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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES

10 SHERA BECHARD,

11 Plaintiff,

12 vs.

13 ELLIOTT BROIDY, an individual, KEITH
DAVIDSON, an individual; MICHAEL
14 AVENATTI, an individual; DAVIDSON &
ASSOCIATES, PLC, a professional limited
15 liability company; and DOES 1 through 20,
inclusive,

16 Defendants.
17

) Case No. BC712913

) Assigned for all purposes to the Hon. Samantha
Jessner, Dept. 31

) **PUBLIC-REDACTS MATERIALS FROM
CONDITIONALLY SEALED RECORD**

) **DEFENDANT MICHAEL J. AVENATTI'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANT ELLIOTT BROIDY'S
MOTION TO SEAL OR ALTERNATIVELY
STRIKE SENSITIVE AND IMMATERIAL
PORTIONS OF THE COMPLAINT**

) Hearing Date: TBD

) Hearing Time: TBD

) Hearing Dept.: 31
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1 **I. INTRODUCTION**

2 Defendant Elliott Broidy ("Broidy")'s Motion to Seal or Strike ("Motion") portions of
3 Shera Bechard ("Bechard's") Complaint against Broidy, Keith Davidson ("Davidson"), Davidson
4 & Associates, P.L.C., and Michael Avenatti ("Avenatti") must be denied. Broidy's Motion is
5 without merit for at least the following reasons:

6 *First*, Broidy's Motion is at odds with the presumption of open court records and would
7 violate the First Amendment,

8 *Second*, because of the immense media attention on this case and its close connection to
9 matters of public concern and political importance, the public's interest in full access to the
10 records of this case is particularly strong.

11 *Third*, Broidy has failed to meet his burden for a sealing order. Among other things, he
12 failed comply with the requirement that he submit a declaration providing facts that support his
13 Motion and failed to even supply the Court with a copy of the Settlement Agreement.

14 *Fourth*, Broidy has failed to provide facts that demonstrate he will suffer any injury from
15 further disclosure of information that is already public.

16 *Fifth*, because Broidy has breached the Settlement Agreement by failing to make required
17 payments, he cannot enforce the confidentiality provisions within it.

18 *Sixth*, the mere existence of a confidentiality provision within the Settlement Agreement is
19 an insufficient basis to seal this complaint.

20 *Finally*, as explained below, the specific portions of the Complaint Broidy wishes to strike
21 are relevant and therefore cannot be struck.

22 **II. ARGUMENT**

23 **A. Broidy's Motion to Seal Conflicts With the Presumption of Open Court**
24 **Records and Would Violate the First Amendment.**

25 "Unless confidentiality is required by law, court records are presumed to be open."
26 California Rules of Court Rule 2.550(e). A party seeking to file documents under seal faces a
27 heavy burden, requiring him or her establish that:

- 1 (1) There exists an overriding interest that overcomes the right of public access to the record;
- 2 (2) The overriding interest supports sealing the record;
- 3 (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
- 4 (4) The proposed sealing is narrowly tailored; and
- 5 (5) No less restrictive means exist to achieve the overriding interest.

6 California Rules of Court Rule 2.550(d). These strict rules are necessary because of the First
7 Amendment implications of sealing documents and depriving the public and the press access to
8 court proceedings. See NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal.4th
9 1178, 1181 (explaining First Amendment implications); Huffly Corp. v. Superior Court (2003)
10 (“[T]he Judicial Council promulgated rules [2.550 and 2.551] which govern sealing requests in the
11 trial courts in order to comply with the constitutional standards set forth in the NBC Subsidiary
12 decision.”). “Nearly all jurisdictions, including California, have long recognized a common law
13 right of access to public documents, including court records.” Overstock.Com, Inc. v. Goldman
14 Sachs Group, Inc. (2014) 231 Cal.App.4th 471, 483. Further, the practice of sealing records is at
15 odds with the tradition of open courts codified into law as Code of Civil Procedure section 124.

