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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

In Re: ADVANCE HEALTH CARE DIRECTIVE OF SUMNER M. REDSTONE.	Case No. BP168725 [Assigned to The Hon. David J. Cowan, Department 79) **PETITIONER'S OPPOSITION TO PROPOSAL OF SUMNER M. REDSTONE TO SEAL TRIAL TESTIMONY AND EXHIBITS** Date: April 27, 2016 Time: 1:30 p.m. Dept.: 79

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I. INTRODUCTION

The Court has repeatedly stated that it will hold an open and public trial on May 6, 2016 where it will hear "all the relevant evidence that supports either side's position." *See* February 29, 2016 Order re Motion to Dismiss Petition at 19 ("[t]he Court also does not want any sealing of records to interfere with what evidence may be received at trial that is by its nature public"); March 18, 2016 Tentative Ruling on Four Motions to Seal Records at 6 ("all the relevant evidence that supports either side's position will be heard starting May 6 at the trial"); *Id.* at 7 n. 1 ("the Court is not proposing taking the drastic action taken by the trial court in *KNBC* to close the trial"); *Id.* at 10 n. 7 ("this Court is not suggesting that these proceedings should be closed"); *Id.* at 11 ("this Court is not intending to hold a closed hearing"); *Id.* at 12 ("nothing herein has any bearing on what the Court will do at the public trial which is when there will be a decision for which there should be rightful scrutiny"); and *Id.* at 16 ("[n]othing herein should be construed to infer that the public or the Press will be precluded from hearing the testimony or knowing what documentary evidence the Court considers at the upcoming trial in coming to its decision. The Court intends that the trial be open to the public, pursuant to CCP sec. 124, as well as for the exhibits offered at trial to be available for inspection").

Notwithstanding the Court's prior rulings and statements, Counsel purporting to represent Sumner M. Redstone ("Counsel") have proposed an unworkable and unconstitutional plan to close the Courtroom for substantial portions of the upcoming trial. Counsel propose to prevent the public and the press from hearing a broad range of testimony and evidence that is central to the issues in this case. Counsel's ambiguous and overbroad proposal is not only contrary to the Court's decision, but also violates the constitutionally mandated "essentially unwavering rule" that a trial should be public. *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555, 593 (1980). *See also* Cal. R. Civ. Proc. § 124 ("[e]xcept as provided in Section 214 of the Family Code or any other provision of law, the sittings of every court shall be public"); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1217 (1999) ("*NBC Subsidiary*") ("it is clear today that substantive courtroom proceedings in ordinary civil cases are 'presumptively open'").

Although Counsel's proposal acknowledges—as it must—the fact that the trial

presumptively open to the public, it nonetheless proposes to close substantial but unspecified portions of these proceedings on the purported grounds of Mr. Redstone's right to privacy and because "public access to this unique proceeding is not constitutionally mandated." Not only does this proposal violate the Court's repeated statements that the trial of this matter should be open, but it would also prevent the public from exercising its protected constitutional right to attend the entire trial and hear all evidence.

Counsel's positions are contrary to the constitutional mandate of *NBC Affiliates* and its progeny. Public access to the trial of this case is necessary to ensure that "justice is meted out fairly," to "scrutinize and check the use and possible abuse of judicial power" and to "enhance the truthfinding function of the proceeding." *NBC Subsidiary*, 20 Cal. 4th at 1219. Privacy considerations also do not outweigh the constitutional mandate that this civil procedure be public. *Burkle v. Burkle*, 135 Cal. App. 4th 1045, 1050 (2006) ("*Burkle*"). Moreover, the rationale of Redstone Counsel's primary authority -- *Sorenson v. Superior Court*, 219 Cal. App. 4th 409, 426 (2013) ("*Sorenson*") – is inapplicable because probate proceedings, unlike involuntary conservatorship proceedings under the Lanterman-Petris-Short Act ("LPS Act"), are presumptively open. *See* March 18, 2016 Tentative Ruling on Four Motions to Seal Records at 11 (there "is no comparable Probate Code section [to *Sorenson*] providing for closed hearings" in this Court). Further, Counsel's proposal fails to meaningfully address the practical considerations that would be caused by the repeated opening and closing of the trial given the time allotted for this trial and the number of witnesses that the parties have indicated they intend to call.

Ultimately, public scrutiny of the proceedings in this Court will serve a constitutionally mandated and salutary function. As Justice Brandeis observed many years ago, "[s]unlight is said to be the best of disinfectants." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting L. Brandeis, *Other People's Money*). The "sunshine" of conducting an open proceeding in this case will dispel the unfortunate misinformation that continues to plague this matter, as well as shed necessary light on the wrongdoing that Petitioner has alleged has occurred behind the gated walls of Mr. Redstone's home, allegations that are wholly unrelated to medical privacy.

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II. PROBATE MATTERS ARE PRESUMPTIVELY OPEN.

