"MORE THAN TANGENTIAL": WHEN DOES THE PUBLIC HAVE A RIGHT TO ACCESS JUDICIAL RECORDS?

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- *Public accountability requires open proceedings and access to documents filed with the courts. The strong policy favoring access to judicial records creates a presumption against sealing documents without a compelling reason.*
- *The Ninth Circuit Court of Appeals recently held that this presumption of access arises when a proceeding relates "more than tangentially" to the merits. This is a low standard under which many types of motions qualify for the compelling reasons test.*
- *With too much litigation occurring in secret, courts can use the "more than tangential" standard proactively to keep electronic case dockets available to citizens.*

INTRODUCTION

In *Center for Auto Safety v. Chrysler Group, LLC*, the Ninth Circuit held that, absent compelling reasons to seal, courts must ensure public access to evidence submitted with a motion "more than tangentially related to the merits" of the case.[1] Because issues litigated to a decision usually relate more than tangentially to the merits of a case, this holding creates presumptive access to nearly everything filed with a court.

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[1] Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1101 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 38 (2016).

The Ninth Circuit stressed that a proceeding relates more than tangentially to the merits when it may affect the parties' substantive rights.[2] That is true of most non-discovery motions for the simple reason that parties have less reason to fund or file a motion if it is unlikely to advance a claim or defense.

Since 2016 the rule of *Center for Auto Safety* has taken hold, been cited in hundreds of cases, and resulted in more liberal use of the "compelling reasons" standard.[3] Before *Center for Auto Safety*, courts within the Ninth Circuit were divided on whether a motion to certify a class carried the presumption of access.[4] But courts applying the "more than tangentially related" rule have consistently held that the public has a right to access the record at class certification.[5] As a result, the compelling reasons test applies—rather than the "good cause" standard of Federal Rule of Civil Procedure 26, which is more lenient in permitting sealing.

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[2] *See id.* at 1098–1101 (reviewing case law and concluding that the presumption of public access to judicial records applies if a decision on the underlying motion or proceeding could adjudicate the litigants' substantive rights).

[3] Courts have broadly applied the "compelling reasons" test after *Center for Auto Safety*. *See, e.g.*, United States v. Kinetic Concepts, Inc., No. CV 08-6403-GHK (AGRx), 2016 WL 11673226, at *4 (C.D. Cal. Apr. 27, 2016) (denying request to seal initial pleadings). *See generally* discussion *infra* Part II.

[4] *Compare, e.g.*, Nygren v. Hewlett-Packard Co., C07-05793 JW (HRL), 2010 WL 2107434, at *1–3 (N.D. Cal. May 25, 2010) (applying Rule 26 standard to class certification motion), *and* Pecover v. Elec. Arts, Inc., No. C 08-2820 VRW, 2010 WL 8742757, at *25–26 (N.D. Cal. Dec. 21, 2010) (same), *with* Labrador v. Seattle Mortg. Co., No. 08-2270 SC, 2010 WL 3448523, at *2 (N.D. Cal. Sept. 1, 2010) (applying compelling reasons standard).

[5] *See* Adtrader, Inc. v. Google LLC, No. 17-CV-07082-BLF, 2020 WL 6387381, at *2 (N.D. Cal. Feb. 24, 2020) ("This Court follows numerous other district courts within the Ninth Circuit in concluding that the compelling reasons standard applies to motions to seal documents relating to class certification."); Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., 326 F.R.D. 592, 617 (N.D. Cal. 2018) (because a class certification motion is "more than tangentially related to the merits of the case," the compelling reasons standard applies); Moussouris v. Microsoft Corp., No. 15-CV-1483 JLR, 2018 WL 1159251, at *2–4 (W.D. Wash. Feb. 16, 2018) (applying the compelling reasons standard to a class certification motion under *Center for Auto Safety*), *report & rec. adopted*, 2018 WL 1157997 (W.D. Wash. Mar. 1, 2018); Baker v. SeaWorld Entm't, Inc., No. 14CV2129-MMA (AGS), 2017 WL 5029612, at *2–3 (S.D. Cal. Nov. 3, 2017).

This *Law and Policy* Article accepts the "more than tangentially related" standard as a reality in the Ninth Circuit and considers what proceedings qualify under it for the presumption of access. Some of these litigation postures are well established (trial; summary judgment), and others addressed in Part II also touch on the merits: evidentiary exclusion, preliminary injunction, class certification, and, in patent cases, *Markman* proceedings. Before the discussion turns to these motions, Part I analyzes the open-records policy and its history and application. Framing these sections is an argument, informed by my work as a practitioner, for increased vigilance by courts in response to the secretive practices that now attend business litigation.

The prevailing practice is to enter a protective order that results in the parties conducting discovery in private. These standardized "umbrella" protective orders, endorsed even in some jurisdictions' local rules,[6] permit designating entire sets of documents as confidential. The resulting blanket over-designation has an inertial effect, preventing the press and the public from seeing *non*-confidential material even when it has been filed with the court.[7]

Litigating in secret, formalized by protective order practices, has become accepted and is now the norm for several other reasons: "First, . . . counsel may fear losing a client or subjecting himself to a malpractice action if sealing is not demanded. Second, opposing counsel may believe that not acquiescing to secrecy requests will delay discovery or foil the settlement."[8] Although embarrassment cannot justify secretive proceedings unless disclosure would cause competitive or other undue harm, it is precisely the risk of offending

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[6] *See* United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990) (observing that "[t]hese stipulated 'blanket' protective orders are becoming standard practice in complex cases."); *see, e.g.*, Washington Federal Rules of Court, Local Civil Rule 26 ("encourag[ing]" parties to adopt a "model protective order, available on the court's website" and requiring "[p]arties that wish to depart from the model order [to] provide the court with a redlined version identifying departures from the model"); Kansas Federal Court Rules, Selected Guidelines and Notices, Guidelines for Agreed Protective Orders for the District of Kansas.

[7] *See* sources cited *infra* notes 17, 41 & 176–177.

[8] Hon. Lloyd Doggett & Michael Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 646 (1991).

the other side that can lead a party to redact heavily. The attorney or paralegal doing the sealing work wants no part of trouble and has every reason to avoid provoking accusations from opposing counsel.[9] Reinforcing a "when in doubt, redact" mentality is the understanding that a sealing dispute could distract or divert the party's focus in the case and drain resources beyond the sealing work itself. This reflexive accommodation of sealing among parties warrants an equally firm judicial counteraction.

Voicing recent concern over "displacing the high bar for sealing orders with the low bar for protective orders," the Fifth Circuit sounded the alarm that "increasingly, courts are sealing documents in run-of-the-mill cases where the parties simply prefer to keep things under wraps."[10] For nearly ten years Bill Cosby was able to keep the public from learning of his deposition testimony that he drugged women with quaaludes to take advantage of them.[11] It took a decade as well for key information learned in discovery about the failing tires at issue in the Bridgestone/Firestone/Ford litigation to come to light.[12] The public now has a need for all manner of evidence ranging from trading records showing market manipulation[13] to public health records reflecting pandemic

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[9] *See, e.g.*, Matt Stoller, *When Google's Fancy Lawyers Screw Up and Jeopardize Sheryl Sandberg, at $1500/Hour*, BIG (Apr. 10, 2021), https://mattstoller.substack.com/p/when-googles-fancy-lawyers-screw (alluding to professed outrage by parties who act as though "revealing public information about big business is some sort of scandal").

[10] Le v. Exeter Fin. Corp., 990 F.3d 410, 417, 421 (5th Cir. 2021).

[11] *See* Graham Bowley & Ravi Somaiya, *Bill Cosby Admission About Quaaludes Offers Accusers Vindication*, N.Y. TIMES (July 7, 2015), https://www.nytimes.com/2015/07/08/business/bill-cosby-said-in-2005-he-obtained-drugs-to-give-to-women.html?ref=topics.

[12] *See* Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1785–86 (2014).

[13] *See, e.g.*, United States v. Walsh, 723 F.3d 802, 808 (7th Cir. 2013) (government used trading records to calculate loss from defendants' investment fraud in foreign currency exchange market).

response measures,[14] from tax records[15] to product safety information[16] and the list continues. Yet cases often drag on or settle before trial, forever shielding relevant evidence from the public.[17]

In response to these conditions, courts can use the "more than tangential" rule proactively, as through orders to show cause, if the litigants merely assume the secrecy of records will be maintained. Companies' awareness that their records may be disclosed promotes compliance; yet open proceedings can only be achieved when the courts insist on them.

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[14] *See* Westinghouse Elec. Corp. v. Newman & Holtzinger, 46 Cal. Rptr. 2d 151, 160 (Ct. App. 1995) ("Because the judicial process is frequently the avenue by which the public and regulatory agencies learn of significant health and safety hazards, blocking this avenue may prove detrimental to the public well-being.").

[15] *See, e.g.*, AmerGen Energy Co., LLC by & through Exelon Generation Co., LLC v. United States, 115 Fed. Cl. 132, 142–43 (2014) (refusing to redact or seal tax returns and related correspondence in suit involving tax treatment of nuclear plant transactions); *In re* Rahr Malting Co., 632 N.W.2d 572, 574–76 (Minn. 2001) (denying petition that challenged tax court's unsealing of financial data of company whose CEO "stated only in conclusory terms that disclosure of the data would be 'devastating' and affect the 'survivability' of the company" by enabling customers to reduce its profits and competitors to undercut its pricing).

[16] *See, e.g.*, Naramore v. Daimler Trucks N. Am., LLC, No. 1:18-CV-156 (LAG), 2019 WL 6037716, at *1–2 (M.D. Ga. Apr. 3, 2019) (denying request to strike provision in protective order allowing vehicle-related information obtained in discovery to be shared with the National Highway Traffic Safety Administration and other potential plaintiffs).

[17] *See* Hon. Craig Smith et al., *Finding a Balance Between Securing Confidentiality and Preserving Court Transparency: A Re-Visit of Rule 76a and Its Application to Unfiled Discovery*, 69 S.M.U. L. REV. 309, 311–13 (2016) (stating that "broad protective orders and silent settlement agreements keep 'confidential' information out of public view, despite the fact that this information may have a substantial effect on the public's interest in health or safety. The risk of disclosing harmful information to the public is the economic incentive to keep it a secret."); Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 607 (2018) (noting "significant losses and costs" to the public from "the ever-increasing rates of settlement"); Benjamin Sunshine & Víctor Abel Pereyra, *Access-to-Justice v. Efficiency: An Empirical Study of Settlement Rates After Twombly & Iqbal*, 2015 U. ILL. L. REV. 357, 387, 398 (2015) (finding that "[s]ettlements in federal civil cases occurred at a higher rate in the post-*Iqbal* era [after May 2009] as compared to the pre-*Twombly* era [before May 2007]" and that "most settlement terms are kept secret"). Also limiting access to records, the government can be slow in processing FOIA requests for information.

I. THE "COMPELLING REASONS" STANDARD OF ACCESS

A. The Presumption of Access

The First Amendment and the common law guarantee a right to inspect materials submitted and used in court cases.[18] Because "courts are public institutions" "their proceedings should be public unless a *compelling* argument for secrecy can be made."[19] Access to proceedings is an implied entitlement under the First Amendment, whose guarantees collectively depend on the open administration of justice.[20] In criminal cases, where the Sixth Amendment comes into play, courts may weigh the constitutional right of access against the accused's right to a fair trial,[21] while in civil cases courts bypass the

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[18] Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 659 (3d Cir. 1991). The rule at common law was that "[a]n inspection of the records of judicial proceedings kept in the courts of the country, is held to be the right of any citizen." Brewer v. Watson, 61 Ala. 310, 311 (1878) (citation omitted). The requirement of public access to judicial proceedings has roots in a 1267 English statute, *see* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1068 (3d Cir. 1984), and the legal concept matured in the seventeenth and eighteenth centuries, largely in reaction to secret Star Chamber prosecutions, *see In re* Oliver, 333 U.S. 257, 268–70 (1948).