16 For more than a century it has been the rule that “[i]n this country it is a first principle that
17 the people have the right to know what is done in their courts.” In re Shorridge (1893) 99 Cal.
18 526, 530. As the Supreme Court of California has recognized, “the public has an interest,
19 in *all* civil cases, in observing and assessing the performance of its public judicial system, and that
20 interest strongly supports a general right of access in ordinary civil cases.” NBC, 20 Cal.4th at
21 1210 (emphasis in original). Public access to the courts and court records is the bedrock of the
22 legitimacy of our legal system because “[i]f public court business is conducted in private, it
23 becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism.
24 For this reason traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings
25 and favors a policy of maximum public access to proceedings and records of judicial tribunals.”
26 Estate of Hearst (1977) 67 Cal.App.3d 777, 784. That interest is particularly strong here. The
27 California Supreme Court has also recognized the “important role of the press in monitoring the
28 administration of justice on behalf of the public,” something that will be hampered in this case if

1 portions of the Complaint are placed under seal. Brian W. v. Superior Court (1978) 20 Cal.3d
2 618, 626.

3 **B. The Public Interest Supports an Order Denying Sealing This Action.**

4 The presence of the media intervenors in this case demonstrates the great public interest in
5 this action. This case has generated immense public interest because of its relation to matters of
6 great public concern and political significance. And justifiably so. Details warranting the very
7 serious interest of the press and the public in the details of this suit include the following. As
8 reported by the *Wall Street Journal* when it first revealed the affair and hush agreement,
9 Defendant Broidy served as the deputy finance chairman of the Republican National Committee.
10 He was represented in connection with the hush agreement by Michael Cohen—the personal
11 attorney and fixer to the President of the United States—the same personal attorney and fixer who
12 also assisted with at least two other hush money deals shortly before the 2016 election for women
13 claiming affairs with the President (i.e., Karen McDougal and Stephanie Clifford aka Stormy
14 Daniels). [Avenatti Decl., Ex. 1.] Moreover, Bechard was represented by Defendant Davidson,
15 who also represented McDougal and Clifford (aka Stormy Daniels), in negotiating their hush
16 agreements to prevent them from discussing their affairs with Trump. [Id.] This article was
17 published just days after the FBI raided Cohen's office as part of an extensive investigation
18 concerning many topics, including the payment to Clifford. [Avenatti Decl., Ex. 2.]

19 After the story of Bechard's affair broke, speculation in the media arose that the purpose of
20 the Settlement Agreement was actually to pay Bechard to keep quiet about an affair with *Trump*
21 rather than Broidy. [Avenatti Decl. Ex., 3.] This ultimately culminated in media coverage of
22 complaints filed with the Federal Election Commission and Justice Department alleging that the
23 payment to Bechard was meant to cover up her affair with President Trump, intended to influence
24 the 2020 presidential election, and therefore an in-kind campaign contribution in violation of
25 federal law. [Avenatti Decl. Ex., 4.]

26 The Bechard Settlement Agreement has become linked to similar payments to McDougal
27 and Clifford because women in all three cases were represented by Davidson and because Cohen
28

1 played a role in all three instances. Their individual circumstances have become inextricably
2 intertwined. Coverage of Bechard's affair has thus become connected by this tangled web of
3 intrigue to President Trump.

4 Indeed, Defendant Broidy and his counsel, who now want to shroud select allegations of
5 this lawsuit in secrecy, elected to announce in a very public fashion that they would stop making
6 payments under the Settlement Agreement that Bechard claims was breached in this case. In a
7 Wall Street Journal article entitled "Top GOP Fundraiser to Stop Hush Payments Over Affair,"
8 Broidy's counsel is quoted as saying: "Elliott specifically was paying for confidentiality that
9 would shield his family from the embarrassing mistake he made, . . . We can prove there was an
10 intentional breach that renders the contract null and void." [Avenatti Decl., Ex. 5.] Broidy should
11 not be permitted to use the media and public disclosure as a weapon when it suits his whims
12 concerning the Settlement Agreement, but to then duck for cover when uncomfortable and
13 unflattering details emerge by soliciting this Court to trample sacred First Amendment protections.

14 Compounding the public's justifiable interest in the allegations of this lawsuit are several
15 other stories concerning Defendant Broidy and his ties to the White House and President Trump.

