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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SONNY LOW, J.R. EVERETT and
JOHN BROWN, on Behalf of
Themselves and All Others Similarly
Situating,

Plaintiffs,

vs.

TRUMP UNIVERSITY, LLC, a New
York Limited Liability Company, and
DONALD J. TRUMP,

Defendants.

No. 3:10-cv-0940-GPC-WVG

**ORDER GRANTING
DEFENDANT'S MOTION TO
AMEND PROTECTIVE ORDER**

[ECF No. 485]

ART COHEN, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

DONALD J. TRUMP,

Defendant.

No. 3:13-cv-02519-GPC-WVG

ORDER:

**GRANTING DEFENDANT'S
MOTION TO AMEND
PROTECTIVE ORDER**

**DENYING MEDIA
INTERVENORS' MOTION TO
INTERVENE AND FOR AN
ORDER MODIFYING
STIPULATED PROTECTIVE
ORDER**

**GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
EX PARTE APPLICATION FOR
LEAVE TO FILE ELECTRONIC
EXHIBITS**

[ECF Nos. 230, 233, 238]

1 Before the Court are three related motions concerning the public
2 dissemination of the videotaped depositions of Defendant Donald J. Trump
3 (“Defendant”) taken on December 10, 2015, and January 21, 2016.

4 First, before the Court is non-party press organizations Cable News Network,
5 Inc. (“CNN”); CBS Broadcasting Inc.; CBS Interactive Inc.; Tribune Publishing
6 Company; NBCUniversal Media, LLC; ABC, Inc.; The New York Times Company;
7 and WP Company LLC d/b/a The Washington Post’s (collectively, the “Media
8 Intervenors”) motion, in *Cohen v. Trump*, No. 3:13-cv-02519-GPC-WVG
9 (“*Cohen*”), to intervene and for an order modifying the stipulated First Amended
10 Protective Order to remove the confidentiality designations to portions of the
11 videotaped depositions. Motion of Media Intervenors to Intervene and for an Order
12 Modifying Stipulated Protective Order (“Media Mot.”), *Cohen*, ECF No. 233.¹

13 Second, before the Court is Defendants Trump University, LLC (“TU”) and
14 Donald J. Trump’s (collectively, “Defendants”) motion, in *Cohen* and the related
15 case *Low v. Trump University*, No. 3:10-cv-00940-GPC-WVG (“*Low*”), to amend
16 the protective order operative in both cases to (1) prohibit the filing of any
17 videotaped deposition, unless under seal; and (2) bar the dissemination of any
18 videotaped deposition. Defendant’s Motion to Amend Protective Order (“Def.
19 Mot.”), *Low*, ECF No. 485/*Cohen*, ECF No. 238.

20 Third, before the Court is Plaintiff’s June 9, 2016 *ex parte* application for
21 leave to file electronic exhibits (“Pl. App.”). *Cohen*, ECF No. 230.

22 The motions have been fully briefed. *See* Defendants’ Response to Media
23 Intervenors’ Motion to Intervene and for an Order Modifying Stipulated Protective
24 Order (“Def. Resp.”), *Cohen*, ECF No. 251; Media Intervenors’ Consolidated Reply
25 in Support of Motion to Intervene and for Order Modifying Stipulated Protective
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27 ¹ On June 15, 2016, Fox News Network, LLC joined Media Intervenors’ motion.
28 *Cohen*, ECF No. 237.

1 Order and Opposition to Defendants’ Motion to Amend Protective Order (“Media
 2 Reply”), *Cohen*, ECF No. 253; Plaintiffs’ Response in Opposition to Defendants’
 3 Motion to Amend the Protective Order (“Pl. Resp.”), *Low*, ECF No. 492/*Cohen*, ECF
 4 No. 254; Defendants’ Consolidated Reply in Support of Motion to Amend Protective
 5 Order (“Def. Reply”), *Low*, ECF No. 494/*Cohen*, ECF No. 255; Defendant’s
 6 Response in Opposition to Plaintiff’s *Ex Parte* Application for Leave to File
 7 Electronic Exhibits (“Def. App. Resp.”), *Cohen*, ECF No. 235; Plaintiff’s Reply to
 8 Defendant’s Opposition to Plaintiff’s *Ex Parte* Application for Leave to File
 9 Electronic Exhibits (“Pl. App. Reply”), *Cohen*, ECF No. 236. A hearing on the
 10 motions was held on July 13, 2016. *Low*, ECF No. 497/*Cohen*, ECF No. 261.

11 Upon consideration of the moving papers, oral argument, and the applicable
 12 law, and for the following reasons, the Court **DENIES** Media Intervenors’ motion
 13 to intervene and for an order modifying the stipulated protective order; **GRANTS**
 14 Defendants’ motion to amend the protective order; and **GRANTS IN PART** and
 15 **DENIES IN PART** Plaintiff’s *ex parte* application for leave to file exhibits.

