

Docket No. H030099
Santa Clara Co. Super. Court No. CV053609

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JOHN DOE, aka "LASHWR45" on Yahoo!,

Appellant

v.

H.B. FULLER COMPANY

Respondent

**NOTICE OF MOTION AND MOTION TO UNSEAL ALL
DOCUMENTS SEALED PURSUANT TO THE JANUARY 27, 2006
ORDER RE: FILING DOCUMENTS UNDER SEAL IN
CONNECTION WITH JOHN DOE'S MOTION TO QUASH
SUBPOENA ISSUED BY H.B. FULLER.**

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**TO PLAINTIFF H.B. FULLER COMPANY AND TO ITS
COUNSEL OF RECORD:**

PLEASE TAKE NOTICE that John Doe aka “lashwr45” on Yahoo! (hereinafter “Doe”) hereby moves the court, pursuant to Cal. Rules of Court 8.54, for an order unsealing all documents sealed pursuant to the January 27, 2006 Order re: Filing Documents Under Seal in Connection with John Doe’s Motion to Quash Subpoena Issued by H.B. Fuller. (CT at 46).

Good cause exists to unseal the records because the order to seal does not meet the requirements set forth in Cal. Rules of Court 243.1. Section 243.1 provides that “the court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest...”

Doe’s motion is based on this Notice of Motion, the Memorandum in support of the Motion, and on any evidence and argument to be presented at any hearing on this matter.

MEMORANDUM

I. FACTS

This case involves a subpoena to third party internet communications provider Yahoo! to discover information that would destroy appellant’s right to speak anonymously. Plaintiff H.B. Fuller Company (Fuller) served Yahoo! with a subpoena seeking personally identifying information about appellant. (CT at 9). On December 16, 2005 appellant moved to quash the subpoena. (CT at 14). In connection with its Opposition to the Motion to Quash, filed on January 30, 2006, Fuller

provided a declaration from Michele Volpi that attached two Yahoo! message board postings. (Volpi Declaration attached to Appellant's Opening Brief (AOB) as Exhibit A. All Exhibit references herein refer to attachments to the AOB). Fuller then submitted a proposed order and stipulation allowing the parties to file under seal 1) the declaration of Michele Volpi and attached exhibits, 2) any reply filed by John Doe in support of his Motion to Quash, and 3) any declaration of John Doe in connection with his Motion to Quash. (CT at 46). The proposed order also stated that any information provided pursuant to a declaration that is filed under seal will be kept confidential at least until the Court provides its Order on John Doe's Motion to Quash. *Id.* The order further states that the parties agreed to seek the court's guidance with respect to the confidentiality of these declarations at the oral argument of John Doe's Motion to Quash. *Id.* The proposed order and stipulation was signed by Superior Court Judge Socrates P. Manoukian on January 27, 2006. *Id.* The trial court did not make any findings of fact before signing the order.

Fuller claims that information about //REDACTED// contained in the Volpi declaration and in the Doe postings (Volpi/Doe information) is confidential. Fuller filed the Declaration of Michele Volpi in Support of H.B. Fuller' Opposition to John Doe's Motion to Quash Subpoena, including screenshots of two postings by user "lashwr45" as exhibits (attached as Exhibit A) under seal.

Following the Order to seal, Doe filed the following documents under seal because they contain references to and discussion of the Volpi/Doe information: 1) Declaration of John Doe (Attached as Exhibit B); 2) Defendant John Doe's Reply to H.B. Fuller Company's Opposition to Motion to Quash (Attached as Exhibit C); 3) Declaration of Daniel P. Taber (Attached as Exhibit D); 4) Declaration of Jennifer Stisa Granick in

Support of John Doe's Motion to Quash Subpoena (Attached as Exhibit E).

The parties failed to raise the issue of confidentiality before the trial court and the order sealing the Volpi/Doe information still stands. As a result, Doe felt constrained to file his Appellant's Opening Brief under seal because it discusses the Volpi/Doe information.

On appeal, the Superior Court Clerk certified that she was unable to locate the five of the sealed documents listed above and discussed below when she compiled the trial record (CT at 330). The filed copies of the sealed documents are attached as Exhibits A through E to Appellant's Opening Brief. Because the Exhibits, which complete the record, comprise more than ten pages, Appellant contemporaneously has applied for Court permission to include them.

II. DISCUSSION

This court should unseal all documents currently under seal in connection with this matter because the sealing does not protect an interest which surpasses the constitutional right of public access to court records. The First Amendment creates a presumption that court records will be open to the public. To justify a seal on court documents, the proponent of secrecy must overcome this presumption. Under Cal. Rules of Court 243.1(d), in order to overcome this presumption a court sealing records must make express findings that there is an overriding interest prejudiced by the public availability of the court records. The seal must be narrowly tailored to protect this overriding interest. There must also be no less restrictive means to protect that interest. The Volpi/Doe information meets none of these requirements, so this Court should unseal the documents that contain the Volpi/Doe information and the documents that reference that information.

