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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

12 UNITED STATES OF AMERICA
13 Plaintiff,

14 v.

15 ELIZABETH HOLMES and
16 RAMESH "SUNNY" BALWANI,
17 Defendants.

Case No. 18-cr-00258-EJD

**MEDIA COALITION’S REPLY IN
SUPPORT OF ITS OF MOTION TO
INTERVENE FOR LIMITED PURPOSE OF
SEEKING THE UNSEALING OF
COMPLETED QUESTIONNAIRES OF
SEATED JURORS AND ALTERNATES;
MOTION TO UNSEAL COMPLETED
QUESTIONNAIRES OF SEATED JURORS
AND ALTERNATES**

18 Date: September 30, 2021
19 Time: 11:30 a.m.
20 Courtroom: 4, 5th Floor
21 Hon. Edward J. Davila

1 The Media Coalition, by and through its undersigned counsel, hereby replies to the
2 Responses to its motion asking the Court to unseal the completed juror questionnaires of the seated
3 jurors and alternates (“the Motion”).

4 **INTRODUCTION**

5 Neither party has contested the portion of the Motion for leave to intervene. Defendant
6 takes no position on the merits of the Motion. The Government opposes the Motion and urges the
7 Court not to unseal the completed juror questionnaires, if at all, until after the verdict has been
8 rendered, and even then, only with the jurors’ identities redacted.

9 As demonstrated below, the Government has not satisfied the applicable test, imposed by the
10 First Amendment (and as prescribed by *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501
11 (1984)), to justify closure of the courtroom or the sealing of written voir dire questioning. The
12 Government has failed to demonstrate (through actual evidence) that unsealing, *now*, poses a
13 “substantial probability” of harm to any compelling interest or that less restrictive alternative means
14 to protect against purely hypothetical attempts to tamper with the jury are inadequate. Accordingly,
15 the Motion should be granted.

16 **REPLY ARGUMENT**

17 **I. THE *PRESS-ENTERPRISE* STANDARD FOR CLOSING THE COURTROOM
18 DURING VOIR DIRE APPLIES HERE**

19 The Government declares that “there is no federal consensus [on] whether the presumption
20 of [public] access extends to” juror questionnaires. Resp. at 2: 1-3. However, the Government has
21 not cited a single authority, from *any* court, that contradicts the holdings of the ten state and federal
22 courts cited in the Motion at 5 - 6, that “the use of the questionnaires is merely a part of the overall
23 voir dire process, [and is therefore] subject to . . . the same qualified limitations as applied to oral
24 voir dire.” *Stephens Media, LLC v. Eighth Judicial Dist. Ct.*, 221 P.3d 1240, 1245 (Nev. 2009).
25 Indeed, the word “questionnaire” appears 216 times in the transcripts of two days of voir dire and of
26 the parties’ oral motions to strike individual jurors for cause, which the Court resolved on the basis

1 of those questionnaires. *See* Tr. 8/31/21 and 9/1/21.¹ Accordingly, in resolving the Motion, the
 2 Court should apply the standard applicable to closing the courtroom during voir dire that is set forth
 3 in *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

4 **II. THE GOVERNMENT HAS NOT DEMONSTRATED THAT UNSEALING THE**
 5 **JUROR QUESTIONNAIRES WOULD CREATE A *SUBSTANTIAL PROBABILITY***
 6 ***OF INJURY TO COMPELLING STATE INTEREST***

7 No one disputes that (a) avoiding jury tampering and (b) protecting jurors' legitimate rights
 8 to personal privacy are compelling state interests. But merely reciting that such interests are *at stake*
 9 does not satisfy the Government's burden to justify closing voir dire (in the form of continued
 10 sealing of the juror questionnaires). Instead, the case law is clear that "[p]resumptively open court
 11 records can be closed *only if*: (1) closing them serves a compelling interest; (2) *there is a*
 12 *substantial probability that, in the absence of closing them, this compelling interest would be*
 13 *harmed*; and (3) there are no alternatives to closing them that would adequately protect the
 14 compelling interest." *U.S. v. McClatchy Newspapers, Inc.*, 2 F. App'x 745, 747 (9th Cir. 2001)
 15 (emphasis added) (citations omitted); *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 949
 16 (9th Cir. 1998) (same); *Oregonian Pub. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1466 (9th Cir. 1990)
 17 (same). The Government's "showing" falls woefully short of satisfying either prong (2) or (3).
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 22 ¹ In light of the numerous references to the completed questionnaires in the publicly released
 23 transcripts, maintaining the seal on the questionnaires raises the specter of a "two-tier" records
 24 system that the Ninth Circuit has expressly decried. *See Phoenix Newspapers, Inc. v. U.S. Dist.*
 25 *Court*, 156 F.3d 940, 948 (9th Cir. 1998) ("If the right of access is to be meaningful, a court has the
 26 duty to ensure that its records are accurate. . . . If public records cannot be compared with the sealed
 27 ones, all of the former are put in doubt.") (quoting *CBS, Inc. v. United States Dist. Ct.*, 765 F.2d
 823, 826 (9th Cir. 1985)).