16 **PROCEDURAL BACKGROUND**

17 On November 7, 2011, Magistrate Judge Gallo granted the parties’ joint
 18 motion for a protective order in the *Low* case. *Low*, ECF No. 91. On March 21, 2014,
 19 after Plaintiff Art Cohen filed his case, Judge Gallo granted the parties’ joint motion
 20 to amend the *Low* protective order so as to govern both cases. First Amended
 21 Protective Order (“Protective Order”), *Low*, ECF No. 316.

22 Under the terms of the Protective Order, the parties may unilaterally designate
 23 as confidential a “deposition or portions of the deposition” without permission from
 24 the Court, and without a particularized showing of good cause. *See id.* at 3 (“[T]he
 25 deposition or portions of the deposition must be designated as containing
 26 Confidential Information subject to the provisions of this Order; such designation
 27 must be made on the record whenever possible, but a party may designate portions
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1 of depositions as containing Confidential Information after transcription of the
2 proceedings; [A] party will have until fourteen (14) days after receipt of the
3 deposition transcript to inform the other party or parties to the action of the portions
4 of the transcript to be designated “CONFIDENTIAL” or “CONFIDENTIAL – FOR
5 COUNSEL ONLY.” (second alteration in original)). The Protective Order prohibits
6 parties from filing a deposition with the court that was designated as “confidential”
7 “unless it can be accomplished under seal, identified as being subject to this Order,
8 and protected from being opened except by order of this Court.” *Id.* Moreover, the
9 Protective Order restricts parties receiving “confidential” information from
10 disclosing it “to anyone other than those persons designated within this order”
11 *Id.*

12 On December 10, 2015, and January 21, 2016, Plaintiff Cohen (“Plaintiff”)
13 deposed Defendant in the *Cohen* case. *Cohen*, ECF Nos. 157, 172. Defendant
14 initially sought to designate the entirety of the deposition transcripts as confidential,
15 but withdrew his designations following a challenge from Plaintiff except as to three
16 categories of information: (1) Defendant’s past praise of public figures; (2) a
17 licensing agreement between TU and a third party; and (3) Defendant’s profits from
18 TU. *Cohen*, ECF No. 172 at 1. On March 14, 2016, Judge Gallo found that the first
19 category was not entitled to a confidential designation, but upheld the designation
20 for the second category and a portion of the third. *Id.* at 5, 7, 9. In accordance with
21 this finding, Judge Gallo ordered the de-designation of approximately 29 pages of
22 the deposition transcript, permitting Defendant to maintain confidentiality
23 designations for only approximately three pages of the deposition transcript, as well
24 as for certain numeric figures. *Id.* at 6–9.

25 On June 3, 2016, Plaintiff Cohen submitted his opposition to Defendant’s
26 motion for summary judgment in the *Cohen* case, including as exhibits 48 video files
27 of discrete portions of Defendant’s depositions. *Cohen*, ECF Nos. 220, 227-1 at 2–
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1 4. On June 8, 2016, the Court found that in so doing, Plaintiff failed to comply with
2 Section 2.k of the Court’s Electronic Case Filing Administrative Policies and
3 Procedures Manual, which requires parties to seek leave of the Court to allow the
4 non-electronic filing of exhibits when they are not convertible to “electronic” (*i.e.*,
5 “Portable Document Format” or “PDF”) form. *Cohen*, ECF No. 228 at 1.
6 Accordingly, the Court did not permit these video files to be entered into the record,
7 but instead returned them to Plaintiff. *Id.* at 2.

8 Later that same day, Plaintiff filed an *ex parte* application for leave to submit
9 the above 48, and two additional, video files as exhibits supporting his opposition to
10 Defendant’s motion for summary judgment. *Cohen*, ECF No. 230.

11 On June 10, 2016, Media Intervenors filed the instant motion, seeking the
12 public filing and dissemination of the complete transcripts and videotapes of
13 Defendant’s December 10, 2015, and January 21, 2016 depositions. *Cohen*, ECF No.
14 233. On June 15, 2016, Defendants filed their related motion to amend the protective
15 order to (1) prohibit the filing of any videotaped deposition, unless under seal; and
16 (2) bar the dissemination of any videotaped deposition. *Low*, ECF No. 485/*Cohen*,
17 ECF No. 238. Therein, Defendants withdrew the remaining confidentiality
18 designations related to Defendant’s deposition testimony. *Id.* at 1.

19 DISCUSSION

20 I. Media Intervenors’ and Defendants’ Motions

21 A. Legal Standard

22 “As a general rule, the public is permitted ‘access to litigation documents and
23 information produced during discovery.’” *In re Roman Catholic Archbishop of*
24 *Portland in Oregon*, 661 F.3d 417, 424 (9th Cir. 2011) (quoting *Phillips v. Gen.*
25 *Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002)) (citing *San Jose Mercury News,*
26 *Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999) (“It is well-established
27 that the fruits of pretrial discovery are, in the absence of a court order to the contrary,
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1 presumptively public.”)). However, under Rule 26, “[t]he court may, for good cause,
2 issue an order to protect a party or person from annoyance, embarrassment,
3 oppression, or undue burden or expense.” *Id.* (alteration in original) (quoting Fed.
4 R. Civ. P. 26(c)(1) (internal quotation marks omitted)). “The party opposing
5 disclosure has the burden of proving ‘good cause,’ which requires a showing ‘that
6 specific prejudice or harm will result’ if the protective order is not granted.” *Id.*
7 (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir.
8 2003)).