16 First, it was reported as early as March of this year that Broidy was "one of President
17 Donald Trump's earliest campaign financiers and subsequently the vice chairman of his
18 Presidential Inaugural Committee," and that since April 2017, he "has had incredible access to the
19 president — and has reportedly taken full advantage of it to reap profits and advance the agendas
20 of foreign actors." [Avenatti Decl., Ex. 6.]

21 Second, as revealed in an *Associated Press* story based on an "exhaustive review" of e-
22 mails and documents, Broidy made efforts to lobby the White House, including in a previously
23 unreported meeting with President Trump, to secure \$1 Billion in consulting contracts from Saudi
24 Arabia and the United Arab Emirates. [Avenatti Decl., Ex. 7.]

25 Third, in May of this year, Broidy filed suit against an American consulting firm and two
26 influential Qataris on charges that Qatar had orchestrated the theft and leak of his emails to
27 discredit him. [Avenatti Decl., Ex. 8.]

28

1 Finally, last Monday, Broidy made headlines in the *Wall Street Journal* and other outlets
2 by suing a former high-ranking United Nations official, alleging he was an unregistered agent of
3 Qatar who participated in a campaign against Mr. Broidy as part of an operation by Qatar to
4 silence its critics and influence U.S. policy. [Avenatti Decl., Ex. 9.]

5 Furthermore, an additional and not insignificant reason why the public has a justifiable
6 interest in the matters Broidy seeks to seal in this case is that they are relevant to the public
7 discourse that has unfolded over the past year concerning the abuses of men of wealth, power, and
8 authority relative to women under their control, otherwise referred to as the #MeToo movement.
9 Although the facts of the present case arguably may not fit neatly within the parameters of the
10 #MeToo discourse, there are at the very least elements that exist in this case that the public should
11 be made aware of to make their own judgments.

12 In sum, the American public has a paramount interest in being able to observe justice in
13 action here and attempting to restrict the public's access to this case will undermine the public's
14 trust in the integrity of the judicial system and its attendant ability to reveal the truth.

15 **C. Broidy Has Failed to Meet His Burden to Justify Sealing Because He Failed to**
16 **Provide a Declaration Containing Facts Sufficient to Justify the Requested**
17 **Relief.**

18 **1. Broidy Failed to File a Declaration Containing Facts Sufficient to**
19 **Justify Sealing As Required by the Rules of Court.**

20 "A party requesting that a record be filed under seal must file a motion or an application
21 for an order sealing the record. **The motion or application must be accompanied by a**
22 **memorandum and a declaration containing facts sufficient to justify the sealing.**" California
23 Rules of Court Rule 2.551(b)(1) (emphasis added). However, Broidy failed to attach any
24 declaration of this sort to his Motion. Instead, Broidy only attached a declaration from his counsel
25 which attaches court filings, but not any facts in support of sealing. [See Putnam Decl.] Absent a
26 declaration from Broidy (or anyone else with personal knowledge of the relevant facts), the Court
27 *must* deny Broidy's motion. This ends the analysis.

28 Besides violating the express language of the California Rules of Court, Broidy's failure to
submit a declaration providing the factual basis for his motion poses practical difficulties that

1 make it impossible for the Court to rule on his motion. “An order sealing the record must . . .
2 [s]pecifically state the facts that support the [Rule 2.550(d)] findings.” California Rules of Court
3 Rule 2.550(e)(1). The Court cannot possibly state facts if it has been provided with none.

4 The absence of a declaration also leaves the reasons Broidy has identified for sealing
5 unsupported by fact as well, as will be discussed below.

6 **2. Because Broidy Has Failed to Attach the Settlement Agreement, the**
7 **Court Cannot Rule on Whether the Settlement Agreement Provides a**
8 **Basis to Seal the Complaint.**

9 Broidy argues that the Settlement Agreement provides a basis to seal portions of the
10 Complaint. [Motion at 15.] However, Broidy never provides the Court with the Settlement
11 Agreement and Bechard failed to attach it to her Complaint. The Complaint itself does little to
12 shed light on the contents of the Settlement Agreement, especially because the descriptions of the
13 Settlement Agreement are framed as information Davidson told Bechard, with the implication that
14 Davidson misled his client. [Complaint at ¶ 26.] As a consequence, it is unclear whether a
15 confidentiality clause actually exists, what its scope might be, or whether Broidy’s failure to pay
16 Bechard has rendered the clause inoperative. Without a copy of the Settlement Agreement, the
17 Court cannot possibly determine whether the Settlement Agreement requires some or all of the
18 redactions Broidy wishes to make to the complaint. This is particularly problematic for, and
19 prejudicial to, Defendant Avenatti because he must be able to prove that he was not a party to the
20 Settlement Agreement (and thus has no liability), let alone any arbitration clause that allegedly
21 exists.

