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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

PLATYPUS WEAR, INC.,	)	Civil No. 09-2839-JLS(WVG)
	)	
Plaintiff,	)	ORDER DENYING MOTION TO
	)	SEAL OR, ALTERNATIVELY,
v.	)	REDACT SETTLEMENT
	)	CONFERENCE TRANSCRIPT
UNITED STATES FIDELITY AND	)	
GUARANTY COMPANY,	)	(Doc. No. 21)
	)	
Defendant.	)	
	)	

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Defendant United States Fidelity & Guaranty Company (hereaf-  
ter "Defendant"), has filed a Motion to Seal Or Alternatively,  
Redact Settlement Conference Transcript (hereafter "Motion").  
Plaintiff Platypus Wear, Inc. (hereafter "Plaintiff"), has filed a  
Statement of Non-Opposition to Defendant's Motion. The Court,  
having reviewed Defendant's Motion and the transcript at issue, and  
GOOD CAUSE APPEARING, HEREBY DENIES Defendant's Motion.

2 PROCEDURAL HISTORY PERTAINING TO DEFENDANT'S MOTION

3 On July 15, 2010, the Court conducted a Settlement Conference  
4 in this matter.<sup>1/</sup> At the Settlement Conference, the case settled. The  
5 terms of the settlement were placed on the record in open court.

6 On July 27, 2010, the official transcript of the terms of the  
7 settlement was filed with the Court.

8 On August 6, 2010, Plaintiff and Defendant filed a Joint  
9 Motion to Dismiss the Entire Action without prejudice. On August 10,  
10 2010, the District Judge assigned to this case granted the Joint  
11 Motion to Dismiss. The Order Granting the Joint Motion to Dismiss  
12 did not reserve the Court's jurisdiction over the case.

13 On August 17, 2010, Defendant filed the Motion now before the  
14 Court. On August 24, 2010, Plaintiff filed a Non-Opposition to the  
15 Motion.

16 On September 15, 2010, Defendant filed a Motion to Amend the  
17 Dismissal in Order to Allow Ruling on Motion to Seal or Alterna-  
18 tively, Redact Settlement Conference Transcript. On October 8, 2010,  
19 the District Judge assigned to this case granted Defendant's Motion  
20 to Amend the Dismissal. The Court's October 8, 2010 Order states:  
21 "The Court retains jurisdiction and the case is reopened for the  
22 limited purpose of deciding Defendant's Motion to seal, or, in the  
23 alternative, redact settlement conference (transcript)."

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<sup>1/</sup> The undersigned conducted a Settlement Conference by speaking to  
28 each party off-the-record, together as well as separately and  
privately. The substance of the off-the-record private  
communications between the Court and the parties are confidential.

1 Defendant seeks a Court order that the transcript recorded in  
2 open court containing the terms of the settlement be sealed or  
3 redacted in its entirety due to the confidential nature of the  
4 discussions at the settlement conference. To support this request,  
5 Defendant cites to the Notice of Early Neutral Evaluation Conference  
6 filed on January 28, 2010, that states "All (Early Neutral Evalua-  
7 tion) Conference discussions will be informal, off-the-record,  
8 privileged and confidential." Defendant also cites to the United  
9 States District Court, Southern District of California Local Rule<sup>2/</sup>  
10 16.1.c.1.b., which states: "The (Early Neutral Evaluation) Confer-  
11 ence will be informal, off-the-record, privileged and confidential."  
12 Further, Defendant cites to Local Rule 16.3.h., which states: "The  
13 Settlement Conference will be off-the-record, privileged and  
14 confidential, unless otherwise ordered by the Court."

15 II

16 ANALYSIS

17 The United States Supreme Court has acknowledged a common law  
18 right of access to court records in a civil proceeding. At the same  
19 time, the Supreme Court recognized that the right of access is not  
20 absolute. The Court stated that courts should consider "the  
21 interests advanced by the parties in light of the public interest  
22 and the duty of the courts. Hagestad v. Tragesser, 49 F.3d 1430,  
23 1434 (9<sup>th</sup> Cir. 1995)[citing Nixon v. Warner Communications, Inc., 435  
24 U.S. 589, 597-598, 602 (1978)].