[19] Arkwright Mut. Ins. v. Garrett & West, Inc., 782 F. Supp. 376, 381 (N.D. Ill. 1991) (emphasis added).

[20] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575–76 (1980) ("In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees . . . . Free speech carries with it some freedom to listen."); Greenan v. Greenan, 91 A.3d 909, 914 (Conn. Ct. App. 2014) (right of public access to proceedings is fundamental).

[21] *See Richmond Newspapers*, 448 U.S. at 564; Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7–10 (1986); *see also* Presley v. Georgia, 558 U.S. 209, 213 (2010) (noting that "[t]he extent to which the First and Sixth Amendment public trial rights are coextensive is an open question"); United States v. Thomas, 745 F. Supp. 499, 502 (M.D. Tenn. 1990) (finding the common law presumption of access to judicial records outweighed by other factors, including the likely impairment from disclosure to the accused's right to a fair trial). In *Wood v. Ryan*, 759 F.3d 1076 (9th Cir. 2014), both the majority and dissenting opinions discuss the constitutional right of access to criminal proceedings. Evidently agreeing with the dissent, the Supreme Court summarily vacated the court's injunction that would have halted an inmate's execution until the State of Arizona disclosed the name and source of the lethal drugs. *See* Ryan v. Wood, 573 U.S. 976 (2014).

constitutional issue and enforce the common law right since "common law . . . can of course go beyond constitutional prescriptions."[22]

There is a "strong presumption in favor of public access reflecting a first principle that the people have the right to know what is done in their courts."[23] The public "has a right to every man's evidence," except for privileged materials, and privileges are narrowly construed[24] because they impede what the Supreme Court called "the search for truth."[25] Correspondingly, the presumption of access "should apply to any motion related to a matter which the public has a right to know about and evaluate."[26] But this

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[22] *In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1340 (D.C. Cir. 1985).

[23] *In re* Providian Credit Card Cases, 116 Cal. Rptr. 2d 833, 847 (Ct. App. 2002) (quoting *In re* Shortridge, 99 Cal. 526, 530 (1893)); *accord* Mosallem v. Berenson, 76 A.D.3d 345, 348 (N.Y. App. Div. 2010) ("Under New York law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records.").

[24] Pierce Cnty., Wash. v. Guillen, 537 U.S. 129, 145 (2003) (reversing a decision that "conflict[ed] with our rule that, when possible, privileges should be construed narrowly."); MCCORMICK ON EVIDENCE § 72 (3d ed. 1984) (pointing out that the effect of privileges—"the most familiar are the rule protecting against self-incrimination and those shielding the confidentiality of communications between husband and wife, attorney and client, and physician and patient"—is "clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light.").

[25] United States v. Nixon, 418 U.S. 683, 709–10 (1974). Courts "generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit." Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978). Hence, the media have standing to assert the right of access to court records and proceedings. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 n.25 (1982) (stating that "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'") (citation omitted); *In re* Associated Press, 162 F.3d 503, 508 (7th Cir. 1998) (holding that "the [p]ress ought to have been able to intervene in order to present arguments against limitations on the constitutional or common law right of access.").

[26] Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1100 (9th Cir. 2016) (citing Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 164 (3d Cir. 1993) (alteration and quotation marks omitted)).

presumption "generally only extends to documents that have been filed with the court."[27]

Presumptive access to the courts "promotes the public's understanding of the judicial process and of significant public events,"[28] furnishing a needed check on rulings.[29] Justice Holmes, highlighting the "vast importance" of open records, expounded that "it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."[30] Put rhetorically, "[h]ow can the public know that courts are deciding cases fairly and impartially if it doesn't know what is being decided?"[31]

Judicial "records often provide important, sometimes the only, bases or explanations for a court's decision."[32] Open proceedings in

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[27] Star Tribune v. Minnesota Twins P'ship, 659 N.W.2d 287, 296 (Minn. Ct. App. 2003) (citing State *ex rel.* Mitsubishi Heavy Indus. Am., Inc. v. Cir. Ct., 605 N.W.2d 868, 874 (Wis. 2000)); *see* Bond v. Utreras, 585 F.3d 1061, 1075 (7th Cir. 2009) ("The rights of the public kick in when material produced during discovery is filed with the court.").

[28] *Ctr. for Auto Safety*, 809 F.3d at 1096 (quoting Valley Broad. Co. v. U.S. Dist. Court—D. Nev., 798 F.2d 1289, 1294 (9th Cir. 1986)).

[29] Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1178 (6th Cir. 1983); *see also* United States v. Sealed Search Warrants, 868 F.3d 385, 395 (5th Cir. 2017).

[30] Cowley v. Pulsifer, 137 Mass. 392, 394 (1884). Serving several purposes, "open judicial processes . . . protect against judicial, prosecutorial, and police abuse; provide a means for citizens to obtain information about the criminal justice system and the performance of public officials; and safeguard the integrity of the courts." Gannett Co. v. DePasquale, 443 U.S. 368, 448 (1979) (Brennan, J., concurring in part and dissenting in part). Similarly, the Sixth Amendment guarantees a criminal defendant a public trial so "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." Waller v. Georgia, 467 U.S. 39, 46 (1984) (citations omitted).

[31] BP Exploration & Prod., Inc. v. Claimant ID 100246928, 920 F.3d 209, 210 (5th Cir. 2019) (citation omitted); *see also* Le v. Exeter Fin. Corp., 990 F.3d 410, 417 (5th Cir. 2021) ("[A]ccessibility enhances legitimacy, the assurance that things are on the level.").

[32] Oliner v. Kontrabecki, 745 F.3d 1024, 1025 (9th Cir. 2014) (citation omitted).

"civil trials, no less than criminal trials" ensure "the free discussion of governmental affairs"[33] and even unopposed motions to seal the courtroom have failed.[34] On the other hand, "[i]n all experience, secret tribunals have exhibited abuses" not committed by courts using public procedures.[35] So "[a]t bottom," access to judicial records "reflects the antipathy of a democratic country to the notion of 'secret law,' inaccessible to those who are governed by that law."[36] At the same time, grand jury proceedings are traditionally secret[37] and a trial judge has discretion to enforce reasonable time,

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[33] Publicker Indus. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984); Matter of Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984). Access to judicial records is necessary as well so that citizens will accept court judgments instead of taking the law into their own hands. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509 (1984) (explaining that "an outlet is provided"). In addition, open proceedings may lead witnesses to "voluntarily come forward and give important testimony." *In re* Oliver, 333 U.S. 257, 271 n.24 (1948). Open records also discourage parties from denying the existence of documents in subsequent litigation, thereby encouraging "greater integrity from attorneys and their clients." Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 664 (3d Cir. 1991) (quoting Hon. Lloyd Doggett & Michael Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 650 (1991)).

[34] *See, e.g.*, United States v. Comprehensive Drug Testing, Inc., 513 F.3d 1085, 1115 n.54 (9th Cir. 2008) (noting that "[o]ral proceedings . . . were open to the public" after the panel denied an unopposed motion to seal the courtroom and then denied an unopposed motion for reconsideration), *vacated on other grounds en banc*, 621 F.3d 1162 (9th Cir. 2010).

[35] *Publicker Indus.*, 733 F.2d at 1070 (quoting 6 J. Wigmore, Evidence § 1834, at 438 (J. Chadbourn rev. 1976)).

[36] *In re* Leopold, 964 F.3d 1121, 1127 (D.C. Cir. 2020).

[37] *See* Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 218–19 & nn. 9–10 (1979); FED. R. CRIM. P. 6(e)(6) (providing that records "relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury"). Courts have also traditionally sealed various proceedings involving the interests of minors, *see* Hynes v. Karassik, 393 N.E.2d 1015, 1018 (N.Y. 1979), and transcripts of *in camera* bench conferences, *see* Pennsylvania v. Long, 922 A.2d 892, 898 (Pa. 2007).

place, and manner restrictions on courtroom attendance and behavior.[38]

Courts apply the strong presumption of access using a compelling reasons test by which material on file must be made public absent a compelling reason that overcomes the public's traditional right of access.[39] Under this standard, the "'strong presumption in favor of access' is the starting point" and "sharply tips the balance in favor of production"[40]—a point that case participants too often overlook in filing or maintaining under seal documents designated as confidential for discovery purposes.[41] To overcome the common law presumption, the sealing proponent must demonstrate a compelling reason to protect each record.[42]

B. The Presumption's Strength: How Important the Dispute? How Impactful the Decision? How Central the Material?

The public interest in accessing judicial records expands and contracts according to the circumstances.[43] Courts ask three questions overall to gauge the strength of this right: (1) how

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[38] *See Richmond Newspapers*, 448 U.S. at 581 n.18; Illinois v. Allen, 397 U.S. 337, 343 (1970).

[39] *See* Foltz v. State Farm Mutual Auto. Ins. Co. 331 F.3d 1122, 1135 (9th Cir. 2003); Wash. Post v. Robinson, 935 F.2d 282, 287 (D.C. Cir. 1991).

[40] Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1178, 1180 (9th Cir. 2006) (quoting *Foltz*, 331 F.3d at 1135); *see also* Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995).

[41] *See* Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1288 (2020) (detailing an empirical study of ninety-five stipulated protective orders entered in federal court that revealed a "common mistake of law . . . wherein the standard for filing materials under seal is conflated with that for keeping unfiled discovery confidential"); Le v. Exeter Fin. Corp., 990 F.3d 410, 420 (5th Cir. 2021) (noting that "[t]his conflation error—equating the standard for keeping unfiled discovery confidential with the standard for placing filed materials under seal—is a common one and one that over-privileges secrecy and devalues transparency").

[42] *Foltz*, 331 F.3d at 1135–36 (quoting Rushford v. New Yorker Mag., 846 F.2d 249, 252 (4th Cir. 1988)). Some of these compelling reasons are mentioned below, in Part I.D.

[43] *See* United States v. Amodeo, 71 F.3d 1044, 1049–50 (2d Cir. 1995) (describing this "continuum").

important is the dispute; (2) what is the likely impact of the decision; and (3) how central is the material to the case and its disposition?[44]

First, the importance of the case naturally modifies the public interest in accessing the records.[45] Courts have declared that "litigation with millions at stake, ought to be litigated openly"[46] and that the need for access may be "particularly compelling" in class actions where a segment of the public belongs to the class.[47] Civil litigation "often exposes the need for governmental action or correction."[48] Thus, a Texas law requires consideration of "any probable adverse effect that sealing will have upon the general public health or safety."[49]

Second, in the Ninth Circuit's approach, the public's right of access principally hinges on the likelihood of harm from the underlying decision to a party's position (*i.e.*, prejudice).[50] Under Rule 26(c), evidence may be developed free from public inspection

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[44] *See infra* notes 45–58.

[45] *See* Pansy v. Borough of Stroudsburg, 23 F.3d 772, 788 (3d Cir. 1994) (recognizing that when a case "involves issues or parties of a public nature, and involves matters of legitimate public concern, that should be a factor weighing against entering or maintaining an order of confidentiality"); *cf.* Jeffrey W. Sheehan, *Confidences Worth Keeping: Rebalancing Legitimate Interests in Litigants' Private Information in an Era of Open-Access Courts*, 21 VAND. J. ENT. & TECH. L. 905, 909 (2019) ("Courts remain public institutions even when the public takes little or no interest in a particular case.").

