chadbourne

Chadbourne & Parke LLP
1301 Avenue of the Americas
New York, NY 10019
telephone: (212) 408-5100

Abbe David Lowell
direct tel 212-408-1170
alowell@chadbourne.com

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BY EMAIL (CaproniNYSDChambers@nysd.uscourts.gov)

The Honorable Valerie E. Caproni
United States District Judge
United States District Court
Southern District of New York
40 Foley Square, Room 240
New York, NY 10007

Re: *U.S. v. Silver*, 15-cr-00093-VEC (S.D.N.Y.)

Dear Judge Caproni:

Pursuant to Your Honor's Order of January 15, 2016, I write on behalf of my client to request that the government's motion *in limine* concerning certain character evidence, the defense's opposition, and portions of the October 16, 2015 hearing transcript regarding same remain under seal. In the event that Your Honor chooses to unseal these documents, then I request that they be redacted in the manner proposed in the attached to protect the privacy of my client, who was not a party to this action and has a strong interest in having unsubstantiated personal allegations made against her presented in a way which will sufficiently conceal her identity.

While Courts acknowledge a presumption of access to judicial documents, this first requires a determination of whether the documents at issue are in fact "judicial documents" and then whether they must be disclosed after balancing the presumption of access against countervailing factors, including "interests in 'unwarranted reputational injury'" and "the privacy interests of third parties." *Lugosch v. Pyramid Co. Ondonga,* 435 F.3d 110, 118-20 (2d Cir. 2006).

In order for a document to be considered a "judicial document" it must be "relevant to the performance of the judicial function and useful in the judicial process." *Id*. at 119 (citations omitted). It is my understanding that the content of the documents at issue here never came to light in the trial of Speaker Sheldon Silver. Under these facts, it is questionable whether these documents were "relevant" at all or useful to the "judicial process." Even if the Court finds that these documents are considered "judicial documents," it must then determine the weight of the presumption of access given the "role of the material at issue in the exercise

of Article III judicial power." *Id.* at 119 (citations omitted). Again, if these issues were raised in motions *in limine* and then the parties made the determination not to raise them at trial (as it appears that the Court reserved judgment on the issue), it is clear that the role of these materials was irrelevant to the proceedings. As the Second Circuit has made clear:

> "[w]e believe that the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance."

United States v. Amodeo, 71 F.3d 1044, 1049 (2d Cir. 1995). The content of these documents can be fairly deemed to be irrelevant since none of this content was raised at trial. The government was able to make its case without raising this insignificant character evidence which implicated third parties.

If the Court assumes that the documents at issue are "judicial documents" and continues this analysis, it must then balance the countervailing factors against the presumption of access to the documents, which weigh heavily in favor of non-disclosure in this circumstance. The Second Circuit understands that privacy interests of third parties weigh in favor of non-disclosure.

> "[The Court has] previously held that "[t]he privacy interests of innocent third parties ... should weigh heavily in a court's balancing equation." *Gardner v. Newsday, Inc. (In re Newsday, Inc.),* 895 F.2d 74, 79–80 (2d Cir.) (quoting *United States v. Biaggi (In re New York Times Co.),* 828 F.2d 110, 116 (2d Cir.1987), *cert. denied,* 485 U.S. 977, 108 S. Ct. 1272, 99 L.Ed.2d 483 (1988) (citation omitted)), *cert. denied,* 496 U.S. 931, 110 S. Ct. 2631, 110 L.Ed.2d 651 (1990). Such interests, while not always fitting comfortably under the rubric "privacy," are a venerable common law exception to the presumption of access. Courts have long declined to allow public access simply to cater "to a morbid craving for that which is sensational and impure." *In re Caswell,* 18 R.I. 835, 836, 29 A. 259, 259 (1893). As the Supreme Court noted in *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 98 S. Ct. 1306, 55 L.Ed.2d 570 (1978), courts have the power to insure that their records are not "used to gratify private spite or promote public scandal," and have "refused to permit their files to serve as reservoirs of libelous statements for press consumption." *Id.* at 598, 98 S. Ct. at 1312 (internal quotation marks and citation omitted) (collecting cases); *see also Stevenson v. News Syndicate Co.,* 276 A.D. 614, 96 N.Y.S.2d 751, *aff'd,* 302 N.Y. 81, 96 N.E.2d 187 (2d Dep't 1950)."

United States v. Amodeo, 71 F.3d 1044, 1050-51 (2d Cir. 1995). The Court here has an interest in assuring that its documents are not used to promote public scandal or to cater to the sensationalism of the media. Additionally, the Court in *Amodeo* noted that when weighing a right of privacy, certain factors such as "family affairs" and "embarrassing conduct with no public ramifications" "will weigh more heavily against access than conduct affecting a substantial portion of the public." *Id.* at 1051. This consideration also weighs against disclosure here, as the content of these documents does not impact the public.

Finally, the Court in *United States v. Amodeo,* determined that because a filed report subjected certain individuals "to the public airing of accusations that are anonymous, unverified, and, to a degree, of doubtful veracity" that the decision to unseal the report was to be reversed. *Id*. at 1047-48. Similarly, the content here could be categorized in this manner.

Based on the foregoing, the documents at issue should remain under seal. These documents should not be deemed "judicial documents" and should not be available to the public. Even if the Court determined that these are properly "judicial documents," the countervailing factors weigh entirely against the presumption of access.

If the Court determines that the documents at issue should be disclosed to the public, then we request that they be disclosed in redacted form so as to protect the privacy of my client. Our proposed redactions are attached for your consideration and we support the inclusion of all of the government's proposed redactions (in black) and our additional proposed redactions (in blue).

We appreciate the Court's attention and consideration.

Respectfully submitted,

/s/ Abbe David Lowell

Abbe David Lowell

cc: Counsel of Record (via email)

Attachments