22 For example, it is plausible that a confidentiality provision in the Settlement Agreement (if
23 one in fact exists) would prohibit Bechard from discussing her sexual relationship with Broidy.
24 But the agreement may also have a provision stating that Bechard was free to discuss information
25 that had already been made public by third parties (such as the existence of the affair and her
26 abortion). [Avenatti Decl. Ex. 1.] Bechard may be free to discuss the details of her abortion now
27 that it is publicly known.
28

1 In addition, the Settlement Agreement may contain language to the effect that "if
2 disclosure is required by a court order, the confidentiality provisions are no longer applicable." If
3 so, Broidy would have no basis to argue that the Settlement Agreement forms the basis for sealing
4 and thus Broidy would not be prejudiced by the Court declining to seal any part of the Complaint.
5 Huffy Corp. v. Superior Court (2003) 112 Cal.App.4th 97, 107.

6 Other information that Broidy seeks to redact, if it is subject to redaction on the basis of a
7 confidentiality clause, would require an unusually broad clause. [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 [REDACTED] This seems implausible and only highlights
14 why Broidy needed to attach the Settlement Agreement if he wished to rely on it as the basis for
15 his Motion.

16 Finally, if Broidy has breached the Settlement Agreement by failing to continue to make
17 payments to Bechard, it is entirely conceivable that Bechard is no longer under any obligation to
18 maintain confidentiality under the express terms of the Settlement Agreement. This would
19 certainly be an equitable way of drafting the contract, but absent Broidy submitting a copy with
20 his Motion, it is impossible to know whether the terms of the Settlement Agreement contemplate
21 such a result.

22 **3. Broidy Has Failed to Provide Factual Support for Why the Specific**
23 **Portions of the Complaint That He Has Identified Must be Sealed.**

24 Broidy's failure to submit a declaration in support of his Motion also creates problems for
25 the relief he seeks because much of the information he seeks to redact is already available to the
26 public. "It should go without saying that there is no justification for sealing records that contain
27 only facts already known or available to the public." H.B. Fuller Co. v. Doe (2007) 151
28 Cal.App.4th 879, 898 see also Universal City Studios, Inc. 110 Cal.App.4th at 1283-85

1 (explaining that information that is publically available should not be sealed); see also In re
2 Providian Credit Card Cases (2002) 96 Cal.App.4th 292, 305-308 (explaining that purported trade
3 secrets that had already been made public should not be sealed).

4 Therefore, if Broidy wished to seal the specific details of the affair, he must establish that
5 he has an “overriding interest [that] supports sealing the record” and that a “substantial probability
6 exists that the overriding interest will be prejudiced if the record is not sealed.” California Rules
7 of Court Rule 2.550(d). If Broidy truly believes that “[t]he publication of these salacious details
8 will cause considerable damage to Mr. Broidy’s reputation, work, and his family,” he must explain
9 how he would be further damaged if the additional information in the Complaint is disclosed.
10 [Motion at 13.] “There must be a specific showing of serious injury. [S]pecificity is essential.
11 Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient.”
12 McNair v. National Collegiate Athletic Association (2015) 234 Cal.App.4th 25, 35 (citation
13 omitted).