[46] *In re* High Sulfur Content Gasoline Prods. Liab. Litig., 517 F.3d 220, 230 (5th Cir. 2008).

[47] *In re* Cendant Corp., 260 F.3d 183, 193 (3d Cir. 2001); *see also* Jenkins v. United Gas Corp., 400 F.2d 28, 32–33 (5th Cir. 1968).

[48] Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

[49] TEX. R. CIV. P. 76a(1)(a)(2); *see also* Westinghouse Elec. Corp. v. Newman & Holtzinger, 46 Cal. Rptr. 2d 151, 160 (Ct. App. 1995) ("Because the judicial process is frequently the avenue by which the public and regulatory agencies learn of significant health and safety hazards, blocking this avenue may prove detrimental to the public well-being."). In re Roman Catholic Archbishop of Portland, 661 F.3d 417, 426–27 (9th Cir. 2011) (reversing decision to publicly release personnel file of 85-year-old priest who had retired, but affirming decision to release allegations of child abuse against another priest, still active, given strong public interest in disclosure).

[50] *See* United States v. Amodeo, 71 F.3d 1044, 1049 (2d Cir. 1995); Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986).

or intrusion, but this discovery policy no longer applies if a party submits evidence with a motion capable of adjudicating the litigants' substantive rights.[51] Courts by the same token may assign greater protection to information discovered via compulsory process from a nonparty whose rights are not directly implicated in the case.[52] In general, while protective orders serve to exclude the public from depositions and protect interrogatory responses,[53] citizens are entitled to view materials filed with a non-discovery motion that could prejudice a party, "whether or not [the motion is] characterized as dispositive."[54]

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[51] *See* Foltz v. State Farm Mutual Auto. Ins. Co., 331 F.3d 1122, 1135–36 (9th Cir. 2003) (quoting Rushford v. New Yorker Mag., 846 F.2d 249, 252 (4th Cir. 1988)).

[52] *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34–35 (1984) (stating that "relevant information in the hands of third parties may be subject to discovery" but that "discovery also may seriously implicate privacy interests of litigants and third parties."); *see, e.g.*, Saint Alphonsus Med. Ctr.—Nampa, Inc. v. St. Luke's Health Sys., Ltd., No. 1:12-CV-00560-BLW, 2014 WL 3101716, at *5–8 (D. Idaho July 3, 2014) (finding compelling reasons to seal "proprietary information" obtained via subpoena that "played no role in the Court's ultimate decision, and thus is not necessary for the public to understand the Court's analysis," and deeming it "important" that nonparties "did not provide the information voluntarily"), *on reconsideration in part*, 2015 WL 632311 (D. Idaho Feb. 13, 2015); Marsteller v. MD Helicopter Inc., No. CV-14-01788-PHX-DLR, 2018 WL 4679645, at *2 (D. Ariz. Sept. 28, 2018) (unsealing confidential information of a litigant while declining to seal that of non-litigants); Epic Games, Inc. v. Apple Inc., No. 4:20-cv-05640-YGR (N.D. Cal. May 5, 2021), ECF No. 594 (in trial context, granting nonparty Spotify's motion to seal user and platform data, "the release of which would result in competitive harm," but denying nonparty Netflix's motion to seal customer payment statistics "reflect[ing] areas . . . not only highly relevant to the Court's determination in this action, but . . . hotly contested."); Bertroche v. Mercy Physician Assocs., Inc., No. 18-CV-59-CJW-KEM, 2019 WL 7761810, at *2 (N.D. Iowa Dec. 16, 2019) (holding that "[t]he non-litigants . . . have a right to keep their personal information private.").

[53] *See Seattle Times*, 467 U.S. at 33 (holding that "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information."). *But see infra* note 113.

[54] Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1100 (9th Cir. 2016) (emphasis added) (quoting Romero v. Drummond Co., Inc., 480 F.3d 1234, 1245–46 (11th Cir. 2007) (citing *Amodeo*, 71 F.3d at 1048)).

Third, given the public's strong interest in understanding the grounds for judicial decisions, its right of access strengthens to the degree the evidence touches on central issues or subject matter, which is more likely when the underlying motion does the same. Thus the access right becomes "particularly strong where the [evidentiary] materials at issue play a substantial role in determining a party's substantive rights."[55] In one recent case, the court denied Ford's request to seal its engineer's comments criticizing the performance and reliability of allegedly defective car software.[56] The court wrote that "[s]uch criticism may be a kind of 'analysis' but that does not convert it into confidential information entitled to be sealed. Even if it did, the public obviously has a strong interest in these materials because they relate directly to the merits."[57] In another case, the court declined to seal information because it was "necessary to understand plaintiffs' theory of liability."[58]

C. When Does the Presumption Apply? Center for Auto Safety Distills an Expansive Rule

The "more than tangential" rule installs a liberal policy favoring more open dockets considering that any number of litigation stages or motions can relate more than tangentially to the merits of a claim or defense. Dispositive motions necessarily satisfy this test, but a motion need not be dispositive to concern the merits more than tangentially; the open-records presumption arises by virtue of a motion's probable significance in disposing of the matter *or* in affecting a party's rights or obligations. This is a very low standard, and there was very little law on this subject just fifty years ago.

In its 1978 *Nixon II* opinion, the Supreme Court found the law of public access undeveloped, concluding it was "difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access

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[55] United States v. Vazquez, 31 F. Supp. 2d 85, 87 (D. Conn. 1998).

[56] *In re* MyFord Touch Consumer Litig., No. 13-cv-03072-EMC (N.D. Cal. Mar. 2, 2018), ECF No. 400.

[57] *Id.* Moreover, the court added, "Ford cannot stake out a litigation position that the software was not defective and then seek to conceal records where its employees, engineers, and executives expressed the contrary view." *Id.*

[58] Maldonado v. Apple, Inc., 333 F.R.D. 175, 194 (N.D. Cal. 2019).

or to identify all the factors to be weighed in determining whether access is appropriate."[59] In 1980, the journalist Nat Hentoff posited that the Supreme Court's public-access precedents might "eventually lead to a much broader definition of access."[60] And indeed, since then this doctrine has developed in the direction of openness.

Two early 1980s cases from the Second Circuit applied the common-law presumption of access. In the Abscam case later portrayed in the movie "American Hustler," the court permitted television networks to copy and televise videotapes entered into evidence at a criminal trial, stating that only "the most extraordinary circumstances [would] justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence . . . ."[61] Next, in a stockholder derivative suit, the court unsealed a report by a bank's special litigation committee revealing its internal operations.[62] The report, the court explained, was "no longer a private document. It is part of a court record. Since it is the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional scrutiny."[63]

The doctrine concerning open records then went through a period of sustained development. In 1984, the Sixth Circuit ruled that tobacco companies could not keep secret FTC documents disclosing the true tar and nicotine levels of cigarettes. "Simply showing that the information would harm the company's reputation is not sufficient," the court held.[64] The Third and Seventh Circuits soon agreed that the presumption of access applies in civil as well as criminal cases.[65] In 1987, the First Circuit concluded the presumption applies to documents filed on a docket "in the course

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[59] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598–99 (1978).

[60] NAT HENTOFF, THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA 240 (1980).

[61] *In re* Application of Nat'l Broad. Co., 635 F.2d 945, 947, 952 (2d Cir. 1980).

[62] Joy v. North, 692 F.2d 880 (2d Cir. 1982).

[63] *Id.* at 894.

[64] Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179–80 (6th Cir. 1983).

[65] *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1061, 1070–71 (3d Cir. 1984); Matter of Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984).

of adjudicatory proceedings."[66] And in 1988 the Fourth Circuit held that once a party submits documents as "part of a dispositive motion, such as a summary judgment motion, they lose their status of being raw fruits of discovery."[67] By 1993, the Third Circuit had applied the presumption of access to civil trial exhibits, material submitted at summary judgment, transcripts of a preliminary injunction hearing, and settlement documents and post-settlement motions seeking to interpret and enforce the agreement.[68] Commentators at the time noted that within "the space of a decade" courts had extended the access right to "an ever wider range of judicial proceedings" along with "a variety of documents and materials associated with" them.[69]

This post-Watergate case law recognizes that the presumption of public access arises if a motion is literally or effectively case-dispositive under the circumstances.[70] The line of Ninth Circuit cases culminating in *Center for Auto Safety* clarifies when the presumption kicks in.

Not until 1999 did the Ninth Circuit squarely hold that the presumption of access applies at summary judgment.[71] The court explained in 2003 that "summary judgment adjudicates substantive

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[66] F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 409 (1st Cir. 1987).

[67] Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 252 (4th Cir. 1988) (internal quotation marks omitted) (quoting *In re* "Agent Orange" Prod. Liab. Litig., 98 F.R.D. 539, 544–45 (E.D.N.Y. 1983)).

[68] *See* Leucadia, Inc. v. Applied Extrusion Techs. Inc., 998 F.2d 157, 161, 165 (3d Cir. 1993) (recognizing a "presumptive right to public access to all material filed in connection with nondiscovery pretrial motions, whether these motions are case dispositive or not.").

[69] JEROME A. BARRON & C. THOMAS DIENES, FIRST AMENDMENT LAW 394 (Thomson West ed., 1993).

[70] *See In re* Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig., 686 F.3d 1115, 1119 (9th Cir. 2012) (per curiam) (reasoning that the compelling reasons test applied to a *Daubert* motion because it was "effectively dispositive") (internal quotation mark and citation omitted); Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1179 (9th Cir. 2006) (finding "good reasons to distinguish between dispositive and non-dispositive motions") (quoting Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003)).

[71] San Jose Mercury News, Inc. v. U.S. Dist. Court—N. Dist. (San Jose), 187 F.3d 1096, 1102 (9th Cir. 1999) ("[W]e have never squarely held that the federal common law right of public access extends to materials submitted in connection with motions for summary judgment in civil cases prior to judgment.").

rights and serves as a substitute for trial."[72] In 2006, the court made clear in its *Kamakana* decision that "*dispositive* pleadings and attachments" give rise to the presumption.[73] Then in 2012, the court indicated that "dispositive" should be interpreted constructively rather than technically, holding that a *Daubert* motion carried the presumption despite being technically non-dispositive.[74] In *Center for Auto Safety*, a divided Ninth Circuit panel further held that the presumption *also* arises if the underlying motion or proceeding relates "more than tangentially" to the merits of a claim or defense.[75]

The documents at issue in *Center for Auto Safety* had been submitted on the plaintiffs' unsuccessful motion for a preliminary injunction that would have required Chrysler to warn vehicle owners and lessees of alleged safety risks from certain electrical systems.[76] The court's analysis filled a gap in the Eleventh Circuit's "refined approach" under which "material filed with *discovery* motions is not subject to the common-law right of access, whereas discovery material filed in connection with pretrial motions that require judicial *resolution of the merits* is subject to the common-law right."[77] That standard leaves unaddressed the status of non-discovery, non-dispositive pretrial motions. Such motions, the Ninth Circuit held in *Center for Auto Safety*, carry the public-access right if they relate "more than tangentially" to the merits.[78]

The court held that the "old tradition" of open proceedings requires the public be given presumptive access when the matter bears on the parties' *substantive* rights or obligations even where it is not *dispositive* of their dispute.[79] The court picked up on the

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[72] *Foltz*, 331 F.3d at 1135–36 (quoting *Rushford*, 846 F.2d at 252).

[73] *Kamakana*, 447 F.3d at 1180 (emphasis added).

[74] *Midland*, 686 F.3d at 1119–20.

[75] Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1101 (9th Cir. 2016).

[76] *Id.* at 1095.