As was made clear in prior briefings[1] (and as the Court has previously found), there is a *presumptive* constitutional right of public access to probate proceedings, such as this one. *See Estate of Hearst*, 67 Cal. App. 3d 777, 784 (1977) (the "public has a legitimate interest and right of general access to court records, one of special importance where probate involves a large estate with on-going long-term trusts which reputedly administer and control a major publishing empire"); *Burkle*, 135 Cal. App. 4th at 1058 ("probate proceedings" are "presumptively open").

Despite this undoubted presumption of public access to these probate proceedings. Counsel argues that privacy concerns relating to Mr. Redstone's medical condition require that significant parts of the trial be closed to the public. Not only is this proposal contrary to the Court's statements that the entire trial will be public, but it is also not supported by any authority. Indeed, controlling authority holds that privacy concerns in and of themselves do not determine whether a proceeding is public *NBC Affiliates* and other authority.

The court in *Burkle* rejected the argument that privacy considerations were a sufficient ground for preventing public access to documents relating to a contested divorce proceeding involving "persons of 'high public interest.'" 135 Cal. App. 4th at 1049. As the court stated, "[n]o authority supports the notion that the constitutional right of privacy is to be treated differently from any other potentially overriding interest for purposes of First Amendment analysis. . . . We scarcely need note that state constitutional privacy rights do not automatically 'trump' the First Amendment right of access under the United States Constitution. Neither constitutional right is absolute." *Burkle*, 136 Cal. App. 4th at 1059.

In other words, Mr. Redstone's privacy interests are but one factor to be balanced in considering whether this is the "rarest of circumstances" where proceedings should be closed to

[1] This response incorporates by reference the extensive discussion regarding the presumptive openness of civil proceedings provided by press organizations in regard to the motions to seal documents proffered by Redstone Counsel. *See, e.g.*, Request to Intervene and Consolidated Oppositions filed on behalf of the Los Angeles Times Communications LLC and the Hollywood Reporter Inc. (filed February 26, 2016); Variety Media LLC's Opposition to Motions to Seal (filed February 26, 2016) and Brief of Los Angeles Times Communications LLC and the Hollywood Reporter, LLC (filed March 9, 2016).

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the public in violation of historical tradition and the institutional utility of open proceedings. *See NBC Affiliates* at 1219-20, 1226. In this case, as the Court has recognized, there are strong constitutional grounds for making the entire upcoming trial open, including "rightful scrutiny" of the Court's conduct of the proceeding and the other considerations described in *NBC Affiliates*. *See* March 18, 2016 Tentative Ruling at 12. Indeed, public access to the trial of this hotly contested proceeding, which has excited considerable public interest, will "(i) demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings; (ii) provide a means by which citizens scrutinize and check the use and possible abuse of judicial power; and (iii) enhance the truthfinding function of the proceeding." *NBC Subsidiary*, 20 Cal. 4th at 1119.

Counsel have cited no authority to support their position that privacy of medical information *requires*, let alone *allows*, closing of substantial portions of what is presumptively a public trial of a probate matter. None of the cases cited by Counsel remotely holds that a trial should be closed because it potentially impacts the privacy of an individual. Indeed, all of the cases cited in the proposal arose in the far different context of whether third parties violated privacy rights. For example, the issue in *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1 (1994) was not airing of private information in open court, but whether the NCAA's drug testing program violated athletes' California's constitutional right to privacy. Similarly, in *Boler v. Superior Court*, 201 Cal. App. 3d 467, 473 (1987), the court considered whether an individual should be required to disclose information subject to sexual privacy in an employment lawsuit. Finally, the issue in *Bd. Of Med. Quality Assurance v. Gherardini*, 93 Cal. App. 3d 669, 678-79 (1979) was not whether a trial would be public, but whether an administrative agency could obtain medical information without consent of patients. Moreover, as *Hill* and other cases make clear, the constitutional right to privacy can be overcome by a "compelling public need." *Hill*, 7 Cal. 4th at 20-21. As the court recognized in *Burkle*, the presumptive First Amendment right for the public to access civil proceedings, such as this one, is precisely such a "compelling" need.

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III. THERE IS NO STATUTORY PRESUMPTION FOR CLOSED PROBATE PROCEEDINGS.

Counsel also incorrectly argues that *Sorenson* mandates that portions of this proceeding should be close to the public because they may involve sensitive issues regarding competency. There is no authority for such closure. Indeed, many probate proceedings, involve similarly sensitive issues, including the competency of a testator or undue influence by caretakers or others over an individual. *See, e.g.*, *Hearst Estate*, 67 Cal. App. 3d at 781 (probate proceeding open despite concern of Hearst family members that their lives and property would be in grave danger); *Lintz v. Lintz*, 222 Cal. App. 4th 1346, 1357 (2014) (court conducted bench trial in which evidence was adduced regarding undue influence of wife leading to susceptibility and fear of husband).