14 But unsubstantiated broad allegations of harm is precisely what Broidy relies upon here.
15 Broidy cites a general privacy interest without any degree of specificity as to how he will be
16 harmed. “[W]ithout a clear enumeration of specific facts alleged to be worthy of the extraordinary
17 measure of maintaining our records under seal, there is simply no basis to conclude that unsealing
18 the records will actually infringe any interest of plaintiff’s or inflict any harm on it.” H.B. Fuller
19 Co. v. Doe (2007) 151 Cal.App.4th 879, 898. If the public already knows that Broidy had an
20 affair with Bechard, impregnated her, and that she got an abortion, Broidy fails to specify how his
21 reputation will be further damaged. [Avenatti Decl. Ex. 1.] He also fails to describe what
22 precisely is the additional harm he believes he will suffer if additional details about a matter that
23 has already received widespread media coverage come out. Absent a declaration from Broidy
24 providing insight into these unsubstantiated claims of harm, it is impossible to know.

25 Indeed, while Broidy focuses on a sexual privacy interest [Motion at 13], significant
26 portions of the matters sought to be sealed have nothing to do with his sexual relationships at all,

27 [REDACTED]
28 [REDACTED] In fact, it is unclear how Broidy could

1 have any privacy interest that would merit sealing with regards to information *Davidson*
2 communicated to Bechard¹, which makes up a significant portion of the information he seeks to
3 redact from the Complaint. [See Complaint ¶¶ 26(a), 27, 28, 31.] This lack of factual
4 support only further demonstrates why the Motion must be denied.

5 **D. Broidy’s Breach of the Terms of the Settlement Agreement Releases Bechard**
6 **from Keeping the Allegations of the Complaint Under Seal.**

7 Despite being required to maintain confidentiality [Complaint ¶ 26(c)], Broidy waived the
8 confidentiality clause of the Settlement Agreement by discussing the affair himself. [Avenatti
9 Decl., Ex. 1.] “Although waiver is frequently said to be the intentional relinquishment of a known
10 right, waiver may also result from conduct which, according to its natural import, is so
11 inconsistent with the intent to enforce the right in question as to induce a reasonable belief that
12 such right has been relinquished.” Rubin v. Los Angeles Fed. Sav. & Loan Assn. (1984) 159
13 Cal.App.3d 292, 298 (citation and quotation omitted).

14 Here, Broidy could not possibly have valued keeping his affair with Bechard confidential
15 when he made statements to the media about his affair. [Avenatti Decl., Ex. 1.] Regardless of
16 whether or not Broidy specifically intended to waive any confidentiality clause in the Settlement
17 Agreement by discussing the affair, his conduct constitutes waiver. The alternative would be
18 perverse: Broidy would be free to speak out about the affair while Bechard would be prohibited
19 from doing the same, including filing this lawsuit in its unredacted form. Similarly, by refusing to
20 maintain confidentiality and announcing that he would no longer pay Bechard [Avenatti Decl., Ex.
21 5.], Broidy repudiated the Settlement Agreement and Bechard is therefore no longer required to
22 perform her obligations under the contract and maintain confidentiality. See Ferguson v. City of
23 Cathedral City (2011) 197 Cal.App.4th 1161, 1169. Because Bechard is no longer under any

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26
27 ¹ Broidy never alleges that Davidson had some sort of preexisting confidentiality agreement with
28 Broidy. Nor does he even allege that Davidson was bound by the Settlement Agreement. Broidy’s attempt to redact Davidson’s communications with Bechard is simply inexplicable and unsupported by any authority.

1 obligation to maintain confidentiality under the Settlement Agreement, the Settlement Agreement
2 cannot provide a basis for sealing the Complaint.

3 **E. Even if Bechard Did Breach a Confidentiality Clause in the Settlement**
4 **Agreement, the Existence of the Clause is Not a Sufficient Reason to Seal.**

5 California courts have repeatedly held that the fact a confidentiality agreement exists is not
6 a sufficient basis to seal a complaint. Significantly, while “a binding contractual agreement not to
7 disclose” is “a potential overriding interest,” “[t]he second element of the overriding interest
8 analysis is there must be a substantial probability that it will be prejudiced absent closure or
9 sealing.” Universal City Studios, Inc. v. Superior Court (2003) 110 Cal.App.4th 1273, 1283;
10 Huffy Corp. v. Superior Court (2003) 112 Cal.App.4th 97, 106 (stating same). Therefore, even if
11 a confidentiality clause exists in the Settlement Agreement, Broidy must still present “admissible
12 evidence” showing that he will be harmed if the confidential information is disclosed. Universal
13 City Studios, Inc. 110 Cal.App.4th at 1283. California Courts have explicitly emphasized that
14 courts following the rule of Publicker Industries, Inc. v. Cohen (3d Cir. 1984) 733 F.2d 1059, cited
15 by Broidy, hold that “closure or sealing can only occur under the Third Circuit rule when there has
16 been a specific showing of serious injury.” Huffy Corp., 112 Cal.App.4th at 106 (quoting
17 Universal City Studios, Inc., 110 Cal.App.4th at 1282).