9 “While courts generally make a finding of good cause before issuing a
10 protective order, a court need not do so where (as here) the parties stipulate to such
11 an order.” *Id.* Where “the protective order was a stipulated order and no party ha[s]
12 made a good cause showing, then the burden of proof . . . remain[s] with the party
13 seeking protection.” *Id.* (alterations in original) (quoting *Phillips*, 307 F.3d at 1211
14 n.1) (internal quotation marks omitted); *see also Foltz*, 331 F.3d at 1138 (noting that
15 “[r]eliance will be less with a blanket [protective] order, because it is by nature
16 overinclusive” (alterations in original) (quoting *Beckman Indus., Inc. v. Int’l Ins.*
17 *Co.*, 966 F.2d 470, 476 (9th Cir. 1992))). Therefore, where the release of documents
18 subject to a stipulated order is contemplated, “the party opposing disclosure has the
19 burden of establishing that there is good cause to continue the protection of the
20 discovery material.” *Id.*

21 The Ninth Circuit has delineated a two-step process for determining whether
22 there is good cause to continue the protection of disputed discovery material:

23 First, [the court] must determine whether “particularized harm will
24 result from disclosure of information to the public.” As we have
25 explained, “[b]road allegations of harm, unsubstantiated by specific
26 examples or articulated reasoning, do not satisfy the Rule 26(c) test.”
27 Rather, the person seeking protection from disclosure must “allege
28 specific prejudice or harm.” Second, if the court concludes that such
harm will result from disclosure of the discovery documents, then it

1 must proceed to balance “the public and private interests to decide
2 whether [maintaining] a protective order is necessary.”

3 *Id.* (second and third alterations in original) (footnote omitted) (citations omitted).

4 In balancing the public and private interests, the Ninth Circuit directs courts
5 to consider the factors identified by the Third Circuit in *Glenmede Trust Co. v.*
6 *Thompson*, 56 F.3d 476, 483 (3d Cir. 1995):

7 (1) [W]hether disclosure will violate any privacy interests; (2) whether
8 the information is being sought for a legitimate purpose or for an
9 improper purpose; (3) whether disclosure of the information will cause
10 a party embarrassment; (4) whether confidentiality is being sought over
11 information important to public health and safety; (5) whether the
12 sharing of information among litigants will promote fairness and
13 efficiency; (6) whether a party benefitting from the order of
14 confidentiality is a public entity or official; and (7) whether the case
15 involves issues important to the public.

14 *Id.* at 424 n.5 (quoting *Glenmede Trust*, 56 F.3d at 483). The *Glenmede* court
15 recognized, however, that these seven factors “are neither mandatory nor
16 exhaustive.” Ultimately,

17 Discretion should be left with the court to evaluate the competing
18 considerations in light of the facts of individual cases. By focusing on
19 the particular circumstances in the cases before them, courts are in the
20 best position to prevent both the overly broad use of [confidentiality]
21 orders and the unnecessary denial of confidentiality for information that
22 deserves it

22 *Glenmede Trust*, 56 F.3d at 483 (quoting Arthur R. Miller, *Confidentiality,*
23 *Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 492
24 (1991) (footnote omitted)).

25 **B. Analysis**

26 Media Intervenors seek the public filing and dissemination of the complete
27 transcripts and videotapes of the depositions of Defendant taken on December 10,
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1 2015, and January 21, 2016. Media Mot. 1. Plaintiff does not oppose Media
2 Intervenors’ motion. Pl. Resp. 1. Defendants do not oppose Media Intervenors’
3 motion as to the transcripts of the depositions, and have withdrawn all confidentiality
4 designations related to the transcripts of Defendant’s deposition testimony. Def.
5 Resp. 1. Thus, the sole remaining dispute concerns the videos of Defendant’s
6 depositions.

7 The protective order operative in these two cases is a stipulated or “blanket”
8 protective order, since it was obtained “without making a particularized showing of
9 good cause with respect to any individual document.” *See Blum v. Merrill Lynch*
10 *Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1351 n.1 (9th Cir. 2013) (quoting *Foltz*,
11 331 F.3d at 1138) (internal quotation marks omitted). As such, Defendants have the
12 burden of demonstrating that there is good cause to maintain the confidentiality of
13 the deposition videos. *See also* Def. Reply 3 (recognizing that “[t]he good cause
14 standard applies here”).