1 **A. The Government’s Expressed Concern Of *Potential* Juror Tampering Is**
 2 **Completely Speculative And Conjectural**

3 Under the First Amendment, “[i]t is the burden of the party seeking closure . . . *to present*

4 *facts* supporting closure,” i.e., actual evidence, not mere arguments of counsel, demonstrating that

5 “there is a *substantial probability* that, in the absence of clos[ure, a] compelling interest *would be*

6 *harmed.*” *Oregonian Pub.*, 920 F.2d at 1466-67 (emphasis added) (citation omitted). This

7 evidentiary burden is not mere semantics; the Supreme Court has held that denying the public’s

8 right of access under any lower evidentiary standard violates the Constitution of the United States.

9 *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 2 (1986) (holding that order closing a

10 preliminary hearing to the public at defendant’s request was unconstitutional because “the

11 ‘reasonable likelihood’ test applied by the California Supreme Court placed a lesser burden on the

12 defendant than the ‘substantial probability’ test *required by the First Amendment*”) (emphasis

13 added).

14 Here, the Government attempts to meet that burden by pointing solely to two discreet and

15 rather unextraordinary events: one in which a member of the public shouted something *outside the*

16 *courthouse* during voir dire that “none of the jurors heard,” Gov. Resp. at 3, and one in which Juror

17 12 notified the Court that she had been contacted by the husband of one her friends whom she had

18 told, directly, she had jury duty, and her friend’s husband had apparently deduced that she was one

19 of the seated jurors. *Id.* (citing 9/1 Tr. 671 – 683). Notably, (but unmentioned by the Government),

20 when Juror 12 proactively and promptly brought this incident to the Court’s attention, it was

21 quickly determined, after questioning in chambers, that Juror 12 had not been exposed to any

22 information, whatsoever, about this case:

23 THE COURT: OH, OKAY. ALL RIGHT. SO IN REGARDS TO WHETHER

24 OR NOT YOU'VE SEEN, HEARD, OR READ ANYTHING,

25 COMMUNICATED YOURSELF OR ANYONE TO YOU

26 ABOUT THIS CASE, IS THAT ANSWER NO?

1 JUROR: THE ANSWER IS NO. YES.

2 9/14 Tr. at 673:6 - 10.

3 The Government surmises that these two practical non-events “are concrete enough to
4 warrant’ certain limitations on the public’s right of access.” Gov. Resp. at 3: 27 -28. In other words,
5 the Government asks the Court to enter a *finding of fact* that unsealing the portion of the voir dire
6 conducted in writing poses a “substantial probability” that some member of the press (or the public)
7 will attempt to commit the federal crime of jury tampering,² and further, that such person(s) will
8 succeed in that effort.

9 If such baseless conjecture of counsel were found to provide a sufficient factual basis to
10 overcome the public’s presumptive right of access to criminal proceedings and judicial records,
11 there would be nothing left to that constitutional right. Thankfully, that is not the law. *See, e.g.,*
12 *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986) (“The First Amendment right of
13 access cannot be overcome by the *conclusory assertion* that publicity *might* deprive the defendant
14 of [a fair trial].”) (emphasis added); *see also Valley Broad. Co. v. United States Dist. Ct.*, 798 F.2d
15 1289, 1293 (9th Cir. 1986) (holding, under the less stringent standard of the common law, that the
16 presumption of public access can “be overcome only on the basis of articulable facts known to the
17 court, not on the basis of unsupported hypothesis or conjecture”) (internal quotation marks and
18 citations omitted); *Rockdale Citizen Publishing Co. v. State*, 266 Ga. 579, 580 (Ga. 1996)
19 (“Assumptions and speculation can never justify the infringement on First Amendment rights which
20 the closure of criminal proceedings creates.”).