18 But, as was already explained, Broidy has submitted no admissible evidence at all, so he
19 cannot meet this burden. All that Broidy argues is that the purpose of the Settlement Agreement is
20 to keep information private and to ensure that disputes would be resolved in private. [Motion at
21 15.] This is not a sufficient showing. All lawsuits involving confidentiality clauses would be
22 sealed if this were all that was required and the second element of substantial probability of
23 prejudice would be unnecessary in such circumstances. However Universal City Studios, Inc. and
24 Huffy Corp. demonstrate that this is not the rule.

25 Finally, facts that already are public, even if they are also subject to a confidentiality
26 agreement, cannot be sealed. Broidy thus cannot simply claim that the disclosure of his affair is
27 inherently harmful and will prejudice him when that information is already public. Universal City
28 Studios, Inc. 110 Cal.App.4th at 1284.

1 **F. The Specific Portions of the Complaint that Broidy Has Identified Are**
2 **Relevant to the Lawsuit and Should Not be Struck or Sealed.**

3 Broidy argues that the Court should strike portions of Bechard's complaint on the basis
4 that they are extraneous and irrelevant. [Motion at 10-12.] As a preliminary matter, Broidy's
5 motion to strike should be summarily denied because he appears to be attempting to bypass Judge
6 Hiroshige's order stating that he would not accept any other motions for hearing until he
7 determined which portions of the Complaint should be sealed. Broidy thus also attempts to bypass
8 the meet and confer requirements of Code of Civil Procedure section 435.5. For these reasons
9 alone, Broidy's motion to strike should be denied.

10 In addition, as discussed below, the Court should decline to strike the allegations because
11 they are in fact relevant.

12 **1. Because Broidy Only Objects to a Few Paragraphs of the Complaint,**
13 **Striking These Paragraphs is Inappropriate.**

14 While Broidy has cited cases that suggest that striking may be a suitable alternative to
15 sealing in certain circumstances, the cases he has cited involve parties that filed large volumes of
16 irrelevant material and would therefore require extensive effort by the Court in determining
17 whether the documents should be sealed. See Overstock.com, Inc. v. Goldman Sachs Group,
18 Inc. (2014) 231 Cal.App.4th 471, 506 (exhibits that were uncited or scarcely cited); Mercury
19 Interactive Corp. v. Klein (2007) 158 Cal.App.4th 60, 104 (complaint attached unnecessary
20 exhibits).

21 Here, Broidy only seeks to strike isolated sentences in the Complaint that total a few pages.
22 The Court should be especially cautious in striking Bechard's allegations given the difficulty in
23 determining which sentences are in fact essential to Bechard's causes of action given the
24 complicated facts of this case.

25 **2. The Allegations Broidy Seeks to Strike Are in Fact Relevant to the**
26 **Claims Against Davidson.**

27 Contrary to Broidy's claims, the allegations that he seeks to seal or strike appear to be
28 relevant to Bechard's claims against Davidson. For example, the main paragraph Broidy seeks to
strike or redact, Paragraph 20, is framed as the confidential information Bechard shared with her

1 attorney Davidson. [Complaint ¶ 20.] [REDACTED]

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED] Clearly, these allegations are directly relevant to Bechard's
6 causes of action against Davidson, including the legal malpractice cause of action. [Complaint ¶¶
7 89-92.] They appear to be intended to address the "failing to perform legal services with the care
8 and competence of a reasonable attorney" portion of the legal malpractice cause of action,
9 [REDACTED]
10 [REDACTED]

11 **3. Many of the Allegations Broidy Seeks to Strike Serve to Plead Around**
12 **Defenses or Are Themselves Facts Supporting a Defense.**

