsheet reporting details about numerous client trades. Plaintiffs cited to the exhibit to demonstrate the great volume of "fails to deliver" and also to highlight certain trades. Thus, portions of the exhibit were relevant to their summary judgment opposition. However, the client-identifying information in the exhibit was *irrelevant and should have been struck and either removed from the record or sealed (by redaction if appropriate) for good cause.* (See *Apple, supra,* 727 F.3d at pp. 1226–1228.)

[45] *Exhibit 150 to the Sommer Declaration.* This exhibit lists five Goldman clients and their short positions in Overstock. Plaintiffs cited to this exhibit, but only to show the fees charged by Goldman. Accordingly, the client-identifying information in the exhibit was *irrelevant and should have been struck and either removed from the record or sealed (by redaction if appropriate) for good cause.* (See *Apple, supra,* 727 F.3d at pp. 1226–1228.)

[46] *Exhibit 166 to the Sommer Declaration.* Plaintiffs cited to this exhibit, an e-mail chain, to show that one Goldman client, who had been sanctioned for unlawful short selling, did not became a paying client. The particular identity of the client, however, was irrelevant to plaintiffs' point, as were the short positions listed. Accordingly, the client-identifying information in the exhibit was **irrelevant and should have been struck and either removed from the record or sealed (by redaction if appropriate) for good cause.** (See *Apple, supra,* 727 F.3d at pp. 1226–1228.)

****268 v) *Other Documents Containing Client Financial Information***

[47] Defendants once again string-cite to other exhibits they contend should have been sealed, but provide no separate analysis.[30] Given the significance ***511** of the privacy interest at stake, and the fact we have concluded, as to the exhibits defendants have separately discussed, much of the information was irrelevant to plaintiffs' summary judgment opposition and therefore should have been struck or sealed for good cause, we are persuaded defendants have shown a sufficiently erroneous approach prejudicing third parties, **requiring reversal and remand for further consideration of these exhibits**.

Again, the parties may not simply dump these discovery materials back into the lap of the trial court. On remand, they are to proceed as follows: (a) review each of the string-cited exhibits in light of our discussion above of exhibits containing third party confidential financial information; (b) reach agreement to the extent possible as to (1) those exhibits (or *pages* thereof) that were *irrelevant* to plaintiffs' summary judgment opposition (e.g., not cited by plaintiffs, or having no bearing on the point in connection with which the exhibits were cited by plaintiffs) and which therefore should have been struck and either removed from the record or sealed for good cause, and (2) those exhibits (or pages thereof) that *were* relevant and contain *confidential* third party financial information (i.e., information not already in the public domain) and as to which a sealing determination must be made under the sealed records rules; and (c) return to the trial court on further motions to seal that are focused and limited according.

e. *Other Lengthy and Almost Entirely Irrelevant Documents*†

F.–G.†

IV. Disposition

The August 3, 2011, sealing order challenged in appeal No. A133487 and the March 6, 2012, sealing order challenged in appeal No. A135180 are ***512** affirmed in part and reversed in part as specified herein, and limited remands are ordered for further proceedings consistent with this opinion. The parties are to bear their own costs on appeal.

We concur:

Margulies, Acting P.J.

Dondero, J.

All Citations

231 Cal.App.4th 471, 180 Cal.Rptr.3d 234, 14 Cal. Daily Op. Serv. 12,958, 2014 Daily Journal D.A.R. 15,239

Footnotes

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts III(D), III(E)(2)(a)–(c), (e) and III(F)–(G).

1 All further rule references are to the California Rules of Court.

2 Orders concerning the sealing and unsealing of documents are appealable as collateral orders. (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1064, [151 Cal.Rptr.3d 65] (*Oiye*)); *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 77, [70 Cal.Rptr.3d 88] (*Mercury*).

3 Defendants filed several other joint motions to seal portions of their moving and reply papers, but these motions and related orders are not at issue on appeal.

4 Plaintiffs and the media have not expressly abandoned their appeal from the 2011 order, and in their reply brief on appeal, plaintiffs' urge “The proposed Fifth Amended Complaint should be filed in the public record.” As to the discovery materials,

however, none of the parties has identified any material covered by the 2011 sealing order not addressed by the 2012 order. Accordingly, we, like the trial court, take a "holistic," view of the sealing dispute in this case (see *In re Marriage of Nicholas, supra,* 186 Cal.App.4th at p. 1569, 113 Cal.Rptr.3d 629), and our determination as to the propriety of sealing the summary judgment materials covered by the 2012 order is controlling as to those materials initially addressed by the 2011 order.

5 While most federal circuit courts of appeals have also recognized a First Amendment right of access to court documents, the United States Supreme Court has not yet done so. (See *Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 654, [64 Cal.Rptr.3d 854] ["the United States Supreme Court has not specifically extended the First Amendment right of access beyond judicial proceedings to judicial records..."]; *IDT Corp., supra,* 709 F.3d at p. 1222 [same].)