21 Of course, in any high-profile criminal case like this one – which is of tremendous public
22 interest and has justifiably attracted a great deal of press attention – there is the *possibility* that
23 members of the jury may, even inadvertently, be exposed to information outside the courtroom
24

25 _____
26 ² See 18 U.S.C. §§ 1504(b), 1503(b)(3) (imposing maximum penalties of either six months or ten
years imprisonment for interfering with a federal juror’s duties).

1 concerning the case at issue. Accordingly, this Court instructed all potential jurors consciously to
 2 avoid all press reports, not to conduct any independent research, Doc. 928 at 21 (Question 63), and
 3 has queried the venire at the start of each day of trial whether any such event has occurred. *See*,
 4 *e.g.*, 9/14 Tr. 684: 4 -9. With the exception of the one instance discussed above (involving Juror 12),
 5 no juror has notified the Court of any such occurrence – notwithstanding the fact that all of the
 6 seated jurors and alternates were called to the jury box by their last names in open court. 9/2 Tr. at
 7 479:18 -482:24.³

8 For the Court to accept as actual evidence the Government’s bald prognostication that
 9 disclosure of the juror’s written questionnaires “*could* increase the chances of jury tampering in this
 10 case,” Gov. Resp. at 6: 2 -3, would fly in the face of this Circuit’s precedent that forbids such
 11 speculative assumptions, *without proof*, from denying the public’s right of access:

12 [T]he district court did consider whether disclosure of the plea agreement
 13 and related documents would pose a risk of harm to Wolsky and his family.
 14 The court concluded that, in the absence of closure, the safety of Wolsky
 15 and his family would be placed in jeopardy. This conclusion, however, was
 16 not supported by any factual finding. It was based upon the district court’s
 stated belief that because the agreement contemplated Wolsky’s cooperation
 with the government, Wolsky would be in danger if the court disclosed the
 terms of the plea agreement. There was *no evidentiary support for this*.

17 *Oregonian Pub. v. U.S. Dist. Ct.*, 920 F.2d at 1467 (emphasis added).
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21 ³ Not only have none of the jurors or alternates been so much as *approached* by any member of the
 22 press, the Media Coalition is not aware of *anyone* having published their last names, including those
 23 whose unique spellings render them fully identifiable via a simple Google search. Of course,
 24 because those names have already been publicly disclosed, they can no longer be subject to sealing.
 25 *See, e.g., In re Copley Press, Inc.*, 518 F.3d 1022, 1024 (9th Cir. 2008) (“Once information is
 26 published, it cannot be made secret again.”); *Gambale v. Deutsche Bank Ag*, 377 F.3d 133, 144 (2d
 Cir. 2004) (“We simply do not have the power . . . to make what has thus become public private
 again.”) (citations omitted); *SmithKline Beecham Corp. v. Pentech Pharms., Inc.*, 261 F. Supp. 2d
 1002, 1008 (N.D. Ill. 2003) (refusing to redact information that had previously been disclosed in a
 court opinion because “the cat is out of the bag”).

1 In sum, the Government has not presented any “evidentiary support” for its speculative
 2 claim⁴ that disclosure of the questionnaires creates a “substantial probability” that jury tampering
 3 will occur.⁵

4 **B. Jurors’ Right to Privacy Is Extremely Limited and Can Be Accommodated By**
 5 **Allowing Them to “Affirmatively Request” Confidentiality Only of “Deeply**
 6 **Personal Matters”**

7 The second compelling interest the Government advances to support continued and
 8 complete sealing of the juror questionnaires (and the redaction of their names therefrom) is the
 9 juror’s right to personal privacy. Gov. Resp. at 6 - 8. Of course, the Motion acknowledged that
 10 jurors’ personal privacy interests, properly confined to sensitive and intimate information, is a
 11 compelling interest. *See* Mot. at 6: 22 – 25 (noting that the Supreme Court has expressly limited
 12 such right to “when interrogation touches *on deeply personal matters* that person has legitimate
 13 reasons for keeping out of the public domain”) (emphasis added). The Government quotes Justice
 14 Blackmun’s concurrence in *Press-Enterprise*, suggesting that jurors should “not be required to