13 Relatedly, while it is unclear what the actual terms of the contract were, Bechard alleges
14 that she was told the \$1.6 Million payment "represented the net present value of child-support
15 payments Mr. Broidy would be expected to make over the 18-year support term of their child."
16 [Complaint ¶ 25.] However, attempts by parents to waive or limit child support "obviate the clear
17 and strong policy of this state that a parent must support his children." In re Marriage of
18 Ayo (1987) 190 Cal.App.3d 442, 451. Besides the professional malpractice implications, Bechard
19 may be concerned that the Court will find her contract with Broidy unconscionable or void as
20 contrary to public policy. See, e.g., Cal. Civ. Code §1670.5 (unconscionability); Cal. Civ. Code §
21 1667-1668 (contracts contrary to public policy). [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 [REDACTED] Bechard may intend to use some of her allegations to avoid alleging a
25 contract that is unconscionable or void as contrary to public policy. [REDACTED]
26 [REDACTED]
27 [REDACTED]

28 Bechard may have therefore intended to plead around defenses. "Where the complaint's

1 allegations or judicially noticeable facts reveal the existence of an affirmative defense, the plaintiff
2 must 'plead around' the defense, by alleging specific facts that would avoid the apparent defense.
3 Absent such allegations, the complaint is subject to demurrer for failure to state a cause of action."
4 Gentry v. eBay, Inc. (2002) 99 Cal.App.4th 816, 824 (citation and quotation omitted).

5 Some of Bechard's allegations appear to be intended to plead a defense of duress or
6 menace. See Cal. Civ. Code §§1565-1570. [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 **4. Many of the Allegations Broidy Seeks to Strike Involve Elements of**
12 **Bechard's Breach of Contract Claim.**

13 Bechard implies that the Settlement Agreement involved a release of her claims against
14 Broidy. For example, she states that "Davidson treated Ms. Bechard's claims as a commodity to
15 be traded for his own financial gain." [Complaint ¶ 5.] Her equitable cause of action alleges that
16 "she retained Mr. Davidson to represent her in connection with her claims." [Complaint ¶ 95.]
17 While Bechard never explicitly identifies what her claims against Broidy are, many of the
18 allegations Brody seeks to redact are in a paragraph of the Complaint that discuss what Mr.
19 Davidson learned when he spoke to his client Bechard. [Complaint ¶ 20.] The allegations of
20 [REDACTED] in this paragraph likely form the basis for the claims for which
21 Davidson was supposed to help his client obtain a settlement. This information is relevant to her
22 claims against Davidson. It is also relevant in establishing that the Settlement Agreement was not
23 just a confidentiality agreement, but also a release of claims, a distinction Bechard may intend to
24 use to argue that, even if she breached the nondisclosure portions of the Settlement Agreement,
25 she is still entitled to some portion of the unpaid balance she is still owed.

26 Independent of whether this information constitutes the factual basis for the claims she had
27 against Broidy, the allegations of Paragraph 20 also establish that she had valuable information
28 that she could keep confidential in exchange for compensation. Consideration is one of the

1 elements “essential to the existence of a contract.” Civ. Code, § 1550. “A cause of action
2 for breach of contract requires proof of the following elements: (1) existence of the contract; (2)
3 plaintiff’s performance or excuse for nonperformance; (3) defendant’s breach; and (4) damages to
4 plaintiff as a result of the breach.” Miles v. Deutsche Bank National Trust Co. (2015) 236
5 Cal.App.4th 394, 402. Therefore, it was necessary for Bechard to allege that she in fact had
6 confidential information that she would agree to not disclose, allegations constituting
7 consideration in her contract with Broidy, so that she could properly allege a breach of contract
8 against him. Bechard’s detailed allegations may also be necessary because she has opted to plead
9 the legal effect of her contract. See 4 Witkin, Cal. Proc. 5th Plead § 519 (2008) (explaining how
10 legal effect of contract should be pled). As the Supreme Court has recognized, the difficulty is
11 that when “a party relies upon a contract in writing, and it affirmatively appears that all the terms
12 of the contract are not set forth *in hac verba*, nor stated in their legal effect, but that a portion
13 which may be material has been omitted, the complaint is insufficient.” Gilmore v. Lycoming
14 Fire Ins. Co. (1880) 55 Cal. 123, 124.