The records the trial court sealed should be unsealed by this court

because those records were not properly sealed under Cal. Rules of Court 243.1, which codifies the requirements of the California Supreme Court promulgated in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal.4th 1178, 1217-1218 (1999). The California Supreme Court has held that the First Amendment provides a right of access to ordinary civil trials and proceedings. *NBC Subsidiary*, 20 Cal.4th at 1217-1218. In ordinary civil cases, trial records and the documents they contain are therefore presumed open and accessible to the public. *Id.* In determining whether to unseal records, this court must presume that records are open to the public.

A court may only seal records by making express factual findings which overcome the constitutional presumption of public access, and must set forth those findings in the order to seal. Cal. Rules of Court 243.2 (h)(4). Under Cal. Rules of Court 243.1(d), the court must expressly find that 1) there is an overriding interest to support closure or sealing; 2) there is a substantial probability that the interest will be prejudiced absent closure or sealing; 3) the proposed closure or sealing is narrowly tailored to serve the overriding interest 4) there is no less restrictive means of achieving the overriding interest. *Id. See also NBC Subsidiary*, 20 Cal.4th at 1217-1218.

This Court owes the trial court's decision to seal no deference and should review the propriety of placing records under seal *de novo* in an independent review. In *Huffy v. Superior Court*, 112 Cal.App.4th 97 (2003), the trial court sealed trial records by stipulation of the parties but held no hearing and made no findings to support sealing the records. *Id.* at 102. The seal covered over 2000 pages of trial records the defendant claimed contained confidential business information. *Id.* On appeal, the court refused to seal even selected documents. *Id.* at 110. In so refusing, it declared that the court order sealing the documents was entitled to no deference because it did not make express findings of compliance with the

Cal. Rules of Court 243.1 requirements nor did the trial court hold hearings to support those findings. *Id.* at 104. In *People v. Jackson*, 128 Cal.App.4th 1009, 1021 (2005), the appeals court applied an independent review standard, when “the trial court did not take testimony,” there was “no credibility of witnesses to determine,” and the trial court only considered the same court records the appeals court was reviewing. *Id.* at 1021. In contrast, the trial court in *In re Providian*, 96 Cal.App.4th 292, 299 (2002) had exercised discretion, held hearings, and considered rule 243.1, so its ruling was reviewed for abuse of discretion. Because the trial court below made no findings and held no hearings that complied with the requirements of *NBC Subsidiary* or Cal. Rules of Court 243.1, this court should give their order to seal trial records no deference. This court must therefore do an independent, de novo, review and analysis of the 243.1 factors.

Furthermore, the court order sealing the documents states that the decision to seal should be reexamined in a later proceeding. The parties agreed in section F of the stipulation and proposed order that the Volpi/Doe information would remain confidential “at least until the court provides its order on John Doe’s Motion to Quash,” and to seek the courts guidance at the oral argument of John Doe’s Motion to Quash (CT at 46). At the hearing below, the order to seal was not discussed and no reexamination took place. The order should be reexamined now to comply with the stipulation in section F.

Fuller’s interest in sealing the Volpi/Doe information does not overcome the presumption of public access. Although protecting confidential business information might be considered an overriding interest, Fuller has not demonstrated that the Volpi/Doe information is confidential, that any interest in preserving its confidentiality would be prejudiced by inclusion in a trial record, or that there is no alternate way to

protect the business information. Therefore, the documents do not meet the constitutional or statutory requirements that must be met to seal them.

There is no overriding interest to support sealing the information contained in the Volpi declaration and Doe's postings. Information about business strategies or sensitive private information falling within a confidentiality agreement may be the type of information whose protection could qualify as an "overriding interest." *Universal Studios v. Superior Court*, 110 Cal.App.4th 1273, 1281 (2003). However, Fuller's "confidential" or "private" information is neither confidential nor private. The Volpi declaration describes //REDACTED//. (Exhibit A). The attached exhibits contain Doe's postings, which say //REDACTED//. (Exhibit B). Both types of information were available to the public even before Doe's postings. (Declaration of John Doe, Exhibit C at 11-17.) There is no reason to protect the confidentiality of public information, so such protection does not qualify as an overriding interest.

There is no substantial probability that any interest in business confidentiality will be prejudiced by disclosure of the Volpi /Doe information. In order for confidential business information to be sealed in a court record its disclosure must prejudice an overriding interest. Cal. Rules of Court 243.1(d). Although confidential business information could potentially be considered an overriding interest, *Universal* made clear that a settlement agreement with a confidentiality provision should not be sealed unless there was a showing that "serious injury would result from public disclosure." *Universal*, 110 Cal.App.4th at 1281. An insufficient showing of prejudice "to any legitimate proprietary or business interest" caused the *Universal* court to unseal records. *Id.* at 1283. Sealing the documents also requires a *substantial* prejudice to an overriding interest if the documents are made available. Cal. Rules of Court 243.1(d). No harm to

confidentiality can stem from publishing public information in a court record. Fuller's business interests will not be prejudiced by releasing information //REDACTED//. Fuller will not suffer any serious harm if the records are disclosed, nor will its interests be substantially prejudiced by disclosure.

