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K. J. ... CEO
SUPERIOR COURT OF CA.
COUNTY OF SANTA CLARA
... DEPUTY

6 Attorneys For Plaintiff
EAGLE BROADBAND, INC.

8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SANTA CLARA

11 EAGLE BROADBAND, INC.,

12 Plaintiff,

13 vs.

14 DOES 1 through 25, inclusive,

15 Defendants.

) CASE NO. 1-05-CV-050179

) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **PLAINTIFF'S MOTION TO SEAL**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES AND DECLARATION**
) **IN SUPPORT OF OPPOSITION TO**
) **DEFENDANT'S MOTION FOR**
) **ATTORNEYS' FEES**

) **Accompanying Papers:**
) Notice of Motion and Motion to Seal;
) [Proposed] Order; Declaration in Support
) of Motion to Seal

) Date: August 8, 2006
) Time: 9:00 a.m.
) Dept.: 2
) Judge: Hon. William J. Elfving

) Complaint filed: October 5, 2005
) Trial Date: None Set
) Special Motion to Strike
) Granted: March 7, 2006

25 I.

26 **FACTUAL BACKGROUND**

27 In an effort to facilitate the global settlement of this action with Does 4 and 5, Plaintiff
28 Eagle Broadband, Inc. ("Plaintiff" or "Eagle Broadband") and Defendants Doe 4 a.k.a.

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1 Richwill21 and Doe 5 a.k.a. Benderanddunat (“Defendants”) entered into a Settlement
2 Negotiation Agreement on or around April 21, 2006. The Settlement Negotiation Agreement
3 contains a confidentiality clause preventing the disclosure of specified information relating to the
4 underlying litigation and its resolution except in connection with Doe 5’s motion for attorneys’
5 fees. See Declaration of Karineh Khachatourian in Support of Opposition to Defendant’s Motion
6 for Attorneys’ Fees (the “Declaration”), ¶ 10 & Exhibit E. Defendant Doe 5 filed a Motion for
7 Attorneys’ Fees (“Defendant’s Motion”) set for a hearing date on August 8, 2006. In order to
8 properly respond to Defendant’s Motion, Plaintiff must include information that is specifically
9 covered by the confidentiality clause of the Settlement Negotiation Agreement in its
10 Memorandum of Points and Authorities in support of the Opposition to Defendant’s Motion for
11 Attorneys’ Fees (“MPA in support of Opposition”) and in the supporting Declaration and its
12 attachments. The Settlement Negotiation Agreement only allows the use of the specified
13 information by the parties in connection with the adjudication of a motion for attorneys’ fees,
14 and then only as long as the information is filed under seal. The Plaintiff is acting in reliance on
15 the agreement.

16 In order to protect the interests of both Plaintiff and Defendants in preserving the
17 confidentiality of the Settlement Negotiation Agreement, the instant Motion should be granted.

18 **II.**

19 **LEGAL ARGUMENT**

20 **A. This Court Has the Authority to Seal Its Record.**

21 Pursuant to California Rules of Court Rule 243.2(b)(1), a party may file a motion for an
22 order sealing the record. Pursuant to Rule 243.1, a trial court may order a record sealed if:

- 23 (1) there exists an overriding interest that overcomes the right of
24 public access to the record;
- 25 (2) the overriding interest supports sealing the record;
- 26 (3) a substantial probability exists that the overriding interest will be
27 prejudiced if the record is not sealed;
- 28 (4) the proposed sealing is narrowly tailored; and
- (5) no less restrictive means exist to achieve the overriding interest.

1 (See also, *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1217-18.)
2 A trial court's decision to seal court records is reviewed for abuse of discretion. (*In re Providian*
3 *Credit Card Cases* (2002) 96 Cal.App.4th 292, 299-300.)

4 As discussed in detail below, the interests served by sealing the court record override the
5 rights of public access. The sealing proposed in this Motion is narrowly tailored and in a manner
6 whereby no less restrictive means exist to achieve Plaintiff's interests.