15 1. Specific Prejudice or Harm

16 Defendants advance a number of theories as to how the release of the
17 deposition videos could cause specific prejudice or harm to the Defendant. However,
18 the gravamen of Defendants’ opposition, and the argument focused on by
19 Defendants’ counsel at the hearing, is that releasing the deposition videos would
20 pose a “threat to the integrity and fairness of the trial proceedings.” Hr’g Tr. 5, July
21 13, 2016, *Low*, ECF No. 498/*Cohen*, ECF No. 262.

22 Defendants argue that “allowing public access to the video depositions creates
23 a significant risk of irrevocably tainting the jury pool.” Def. Mot. 2. Defendants
24 suggest that due to the “media frenzy” around this case and the risk that videos can
25 be “cut and spliced and used as ‘sound-bites’ on the evening news or sports shows,”
26 releasing the videos could impact Defendants’ ability to receive a fair trial. *Id.* (citing
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1 *Felling v. Knight*, No. IP01-0571-C-T/G, 2001 WL 1782360, at *3 (S.D. Ind. Dec.
2 21, 2001)).

3 The Court finds that Defendants’ argument has some merit. Courts have
4 expressed caution about the release of litigation documents in audio or video form,
5 which are “subject to a higher degree of potential abuse” than written transcripts.
6 *Felling*, 2001 WL 1782360, at *3. For instance, in *Nixon v. Warner*
7 *Communications, Inc.*, 435 U.S. 589 (1978), the Supreme Court acknowledged a
8 concern that releasing the Watergate audiotapes could open the door to the
9 audiotapes’ contents being “distort[ed] through cutting, erasing, and splicing of [the]
10 tapes” by the media. *Id.* at 601. However, the Court then found that it need not
11 balance this concern with the public interest in “understanding . . . an immensely
12 important historical occurrence,” because the question of whether to release the tapes
13 could be decided on the basis of the Presidential Recordings Act, a statute not at
14 issue here. *Id.* at 602–03.

15 Here, the proceedings in this case have been subject to a high degree of public
16 scrutiny. *See* Media. Mot. Exs. A–E. Given the context of the case and the timing of
17 Media Intervenors’ request, it is nigh-inevitable that “cut[]” and “splic[ed]”
18 segments of Defendant’s deposition videos would appear in both media reports and
19 in political advertisements aired nationwide prior to the trial date in November,
20 increasing the likelihood that prospective jurors would be exposed to information
21 about the case, as well as to evidence that could be introduced at trial to impeach
22 Defendant’s testimony.

23 Media Intervenors and Plaintiffs argue that because Defendants have not
24 identified which specific portions of the videos would be especially damaging, the
25 harms asserted by Defendants are “abstract” and “speculative.” Hr’g Tr. 16, 26; *see*
26 *also* Pl. Resp. 11, Media Reply 1. However, in order to establish specific prejudice
27 or harm in the context of videos, Defendants are not required to point to a specific
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1 portion of the videos that would be especially damaging if released. Instead, courts
2 have recognized that the specific harm derives from the nature of the video medium
3 itself. *See, e.g., U.S. v. Dimora*, 862 F. Supp. 2d 697, 711 (N.D. Ohio 2012)
4 (recognizing that the fact that the “exhibits are videos increases the probability that
5 they will be widely disseminated and thus taint the jury pool”); *United States v.*
6 *McDougal*, 103 F.3d 651, 658 (8th Cir. 1996) (finding a “potential for misuse of the
7 [video]tape . . . through cutting, erasing, and splicing” (citing *Nixon*, 435 U.S. at
8 401)); *cf. United States v. Poindexter*, 732 F. Supp. 170, 172 (D.D.C. 1990) (finding
9 no dispute that “should copies of the tape itself be made freely available, the breadth
10 of the publicity would be increased manifold”). The Court thus finds that Defendants
11 have established that particularized harm will result from disclosure of the
12 deposition videos to the public.

13 **2. Balancing the Public and Private Interests**

14 Having established that particularized harm will result from disclosure of the
15 deposition videos, the Court must balance the public and private interests to
16 determine whether release of the videos is nonetheless warranted. As Defendants’
17 counsel acknowledged at the hearing, “the cases in this area . . . are very
18 circumstance– and fact–specific.” Hr’g Tr. 5. In cases where courts have considered
19 whether to release disputed materials, they have almost always engaged in granular
20 scrutiny of the nature of the content at issue, the circumstances of the case, and the
21 realities on the ground, before fashioning relief that balances the private and public
22 interests at stake.