[77] Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1312 (11th Cir. 2001) (emphasis added).

[78] *Ctr. for Auto Safety*, 809 F.3d at 1101.

[79] *Id.* at 1100–01. So too, in its *Republic of Philippines* decision ordering the unsealing of documents related to bribery charges against Ferdinand Marcos, the Third Circuit rejected the claim that the principles "allowing public access to judicial proceedings and judicial records are inapplicable to material filed in

Supreme Court's statement in *Seattle Times Company v. Rhinehart* that "[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only *tangentially* related, to the underlying cause of action."[80] The detritus here is released as byproduct of civil discovery's liberal scope.[81] The Ninth Circuit adopted this phrase describing discovery matter when it ruled that "public access will turn on whether the motion is more than tangentially related to the merits of a case."[82]

Under *Center for Auto Safety*, the presumption of access to court records is strongest on dispositive motions[83]—but not limited to such motions because a motion may relate more than tangentially to the merits even if it is not dispositive in any sense.[84] "Tangential" means "peripheral" or only "slightly connected" to the subject at hand.[85] The Ninth Circuit's rule suggests, therefore, that the only

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support of a non-dispositive motion." Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 660 (3d Cir. 1991). *Markman* patent rulings, and exclusion of an expert's damages theory, discussed below, are examples of decisions that affect the parties' substantive rights without disposing of their dispute. *See infra* Parts II.A.i, II.D.

[80] Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984).

[81] *Id.* at 34–35 (noting "liberality of pretrial discovery permitted"); *see* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (stating that "discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues."); Hawkins v. AT & T, 812 F. App'x 215, 218 (5th Cir. 2020) ("Generally, the scope of discovery is broad and permits the discovery of 'any nonprivileged matter that is relevant to any party's claim or defense.'") (citations omitted); FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment (clarifying proportionality factors and that burden of responding to discovery "often . . . lies heavier on the party who has more information").

[82] *Ctr. for Auto Safety*, 809 F.3d at 1101.

[83] *See id.* at 1098; Greater Miami Baseball Club Ltd. P'ship v. Selig, 955 F. Supp. 37, 39 (S.D.N.Y. 1997); *see also* Zapp v. Zhenli Ye Gon, 746 F. Supp. 2d 145, 148 (D.D.C. 2010) (opining that the presumption is "strongest"—additionally or alternatively—"when the documents at issue are specifically referred to in a trial judge's public decision") (internal quotation marks, citation, and alterations omitted)

[84] *See Ctr. for Auto Safety*, 809 F.3d at 1099–1101.

[85] Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd., 344 F.3d 1359, 1369 (Fed. Cir. 2003) (quoting THE AMERICAN HERITAGE COLLEGE DICTIONARY 1385 (3d ed. 1997)) (defining "tangential" as "merely touching or slightly connected" or "only superficially relevant; divergent"); 2 THE NEW

motions that do *not* trigger the right are those that have little relevance or consequence to a party's litigation position. Few such motions are filed, as parties have little reason to expend resources on a motion that will not advance their substantive position in the case. Accordingly, the more-than-tangential rule lends a broad scope to the access right.

Before *Center for Auto Safety*, a "more than tangentially related" concept did not supply the rule of decision for when the presumption of public access arises. The majority's repeated statements that its holding fits with the case law[86] demonstrate that, regardless of whether the dissent is correct that this holding "overtly overrules [the Ninth Circuit's] prior decisions,"[87] the majority was seeking to synthesize a principle that had never before been articulated in this way. The dissent in *Center for Auto Safety* takes the court to task for reducing a descriptive quality to a sufficient condition; the majority opinion appears to reason that the compelling reasons test applies to *any* motion more than tangentially related to the merits simply because the reported decisions applying this test did so on a motion having that characteristic.[88] The dissent argues that the dispositive vs. non-dispositive distinction is clearer and easier to administer, whereas "district courts will have no framework for deciding what quantum of relatedness is more than tangential."[89] Despite these dissenting views, however, district courts have applied the rule of *Center for Auto Safety* for several years without evident difficulty or impairment of their powers to fashion suitable protective orders, and the "more than tangential" rule controls in the Ninth Circuit.

SHORTER OXFORD ENGLISH DICTIONARY 3215–16 (1993) (defining "tangential" as "merely touching a subject or matter; peripheral") (alterations omitted).

[86] *See Ctr. for Auto Safety*, 809 F.3d at 1099 (maintaining that "[t]he focus in all of our cases is on whether the motion at issue is more than tangentially related to the underlying cause of action."); *id.* at 1103 (repeating that "[o]ur precedent . . . always has focused on whether the pleading is more than tangentially related to the merits").

[87] *Id.* at 1109 (Ikuta, J., dissenting).

[88] *Id.* at 1105.

[89] *Id.* at 1107.

D. How Does the Presumption Apply?

Under the compelling reasons test, unless a record is of a type traditionally kept secret,[90] the proponent of secrecy bears the burden of showing that its disclosure "will work a clearly defined and serious injury."[91] The proponent must "articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure."[92] If the proponent makes this particularized showing for a certain item of evidence, the court balances that party's interests in keeping it secret against the public's competing interests in accessing it.[93] The court may seal an item by finding a compelling reason based in fact and not "rely[ing] on hypothesis or conjecture."[94]

Law-abiding companies should not fear application of this test. Disclosure of past promotional ideas[95] or historical financial data[96]

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[90] *See* Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006).

[91] Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 307 (6th Cir. 2016) (quoting *In re* Cendant Corp., 260 F.3d 183, 194 (3rd Cir. 2001)).

[92] *Kamakana*, 447 F.3d at 1178–79 (alternations, quotation marks, and citations omitted).

[93] Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1096–97 (9th Cir. 2016).

[94] *Id.*

[95] *See* Marietta Corp. v. Fairhurst, 301 A.D.2d 734, 738 (N.Y. App. Div. 2003); SDT Indus., Inc. v. Leeper, 793 So. 2d 327, 332 (La. Ct. App. 2001).

[96] *See* Fox Sports Net North v. Minn. Twins P'ship, 319 F.3d 329, 336 (8th Cir. 2003) (holding that "obsolete information cannot form the basis for a trade secret claim because the information has no economic value."); Marsteller v. MD Helicopter Inc., No. CV-14-01788-PHX-DLR, 2018 WL 4679645, at *2 (D. Ariz. Sept. 28, 2018) (declining to seal "pricing, compensation, and contract information" based on "doubts about the concreteness of the harm [the defendant] claim[ed] would result from public disclosure . . . given the age of this information."); F.T.C. v. DIRECTV, Inc., No. 15-CV-01129-HSG, 2017 WL 840379, at *2 (N.D. Cal. Mar. 3, 2017) (declining to seal historical pricing and financial data and rejecting assertions of competitive harm); Saint Alphonsus Med. Ctr.—Nampa, Inc. v. St. Luke's Health Sys., Ltd., No. 12-CV-00560-BLW, 2014 WL 3101716, at *3 (D. Idaho July 3, 2014) (finding "no compelling reason" to seal evidence of a five-year-old business negotiation "[g]iven its age"), *on reconsideration in part*, 2015 WL 632311 (D. Idaho Feb. 13, 2015); Clark v.

is unlikely to cause competitive harm. And though the test is stringent, compelling secrecy interests exist where disclosure will reveal privileged information or trade secrets, jeopardize health or other personally identifying information, threaten national security or otherwise endanger lives, imperil an accused's right to a fair trial, intimidate a witness, or traumatize a juvenile crime victim.[97]

But the likelihood of reputational harm from disclosure of court records does not justify sealing them: "Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know."[98] Hence despite companies' "natural desire" to shield embarrassing facts, complaints of litigation-driven publicity, without more, are insufficient to justify secrecy.[99] For example, in a RICO case involving "massive contamination" from hazardous waste,[100] the defendant companies opposed a motion to unseal the pleadings, claiming they would

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Prudential Ins. Co. of Am., No. CIV. 08-6197-DRD, 2011 WL 1833355, at *3 (D.N.J. May 13, 2011) (gathering earlier cases supporting the "general rule" that "business information that is substantially out of date is unlikely to merit protection").

[97] *See* NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct., 980 P.2d 337, 368 n.46 (Cal. 1999); *see also* Hon. Lloyd Doggett & Michael Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 669–77 (enumerating types of material that may merit sealing based on a compelling countervailing interest).

[98] Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1180 (6th Cir. 1983); *see* Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1179 (9th Cir. 2006) ("The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records.") (citing Foltz v. State Farm Mutual Auto. Ins. Co., 331 F.3d 1122, 1136 (9th Cir. 2003)); State v. Cottman Transmission Sys., Inc., 542 A.2d 859, 864 (Md. App. 1988) ("Possible harm to a corporate reputation does not serve to surmount the strong presumption in favor of public access to court proceedings and records. Injury to corporate or personal reputation is an inherent risk in almost every civil suit.") (internal citation omitted).

[99] *Kamakana*, 447 F.3d at 1179; *Brown & Williamson*, 710 F.2d at 1180; *see, e.g.*, Romero v. Drummond Co., Inc., 480 F.3d 1234, 1247 (11th Cir. 2007) (reversing a sealing order for failure to substantiate the finding that permitting access would further lawyers' allegedly improper motives).

[100] Huntsman-Christensen Corp. v. Entrada Indus., Inc., 639 F. Supp. 733, 734 (D. Utah 1986).

suffer harm from disclosure of the complaint charging them with conspiracy and fraud because their stock would drop and they would lose investment money and opportunities.[101] But the court wrote that it "simply [did] not perceive the defendants' or the public's plight to be extraordinary were the Complaint to be unsealed" and that "[w]hen denial of access to court records deprives the public of information or the ability to know, a stronger presumption of access arises and the Court's discretion is significantly curtailed."[102]

In most disputes involving businesses, "[i]nformation may be sealed from the public only if it is truly confidential, not generally known, and its disclosure would likely cause [the business] competitive harm."[103] Even trade secrets do not receive "automatic and complete immunity against disclosure" but are instead considered "against the need for disclosure" and "[f]requently . . . have been afforded a limited protection."[104] For

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[101] *Id.* at 738.

[102] *Id.* at 737, 738 n.5.

[103] Krommenhock v. Post Foods, LLC, 334 F.R.D. 552, 587 (N.D. Cal. 2020) (emphasis omitted); *see also* Willis v. United States, No. CV 117-015, 2019 WL 7194599, at *1 n.3 (S.D. Ga. Dec. 26, 2019) (discerning "no reason to seal this already public document"); P&L Dev. LLC v. Bionpharma Inc., No. 1:17CV1154, 2019 WL 2079830, at *8 (M.D.N.C. May 10, 2019) (mandating disclosure as "much of the information the parties sought to seal was already public"). Publicly traded companies must disclose earnings and other financial information every fiscal quarter on the SEC's Form 10-Q and once per year on Form 10-K. *See* 15 U.S.C. § 78m; 17 C.F.R. pts. 210, 229 (2021).