7 **B. Plaintiff Has An Overriding Interest In Preserving Settlement**
8 **Negotiations and In Having Settlement Negotiation Agreements**
9 **Honored By The Court and Will Suffer Prejudice If Plaintiff's**
10 **Memorandum Of Points and Authorities and Declaration In**
11 **Opposition To Attorneys' Fees Are Not Sealed Per The Agreement.**

12 Courts have acknowledged various overriding interests that warrant protection. One such
13 potential overriding interest is the enforcement of a binding contractual obligation not to disclose
14 certain information produced in reliance on a confidentiality agreement. (*NBC Subsidiary*
15 (*KNBC-TV), Inc. v. Superior Court, supra*, 20 Cal.4th at p. 1222 fn 46; *See Publiker Ind., Inc. v.*
16 *Cohen* (1984) 733 F.2d 1059, 1073.) When a binding contractual obligation not to disclose
17 certain information exists, unbridled disclosure of the information would deprive the litigant of
18 his right to enforce a legal obligation. (*Publiker Ind., Inc. v. Cohen, supra*, 733 F.2d at pp.
19 1073-1074.) The prevention of such a deprivation of a legal right can constitute an overriding
20 interest within the meaning of rule 243.1(d). *Universal City Studios, Inc. v. Superior Court of*
21 *Los Angeles County* (2003) 110 Cal.App.4th 1273, 1283.

22 The Settlement Negotiation Agreement entered into between Plaintiff and Defendants
23 contains a confidentiality clause restricting the disclosure of certain specified information
24 relating to the litigation and its potential resolution for any purpose other than to adjudicate a
25 motion for attorneys' fees and then the information should be filed under seal. Declaration, ¶ 16
26 & Exhibit G. The purpose of the confidentiality clause is to facilitate settlement negotiations
27 while at the same time, allowing Plaintiff to use the information in opposition to a motion for
28 attorneys' fees. Here the confidentiality clause is a binding agreement between both parties not
to disclose the specified information unless in conjunction with Doe 5's Motion for Attorneys'
Fees and in that case the parties must take reasonable measures to file the information under seal.

1 In order to adequately respond to the Defendant's Motion for Attorneys' Fees, Plaintiff
2 must discuss information that is directly covered by the confidentiality clause of the Settlement
3 Negotiation Agreement, including the agreement itself. Declaration in Support of Motion to
4 Seal, ¶ 8. As such the Plaintiff will be forced to forfeit the protections afforded by the agreement
5 and suffer the commensurate prejudice, unless the Court honors the Settlement Negotiation
6 Agreement and seals the above mentioned papers. The disclosure of confidential settlement
7 information could also undermine any future settlement negotiations and prevent a resolution of
8 the litigation, further prejudicing the Plaintiff. Declaration in Support of Motion to Seal, ¶ 9.
9 Accordingly, this Court should seal Plaintiff's MPA in support of Opposition to Defendant's
10 Motion, the Declaration in support of the Opposition, and attachments thereto.

11 C. **The Proposed Sealing Is Narrowly Tailored and No Less Restrictive**
12 **Means Exist.**

13 The proposed sealing is narrowly tailored to only sealing Plaintiff's MPA in support of
14 the Opposition to Defendant's Motion, the Declaration in support of the Opposition to
15 Defendant's Motion, and two attachments thereto. Declaration in Support of Motion to Seal,
16 ¶ 10. Due to the disclosure of confidential information throughout these papers, there is no
17 other tailoring that would adequately protect Plaintiff's rights and interests. Further, absent
18 sealing these papers, Plaintiff cannot control access to and disclosure of the confidential
19 information disclosed therein. The information which is protected by the confidentiality clause
20 in the Settlement Negotiation Agreement, cannot be adequately guarded short of sealing the
21 above mentioned papers. Thus, this Court should grant Plaintiff's Motion.

22 III.

23 CONCLUSION

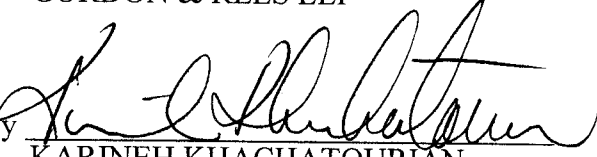
24 For the foregoing reasons, Plaintiff respectfully requests that the Court grant Plaintiff's
25 Motion to Seal Plaintiff's MPA in support of Opposition to Defendant's Motion, the Declaration
26 in support of the Opposition, and attachments thereto. Sealing these papers is necessary to
27 protect Plaintiff's right to preserve its reliance on a bargained for confidentiality agreement as
28 well as preserving the integrity of the settlement negotiations in this litigation. Thus, as Plaintiff

1 has established overriding interests that support a narrow sealing of the record, Plaintiff's Motion
2 should be granted.

3 Dated: July 26, 2006

Respectfully Submitted,

GORDON & REES LLP

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6 By 

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8 Attorneys for Plaintiff
9 EAGLE BROADBAND, INC.
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