25 The Ninth Circuit has held that the approach for determining  
26 whether the common law right of access should be overridden requires  
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28 <sup>2/</sup> All further references to the United States District Court, Southern  
District of California Local Rules shall be to "Local Rule."

1 the court to start with a strong presumption in favor of access.  
2 Hagestad, 49 F.3d at 1434 [citing Valley Broadcasting v. United  
3 States District Court, 798 F.2d 1289 (9<sup>th</sup> Cir. 1986)]. ["The  
4 presumption of access may be overcome only 'on the basis of  
5 articulable facts known to the court, not on the basis of un-  
6 supported hypothesis or conjecture.'" Id. at 1293]. "The factors  
7 relevant to a determination of whether the strong presumption of  
8 access is overcome include the '*public interest in understanding the*  
9 *judicial process and whether disclosure of the material could result*  
10 *in improper use of the material for scandalous or libelous purposes*  
11 *or infringement upon trade secrets.'*" Hagestad, 49 F.3d at 1434  
12 [citing EEOC v. Erection Co., Inc., 900 F.2d 168, 170 (9<sup>th</sup> Cir.  
13 1990)](emphasis added).

14 After the court takes the relevant factors into consider-  
15 ation, it must base its decision on a compelling reason and  
16 articulate the factual basis for its ruling. Pintos v. Pacific  
17 Credit Assn., 605 F.3d 665, 667-668 (9<sup>th</sup> Cir. 2010)[citing Valley  
18 Broadcasting, 798 F.2d at 1295; Kamakana v. City and County of  
19 Honolulu, 447 F.3d 1172, 1178 (9<sup>th</sup> Cir. 2006); Foltz v. State Farm  
20 Mut. Auto Ins. Co., 331 F.3d 1122, 1135-1136 (9<sup>th</sup> Cir. 2003)].

21 Here, Defendant fails to state reasons for its request to  
22 seal the transcript containing the terms of the settlement suffi-  
23 cient to override the "public('s) interest in understanding the  
24 judicial process." First, Defendant's citations to the Notice of  
25 Early Neutral Evaluation Conference and Local Rule 16.1.c.1.b. are  
26 inapposite. The settlement was reached after a settlement confer-  
27 ence, not an Early Neutral Evaluation Conference. While the  
28 principle of "confidentiality" is applicable in both scenarios, it

1 simply is inaccurate to cite to the rules of the Early Neutral  
2 Evaluation Conference to support Defendant's contention in this  
3 context.

4           Second, Defendant also cites to Local Rule 16.3 to support  
5 its Motion. Local Rule 16.3 provides rules regarding the conduct of  
6 settlement conferences in this Court. While Local Rule 16.3 states  
7 that the settlement conference will be off-the-record, privileged  
8 and confidential, Defendant misconstrues the Rule.

9           The Court sees a very distinct and important difference  
10 between maintaining the confidentiality of the actual discussions  
11 had in the settlement conference (absent a stipulation to the  
12 contrary) on one hand, and memorializing on the record in open court  
13 the terms of an agreed upon settlement on the other. The latter  
14 will not be confidential unless specific, articulable and compelling  
15 reasons justifying secrecy are made known to the Court before (or at  
16 least during) the on the record session. Afterwards is generally  
17 too late to make this showing.