6 Code of Civil Procedure section 2016.010 et seq.

7 These rules replaced former rules 243.1 and 243.2 and "do not differ materially from the sealed records rules as originally adopted." (*Mercury, supra,* 158 Cal.App.4th at p. 68, fn. 1, 70 Cal.Rptr.3d 88.)

8 "A 'lodged' record is a record that is temporarily placed or deposited with the court but not filed." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 311, [116 Cal.Rptr.2d 833] (*Providian*).) "Filing a document makes it a part of the permanent court file, whereas lodging a document makes it only temporarily a court record." (*Mao's Kitchen, Inc. v. Mundy* (2012) 209 Cal.App.4th 132, 150–151, [146 Cal.Rptr.3d 787].)

9 If a party believes such findings are insufficiently detailed, as opposed to totally nonexistent, the party must raise the asserted deficiency in the trial court to ensure preservation of the right to challenge the sufficiency of the findings on appeal. (See *Oiye, supra,* 211 Cal.App.4th at pp. 1065–1066, 151 Cal.Rptr.3d 65 [challenge to sealing findings forfeited; it is " 'clearly unproductive to deprive a trial court of the opportunity to correct such a purported defect by allowing a litigant to raise the claimed error for the first time on appeal' "].)

10 Here, it appears the trial court simply ordered lodged documents to be publicly filed, rather than returned to the proffering party. This was without consequence, however, since plaintiffs both proffered the documents and opposed their sealing.

11 *Providian* thus leaves intact the trial court's discretion with respect to evidentiary rulings and gives due deference to the court's credibility determinations and resolution of conflicting evidence and inferences. (*Providian, supra,* 96 Cal.App.4th at p. 301, 116 Cal.Rptr.2d 833.)

12 *Jackson* relied on *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 499, [104 S.Ct. 1949, 80 L.Ed.2d 502] (*Bose*), a defamation case, in which the Supreme Court observed " 'in cases raising First Amendment issues [the court] has repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." ' " (*Jackson, supra,* 128 Cal.App.4th at p. 1020, 27 Cal.Rptr.3d 596.) *Jackson* also cited *In re George T.* (2004) 33 Cal.4th 620, [16 Cal.Rptr.3d 61, 93 P.3d 1007] (*George T.*), in which the California Supreme Court, citing to *Bose,* stated independent review is not limited to "specific First Amendment contexts." (*George T., supra,* 33 Cal.4th at p. 632, 16 Cal.Rptr.3d 61, 93 P.3d 1007.) Rather, the heightened standard is broadly applied " 'both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.' " (*Id.* at p. 633, 16 Cal.Rptr.3d 61, 93 P.3d 1007; see *Bose, supra,* 466 U.S. at p. 508, 104 S.Ct. 1949 [independent review serves goal of assuring proper "line" between protected and unprotected speech].) *George T.,* thus, independently considered whether the minor's poem constituted a criminal threat falling outside the protection of the First Amendment, and concluded it did not. (*George T.,* at p. 639, 16 Cal.Rptr.3d 61, 93 P.3d 1007.)

13 The *Mercury* court also noted "a third potential interpretation," under which discovery material would be subject to access if "the filing party intends that it be used 'as a basis for adjudication' of some matter other than a discovery motion." (*Mercury, supra,* 158 Cal.App.4th at p. 90, fn. 26, 70 Cal.Rptr.3d 88.) The court rejected this view because "such a standard requiring a determination of a litigant's intent would be cumbersome and would lead to uncertain and contradictory results." (*Ibid.*)

14 See also *Newsday, supra,* 730 F.3d at page 167 [no 1st Amend. presumption of access unless "parties could reasonably have been expected to make" use of the document]; *United States v. Snyder* (N.D.N.Y.2002) 187 F.Supp.2d 52, 62–63 [" 'mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access ... item filed must be relevant to the performance of the judicial function...' "]; *G & C Auto Body Inc v. Geico General Ins. Co.* (N.D. Cal., Mar. 11, 2008, No. C06–04898 MJJ) 2008 WL 687372 *1, *2 [confidential financial information " 'irrelevant to the Court's resolution of the legal challenges' "]; *Young v. Actions Semiconductor Co., Ltd.* (S.D.Cal., July 27, 2007, No. Civ.06CV1667–L(AJB)) 2007 WL 2177028 *1, *5 [to the extent not relevant to a motion to dismiss, "moving the court to review voluminous exhibits for purposes of sealing is an inefficient use of judicial resources..."]; *Bridgeport Music, Inc. v. Smith* (E.D.Mich., Feb. 22, 2012, No. 03–cv–72211) 2012 WL 579710 *1, *6 ["72

pages of royalty statements" for clients other than client at issue were irrelevant]; *Cohen v. Gerson Lehrman Group, Inc.* (S.D.N.Y., Sept. 15, 2011, No. 09 Civ. 4352(PKC)) 2011 WL 4336679 *1, *2 [individual contact information, such as e-mail addresses, home addresses and phone numbers, not relevant and would remain redacted].