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 16 ⁴ Equally unfounded is the Government’s assertion that “the *Bond* case occurred more than a decade
 17 ago and before social media platforms became ubiquitous.” Gov. Resp. at 8: 23 – 24. The trial of
 18 Barry Bonds occurred in 2011. *But see* Faith Merino, *Global Population Reaches 7 Billion, 1/70*
 19 *Has An Iphone*, Vator News, Oct. 31, 2011 (“With 800 million users (and some saying that number
 20 is quickly approaching one billion), Facebook now has nearly one-seventh of the global population
 21 on its site.”), <https://vator.tv/n/20e5>; Leena Rao, *Twitter Added 30 Million Users In The Past Two*
 22 *Months*, TechCrunch, Oct. 30, 2010 (“Twitter now has 175 million registered users, which is up
 23 from 145 million users in September.”), <https://techcrunch.com/2010/10/31/twitter-users/>; Jessie
 24 Hempel, *How Facebook is Taking Over Our Lives*, CNN, Feb. 17, 2009 (“growing at the
 25 astounding rate of about five million new users a week . . . It even edges out the U.S. television
 26 audience for Super Bowl XLIII”),
 27 https://money.cnn.com/2009/02/16/technology/hempel_facebook.fortune/index.htm?postversion=2009021910.

28 ⁵ Curiously, the Government cites and summarizes eight cases in which a seated juror was
 29 contacted, at some point in the trial court proceeding, including post-verdict. Gov. Resp. at 4 -5.
 30 But the word “questionnaire” appears in only one of those decisions, and then only once, in the
 31 recitation of the trial court’s *Allen* charge. *See U.S. v. Ruggiero*, 928 F.2d 1289, 1293 (2d Cir.
 32 1991).

1 disclose to all the world highly personal and embarrassing information,” and that “privacy interests
 2 of the jurors may be accounted for by delaying disclosure . . . and may sometimes warrant
 3 permanent sealing.” Gov. Resp. at 6: 17 – 22.⁶

4 Only three of the 68 questions in the Juror Questionnaire (numbers 32, 50, and 66) call for
 5 responses that could *potentially* “touch on deeply personal matters.” *Press-Enterprise Co.*, 464
 6 U.S. at 511. ⁷ If any of the other 65 questions were put to potential jurors during oral voir dire, there
 7 would not be even a colorable basis to exclude the public from the courtroom. That the voir dire
 8 here was conducted in writing makes no difference. *See* Mot. at 5 - 6. Indeed, even with respect to
 9 a potentially sensitive and personal topic – the jurors’ personal experience(s) with domestic
 10

11 ⁶ The Government’s Response cites several law review articles that discuss the use of anonymous
 12 juries, which, in certain circumstances, may be appropriate (e.g., in cases involving organized crime
 13 figures, gang members, or drug cartel kingpins). *See, e.g., United States v. Gotti*, 777 F. Supp. 224
 14 (E.D.N.Y. 1991); *United States v. Gambino*, 819 F. Supp. 536 (E.D.N.Y. 1993); *United States v.*
 15 *Bellomo*, 263 F. Supp.2d 557 (E.D.N.Y. 2003). However, it is long-settled that in ordinary criminal
 16 cases, like securities fraud, jurors’ identities are not secret. Indeed, dating back to colonial times,
 17 jurors were identified in high-profile criminal cases. *See, e.g., In re Baltimore Sun Co.*, 841 F.2d
 18 74, 75 (4th Cir. 1988) (“When the jury system grew up with juries of the vicinage, everybody knew
 19 everybody on the jury and we may take judicial notice that this is yet so in many rural communities
 20 throughout the country.”); *see also* Marcus M. Wilson, Jr., *Juror Identities in High-Profile Trials: The Case for a First Amendment Right of Access*, 3 First Amend. L. Rev. 437, 457 (2005) (“In
 21 1670, the names of jurors were publicly announced at William Penn’s trial for inciting unlawful
 22 assembly. Jurors’ identities were also made public at John Peter Zenger’s trial in 1735.”) (citations
 23 omitted); *id.* at 458 (“the considerable body of evidence available suggests [that] jurors’ identities
 24 were presumptively public both under English and American law”); Steven Zansberg, *The Public’s
 25 Right of Access to Juror Information Loses More Ground*, 17 Comm. L. 11 (ABA 2000) (“So
 26 common was the practice of disclosing the identity of jurors that in the conspiracy trial of Aaron
 27 Burr, over which Chief Justice Marshall presided, the names of the twelve chosen jurors were
 28 printed in the reported decision.”) (citations omitted), <https://corporate.findlaw.com/law-library/the-public-s-right-of-access-to-juror-information-loses-more.html>. In any event, the last names of the
 seated jurors and alternates in this case are already a matter of public record. *See supra n. 3.*

24 ⁷ *See Press-Enterprise Co.*, 464 U.S. at 513 (“Assuming that some jurors had protectible privacy
 25 interests in *some* of their answers, the trial judge provided no explanation as to why his broad order
 26 denying access to information at the voir dire was not *limited to information that was actually
 sensitive and deserving of privacy protection.*”) (emphasis added).