The current seal is not narrowly tailored to protect any confidentiality interest Fuller might have, and there are less restrictive means to protect such interests if they exist. Express facts must establish that any seal is narrowly tailored and that there is no less restrictive means to protect the interest of a party who wishes to seal those records. Cal. Rules of Court 243.1(d). Fuller has not identified any specific piece of information that needs to be kept confidential or why that information should be kept confidential. It is not narrowly tailored to protect any particular secret. Nor has Fuller offered any evidence that a seal covering the current range of documents is the least restrictive means to protect any "secret." The current seal covering discussion of the //REDACTED// is too broad to meet the constitutional requirements of Cal. Rules of Court 243.1.

In fact, since the time of the Town Meeting, Fuller has had to disclose information about //REDACTED// in its filings with the Securities and Exchange Commission, just as Doe's attorney Dan Taber said it would. (Ex. E, Taber Decl. ¶¶ 11-12.) In its 2005 Annual Report of February 14, 2006 for Fiscal Year ending December 3, 2005, *available at* <http://www.sec.gov/Archives/edgar/data/39368/000119312506031637/d10k.htm>, the company reports that it outsourced certain of the company's information technology functions, reports that a number of managers and executives left the company (p. 17), affirms that the company hired Accenture LLP to assist in delivering Information Technology (p. 60), and discloses details of 2004 and 2005 restructuring activity (p. 64).

Doe merely disclosed information that competitors already knew, and because that information is already more widely reported in far more detail, Fuller cannot be harmed by competitors reading about general information on a Yahoo! message board.

Fuller has not and cannot show why the information it wants sealed should be made confidential or how it will suffer harm if the information is disclosed in the trial record. It has not demonstrated that any sealing meets the narrow tailoring requirement, or why other methods of maintaining confidentiality would be insufficient. It does not meet the constitutional requirements set forth in Cal. Rules of Court 243.1, so has not overcome the presumption of public access it must to legitimately remain sealed. Therefore, the records should be unsealed.

III. UNSEAL PROCESS

Under Cal. Rules of Court 243.2 (h), a party may move to unseal records and must provide notice to the other parties that it so moves. Doe has done so. This court has two options if it finds that there is insufficient basis on which to keep the Volpi/Doe information sealed. First, Doe asks that this Court issue an order to unseal the documents listed above, including Appellants Opening Brief.

In the alternative, it could return the sealed documents to Fuller, allow Fuller to refile in the public record any documents it chooses, and make a determination of this appeal based on those documents alone. In *Huffy*, the appellate court itself moved to unseal records sealed below. 112 Cal.App.4th at 99. The court then asked the parties whether there were specific documents meeting the Cal. Rules of Court 243.1 criteria which should remain sealed. *Id.* The court allowed the defendant to resubmit records it wished to keep sealed on appeal. *Id.* Once the court had made a final determination that even the resubmitted records could not be properly

sealed under California law, it returned those records to the defendant and allowed it to refile any documents it chose within 10 days with the stipulation that no documents would be filed under seal. 112 Cal.App.4th at 110.

IV. CONCLUSION

This Court should unseal all records now under seal, including the content of posting by John Doe, a.k.a “lashwr45,” John Doe’s reply brief in response to Plaintiff’s Opposition to Doe’s Motion to Quash, the Declaration of John Doe, and John Doe’s opening brief to this court filed contemporaneously with this motion. In the alternative, the Court should strike from the record any evidence that Fuller refuses to unseal, and decide the matter based on the public record alone.

Date: February 14, 2007

By: _____
Jennifer Stisa Granick
(CA Bar No. 168423)
Attorneys for Appellant JOHN
DOE, aka “LASHWR45” on
Yahoo!

PROOF OF SERVICE

I, the undersigned hereby declare:

I am over eighteen years of age and not a party to the above action. My business address is 559 Nathan Abbott Way, Stanford, CA 94305-8610.

On February 14, 2007, I caused to be served the following documents:

NOTICE OF MOTION AND MOTION TO UNSEAL ALL DOCUMENTS SEALED PURSUANT TO THE JANUARY 27, 2006 ORDER RE: FILING DOCUMENTS UNDER SEAL IN CONNECTION WITH JOHN DOE'S MOTION TO QUASH SUBPOENA ISSUED BY H.B. FULLER.

via Federal Express, by placing four (4) true and correct copies of the above-mentioned document in a properly addressed and sealed envelope in a pickup box routinely maintained by Federal Express, in conformity with the usual business practices of the Stanford Law School, on the following interested party:

Clerk of the Court
State of California
Supreme Court
350 McAllister Street
San Francisco, California 94102-4783

and *via* Federal Express, by placing one (1) true copy of the above-mentioned document in a properly addressed and sealed envelope in a pickup box routinely maintained by Federal Express, in conformity with the usual business practices of the Stanford Law School, on the following interested parties:

Attorneys for Respondent
Jose Luis Martin
Squire, Sanders & Dempsey
600 Hansen Way
Palo Alto, CA 94303-1043

PROOF OF SERVICE

Clerk of the Court
Superior Court of California
County of Santa Clara
191 North First Street
San Jose, California 95113

I declare, under the penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed this 14th day of February, 14 2007 at Stanford, California.

Amanda Smith