[104] FED. R. CIV. P. 26(c) advisory committee's note to 1970 amendment; *see* Hartley Pen Co. v. U.S. Dist. Ct., 287 F.2d 324, 328 (9th Cir. 1961) ("A trade secret must and should be disclosed where upon a proper showing it is made to appear that such disclosure is relevant and necessary to the proper presentation of a plaintiff's or defendant's case."); *In re* Apple Inc. Device Performance Litig., No. 5:18-MD-02827-EJD, 2019 WL 1767158, at *2 (N.D. Cal. Apr. 22, 2019); *infra* note 111. A trade secret is information whose disclosure would result in tangible economic loss. *See* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1090 (9th Cir. 1986) ("If an outsider would obtain a valuable share of the market by gaining certain information, then that information may be a trade secret if it is not known or readily ascertainable."). To be a trade secret, information must also be the subject of reasonable efforts to maintain its secrecy. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002 (1984) ("Because of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others."). The Uniform Trade Secrets Act thus defines a trade secret as information that "(i)

instance, at a 2014 trial that concerned an Idaho health care provider's acquisition of a physician group, the court initially sealed "[c]urrent (within the last four years)" business information in four categories, but as the trial progressed "the Court became convinced that the original reasons for sealing certain material appeared less compelling" and "[u]ltimately . . . decided to issue its Findings of Fact and Conclusions of Law without any redactions."[105] Finally, if a court finds a compelling reason to seal materials or proceedings, the resulting redactions or procedures must be narrowly tailored to protect that interest.[106]

The lower "good cause" standard applies to ordinary discovery or administrative motions.[107] In these settings, the court has broader discretion to fashion orders to protect litigants and third parties from "annoyance, embarrassment, oppression, or undue burden or expense."[108] Discovery can "seriously implicate privacy interests of litigants and third parties" if it unearths information that "if publicly released could be damaging to reputation and privacy."[109] Nonetheless, the designating party must make a particularized

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derives independent economic value . . . from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." UNIFORM TRADE SECRETS ACT § 1(4) (NAT'L CONF. OF COMM'RS ON UNIFORM STATE L. 1985).

[105] Saint Alphonsus Med. Ctr.—Nampa, Inc. v. St. Luke's Health Sys., Ltd., No. 1:12-CV-00560-BLW, 2014 WL 3101716, at *2 (D. Idaho July 3, 2014) (internal citation omitted), *on reconsideration in part*, 2015 WL 632311 (D. Idaho Feb. 13, 2015); *see also* Saint Alphonsus Med. Ctr.—Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 781–82 (9th Cir. 2015).

[106] *See, e.g.*, *In re* NHL Players' Concussion Injury Litig., MDL No. 14-2551 (SRN/JSM), 2016 U.S. Dist. LEXIS 91111, at *12 (D. Minn. July 13, 2016) (determining that redaction of names from medical records sufficiently protected patient privacy interests); KlausTech, Inc. v. Google. Inc., No. 10-cv-05899-JSW (DMR), 2017 WL 4808558, at *3 (N.D. Cal. Oct. 25, 2017) (describing how the court, "[b]alancing the public's right to access and Google's interest in the proprietary nature of its technology," sealed the courtroom only during the technical discussion at a hearing).

[107] *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33–37 (1984); United States v. Kravetz, 706 F.3d 47, 54 (1st Cir. 2013); Bond v. Utreras, 585 F.3d 1061, 1073–76 (7th Cir. 2009); *see also supra* notes 40–41 and accompanying text.

[108] FED. R. CIV. P. 26(c)(1).

[109] *Seattle Times*, 467 U.S. at 35.

showing of "some plainly adequate reason" to protect each record.[110] Courts have extended protection under Rule 26 to current customer and supplier information, sales and revenue data, business plans, and other competitively sensitive information.[111] Although most discovery occurs "in private as a matter of modern practice,"[112]

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[110] 8A Wright, Miller & Marcus, *Federal Practice & Procedure* § 2035 (3d ed. 2010). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning" do not establish good cause—the sealing proponent "bears the burden, for each particular document . . . of showing that specific prejudice or harm will result" from disclosure. Beckman Indus., Inc. v. Int'l Ins. Co., 966 F.2d 470, 476 (9th Cir. 1992); *see also* Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003); FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION § 11.432, at 64–65 & n.136 (4th ed. 2004); *In re* Zyprexa Injunction, 474 F. Supp. 2d 385, 416 (E.D.N.Y. 2007) (burden "rests at all times with the party seeking protection."); H.B. Fuller Co. v. Doe, 60 Cal. Rptr. 3d 501, 512 (Ct. App. 2007) (sealing proponent "must come forward with a specific enumeration of the facts sought to be withheld and specific reasons for withholding them.").

[111] *See* Momentive Specialty Chems., Inc. v. Alexander, No. 2:13-cv-275, 2013 WL 2287091, at *4 (S.D. Ohio May 23, 2013) (noting "[i]t is typical that business plans containing competitively sensitive information be restricted, at least in the first instance, to attorneys and not be shared with parties who work for or might share information with the producing party's competitors."); Joint Stock Soc. v. UDV N. Am., Inc., 104 F. Supp. 2d 390, 396 (D. Del. 2000) (adopting magistrate judge's recommendation to seal "vodka formulas, consumer research studies, strategic plans, potential advertising and marketing campaigns or financial information"); Nutratech, Inc. v. Syntech (SSPF) Int'l, Inc., 242 F.R.D. 552, 556 n.5 (C.D. Cal. 2007) (finding good cause to prevent disclosure of "supplier/customer identities and cost/sales figures related to specific suppliers/customers"). *But see* ATM Exp., Inc. v. ATM Exp., Inc., No. 07cv1293-L (RBB), 2008 WL 4997600, at *2 (S.D. Cal. Nov. 20, 2008) (refusing to seal deposition testimony regarding a party's "finances, business, advertising and promotional strategies, and its customer base"); Prod. Res. Grp., L.L.C. v. Oberman, No. 03 Civ. 5366 (JGK), 2003 WL 22350939, at *14 (S.D.N.Y. Aug. 27, 2003) (rejecting "contention that [a party's] rebate programs and supplier discounts [were] protectable trade secrets."); Cudahy Co. v. Am. Labs., Inc., 313 F. Supp. 1339, 1343 (D. Neb. 1970) (declining to grant trade secret status to "data on profits and costs of production" or to two customer lists); *supra* note 15.

[112] *Seattle Times*, 467 U.S. at 33.

discovery materials remain presumptively public absent court order[113] and any redactions must be narrowly tailored.[114]

II. MOTIONS CARRYING THE PRESUMPTION OF ACCESS

In the Ninth Circuit today, as discussed above, the presumption of access applies not just to *literally* dispositive motions but to *effectively* dispositive motions as well, and further to all motions that relate more than tangentially to the merits. "[S]ome" motions that do not technically end the case "will pass" this test, the court in *Center for Auto Safety* opined.[115] But which motions are those? I argue here that, beyond trial,[116] summary judgment,[117] and motions to dismiss[118]—which are literally dispositive—motions to exclude evidence, for a preliminary injunction or class certification, or to define a central issue in dispute, as with *Markman* proceedings in patent litigation, tend to dispose of the case and virtually always concern its merits. Therefore, under *Center for Auto Safety*, the compelling reasons test applies in these settings, among others.

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[113] San Jose Mercury News, Inc. v. U.S. Dist. Ct.—N. Dist. (San Jose), 187 F.3d 1096, 1103 (9th Cir. 1999) (citing other appellate authorities). Florida law deems deposition transcripts filed with the court publicly available, unless otherwise ordered. *See* Tallahassee Democrat, Inc. v. Willis, 370 So. 2d 867, 870–71 (Fla. Dist. Ct. App. 1979).

[114] *See, e.g.*, United States *ex rel.* Roberts v. QHG of Ind., Inc., No. 1:97-CV-174, 1998 WL 1756728, at *8 (N.D. Ind. Oct. 8, 1998) ("Once the identifying information is removed from the record, the patient's privacy interest is essentially eliminated.") (citing cases); Finjan Inc. v. Sophos, Inc., No. 14-cv-01197-WHO, 2016 WL 7911365, at *1 (N.D. Cal. Aug. 30, 2016) (approving use of codenames to protect identities).

[115] Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1101 (9th Cir. 2016).

[116] Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984) (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982)).

[117] Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135–36 (9th Cir. 2003) (citing Rushford v. New Yorker Mag., 846 F.2d 249, 252 (4th Cir. 1988)).

[118] E. & J. Gallo Winery v. Instituut Voor Landbouw-En Visserijonderzoek, No. 1:17-cv-00808-DAD-EPG, 2018 WL 3769410, at *2 (E.D. Cal. Aug. 7, 2018) (denying defendants' request to seal portions of their motion to dismiss and pointing out that such a motion "is undoubtedly a dispositive motion" warranting compelling reasons scrutiny).

A. Motions to Exclude Evidence

Motions to exclude evidence from trial "may, in reality, be a part of, or so nearly like the trial itself" as to trigger the constitutional right to access[119] and normally implicate the common law right.[120]

i. Daubert

Challenging subject matter intensifies the effect of expert-witness proceedings under *Daubert*[121] or equivalent state law. The trial court's evidentiary determinations will be reviewed only for an abuse of discretion—meaning reversal requires "a definite and firm conviction" of a "clear error of judgment" in the ruling.[122] That *Daubert* decisions are unlikely to be disturbed vests the trial court with broader authority, setting an expectation of finality from the expert proceedings. Meanwhile, a fleet of economists and other specialized experts stands at the ready, driving up costs and fueling the parties' impulse to use the expert to win the case.

A mistake can prove fatal, as in the mass tort litigation asserting the blockbuster cholesterol drug Lipitor caused type 2 diabetes, where the court dismissed claims because plaintiffs failed to "produce an expert on specific causation that will survive

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[119] Nat'l Broad. Co., Inc., v. Presser, 828 F.2d 340, 354 (6th Cir. 1987); *see* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7 (1986) (holding that "the First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (discussing the public's First Amendment right to receive information).

[120] *See* Amtower v. Photon Dynamics, Inc., 71 Cal. Rptr. 3d 361, 372 (Ct. App. 2008) ("It has become increasingly common" for parties to enlist motions to exclude evidence as a means of seeking to prevail); 1 EDWARD L. BIRNBAUM ET AL., NEW YORK TRIAL NOTEBOOK § 13:02, at 13–3 (2010) (winning a pretrial motion *in limine* prevents the adversary from talking about or introducing damaging evidence, and can create settlement leverage). *See also infra* notes 130–137 (*in limine* authorities) & 123–26 (*Daubert* authorities).

[121] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

[122] *See, e.g.*, Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 857 F.3d 907, 911 (D.C. Cir. 2017); MTS Int'l, Inc. v. Comm'r, 169 F.3d 1018, 1022 (6th Cir. 1999).

Daubert . . . ."[123] If the exclusion of a plaintiff's expert can end the case, the defendant's failure to exclude the plaintiff's expert "undoubtedly" may affect the defendant's willingness to talk settlement.[124] Not only are expert opinions procured to advance a party's claim or defense,[125] but allowing access to related motion practice[126] is also consistent with the liberal approach to admitting expert evidence itself.

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[123] *In re* Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig., 227 F. Supp. 3d 452, 491 (D.S.C. 2017), *aff'd*, 892 F.3d 624 (4th Cir. 2018).

[124] Margaret A. Berger, *The Admissibility of Expert Testimony*, in FED. JUD. CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 11, 19 (3d ed. 2011); *see* David M. Flores et al., *Examining the Effects of the* Daubert *Trilogy on Expert Evidence Practices in Federal Civil Court: An Empirical Analysis*, 34 S. ILL. U. L.J. 533, 563 (2010) (the authors' empirical study of federal cases in South Carolina showed that "*Daubert* challenges targeted evidence central to the plaintiff's case and a settlement agreement was reached soon after the motions were filed").

[125] *See supra* notes 120 & 123–24; *infra* note 126; *cf.* Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1100–01 (holding that the right of access arises when the matter bears on the parties' *substantive* rights even where it is not *dispositive* of their dispute) (citing Romero v. Drummond Co., Inc., 480 F.3d 1234, 1245–46 (11th Cir. 2007) (citing United States v. Amodeo, 71 F.3d 1044, 1050 (2d Cir. 1995)).