15 **S. Even if Bechard’s Claims Against Broidy are Sent to Arbitration, the**
16 **Same Allegations Will Need to Remain in the Complaint for the Claims**
17 **Against Other Defendants.**

18 Broidy at one point argues that “the most appropriate way to address plaintiff’s claims
19 against Mr. Broidy would be to order the agreed-upon arbitration, and to strike *all* allegations
20 relating to Mr. Broidy from the operative complaint.” [Motion at 8 (emphasis in original).]
21 Elsewhere, he claims that “[n]one of these vicious accusations [that Broidy seeks to redact] have
22 *anything* to do with plaintiff’s legal claims in this case, against Mr. Broidy or anyone else.”
23 [Motion at 10 (emphasis in original).] Broidy would also prefer that the redacted portions of the
24 Complaint be sealed until Bechard’s case is sent to arbitration. [Motion at 17.] This argument is
25 fatally flawed, however, because Broidy is not the only defendant in this lawsuit. Even if
26 Bechard’s claims against Broidy are sent to arbitration, the other defendants, including Avenatti,
27 will still need to defend themselves in court. At a bare minimum, Avenatti cannot be forced into
28 arbitration. See Suh v. Superior Court (2010) 181 Cal.App.4th 1504, 1512 (“[T]he strong public

1 policy in favor of arbitration does not extend to those who are not parties to an arbitration
2 agreement or who have not authorized anyone to act for them in executing such an agreement”),
3 Bechard’s tortious interference with contract and interference with prospective economic
4 advantage cause of action is explicitly premised on Bechard’s contention that there is a valid
5 contract between Broidy and Bechard. [Complaint ¶64.] While Bechard does not have a valid
6 cause of action against Avenatti that would survive a demurrer regardless of whether or not
7 Bechard has in fact alleged a valid contract, the details of the contract and its surrounding
8 circumstances are relevant to that cause of action. One way the tortious interference defendants
9 may choose to defend themselves is by making arguments relating to the validity of the contract or
10 its monetary value to Bechard.

11 **III. CONCLUSION**

12 For the reasons stated above, Avenatti respectfully requests that Broidy’s Motion be denied
13 in its entirety.

14 Dated: July 30, 2018

AVENATTI & ASSOCIATES, A/P/C

15
16 By: _____

17 Michael J. Avenatti
18 Attorneys for Defendant Michael Avenatti
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 520 Newport Center Drive, Suite 1400, Newport Beach, CA 92660.

On July 30, 2018, I served the foregoing document described as: **DEFENDANT MICHAEL J. AVENATTI'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT ELLIOTT BROIDY'S MOTION TO SEAL OR ALTERNATIVELY STRIKE SENSITIVE AND IMMATERIAL PORTIONS OF THE COMPLAINT - PUBLIC-REDACTS MATERIALS FROM CONDITIONALLY SEALED RECORD** on the following person(s) in the manner indicated:

SEE ATTACHED

(BY MAIL) I am familiar with the practice of Eagan Avenatti for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope, with postage fully prepaid, addressed as set forth herein, and such envelope was placed for collection and mailing at Eagan Avenatti, Newport Beach, California, following ordinary business practices.

(BY FEDEX/OVERNITE) I am familiar with the practice of Eagan Avenatti for collection and processing of correspondence for delivery by overnight courier. Correspondence so collected and processed is deposited in a box or other facility regularly maintained by FedEx/Overnite that same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope designated by FedEx/Overnite with delivery fees paid or provided for, addressed as set forth herein, and such envelope was placed for delivery by FedEx/Overnite at Eagan Avenatti, Newport Beach, California, following ordinary business practices.

(BY ELECTRONIC MAIL) On this date, I caused a copy of said document to be transmitted via electronic mail to the e-mail addresses listed on the attached service list.

(BY MESSENGER SERVICE) I caused the documents to be served by placing them in an envelope or package addressed to the person at the addresses listed above and providing them to a professional messenger service for service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 30, 2018, at Newport Beach, California.



Suzy Garcia

1
2 Shera Bechard v. Elliott Broidy, *et al*
3 Case No. BC712913

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