1 violence or “intimate partner” abuse – several of the potential jurors (and one selected alternate, *see*
 2 9/1 Tr. 401:22 – 402:21) willingly discussed those experiences in open court. 8/31 Tr. 134:5 –
 3 136:15; 137:8 – 142:3; 9/1 Tr. 396:11 – 407:4. And they did so notwithstanding the Court’s
 4 repeated declaration that anyone wishing to discuss such matters “privately” (outside of a public
 5 courtroom) were invited to so indicate and the Court would accommodate that request. 8/31 Tr.
 6 41:4 – 43:23; 138: 20 - 23; 9/1 Tr. 310: 4 - 20. 396: 11 – 15. Only a few of the potential jurors
 7 accepted the Court’s invitation. *See, e.g.*, 8/31 Tr. 199: 2 - 10; 199:18 – 203:11.

8 Thus, consistent with the holding of *Press Enterprise* (which the Government’s Response
 9 ignores), the appropriate and *constitutionally-required* course of action is to ask each of the jurors,
 10 prior to unsealing, whether they have any concerns about any portion of their answers to Question
 11 Numbers 32, 50 and 66 being publicly disclosed (thereby “requiring the prospective juror to make
 12 an affirmative request”); the Court cannot simply assume that is the case. *See Mot.* at 6:25 – 7:10.
 13 Arguably, Questions 50 and 66 have already provided the jurors with that opportunity.

14 **III. EVEN IF THE GOVERNMENT HAD DEMONSTRATED A REAL AND**
 15 **SUBSTANTIAL RISK OF JUROR TAMPERING, LESS RESTRICTIVE**
 16 **ALTERNATIVES TO CONTINUED BLANKET SEALING ARE READILY**
 17 **AVAILABLE**

18 As indicated above, the Government has failed to meet its evidentiary burden to demonstrate
 19 that disclosure of the completed juror questionnaires creates a “substantial probability” that juror
 20 tampering or other interference with the jurors’ conduct will occur. But even *if* the Government *had*
 21 satisfied its burden of proof, continued sealing cannot be authorized by the Court because the
 22 Government has also failed to satisfy its other necessary burden, “to demonstrate that available
 alternatives will not protect [against such harm].” *Oregonian Pub.*, 920 F.2d at 1467.

23 As previously mentioned, intentional interference with a member of the petite venire,
 24 through oral or written communications, constitutes a federal crime. *See supra* n. 2. In addition,
 25 any reporter who violates court orders prohibiting such contacts (with knowledge of such orders)
 26

1 faces a possible contempt sanction for doing so. *See, e.g., In re Stone*, 703 P.2d 1319, 1322 (Colo.
2 App. 1985) (affirming contempt sanction on reporters who contacted potential jurors during voir
3 dire: “once the trial process had begun, respondents’ First Amendment rights did not extend to
4 permit communication with prospective jurors who had been admonished not to discuss the pending
5 case”). Because these less restrictive alternative means prospectively to prevent any such
6 sanctionable conduct are available, and have not been shown to be “inadequate,” the Government
7 has not met its burden of “demonstrat[ing] that alternatives will not protect” against the remote
8 possibility of juror tampering.⁸

9 **CONCLUSION**

10 For the reasons set forth in the Motion, and above, the Court should grant the Media
11 Coalition’s motion and order the unsealing of the completed juror questionnaires for the 12 original
12 jurors and five alternates, forthwith.

13
14 DATED: September 27, 2021

15 /s/ Steven D. Zansberg

16 STEVEN D. ZANSBERG
17 Attorney for The Media Coalition

18 (American Broadcasting Companies, Inc. d/b/a ABC
19 News, the Associated Press, Bloomberg L.P., The Daily
20 Mail, Dow Jones and Company, Inc., NBCUniversal
21 Media, LLC, The New York Times Company, Portfolio
22 Media, Inc. – publisher of Law360, Three Uncanny
23 Four LLC, and the Washington Post Company)

24 ⁸ Similarly, the Government’s expressed concern that unsealing the questionnaires *in this case* may
25 “discourage juror candor” *in future cases*, is easily addressed by not including any promise of
26 confidentiality in *future* written questionnaires, or, alternatively, dispensing with written
27 questionnaires altogether, despite the inefficiency of doing so.

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2021, a copy of this filing was delivered via ECF to all counsel of record.

/s/ Steven D. Zansberg
STEVEN D. ZANSBERG

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