[126] One federal court supervising a multidistrict proceeding alleging deceptive marketing of an unsafe contraceptive device ordered the public release of all documents filed under seal as part of the defendants' *Daubert* motions, and a New Jersey state court supervising parallel coordinated litigation issued a similar order. *See In re* Nuvaring Prods. Liab. Litig., No. 4:08-md-01964-RWS (E.D. Mo. Oct. 25, 2012), ECF No. 1390 at 2; *In re* Nuvaring Litig., No. BER-L-3081-09 (N.J. Super. Ct., Bergen Cnty., Oct. 22, 2012). Another court found no compelling reason to seal portions of an economist's 372-page report regarding "the crucial merits question of whether Qualcomm's conduct had anticompetitive effects." F.T.C. v. Qualcomm Inc., No. 17-CV-00220-LHK, 2018 WL 6615298, at *2 (N.D. Cal. Dec. 17, 2018); *see also In re* Midland Nat. Life Ins. Co. Annuity Sales Practices Litig., 686 F.3d 1115, 1119–20 (9th Cir. 2012) (holding that the compelling reasons test applied to a *Daubert* motion submitted, per common practice, with a summary judgment motion, a result that followed from the court's practical recognition that "a *Daubert* motion connected to a pending summary judgment motion may be effectively dispositive") (internal quotation marks and citation omitted); Flores, *supra* note 124, at 563; *In re* Packaged Seafood Prods. Antitrust Litig., No. 15-MD-2670 JLS (MDD), 2020 WL 5709269, at *1 (S.D. Cal. Sept. 24, 2020) (enforcing open-records presumption to order *Daubert* materials unsealed); Marsteller v. MD Helicopter Inc., No. CV-14-01788-PHX-

While it disallows junk science, Federal Rule of Evidence 702 was framed "to *relax* traditional barriers to admission of expert opinion testimony," the Supreme Court made clear.[127] An expert "is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation," and this relief from the personal knowledge requirement "is premised on the assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline."[128] In *Daubert*, moreover, the Court specified "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof"—all historically open to the public—as "the traditional and appropriate means of attacking shaky but admissible evidence."[129]

DLR, 2018 WL 4679645, at *2 (D. Ariz. Sept. 28, 2018) (same); Hudock v. LG Elecs. U.S.A., Inc., No. 0:16-CV-1220-JRT-KMM, 2020 WL 2848180, at *2 (D. Minn. June 2, 2020) (citing cases and holding that *Daubert* motions "intertwined with the ultimate merits of the claims" command the presumption of public access).

[127] Cary v. Auto. Ins. Co. of Hartford, Conn., 838 F. Supp. 2d 1117, 1122 (D. Colo. 2011) (emphasis added) (citation omitted); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 588–89 (1993).

[128] *Daubert*, 509 U.S. at 592 (citing FED. R. EVID. 702, 703). The Court identified four factors that may bear on the analysis of reliability: (1) whether the theory can be and has been tested; (2) whether the theory has been published following peer review; (3) the theory's known or potential error rate; and (4) whether the theory is generally accepted in the relevant scientific community. *See id.* at 593–94. Additional factors may include whether experts have adequately accounted for obvious alternative explanations, and are being as careful as they would be in their regular professional work outside the courtroom. *See* FED. R. EVID. 702 advisory committee's note to 2000 amendment.

[129] *Daubert*, 509 U.S. at 596. In general, "[w]hen the factual underpinning of an expert's opinion is weak, it is . . . a question to be resolved by the jury," Milward v. Acuity Specialty Prods. Grp., Inc., 639 F.3d 11, 22 (1st Cir. 2011) (citations omitted), and "faults in his use of a differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony," McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir. 1995); *see also* Hartley v. Dillard's, Inc., 310 F.3d 1054, 1061 (8th Cir. 2002).

ii. In Limine

Motions to exclude key documents or lay-witness testimony also cut to the heart of a case. Many a jury has been influenced by a memorable description or other item of evidence recapitulated during closing argument. Excluding such evidence may spell defeat for the losing party, while admitting it may clinch the case for the victor.[130] A witness whose drinking problem or tainted blood test comes out will have trouble getting past it, whether in a routine matter or a larger controversy.[131] In a trademark dispute between manufacturers of thermal imaging equipment, the defendant prevailed on false advertising counterclaims after the court precluded the plaintiff *in limine* from introducing evidence that the defendant misled the Patent and Trademark Office.[132] More than five years after plaintiffs filed wrongful death cases arising out of the September 11th attacks, many of the cases settled soon after the trial court excluded *in limine* estimates of a decedent's earning potential and other evidence.[133]

Parties use pretrial *in limine* motions to try to exclude prejudicial evidence—colorful or mundane—before it "rings the bell" by being

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[130] *See* Robert Hornstein, *Mean Things Happening in This Land: Defending Third Party Criminal Activity Public Housing Evictions*, 23 S.U. L. REV. 257, 267–68 (1996) ("The effective use of a motion in limine can be the determinative factor in many cases."); *Ctr. for Auto Safety*, 809 F.3d at 1099 & n.5 (explaining that requests to exclude co-conspirator statements under Rule 801(d)(2)(E)—and other "routine motions in limine—are strongly correlative to the merits of a case"). *See also supra* note 120.

[131] Exxon Shipping Co. v. Baker, 554 U.S. 471, 476–77 (2008) (Valdez captain was drunk at the time of the oil spill).

[132] *See* FLIR Sys., Inc. v. Sierra Media, Inc., 965 F. Supp. 2d 1184, 1188 (D. Or. 2013) (post-trial opinion); Flir Sys., Inc. v. Fluke Corp., No. 3:10-CV-00971-HU, 2012 WL 13054267, at *3 (D. Or. Nov. 29, 2012) (*in limine* order).

[133] *See In re* Sept. 11 Litig., No. 21 MC 97 (AKH), 2007 WL 3036439, at *2–5 (S.D.N.Y. Oct. 17, 2007); *see also* Joseph Ax, *Factbox: The State of September 11 Litigation*, REUTERS (Sept. 9, 2011, 3:55 PM), https://www.reuters.com/article/us-sept11-litigation/factbox-the-state-of-september-11-litigation-idUSTRE7886N920110909 (reporting that "[m]ost of the cases in 21-MC-97 were settled").

introduced before the jury.[134] Excluding evidence *in limine* is disfavored[135] and courts issue terse orders reserving judgment on multiple objections so that they can be resolved in their full context at trial.[136] *In limine* rulings, then, both substitute for and are subject to later trial rulings.[137] Based on the strong presumption that disputes will be openly tried,[138] third parties should be allowed to

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[134] *See* Charles W. Gamble, *The Motion* in Limine: *A Pretrial Procedure That Has Come of Age*, 33 ALA. L. REV. 1, 3–8 (1981).

[135] The court may not exclude evidence *in limine* unless is "clearly inadmissible on all potential grounds." Rivera v. Robinson, 464 F. Supp. 3d 847, 853 (E.D. La. 2020); Leonard v. Stemtech Health Scis., Inc., 981 F. Supp. 2d 273, 276 (D. Del. 2013); United States v. Gonzalez, 718 F. Supp. 2d 1341, 1345 (S.D. Fla. 2010); Indiana Ins. Co. v. Gen. Elec. Co., 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004); United States v. Paredes, 176 F. Supp. 2d 179, 181 (S.D.N.Y. 2001); Hawthorne Partners v. AT & T Techs., Inc., 831 F. Supp. 1398, 1400 (N.D. Ill. 1993).

[136] *See* Regassa v. United States, No. 4:14-CV-01122, 2020 WL 2342982, at *2 (M.D. Pa. May 11, 2020) ("[M]otions *in limine* often present issues for which final decision is best reserved for a specific trial situation.") (quoting Walden v. Ga.-Pac. Corp., 126 F.3d 506, 518 n.10 (3d Cir. 1997)); Mendelsohn v. Sprint/United Mgmt. Co., 587 F. Supp. 2d 1201, 1208 (D. Kan. 2008) (although *in limine* rulings can save time, cost, effort, and preparation, the court is usually better situated during trial to assess evidence) (citing Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708, 712 (6th Cir. 1975)), *aff'd*, 402 F. App'x 337 (10th Cir. 2010); Deere & Co. v. FIMCO Inc., 260 F. Supp. 3d 830, 834 (W.D. Ky. 2017) (unless evidence "is 'patently inadmissible for any purpose' . . . the 'better practice' is to defer evidentiary rulings until trial, so that 'questions of foundation, relevancy and potential prejudice may be resolved in proper context.'") (internal citations omitted).

[137] Denial of a motion *in limine* "simply means that, without the benefit of the proper context of trial, the Court cannot determine that the evidence in question is clearly inadmissible." *Leonard*, 981 F. Supp. 2d at 277 n.3. Decisions on these motions accordingly are "subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the . . . proffer." Luce v. United States, 469 U.S. 38, 41 (1984).

[138] "[T]he public has an 'especially strong' right of access to evidence introduced in trials," United States v. Amodeo, 71 F.3d 1044, 1049 (2d Cir. 1995) (citations omitted), as "historically both civil and criminal trials have been presumptively open," Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980); *see* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070–71 (3d Cir. 1984). Advocates in ancient Rome made their case in the Forum atop the Rostra, an eleven-foot-high platform decorated with the beaks of captured enemy ships. *See* SAMUEL BALL PLATNER, A TOPOGRAPHICAL DICTIONARY OF ANCIENT ROME

see evidence proffered before trial to the same extent as if its admissibility were challenged at trial.[139]

B. Motions for a Preliminary Injunction

Under *Center for Auto Safety*, absent a compelling countervailing reason, documents and testimony presented with a preliminary injunction request must be made public,[140] for a decision on whether to issue a preliminary injunction concerns the merits of the plaintiff's request for injunctive relief.[141]

In contrast to a temporary restraining order, a preliminary injunction can only be entered after notice to the defendant and, if material facts are disputed, a hearing.[142] When relief is granted the defendant is enjoined and the matter may conclude from that basis.[143] Denial of preliminary relief also makes final injunctive

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450–51 (1929); J. HENRY MIDDLETON, THE REMAINS OF ANCIENT ROME 244–46 (1892).

[139] *See, e.g.*, Cramton v. Grabbagreen Franchising LLC, No. CV-17-04663-PHX-DWL, 2020 WL 7264302, at *1 (D. Ariz. Feb. 26, 2020) (ordering unsealing of motions *in limine* based on failure to satisfy compelling reasons test); United States v. Martoma, No. S1 12 CR 973 PGG, 2014 WL 164181, at *5 (S.D.N.Y. Jan. 9, 2014) (applying "the strong presumption of public access that attaches to motion *in limine* papers submitted to a court in connection with a criminal proceeding"); Fitzgerald v. Gonzales, No. 04-CV-00421-MSK-OES, 2006 WL 8454031, at *1 (D. Colo. Feb. 8, 2006) (finding "no compelling reasons for the motion *in limine* to be filed under seal.").

[140] Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1099–1101 (9th Cir. 2016); *see also* Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 660 (3d Cir. 1991).

[141] *See* Maggie Wittlin, *Meta-Evidence and Preliminary Injunctions*, 10 UC IRVINE L. REV. 1331, 1331 (2020) (calling preliminary injunction decisions "enormously consequential"); Lenihan v. City of New York, 640 F. Supp. 822, 825 (S.D.N.Y. 1986) (referring to "the crucial preliminary injunction hearing.").

[142] FED. R. CIV. P. 65(a); Cobell v. Norton, 391 F.3d 251, 261 (D.C. Cir. 2004).