WTF

This is a pretty bad look for a court to go out of its way to call you a liar personally

15 The 95–volume appendix in the appeal from the 2012 sealing order (No. A135180) exceeds 22,000 pages. The 17–volume appendix in the appeal from the 2011 order (No. A133487) exceeds 4,375 pages. Plaintiffs' attempt at oral argument to brush aside the magnitude of their document dump, by claiming defendants' appeal implicates only two banker's boxes of the documents, is stunningly disingenuous, as was their assertion they were forced to overdocument their summary judgment opposition in light of defendants' evidentiary objections, which, of course, were nonexistent at the time plaintiffs prepared and filed their opposing papers.

16 For example, plaintiffs submitted large swaths of 16 deposition transcripts and all 791 of defendants' responses to requests for admission, but cited only minimal excerpts of the transcripts and a handful of mundane responses authenticating documents. They similarly submitted entire documents, but cited only a page or two, sometimes only a line or two. This glut of material was inexcusable—only the face sheets and a handful of relevant pages of the deposition transcripts, discovery responses and documents should have been submitted. (Rule 3.1116(b) ["the exhibit must contain only the relevant pages of the transcript"]; Thomas, Cal. Civil Courtroom Handbook & Desktop Reference (2014 ed.) § 17:19 ["The relevant portions of the document are usually excerpted in the moving or opposing papers and then attached as an exhibit."].)

17 For example, plaintiffs submitted four documents (Sommer exhibits 80, 10, 55, 230) to argue that important Goldman policies were written down and an unwritten policy was unusual. Only two of these cited documents, exhibits 80 and 55, were actually policy documents. Further, the proffered policy documents were wholly duplicative for the purpose for which they were submitted, particularly in light of a declaration plaintiffs submitted making the precise point that unwritten policies were unusual without referring to a single provision of even one of the purported written policies.

18 As a practical matter, such "removal" from the court's file may need to be effectuated by an order sealing the irrelevant, confidential material, for example, when a party anticipates challenging a court's irrelevancy determination on appeal. This removes the material from the public record, but physically leaves it in the court file for future appellate review. This is not a sealing order that implicates any right of access to court records (or, concomitantly, the sealed records rules), since there is no such right with respect to irrelevant discovery materials. (See cases cited, *ante,* at p. 497.)

** See footnote *, *ante*, page 471.

19 Plaintiffs also assert defendants' litigation counsel, Floren and Vigo, lack sufficient personal knowledge to provide testimony about the competitive value and confidential nature of their clients' documents. Any shortcoming in this regard, however, was corrected by the clients' own declarations adopting the attorneys' assertions as their own. (See *Snider v. Snider* (1962) 200 Cal.App.2d 741, 749, [19 Cal.Rptr. 709] ["John Snider's affidavit, adopting the affidavit of Mathew, corroborates Mathew's statements."].)

20 The trial court overruled defendants' objections to Manzino's declaration, stating they went to the weight of his statements, not their admissibility. Defendants do not take issue with the court's evidentiary ruling on appeal, but assert the court did not rely on the declaration. That is not what the court said. After overruling the objections the court stated even if it "were to sustain each objection, the Court's ruling on these sealing motions would be the same." So from the trial court's perspective the Manzino declaration was not outcome determinative, but this is not tantamount to a statement the court disregarded the evidence. Manzino's declaration was hardly a model declaration, however. While Manzino discussed many types of information, he did not specifically reference any of the exhibits at issue. Such linkage would have been extremely helpful to the trial court and this court, and should be done as a matter of practice in such declarations.

*** See footnote *, *ante*, page 471.

30 Goldman cites to: "Sommer Declaration exhibits 4, 7–8, 15–16, 18, 20–21, 33, 46–48, 59, 70, 75–76, 105–06, 111–12, 116–17, 135, 137–40, 149–50, 166–67, 193, 207, 209–10, 214, 216, 220, 222, 227–28, 232–38, 243–44 (CA 32:C7445–44:C10677); Allaire Declaration and exhibits B, C–1–C–5, C–8–C–12, C–18, C–19, F (CA 3:C647–9:C2061); and those portions of the other opposition and reply papers that disclose their content."

Merrill cites to: "Cirangle exhibits 4, 5, 7, 8, 10, 11, 13–18, 21, 23–31, 34, 36–40, 44, 45, 47, 49, 50, 53–55, 57–60, 62, 63, 65, 70–72, 74, 76, 78–80, 84, 86–94, 99, 102–04, 108, 111, 117–19, 121, 129, 134, 136, 138–41, 151, 161, 164–67, 171, 172, 174, 175–83, 187, 201, 204, 206, 208, 210, and 211; (*see* 13–32 CA C003083–7360); Sommer exhibit 107 (34 CA C008025–28); Banks exhibits 1, 3, 11, 15, 18, 21, and 27; (*see* 60–61 CA 014653–867) and Powers exhibits 1 and 2 (60 CA C014570–612)."

† See footnote *, *ante*, page 471.

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