MOLOLAMKEN

Steven F. Molo
MoloLamken LLP
540 Madison Avenue
New York, NY 10022
T: 212.607.8170
F: 212.607.8161
smolo@mololamken.com
www.mololamken.com

FILED UNDER SEAL

January 22, 2016

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

VIA E-MAIL AND HAND

Re: *United States v. Sheldon Silver*, No. 15 Cr. 093 (VEC)

Dear Judge Caproni:

As you know, we represent Sheldon Silver in the above-captioned case. We write pursuant to the Court's order directing the parties to submit letter briefs as to whether the Government's October 12, 2015 motion *in limine*, the defense's response, and the transcript of the arguments regarding the motion – all currently under seal – should be publicly disclosed now that the trial has concluded. Dkt. #138. For the reasons discussed herein, we respectfully submit that these materials should remain permanently sealed in their entirety.

The materials at issue concern the Government's unsuccessful motion *in limine* to offer at trial irrelevant and tawdry gossip about two purported extramarital affairs. The Court excluded such evidence because its "probative value is low" and "overwhelme[d]" by its unfair prejudice to Mr. Silver. Ex. A (sealed portion of October 16, 2015 hearing) at 107. Moreover, the Court recognized that public disclosure of the allegations would violate Mr. Silver's right to a fair trial. *Id.* at 115. Disclosure would also violate the privacy rights of Mr. Silver and the two women mentioned in the Government's motion. *Id.* The Court therefore sealed the Government's motion, the defense's response, and the transcript of the arguments pending trial. *Id.*

The Court should reach the same conclusion now. Neither the First Amendment nor the common law compels public access to these materials. Mr. Silver's fair-trial rights, his privacy interests and that of third parties far outweigh whatever minimal value airing the Government's accusations might have for the judicial process. And while the Government offers redactions, those redactions fail to even shield the identities of the two women discussed in the *in limine* materials, let alone meaningfully protect their privacy or Mr. Silver's. The Court should order

that the filings and transcript regarding the Government's October 12, 2015 motion *in limine* remain under seal.[1]

I. The First Amendment Permits Sealing the Motion Record

Pre-trial motion papers like these are "judicial documents" to which a presumption of public access exists under the First Amendment. *See Matter of N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (the presumption of access applies only to "judicial documents"). That presumption, however, "is far from absolute." *United States v. Rajaratnam*, 708 F. Supp. 2d 371, 377 (S.D.N.Y. 2010); *see also N.Y. Times Co.*, 828 F.2d at 116. Protecting such material "from the public eye is often critical to protect defendants' fair trial and privacy interests, especially when the material has yet to be tested in court." *Rajaratnam*, 708 F. Supp. 2d at 377. As a result, the First Amendment presumption can be overcome by "specific, on-the-record findings that higher values necessitate a narrowly tailored sealing." *Lugosch*, 435 F.3d at 126.

As the Court previously held, unsealing the material could place Mr. Silver's fair-trial rights at risk. *See* Ex. A at 115 (finding that fair-trial concerns over picking a jury justified sealing this material before trial). That remains a concern today. On January 21, 2016, Mr. Silver filed a motion for a new trial under Rule 33 as well as a motion for a judgment of acquittal under Rule 29. Dkt. # 179, 180. Those two motions raise serious questions about evidentiary rulings and other issues. Any new trial that Mr. Silver might receive – as a result of his post-trial motions or appeal if such motions are unsuccessful – would be tainted if the Government's October 12 motion and the related materials were unsealed. At a minimum, therefore, Mr. Silver's right to a fair trial weighs strongly against unsealing until after Mr. Silver is tried again or his appellate rights are exhausted.[2]

Moreover, Mr. Silver and the two women identified in the Government's motion have an obvious and compelling interest in keeping these scurrilous allegations private. "[T]he privacy interests of innocent third parties as well as those of defendants . . . should weigh heavily in a court's balancing equation in determining what portions of motion papers should remain sealed or should be redacted." *N.Y. Times Co.*, 828 F.2d at 116; *see Press-Enterprise Co. v. Superior*

---

[1] Pursuant to the Court's order, counsel for Mr. Silver have met and conferred with the Government on this issue but have been unable to reach an agreement.