[143] *See, e.g.*, Miller v. Rich, 845 F.2d 190, 191 (9th Cir. 1988) (finding that "in this case, the denial of the preliminary injunction effectively decided the merits of the case."); Yablonski v. United Mine Workers of Am., 466 F.2d 424, 431 (D.C. Cir. 1972) (concluding that "the preliminary injunction was the critical step and procured all the relief required"); Vincent v. Local 294, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., No. 70-CV-244, 1970

relief unlikely, absent different evidence or changed circumstances, given the failure to satisfy the likelihood-of-success factor. Although the initial decree does not bind the court, often "the facts are sufficiently developed on the preliminary injunction hearing and the court may proceed to issue a permanent decree if the parties have no further evidence to present."[144] Further reflecting the import of preliminary injunctions, they can be immediately appealed.[145]

C. Motions for Class Certification

Though procedural in nature, class certification may induce settlement because allowing the affected group to proceed as a unit risks larger exposure for the defendant.[146] And denial of class certification may sink the case, with the decision being "effectively dispositive" since "the stakes of the litigation are such that proceeding individually would not be viable from a practical perspective."[147] The provision governing most class actions for

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WL 758, at *1 (N.D.N.Y. Aug. 17, 1970) (noting that "a preliminary injunction is of critical importance, often decisive by its timing and impact and its grant may render illusory under certain circumstances the right to hearing later on the merits.").

[144] DAN B. DOBBS, REMEDIES: DAMAGES—EQUITY—RESTITUTION § 2.10 (1973).

[145] 28 U.S.C. § 1292(a)(1).

[146] *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 470, 476 (1978); In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 145 (2d Cir. 2001) (Sotomayor, J.) (observing that settlement pressure is "a fact of life for class action litigants"), *superseded by statute on other grounds as stated in* Brown v. Kelly, 609 F.3d 467, 483 n.17 (2d Cir. 2010); Il Fornaio (Am.) Corp. v. Lazzari Fuel Co., LLC, No. C 13-05197 WHA, 2015 WL 2406966, at *4 (N.D. Cal. May 20, 2015) (reporting that, "[a]fter class certification, all parties promptly settled" claims for price fixing). It was largely in response to this pressure that the class action rule was amended to allow petitions for discretionary review of certification decisions. *See* FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment; Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1709–10 (2017).

[147] *In re* Seagate Tech. LLC, 326 F.R.D. 223, 246 (N.D. Cal. 2018); *see* Klay v. Humana, Inc., 382 F.3d 1241, 1275 (11th Cir. 2004) (holding settlement pressure irrelevant to the certification analysis and noting the pressure is mutual: "[W]hile affirming certification may induce some defendants to settle, overturning certification may create similar 'hydraulic' pressures on the plaintiffs, causing them to either settle or—more likely—abandon their claims altogether"),

damages[148] responds to the same policy problem—"small recoveries do not provide the incentive for any individual to bring a solo action"[149]—an economic reality that makes it important to disclose the case record to individual class members,[150] including so they can "intelligently" decide whether to opt out to avoid being bound by the judgment.[151]

When inquiring into whether common or individualized issues will predominate in damage suits, the court considers which issues will be "more prevalent or important" under the cause of action.[152] The court consequently receives and evaluates evidence purportedly

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abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008); Davidson v. Apple, Inc., No. 16-CV-04942-LHK, 2019 WL 2548460, at *17 (N.D. Cal. June 20, 2019) & ECF No. 398 at 2 (N.D. Cal. July 3, 2019) (days after the court denied class certification based on flaws in their expert's damages model, plaintiffs alleging an iPhone touchscreen defect dropped their claims); FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION § 11.213, at 40 (4th ed. 2004) ("Denial of class certification may effectively end the litigation.").

[148] FED. R. CIV. P. 23(b)(3). It bears emphasis that "many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment (citation omitted). Class actions for injunctive relief also may ring "heavy overtones of public interest." Jenkins v. United Gas Corp., 400 F.2d 28, 32–33 (5th Cir. 1968).

[149] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citation omitted).

[150] *See In re* Cendant Corp., 260 F.3d 183, 193 (3d Cir. 2001). Class members have an interest in monitoring the litigation and are expressly permitted to enter an appearance through a lawyer of their own choosing. *See* FED. R. CIV. P. 23(c)(2)(B)(iv).

[151] Hanlon v. Chrysler Corp., 150 F.3d 1011, 1024 (9th Cir. 1998), *overruled on other grounds by* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); *see also In re* CenturyLink Sales Practices & Sec. Litig., No. CV 17-2832, 2020 WL 3512807, at *4 (D. Minn. June 29, 2020) (the rule contemplates "each class plaintiff will make an informed, individualized decision whether to opt out, and courts want to encourage this careful decisionmaking process.") (quoting Hallie v. Wells Fargo Bank, N.A., No. 2:12-CV-00235-PPS, 2015 WL 1914864, at *4 (N.D. Ind. Apr. 27, 2015)).

[152] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 4:49 (5th ed. 2012)); *see* Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011) (the predominance inquiry "begins, of course, with the elements of the underlying cause of action").

central to the grievance,[153] such as evidence of the alleged violation to which the class was exposed. The court then assesses whether the same evidence plaintiffs would use to show liability shows the prevalence of common proof, taking into account variations in how individual class members are situated.[154] "A critical need is to determine how the case will be tried" and "[a]lthough an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery . . . often includes information required to identify the nature of the issues that actually will be presented at trial."[155] For these reasons, courts bound by *Center for Auto Safety* have held that class certification proceedings are presumptively open.[156]

D. Markman *Proceedings*

Just as class certification, without being technically dispositive, may realize the threat posed by a case, so do *Markman* hearings take

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[153] *See supra* Part I.B.

[154] *See* Krakauer v. Dish Network, L.L.C., 925 F.3d 643, 655 (4th Cir. 2019); Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1234 (11th Cir. 2000).

[155] FED. R. CIV. P. 23(c)(1) advisory committee's note to 2003 amendment; *see* Wal–Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011) (stating that the "rigorous analysis" of whether the plaintiff has met the requirements for certification "[f]requently . . . will entail some *overlap with the merits* of the plaintiff's underlying," "enmeshed" cause of action) (emphasis added) (citing Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160–61 (1982)); Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013).

[156] *See, e.g.*, Adtrader, Inc. v. Google LLC, No. 17-CV-07082-BLF, 2020 WL 6387381, at *2 (N.D. Cal. Feb. 24, 2020) ("follow[ing] numerous other district courts within the Ninth Circuit in concluding that the compelling reasons standard applies to motions to seal documents relating to class certification."); Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., 326 F.R.D. 592, 617 (N.D. Cal. 2018) (holding that, as a class certification motion is "more than tangentially related to the merits of the case," the compelling reasons test applies); Moussouris v. Microsoft Corp., No. 15-CV-1483 JLR, 2018 WL 1159251, at *2–5 (W.D. Wash. Feb. 16, 2018) (applying compelling reasons test to class certification motion under *Center for Auto Safety*), *report & rec. adopted*, 2018 WL 1157997 (W.D. Wash. Mar. 1, 2018); Baker v. SeaWorld Ent., Inc., No. 14CV2129-MMA (AGS), 2017 WL 5029612, at *2–3 (S.D. Cal. Nov. 3, 2017) (same).

center stage in high-stakes patent litigation.[157] Every patent "must describe the exact scope of the invention and its manufacture," both to "secure to the patentee all to which he is entitled" and "to apprise the public of what is still open to them."[158] In a *Markman* decision, the court construes the meaning and reach of the language the patent holder used to publicly disclose the invention, providing notice against infringing use.[159] The court thus interprets a public document at the heart of the lawsuit, and "the public interest . . . is dominant in the patent system."[160] It follows that the public should be entitled to access *Markman* proceedings and information, except when secrecy is needed to protect genuine trade secrets.

By resolving a core substantive issue—how far the patent's claims extend—*Markman* decisions settle the parties' expectations. "Indeed, a *Markman* hearing and claim construction order are two of the most important and time-intensive substantive tasks a district

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[157] Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996); *see* Jonathan H. Ashtor, *Opening Pandora's Box: Analyzing the Complexity of U.S. Patent Litigation*, 18 YALE J. L. & TECH. 217, 225 (2016) (*Markman* hearings are "key events"); Peter E. Heuser & Robert A. Shlachter, *Patent Litigation: If You're Going to Do It, Do It Right*, OR. ST. BAR BULLETIN (Apr. 2009), https://www.osbar.org/publications/bulletin/09apr/tips.html ("[T]he *Markman* hearing is a critical juncture in the life of a patent lawsuit."); Michael A. O'Shea, *A Changing Role for the* Markman *Hearing: In Light of* Festo IX, Markman *Hearings Could Become M-F-G Hearings Which Are Longer, More Complex and Ripe for Appeal*, 37 CREIGHTON L. REV. 843, 843 (2004) (claim construction is "[t]he most hotly contested issue in virtually every patent litigation" and "[t]he significance of *Markman* to patent litigation cannot be underestimated").

[158] *Markman*, 517 U.S. at 373 (quoting McClain v. Ortmayer, 141 U.S. 419, 424 (1891)) (internal quotation marks and alteration omitted).

[159] *See id.*; 35 U.S.C. § 112.

[160] Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 665 (1944). Courts do not construe patents broadly; instead "[i]t is the responsibility of patent applicants to disclose their inventions adequately." N. Am. Vaccine, Inc. v. Am. Cyanamid Co., 7 F.3d 1571, 1577 (Fed. Cir. 1993) (citing 35 U.S.C. § 112); *see* Aspex Eyewear, Inc. v. Marchon Eyewear, Inc., 672 F.3d 1335, 1349 (Fed. Cir. 2012) (affirming narrow construction of "adapted to" phrase in patent claims for sunglass lenses magnetically secured to primary frames); Athletic Alternatives, Inc. v. Prince Mfg., Inc., 73 F.3d 1573, 1581 (Fed. Cir. 1996) (holding that, "[w]here there is an equal choice between a broader and a narrower meaning of a claim, and there is an enabling disclosure that indicates that the applicant is at least entitled to a claim having the narrower meaning, we consider the notice function of the claim to be best served by adopting the narrower meaning.").

court undertakes in a patent case," the Federal Circuit observed.[161] Deciding the claim interpretation issue tends to decide the subsequent, connected infringement issue.[162] And the hearings themselves resemble bench trials, with extensive argument or live testimony.[163]

E. Summary; Other Motions and Postures

Pretrial motions on the admissibility of evidence, entry of a preliminary injunction, certification of a class, and interpretation of

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[161] *In re* Apple Inc., 979 F.3d 1332, 1338 (Fed. Cir. 2020); *see, e.g.*, Lonestar Inventions, L.P. v. Sony Elecs. Inc., No. 6:10-CV-588-LED-JDL, 2011 WL 3880550, at *4 (E.D. Tex. Aug. 29, 2011) (court "invested a considerable amount of time analyzing the patent including holding a *Markman* hearing"). Most judges rely on the lawyers to educate them, but they also may designate a special independent expert or a technical advisor to help translate the concepts and materials. *See* Andrew T. Zidel, *Patent Claim Construction in the Trial Courts: A Study Showing the Need for Clear Guidance from the Federal Circuit*, 33 SETON HALL L. REV. 711, 732 (2003); FED. R. EVID. 706; Reilly v. United States, 863 F.2d 149, 155–57 (1st Cir. 1988).