23 That said, when examining the precedents offered by Defendants and Media
24 Intervenors, a number of broad principles can be discerned in the case law. First,
25 courts have sometimes restricted access to video depositions to protect parties from
26 the potential for embarrassment, but not where there is a significant and legitimate
27 public interest in the content of those depositions. *Compare Lopez v. CSX*

1 *Transportation, Inc.*, No. 3:14-257, 2015 WL 3756343, at *7 (W.D. Penn. June 16,
2 2015) (barring dissemination of video depositions of defendant corporation’s
3 employee where the train accident at issue in the case did not implicate significant
4 public policy concerns), *with Condit v. Dunne*, 225 F.R.D. 113, 118–20 (S.D.N.Y.
5 2004) (releasing video depositions where the case was one of “public concern”
6 because it involved a “then-sitting United States Congressman in the discharge of
7 his duties,” and where court found that “any tainting of the jury pool can be remedied
8 through voir dire”), *Felling v. Knight*, 211 F.R.D. 552, 554–55 (S.D. Ind. 2003)
9 (initially sealing video depositions of non-parties in lawsuit involving battery
10 allegations against Bobby Knight, the well-known Indiana college basketball coach,
11 to protect those non-parties from potential embarrassment, and then releasing the
12 video depositions after the case settled, both on the grounds that the potential for
13 embarrassment had decreased following settlement of the case, and on the grounds
14 that any remaining potential for embarrassment was “outweighed by the public’s
15 right to know,” since “[s]eemingly few topics in the state of Indiana have generated
16 more attention or public debate in recent times than the events surrounding Knight’s
17 termination”), *and Flaherty v. Seroussi*, 209 F.R.D. 295, 300 (N.D.N.Y. 2001)
18 (releasing video depositions of mayor and other public officials where the
19 underlying litigation alleged improper official action, since the public interest
20 outweighed any interest in preventing “modest embarrassment” to the mayor).

21 Second, courts have tended to restrict access to video depositions of
22 celebrities where the improper purpose for which the deposition is sought is
23 commercial gain or prurient interest in exposing the details of a celebrity’s personal
24 life. *See Paisley Park Enterprises, Inc. v. Uptown Productions*, 54 F. Supp. 2d 347,
25 348–49 (S.D.N.Y. 1999) (barring public dissemination of deposition video of
26 musical artist Prince where Prince was a third party to the intellectual property
27 dispute, the dispute itself was not of public interest, and the defendants’ desire to
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1 circulate the video was “commercially motivated”); *see also Stern v. Cosby*, 429 F.
2 Supp. 2d 417, 422 (S.D.N.Y. 2007) (finding judicial efficiency would be impaired
3 by public dissemination of deposition video of author of “Blonde Ambition: The
4 Untold Story Behind Anna Nicole Smith’s Death” where author was defendant in
5 libel action and dissemination would contribute to “circus-like atmosphere”
6 produced by “exploitive media” and “celebrity gossip” talk shows).

7 Third, courts have found a diminished privacy interest where the party
8 opposing release is a public figure experienced in dealing with the media. *See Estate*
9 *of Rosenbaum v. City of New York City*, 1993 U.S. Dist. LEXIS 15908, at *7
10 (E.D.N.Y. Aug. 13, 1993) (permitting news media to be present at the depositions
11 of the Mayor and other city officials where “the case [was] of high public interest,
12 th[e] depositions . . . sought are depositions of parties, not of third persons[,] . . . the
13 parties whose depositions at issue are parties experienced in dealing with the media
14 . . . [and] these parties have themselves already spoken out . . . on a number of
15 occasions to members of the press”); *see also Constand v. Cosby*, 112 F. Supp. 3d
16 308, 315–16 (E.D. Pa. 2015) (finding a diminished privacy interest where the “party
17 seeking to use [that privacy interest] as a shield is a public person subject to
18 legitimate public scrutiny,” and where that party “has freely entered the public
19 square and thrust himself into the vortex of these public issues,” *id.* at 315–16
20 (citations omitted) (internal quotation marks omitted)).

21 Fourth, courts have historically extended special protections to the deposition
22 testimony of sitting and former Presidents for reasons connected with protecting the
23 interests of the Presidency and preserving the separation of powers. *See United*
24 *States v. McDougal*, 103 F.3d 651, 657–58 (8th Cir. 1996); *Jones v. Clinton*, 12 F.
25 Supp. 2d 931, 938 (E.D. Ark. 1998); *United States v. Poindexter*, 732 F. Supp. 170,
26 173 (D.D.C. 1990).

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1 Fifth, courts have tended to accord a lower presumption of public access to
2 discovery materials not yet entered into evidence, as compared to evidence or
3 exhibits attached to dispositive motions or introduced at trial. *Compare, e.g., Stern,*
4 *529 F. Supp. 2d at 421* (finding that “the presumption of public access—if any—
5 that attaches to the transcript and video tape is low, at best[, and n]o such
6 presumption attaches at all to the videotape” where the transcript and videotape of
7 the defendant’s deposition were “merely materials generated in discovery [and we]re
8 not relevant to [an]y ‘performance’ of a ‘judicial function,’” *id.* at 421–22 (citation
9 omitted)), *with In re Application of Nat’l Broad. Co., 635 F.2d at 952* (“Once the
10 evidence has become known to the members of the public, including representatives
11 of the press, through their attendance at a public session of court, it would take the
12 most extraordinary circumstances to justify restrictions on the opportunity of those
13 not physically in attendance at the courtroom to see and hear the evidence, when it
14 is in a form that readily permits sight and sound reproduction.”).²