[2] In a January 22, 2016 letter to the Court, the *New York Times* asserts that "[w]ere Mr. Silver to win a retrial, whatever prejudice to the new proceeding might result from this unsealing is overshadowed by the extensive coverage of the trial and the conviction, and can be adequately addressed through the voir dire process." That is plainly wrong. However extensive the press coverage might have been to date, that does not justify ***more*** disclosures that could taint the jury pool – especially on a subject that was not previously covered by the press and which is as personal, sensitive, and prejudicial as this one.

Court, 464 U.S. 501, 511 (1984) (a person may have a "compelling interest" in privacy for "deeply personal matters that person has legitimate reasons for keeping out of the public domain"); *United States v. Doe*, 63 F.3d 121, 128 (2d Cir. 1995) (similar). Such privacy interests can justify permanent sealing of materials after trial. *See, e.g.*, *United States v. Starr*, No. 10 Cr. 520, 2011 WL 1796340, at *2 (S.D.N.Y. May 2, 2011) (permanently sealing sentencing submissions for privacy reasons). The Second Circuit has instructed courts weighing privacy interests to consider "the degree to which the subject matter is traditionally considered private rather than public," "the sensitivity of the information and the subject, "how the person seeking access intends to use the information," the "reliability of the information," and whether "there is a fair opportunity for the subject to respond to any accusations contained therein." *United States v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995).

Each of those factors overwhelmingly supports permanently sealing all material regarding the Government's motion. Even if these allegations were true, the privacy of consenting adults in their sexual lives is not merely a matter of tradition, but a requirement of due process. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003). Thus, both Mr. Silver and the two women referred to in the Government's papers have a strong interest in keeping the documents sealed, regardless of whether their alleged conduct was "proper" or not. *See Seals v. Mitchell*, No. 04 Civ. 3764, 2011 WL 1233650, at *4 (N.D. Cal. Mar. 30, 2011) (party's "need for confidentiality" regarding alleged sexual misconduct "weighs strongly in favor of sealing"); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1976) (citing *In re Caswell*, 18 R.I. 835, 836 (1893)) (privacy supports sealing the "painful and sometimes disgusting details of a divorce case"). Likewise, the "sensitivity" of unproven gossip about Mr. Silver's alleged affairs is obvious, particularly for the two women who have never been accused of wrongdoing. Mr. Silver's wife and children would also be needless victims of these disclosures.

The only possible public use of exposing the prosecutors' scandalous allegations would be "to cater to a morbid craving for that which is sensational and impure" and "promote public scandal" – uses for which "courts have long declined to allow public access." *Amodeo*, 71 F.3d at 1050-51 (citing *Caswell*, 18 R.I. at 836); *see also United States v. Gotti*, 322 F. Supp. 2d 230, 250 (E.D.N.Y. 2004) (finding "no reason" to disclose sentencing letters "revealing the nature of the writers' personal relationship with the defendant"). The allegations in question are wholly untested, made without a single citation or any proof beyond the prosecutor's say-so. *Amodeo*, 71 F.3d at 1051 ("Raw, unverified information should not be as readily disclosed as matters that are verified"); *Rajaratnam*, 708 F. Supp. 2d at 376 (the presumption of access is "a good deal weaker when untested . . . material is at issue," "assuming it exists at all"). And Mr. Silver will have no chance to rebut those allegations in court because the subject, being "totally immaterial" to his guilt or innocence in this case, was properly kept out of trial. *See United States v. Cox*, 536 F.2d 65, 71 (5th Cir. 1976).

By contrast, the public value of unsealing these records is negligible. Even under the Government's theory of admissibility, the evidence would only become relevant if Mr. Silver "put on the sort of character evidence that would be directly impeached by this conduct." Ex. A

at 108. Mr. Silver never put his character in issue. Because the purported affairs never became even hypothetically relevant to the charges and defenses raised at trial, the public interest in those affairs is minimal at best and easily outweighed by the privacy interests of Mr. Silver and the two women. *Cf. Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004) (the "presumptive right" to access "is at its apogee when asserted with respect to documents relating to 'matters that directly affect an adjudication'").[3]