18           Local Rule 16.3.d. specifically states: "The judge conducting  
19 the settlement conference may receive *in camera* communications from  
20 each party and its counsel, and must maintain such in confidence  
21 unless there is a stipulation to the contrary." Therefore, Local  
22 Rule 16.3 contemplates that the court may engage the parties  
23 separately and together in *in camera* settlement *discussions* which  
24 are to be kept confidential unless the party or attorney who engaged  
25 in the *discussions* with the judge allows the judge to disclose any  
26 part of those *discussions* to his/her opponent(s). The Local Rule  
27 does not state nor imply that once the settlement conference  
28 *discussions* are completed, and the terms of the settlement are

1 placed on the record in open court, that the transcript containing  
2 the terms of the settlement be sealed or redacted. In practice, any  
3 party to a settlement may specifically request that the transcript  
4 be sealed when the terms of the settlement are placed on the record  
5 in open court. In fact, the confidentiality of settlement terms is  
6 often discussed with the judge who presided over the settlement  
7 discussions prior to placing the settlement terms on the record in  
8 open court.

9           Here, neither party discussed with the Court at any time  
10 during the settlement discussions, or prior to, during, or after the  
11 settlement terms were placed on the record in open court, that the  
12 terms of the settlement were to be confidential or that the  
13 transcript should be sealed for that, or any other, reason. In fact,  
14 it is the Court's recollection that the parties requested that the  
15 terms of the settlement be placed on the record with at least the  
16 implicit understanding that by doing so, the agreement would become  
17 a matter of public record. Therefore, the Court concludes that  
18 Defendant's citation to Local Rule 16.3 supports the "public  
19 interest in understanding the judicial process." Also, Defendant  
20 has not presented the Court with any facts by which it could  
21 conclude that public availability of the transcript will result in  
22 "improper use of the (transcript) for scandalous or libelous  
23 purposes or infringement of trade secrets." Nor does the Court's  
24 review of the discussions with the parties at the settlement  
25 conference, and an *in camera* review of the transcript, support such  
26 an assertion. Therefore, Defendant has failed to overcome the strong  
27 presumption of the right of access to the Court's records, which in  
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1 this case is the transcript of the hearing in which the terms of the  
2 settlement of this action were placed on the record in open court.

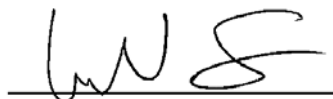
3 Moreover, Ninth Circuit law supports the Court's settlement  
4 process, as used in this case. In Doi v. Halekulani Corp., 276 F.3d  
5 1131, 1138 (9<sup>th</sup> Cir. 2002), a settlement of that action was negoti-  
6 ated in off-the-record discussions with the court. Thereafter, the  
7 parties announced in open court that the case had settled and  
8 recited the terms of the settlement. The court held that a settle-  
9 ment agreement announced on the record is binding even if a party  
10 has a "change of heart" after agreeing to its terms but before the  
11 terms are reduced to writing. See also Grimes v. Barber, 2009 WL  
12 5062348 (N.D. Cal. 2009). Further, a qualification of the terms of  
13 a settlement agreement not stated when the terms of the settlement  
14 are placed on the record is unenforceable. WG Security Products v.  
15 Tyco International, Ltd., 306 Fed. Appx. 353, 2008 WL 5272759 (9<sup>th</sup>  
16 Cir. 2008).

17 Here, Defendant seeks to insert, after-the-fact, a confiden-  
18 tiality provision into the parties' recitation of the terms of the  
19 settlement placed on the record in open court. Defendant's request  
20 is made after the terms of the settlement were placed on the record  
21 in open court, after the terms of the settlement were reduced to  
22 writing, and without mention of such a confidentiality provision  
23 during the private, off-the-record discussions with the Court, or at  
24 the time the settlement terms were placed on the record in open  
25 court. Even though Defendant's Motion is not opposed by Plaintiff,  
26 the Court views Defendant's request to have the transcript sealed or  
27 redacted to protect its confidentiality as a "change of heart" or a  
28 qualification to the terms of the settlement, after it agreed to the

1 terms of the settlement and after the terms of the settlement were  
2 reduced to writing. See Grimes, supra, WG Security Products, supra.

3 As a result of the foregoing, Defendant's Motion is DENIED.

4 DATED: October 15, 2010

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7 Hon. William V. Gallo  
8 U.S. Magistrate Judge

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