15 Sixth, courts have found a greater potential for harm where trial is imminent,
16 or where there is reason to believe that media scrutiny will be on-going rather than
17 dissipate or lessen with time. *Compare Dimora, 862 F. Supp. 2d at 706–07* (finding
18 that releasing video exhibits shown at trial would “implicate the due process rights
19 of Dimora and others” where Dimora could still exercise his right to appeal, was a
20 defendant in another pending case involving substantially similar conduct, and a
21 number of other cases stemming from the same corruption investigation were also
22 pending), *and Poindexter, 732 F. Supp. at 172* (finding that release of videotape of
23 former President Reagan’s testimony eleven days before trial “would be likely both
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25 ² *But see Apple Ipod iTunes Antitrust Litig., 75 F. Supp. 3d 1271, 1275* (N.D. Cal.
26 2014) (barring copying of pre-taped trial testimony on the grounds that the public
27 and the media had already had full access to the information contained in the videos
28 when the videos were presented at trial), *and Dimora, 862 F. Supp. 2d at 705* (barring
copying of video evidentiary exhibits on same grounds).

1 significantly to complicate the process of jury selection and to create possible
2 *Kastigar* problems”), *with Condit*, 225 F.R.D. at 118 (finding, “well before the
3 beginning of trial,” that “[e]ven assuming part or all of the video is disseminated to
4 the public, memories fade, and moreover . . . any tainting of the jury pool can be
5 remedied through voir dire”), *and Felling*, 211 F.R.D. at 554 (finding that, following
6 settlement of the case, “the ‘potential embarrassment the [deponents] would suffer
7 at seeing themselves on the evening news’ ha[d] significantly lessened or outright
8 disappeared,” such that good cause no longer existed to seal deposition videos).

9 Applying these principles to the present case, several factors weigh in favor
10 of disclosure. First, there is a degree of legitimate public interest in the content of
11 the deposition videos. Here, Media Intervenors argue that since Defendant is the
12 Republican nominee in the 2016 presidential race, “has made the litigation itself a
13 campaign issue,” and has “emphasized his business record and negotiating skills as
14 his main qualifications to serve as President of the United States,” the public interest
15 in understanding the judicial process is unusually strong in this case. Media Mot. 19.
16 Defendants respond that even if this were so, the content of the video depositions is
17 “entirely duplicative” of the content of the written transcripts already publicly
18 available. Def. Mot. 1. However, as *Poindexter* acknowledges, the “public’s right to
19 know” can encompass demeanor evidence when the subject matter of the litigation
20 is one of public interest. *See* 732 F. Supp. at 172 (acknowledging that the “public’s
21 right to know” encompassed both “what . . . former President [Reagan] said last
22 week” concerning the Iran-Contra scandal in a videotaped deposition, “and even
23 how he looked and behaved when he said what he said”).

24 Second, unlike in *Paisley Park* and *Stern*, the media is not motivated by the
25 improper purpose of a prurient interest in the private life of a celebrity, but by a
26 legitimate interest in “providing the electorate with valuable insight into the
27 demeanor of the . . . Republican presidential nominee.” Media Mot. 21.

1 Third, Defendant arguably has a diminished privacy interest as someone who
2 is a “public figure experienced in dealing with the media,” *Rosenbaum*, 1993 U.S.
3 Dist. LEXIS 15908, at *7, and who “has freely entered the public square and thrust
4 himself into the vortex of these public issues,” *Constand*, 112 F. Supp. 3d at 316.
5 *See* Media Mot. Exs. A–E; Pl. Resp. 5–6.

6 On the other hand, several factors weigh against disclosure. First, since the
7 deposition videos are “merely materials generated in discovery” that are not
8 currently relevant as to the “performance” of a “judicial function” and have “little or
9 no bearing” on any exercise of the Court’s Article III judicial power, the presumption
10 of public access that attaches to the deposition videos is substantially weaker than if
11 the videos constituted evidence or exhibits properly attached to dispositive motions
12 or introduced at trial. *Stern*, 529 F. Supp. 2d at 421–22 (citations omitted) (internal
13 quotation marks omitted).

14 Second, there is a greater potential for harm to result from the release of the
15 deposition videos because of the high likelihood that media scrutiny in this case will
16 be on-going. Although here, trial is three months away, rather than eleven days like
17 in *Poindexter*, unlike in *Condit*, there is no reason to believe that “memories will
18 fade” before the beginning of trial. 225 F.R.D. at 118. Rather, there is every reason
19 to believe that release of the deposition videos would contribute to an on-going
20 “media frenzy” that would increase the difficulty of seating an impartial jury.