II. The Common Law Right of Access Permits Sealing the Motion Record

Compared to the First Amendment, the motion papers are subject to a weaker presumption of access under federal common law. *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) ("The common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment."); *see Ferguson v. Ferrante*, No. 13 Civ. 4468, 2015 WL 3404140, at *1 (S.D.N.Y. May 27, 2015) (Caproni, J.) (the First Amendment right of access is "more robust" than that afforded by common law). In particular, the Second Circuit affords varying weight to the presumption of access based on "the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information in those monitoring the federal courts." *Lugosch*, 435 F.3d at 119 (internal quotation marks omitted). "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." *Id.*

The common law presumption of access in this case should be given little, if any, weight. Because the motion *in limine* was denied, the allegations "c[ame] within the court's purview solely to insure their irrelevance," thus placing the Government's motion squarely "[a]t the low end of the continuum, where testimony or documents play only a negligible role in the performance of Article III duties." *Lugosch*, 435 F.3d at 119. In such circumstances, "the weight of the presumption is low and amounts to little more than a prediction of public access absent a countervailing reason." *Id.* As a result, the same privacy interests that override any public interest under the First Amendment test compel sealing under the weaker common law test as well. *See* p. 2, *supra*.

---

[3] In its January 22 letter, the *New York Times* asserted that unsealing is warranted because the public interest is "at a maximum in cases . . . that involve allegations of corruption involving a public official." Even if that were true, it is beside the point. Public interest in this trial does not mean that matters found ***wholly irrelevant*** to the trial should become public as well. Exposing Mr. Silver's private life would do nothing to either increase public awareness of alleged public corruption or enable scrutiny of whether Mr. Silver was properly charged or convicted.

III. The Government's Proposed Redactions Are Not Sufficient

The Government has offered proposed redactions to the briefs and the transcript relating to its motion. Exs. B (proposed redactions of Government brief), C (proposed redactions of opposition brief), D (proposed redactions of hearing transcript). But the Government's redactions fail even to meaningfully conceal the identity of the women named in its papers. For example, the Government's redacted version still discloses that [redacted] is an "individual who as a lobbyist had special access to the defendant" and [redacted] Ex. B at 5, giving substantial clues as to her identity. Likewise, the redacted version drops the hints that Mr. Silver supposedly recommended [redacted] for a state job and maintained a separate telephone to talk to her [redacted] *Id.* at 6. As explained in a January 22, 2016 letter by Manuel Ortega, counsel for one of the two women, even in redacted form, these two women face substantial risk that they will be linked to the Government's tawdry gossip against Mr. Silver – [redacted]

Moreover, any redactions would be inappropriate because "the decision to unseal" the Government's motion is "an all or nothing matter." *Amodeo*, 71 F.3d at 1053. ***Any*** disclosure of this motion, no matter how redacted, will disclose the Government's claim that Mr. Silver engaged in two extramarital affairs. Even in redacted form, there is no purpose to the "public airing of accusations that are anonymous, unverified, and to a degree, of doubtful veracity." *Id.* at 1048. Given that the papers cannot be redacted of prejudicial material and still provide meaningful information to the public, the entire motion record should remain sealed in its entirety. *See Amodeo*, 71 F.3d at 1048 (sealing entire record proper where the heavy redactions needed "would provide little meaningful information to the public because the redactions are so extensive or might, if responded to, cause the confidential sources to be identified").[4]

* * *

Mr. Silver's private personal life has nothing to do with this case. The Court properly rebuffed the Government's efforts to offer evidence of purported affairs, and the need for privacy requires keeping that effort out of public view. Mr. Silver therefore respectfully requests that the transcript and briefs relating to the Government's October 12, 2015 motion *in limine* remain permanently sealed.

---

[4] While Abbe Lowell, counsel for one of the two women, proposed redactions to the Court in a January 21, 2016 letter, Mr. Silver respectfully disagrees with the claim that appropriate redactions are possible in this case. Even if the proposed redactions in the January 21 letter were sufficient to conceal the identity of Mr. Lowell's client – and Mr. Silver believes that they are not – the redactions would still obviously violate the privacy interests of others concerned, including Mr. Silver, Mr. Silver's family, and the other woman identified in the Government's motion.

Respectfully submitted,

/s/ Steven F. Molo

Steven F. Molo
Justin V. Shur

CC: All counsel of record (via e-mail)