[162] *See* Elf Atochem N. Am., Inc. v. Libbey-Owens-Ford Co., 894 F. Supp. 844, 859 (D. Del. 1995); *see also* General Mills v. Hunt-Wesson Inc., 917 F. Supp. 663, 667 (D. Minn. 1996) ("*Markman* makes clear that the proper construction of a claim can make short work of the question of infringement."), *aff'd*, 103 F.3d 978 (Fed. Cir. 1997); Frank M. Gasparo, Markman v. Westview Instruments, Inc. *and Its Procedural Shock Wave: The* Markman *Hearing*, 5 J.L. & POL'Y 723, 724 (1997) ("[T]he interpretation of a patent's claims usually determines which party will be victorious at trial.").

[163] *See, e.g.*, JVI, Inc. v. Truckform Inc., No. CIV. 11-6218 FLW, 2012 WL 6708169, at *1 (D.N.J. Dec. 26, 2012) ("After reviewing the parties' substantial briefing and exhibits, and holding a full-day Markman hearing," the court construed a patent for concrete-block connectors); j2 Glob. Commc'ns, Inc. v. EasyLink Servs. Int'l Corp., No. CV 09-04189 DDP (AJWx), 2011 WL 1532048, at *2 (C.D. Cal. Apr. 21, 2011) (court "conducted a lengthy *Markman* hearing" on messaging technology patents "with extensive briefing" in advance); LifeScan, Inc. v. Home Diagnostics, Inc., 103 F. Supp. 2d 345, 362–63 (D. Del. 2000) (proceedings entailed "extensive *Markman* briefing by both parties and a lengthy *Markman* hearing"), *aff'd*, 13 F. App'x 940 (Fed. Cir. 2001); *see also* Jerry A. Riedinger, Markman *Twenty Years Later: Twenty Years of Unintended Consequences*, 10 WASH. J.L. TECH. & ARTS 249, 273 (2015) (*Markman* proceedings have "ranged from long evidentiary hearings, to attorney arguments, to written submissions").

a patent may dispose of the suit and almost always go to its merits more than tangentially. With these motions, therefore, courts applying *Center for Auto Safety* should treat the case file as being presumptively open. Other merits-related proceedings carrying the public access right include motions for relief from a judgment, for a directed verdict or new trial,[164] or to quash an indictment or suppress evidence in a criminal case,[165] as well as search warrant applications[166] and meetings of creditors in bankruptcy court.[167] The presumption of access may also apply to the records submitted with many other non-discovery motions, such as motions to intervene; transfer venue; dismiss for lack of jurisdiction or failure to join an indispensable party; issue emergency relief; reconsider an order; certify an interlocutory appeal; stay or consolidate actions; or bifurcate issues or parties.[168]

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[164] *See, e.g.*, Sisk v. Abbott Labs., No. 1:11-CV-00159-MR-DLH, 2014 WL 1874976, at *2 (W.D.N.C. May 9, 2014) (nixing request of "parties [that] s[ought] the wholesale filing under seal of the trial transcript and the entirety of these post-trial proceedings."); United States v. French, No. 1:12-CR-00160-JAW, 2017 WL 27932, at *1–3 (D. Me. Jan. 3, 2017) (overruling objection to disclosing materials submitted with motion for new trial).

[165] 28 U.S.C. § 636(b)(1)(A) (removing such criminal motions from magistrate judge jurisdiction); *cf.* Waller v. Georgia, 467 U.S. 39, 46–47 (1984) (assessing a criminal defendant's Sixth Amendment right to a public trial and concluding that "[t]he need for an open proceeding may be particularly strong with respect to suppression hearings."); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984) (remarking that "the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness.").

[166] *See, e.g.*, United States v. Sealed Search Warrants, 868 F.3d 385, 390–96 (5th Cir. 2017) (discussing case law relevant to accessing criminal warrant materials); *In re* Application of Newsday, Inc., 895 F.2d 74, 79 (2d Cir. 1990) (holding that a search warrant application is "a public document subject to a common law right of access"); Cowles Publ'g Co. v. Murphy, 637 P.2d 966, 969 (Wash. 1981) (explaining that "[a]ccess to search warrants and affidavits of probable cause can reveal how the judicial process is conducted.").

[167] *See* 11 U.S.C. §§ 341, 343.

[168] *See* Estate of Levingston v. Cnty. of Kern, No. 1:16-cv-00188-DAD-JLT, 2017 WL 4700015, at *1 n.1 (E.D. Cal. Oct. 19, 2017) (stating that under *Center for Auto Safety*, the access presumption may apply to "motions for preliminary injunction, for sanctions, or *in limine*" and applying the presumption to a petition for approval of a minor's compromise of claims); Cont'l Auto. Sys., Inc. v. Avanci, LLC, No. 19-CV-02520-LHK, 2019 WL 6612012, at *3 (N.D. Cal. Dec.

CONCLUSION

Access to judicial records has added value and importance today, when even more cases are settling before trial and internet-based dockets allow people to conveniently read material online.[169] In addition to reviewing court documents, people can now watch hearings over the web.[170] But while these developments promote accountability, only if actual evidence is available can the public stay informed and the open-records policies be upheld.[171]

Documents rather than testimony typically provide the best evidence in commercial controversies, and exposure of wrongdoing remains essential to achieving appropriate reform and redress.

5, 2019) (applying the access presumption to a motion to transfer venue under 28 U.S.C. § 1404(a)); Coleman v. Brown, No. 2:90-cv-0520 KJM DB P, 2018 WL 5292744, at *2 (E.D. Cal. Oct. 25, 2018) (access presumption applied to the report of a correctional department's psychiatrist even though it was not filed by a party or as part of a motion); *In re* Estate of Campbell, 106 P.3d 1096, 1105–08 (Haw. 2005) (access presumption applied to probate proceedings).

[169] *See supra* note 17. Dockets themselves constitute judicial records, and "[i]t would make little sense to provide public access to court documents but not to the indices that record them and thus make them accessible." *In re* Leopold, 964 F.3d 1121, 1129 (D.C. Cir. 2020). On December 8, 2020, the House of Representatives approved and sent on to the Senate a bill that would make the federal courts' PACER electronic case-filing system free for most citizens. *See* Open Courts Act of 2020, H.R. 8235, 116th Cong. (2019–20). Also in 2020, the Federal Circuit, in a class action asserting PACER should be free, affirmed a ruling that the federal judiciary improperly spent almost $200 million in PACER fees. *See* Nat'l Veterans Legal Servs. Program v. United States, 968 F.3d 1340, 1346, 1357 (Fed. Cir. 2020).

[170] *See* Alison Frankel, *Five Big Business Litigation Questions for 2021*, REUTERS (Jan. 3, 2021, 3:30 PM), https://www.reuters.com/article/us-otc-2021/five-big-business-litigation-questions-for-2021-idUSKBN2980NE (noting that "COVID-19 forced courts to adopt procedures that have opened their proceedings to member of the public who would otherwise not have been able to see or hear them."); Dorothy Atkins, *Settling on Zoom: The Rise of Pro Se MDL Objectors*, LAW360 (Dec. 22, 2020), https://www.law360.com/articles/1337218/settling-on-zoom-the-rise-of-pro-se-mdl-objectors (describing how the democratizing effect of this pandemic-induced development in legal practice is amplified when citizens not only can watch but can also air their views to the court via Zoom).

[171] *See supra* Part I.A (discussing the public's right to access court documents).

Documents obtained by journalists show that Exxon and Shell knew for decades but denied that fossil-fuel emissions were causing climate change.[172] Leaked documents suggest Purdue Pharma deliberately concealed information about the potency and addictive qualities of OxyContin.[173] E-mails produced to Congress show that Facebook's CEO sought to acquire rivals because "if they grow to a large scale they could be very disruptive . . . . [W]e can likely always just buy any competitive startups."[174]

Documents produced in complex litigation typically receive blanket protection, meaning they cannot be seen by a third party even if they are not, in fact, confidential.[175] This incongruous state of affairs disserves the tradition and policy of open litigation. Yet the practice of over-designating business records under an "umbrella" protective order seems here to stay.[176] Worse, "too often,

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[172] *See* Neela Banerjee et al., *Exxon: The Road Not Taken*, INSIDE CLIMATE NEWS (2015), https://insideclimatenews.org/book/exxon-the-road-not-taken/; Benjamin Franta, *Shell and Exxon's Secret 1980s Climate Change Warnings*, THE GUARDIAN (Sept. 19, 2018), https://www.theguardian.com/environment/climate-consensus-97-per-cent/2018/sep/19/shell-and-exxons-secret-1980s-climate-change-warnings; Ashley Braun, *An Illustrated History of What Big Oil Knew About Climate Change—Before the Moon Landing*, DESMOG (Mar. 3, 2019), https://www.desmogblog.com/2019/03/03/illustrated-history-american-petroleum-institute-oil-knew-climate-change.

[173] *See* PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY (2021).

[174] E-mail from Mark Zuckerberg (Feb. 27, 2012) (listed with House Committee on the Judiciary under FB-HJC-ACAL-00063220–22), available at https://judiciary.house.gov/uploadedfiles/0006322000063223.pdf; E-mail from Mark Zuckerberg (Apr. 9, 2012) (listed with House Committee on the Judiciary under FB-HJC-ACAL-00067600), available at https://judiciary.house.gov /uploadedfiles/0006760000067601.pdf.

[175] *See supra* notes 6, 10, 17 & 41 and accompanying text.

[176] *See* Sorin Grp. USA, Inc. v. St. Jude Med., S.C., Inc., No. CV 14-4023 (RHK/JJK), 2015 WL 12803580, at *5 (D. Minn. Apr. 15, 2015) (ruing the "tendency for parties to over-designate materials in litigation as confidential when the court enters a blanket protective order"); Minter v. Wells Fargo Bank, N.A., No. CIV WMN-07-3442, 2010 WL 5418910, at *7 (D. Md. Dec. 23, 2010) (concluding that over-designation imposes burdens by "mak[ing] litigation more expensive and more complicated without worthwhile purpose"); Prescient Acquisition Grp., Inc. v. MJ Pub. Tr., 487 F. Supp. 2d 374, 376 (S.D.N.Y. 2007) (criticizing "wholesale over-designation of materials" and unsealing summary judgment exhibits *sua sponte*); THK Am., Inc. v. NSK Co., 157 F.R.D. 637, 645

judicial records are sealed without any showing that secrecy is warranted," resulting in "a gradual, *sub silentio* erosion of public access to the judiciary, erosion that occurs with such drop-by-drop gentleness as to be imperceptible," a federal appeals court warned in 2021.[177] To counter this antidemocratic trend, particularly given litigants' incentives to seal as described in the Introduction, judges should question attempts to redact any filed document other than for personal information such as birthdates or social security numbers.[178]

The Ninth Circuit's "more than tangential" standard sets a low bar for mandatory "compelling reasons" review and can be applied to ensure dockets are presumptively open and cases litigated transparently. Documents filed with redactions that do not rise to the level of trade secrets should be promptly unsealed.

(N.D. Ill. 1993) (sanctioning parties for designating documents highly confidential in bulk); *see also* Endo, *supra* note 41, at 1253 (noting that suppression of information obtained in discovery "may reduce necessary coordination with outside experts, socially beneficial private enforcement, and oversight over the courts themselves.").

[177] Le v. Exeter Fin. Corp., 990 F.3d 410, 421 (5th Cir. 2021) (italicization added); *see also* Stoller, *supra* note 9 ("Today, big business in America is far too secretive, with an endless thicket of confidentiality rules, trade secrets law, and deferential judges . . . . [who] redact way too many details, often protecting what they perceive as business proprietary information but [what] is in fact simply evidence of cheating.").

[178] *See* FED. R. CIV. P. 5.2(a) (permitting redactions from court filings of birthdates, names of minors, and social security, taxpayer identification, and financial account numbers).