21 In weighing these factors, the Court is mindful of the Supreme Court’s
22 instruction that “the court . . . has a responsibility to exercise an informed discretion
23 as to release of the tapes, with a sensitive appreciation of the circumstances that led
24 to their production[,]” and that there “exist[s] a danger that the court could become
25 a partner in the use of the [disputed] material to ‘gratify private spite or promote
26 public scandal,’ with no corresponding assurance of public benefit.” *Nixon*, 435 U.S.
27 at 603 (citation omitted). The core question is whether the public’s interest in
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1 viewing the demeanor of Defendant in the deposition videos outweighs the
2 impairment to judicial efficiency likely to result. The Court concludes that it does
3 not. While there is a degree of legitimate public interest in the demeanor of the
4 Defendant in the deposition videos, it is not a substantial interest. To the extent that
5 the public seeks to understand the substance of the litigation and the conduct of the
6 judicial process, the written transcripts of Defendant’s depositions, Pl. Resp., Exs.
7 1–2, information made public by the Court, *Cohen*, ECF No. 211, and information
8 reported in the media, Media Mot., Exs. A–E, provide a detailed portrait of the
9 underlying facts, claims, and defenses in both cases, including the substance of
10 Defendant’s responses to Plaintiffs’ counsel’s questions under oath.

11 At the same time, a realistic appraisal of the context of the case necessitates
12 the conclusion that releasing the deposition videos would impair judicial efficiency
13 by increasing the likelihood that prospective jurors would be exposed to information
14 about the case, as well as to evidence that could be introduced at trial to impeach
15 Defendant’s testimony. Media Intervenors suggest that courts have found that even
16 extensive publicity does not necessarily prevent a party from getting a fair trial, and
17 that any such risk can be mitigated by the use of jury management tools, such as voir
18 dire. Media Mot. 8 (citing cases). While that may be, the Court is loath to increase
19 the difficulty of the challenge of seating an impartial jury in order to achieve a
20 limited public benefit.³

21 Thus, the Court finds that Defendants have established good cause to bar the
22 further dissemination of the deposition videos. Ultimately, “[v]ideotaped

23
24 ³ Plaintiffs also suggest that Defendants are not in a position to make any arguments
25 about tainting the jury pool, given the “unprecedented public campaign to poison the
26 jury pool by denigrating this case, these proceedings, and Class Representatives”
27 conducted by Defendant. Pl. Resp. 13; *see also* Hr’g Tr. 26. However, this argument
28 does not bear on the degree of legitimate public interest in the deposition videos.
Even assuming *arguendo* that the specific prejudice or harm is thereby diminished,
that harm would still outweigh the low public interest in the deposition videos here.

1 depositions are permitted to facilitate the presentation of evidence to juries; they are
2 not intended to provide ‘a vehicle for generating content for broadcast and other
3 media.’” *Stern*, 529 F. Supp. at 422–23 (quoting *Paisley Park*, 54 F. Supp. 2d at
4 349).

5 Accordingly, the Court **DENIES** Media Intervenors’ motion to intervene and
6 for an order modifying the stipulated First Amended Protective Order to remove the
7 confidentiality designations to portions of the videotaped depositions, and
8 **GRANTS** Defendants’ motion to amend the protective order operative in both *Low*
9 and *Cohen* to (1) prohibit the filing of any videotaped deposition, unless under seal;
10 and (2) bar the dissemination of any videotaped deposition.

11 **II. Plaintiff’s *Ex Parte* Application**

12 Plaintiff makes two arguments supporting his *ex parte* application for leave to
13 file the video exhibits. As an initial matter, Plaintiff argues that Section 2.k does not
14 apply to the video exhibits, because Section 2.k refers to “exhibits . . . not convertible
15 to electronic form,” while the video exhibits are “electronic files” and “the only form
16 in which they have ever existed is electronic.” Pl. App. 2.

17 However, when Section 2.k is examined in the context of the Manual, it is
18 clear that the rule’s reference to “exhibits . . . not convertible to electronic form”
19 refers to all exhibits that cannot be rendered in a “Portable Document Format”
20 (“.pdf”) format. .pdf is the only document format supported by the Case
21 Management/Electronic Case Filing System (“CM/ECF”), the Internet-based system
22 for filing documents and maintaining court case files in this District. In Section 1.d,
23 the Manual states that “ELECTRONIC FILING means uploading a document
24 directly from the registered user’s computer in ‘Portable Document Format’ (.pdf),
25 using the CM/ECF system to file that document in the court’s case file.” *See* Manual,
26 Section 1.d. In turn, Section 2.k states that “[e]xhibits must be submitted
27 electronically in CM/ECF as attachments.” Section 2.k then states that “[a] party
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1 may seek leave of the court to allow the non-electronic filing of exhibits when they
2 are not convertible to electronic form (e.g. videotapes, maps, etc.).” Thus, the
3 Manual contemplates that typically, exhibits will be filed in .pdf format using the
4 CM/ECF system. Where an exhibit cannot be submitted to CM/ECF because it is
5 not convertible to .pdf format, a party must seek leave of the court before filing that
6 exhibit. Thus, under Section 2.k, Plaintiff must seek leave of the court to file the
7 video exhibits.⁴

8 Next, Plaintiff argues that even if Section 2.k applies, Plaintiff should be
9 granted leave to file the video exhibits, because they offer additional evidentiary
10 support for his oppositions to Defendant’s motions, especially Plaintiff’s opposition
11 to Defendant’s motion for summary judgment. Pl. App. 2. The Court will evaluate
12 the merits of this argument for each of Plaintiff’s proffered video exhibits in turn.