The *Sorenson* case, which Counsel cite in support of their claim that substantial portions of the trial should be closed, arose in a far different context than this proceeding. The involuntary conservatorship proceeding in *Sorenson* arose under the LPS Act, not the Probate Code. *See* Welf. & Inst. Code, § 5000 et seq. (LPS Act). Unlike proceedings under the Probate Code, those under the LPS Act are presumptively *nonpublic* under Section 5118 of the LPS Act. *Sorenson*, 219 Cal. App. 4th at 416. For that reason, the court found that, under the criteria set forth in *NBC Affiliates*, LPS Act proceedings were not "ordinary" civil proceedings and that there was no "historical tradition" of openness for such proceedings. *Id*. at 430-34. The court further found that there was no constitutional right of public access to LPS proceedings because they did "not have the character of criminal or civil trials in which public scrutiny will significantly enhance the truth-finding process." *Id*. at 435. Moreover, Section 5118 of the LPS Act created a presumption that proceedings were nonpublic and thus "constitute[ed] a statutory exception to Code of Civil Procedure section 124's general requirement that such 'sittings . . . be public.'" *Id*. at 416.

Unlike the proceedings in *Sorenson*, this matter arise under the Probate Code, where there is a presumption of open proceedings. *See Estate of Hearst*, 67 Cal. App. 3d at 784; *Burkle*, 135 Cal. App. 4th at 1058 ("probate proceedings" are "presumptively open"). Unlike LPS proceedings, the issues in this case are not entirely private, but involve matters of public interest.

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Cf. Sorenson, 219 Cal. App. 4th 409, 435 ("[w]hile there are undoubtedly instances in which there will be contested lay or expert testimony in connection with proceedings to determine, inter alia, whether the proposed conservatee is gravely disabled, many LPS proceedings do not have the character of criminal or civil trials in which public scrutiny will significantly enhance the truth-finding process).

For example, at trial evidence will be adduced not only regarding Mr. Redstone's competency to execute an advanced health care directive, but also Petitioner's protection of Mr. Redstone's interests as a patient and whether the advanced health care directives at issue are in effect. Moreover, the issue of whether Mr. Redstone is subject to undue influence as regards his subsequent purported directives is also deserving of public scrutiny. *See* February 29, 2016 Ruling on Motions to Dismiss.

As the Court also has acknowledged, the parties to this case have starkly contrasting views regarding these issues, including competency and undue influence. The evidence regarding these matters, including testimony of percipient and expert witnesses, should be exposed (as Justice Brandeis observed) to the "sunshine" of open court so that the public may evaluate the judicial process in light of all of the evidence and testimony.

IV. THERE IS NO STATUTORY EXCEPTION TO CALIFORNIA'S OPEN COURT STATUTE.

As the *Sorenson* court also recognized, even if public access to a proceeding is not *constitutionally* required California's open court statute, section 124 of the Code of Civil Procedure, may still mandate that proceedings be public. In *Sorenson*, section 5118 of the Welfare & Institutions Code was a statutory exception to California's open court statute. No such exception exists here. Therefore, the presumption of public access to these proceedings is present.

V. COUNSEL'S PROPOSAL IS IMPRACTICABLE.

The Court has set this matter for trial in 3.5 days (two full days and three half days), and Counsel have now served a revised witness list that indicates their intent to use almost 20 hours of trial time solely for their witnesses. Of course, Petitioner will also need time at trial to present her

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case and to respond to the various specious issues that Counsel have indicated they seek to raise. As a result, especially given the more factually intensive undue influence allegations, the parties are already on an extremely tight schedule. The prospect of adding procedural restrictions that may change the order in which attorneys ask questions and may require the taking of breaks to accommodate the opening and closing of the courtroom will only serve to make a difficult schedule unworkable.

Further, there is significant ambiguity in Counsel's proposal about the scope of testimony and documents that would be covered. Specifically, Counsel broadly seek to preclude the public from hearing the entirety of testimony from certain categories of witnesses, such as all "treating or examining physicians and nursing staff." As the court is aware, such witnesses likely have significant *non-medical* testimony. There is no basis for precluding the public from the entire testimony of each witness simply based on his or her professional title, without regard to the substance of the testimony in question. To use a simple example, a conversation does not invoke Constitutional privacy simply because it occurs in a hospital if it does not involve medical issues. The conversations by medical personnel inside Mr. Redstone's home are no different. Even if the Court were to find that the most personal of medical information supports the closing of very limited portions of this trial, Counsel's proposal does not address the numerous issues that will arise at trial.

Similarly, Counsel's proposal would essentially operate in a one-way manner, precluding the public from hearing testimony about Ms. Herzer's allegations while reserving for public consumption the evidence Counsel contend is harmful to Petitioner. Not only is such a proposal patently self-serving, but it would also present practical challenges that would likely cause significant delays in the trial while the parties attempted to parse out whether evidence fell into one of the categories that the Redstone Counsel believes should be heard outside the presence of the public.

As the California Supreme Court has held, only on an "overriding interest" can justify closing the courtroom from the public. *NBC Affiliates*, 20 Cal. 4th at 1218-19. No such overriding interest exists here and the Court should reject the Redstone Counsel's impractical

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proposal.

VI. CONCLUSION

For the foregoing reasons, the Court should adhere to its previous determination that this proceeding be open and public.

DATED: April 27, 2016

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