13 First, in Exhibit D to Plaintiff’s opposition to Defendant’s motion for
14 summary judgment, Plaintiff offers selected excerpts from two depositions of the
15 Defendant in both transcript and video form. Plaintiff argues that the video form of
16 the deposition excerpts should be considered by the Court because “[Defendant]
17 made many spontaneous and *ad hominem* remarks that are not reflected in the paper
18 transcript of his depositions” and “[Defendant’s] tone, facial expressions, gestures,
19 and body language are also not reflected in the paper transcripts, yet they speak
20 volumes to, *inter alia*, Trump’s complete and utter unfamiliarity with the instructors

22 ⁴ Indeed, the Court’s interpretation of Section 2.k is supported by the previous
23 actions of the parties themselves. As the Court observed in its June 8, 2016 Order,
24 both parties have previously sought leave of the Court to file video exhibits in both
25 *Low* and *Cohen*. See *Low*, ECF Nos. 118, 120, 299, 304; *Cohen*, ECF Nos. 35, 36.
26 Indeed, Plaintiff’s counsel admits that they first sought the agreement of Defendant
27 to file a joint motion seeking leave of the Court to file the video exhibits pursuant to
28 Section 2.k. Pl. App. 2; see also Def. App. Resp. 4. It was only after “[D]efendant
would not agree to a joint motion” that “Class Counsel carefully reviewed Section
2.k [and] concluded that it does not apply to Exhibits D, L, or M.” Pl. App. 2.

1 and ‘instruction’ that student-victims received, instead of ‘my hand-picked
2 instructors [teaching] my techniques, which took my entire career to develop,”
3 which is what [Defendant] promised.” Pl. App. 3 (third alteration in original).

4 However, the Court has reviewed both the written transcript and the video
5 clips proffered by Plaintiff and finds that the transcript appears to be a substantially
6 accurate record of the remarks made by Defendant during his depositions. Indeed,
7 the Court observes that Plaintiff provides no specific examples of any “spontaneous
8 [or] *ad hominem* remarks” made by Defendant that are reflected in the video clips
9 and not the transcript, either in this application or in Plaintiff’s opposition to
10 Defendant’s motion for summary judgment. *See* Pl. App. 3; Plaintiff’s Opposition
11 to Defendant’s Motion for Summary Judgment (“Pl. MSJ Opp.”), *Cohen*, ECF No.
12 220. Similarly, nowhere in Plaintiff’s opposition to Defendant’s motion for summary
13 judgment does Plaintiff rely on Defendant’s “tone, facial expressions, gestures, [or]
14 body language,” rather than the substance of Defendant’s statements as reflected in
15 the transcript, to support his opposition. *See* Pl. MSJ Opp. *passim*.⁵ As Defendant
16 observes, parties have never previously sought to submit video footage of any
17 deposition. Def. App. Resp. 1–2. Plaintiff’s desire “not . . . to leave anything to
18 chance” does not justify the filing of duplicative video evidence where a written
19 transcript fairly reflects the evidence actually relied upon by Plaintiff at the summary
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21
22 ⁵ In his reply, Plaintiff similarly argues that “[s]eeing and hearing [the deposition]
23 testimony will . . . allow the Court to confirm that [Defendant] was fully engaged in
24 the deposition; he was not rushed into giving answers; he was not shouted down;
25 and he was not glib, but rather unhappy about the admissions he had no choice to
26 make.” Pl. App. Reply 1. The Court’s chamber rules make no provision for replies
27 for *ex parte* motions. *See* Curiel Civil Procedures 2. However, even if the Court were
28 to consider the Plaintiff’s reply, Defendant correctly observes that such evidence of
Defendant’s demeanor would go to credibility, which is not a proper consideration
at the summary judgment stage. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
255 (1986).

1 judgment stage. Pl. App. 3. The Court accordingly **DENIES** Plaintiff’s application
2 to file Exhibit D in video form.

3 Second, in Exhibit L to Plaintiff’s opposition to Defendant’s motion for
4 summary judgment, Plaintiff proffers the “Main Promotional Video” filmed by
5 Defendant to advertise Trump University (“TU”) and a transcript thereof. Again, the
6 Court observes that a transcript has been provided, and Plaintiff relies on the
7 substance of Defendant’s statements as reflected in the transcript, rather than
8 imagery from the video, to support his opposition. *See, e.g.*, Pl. MSJ Opp. 4–5.
9 However, the Court also notes that parties jointly sought, and the Court granted,
10 leave to file this exact video as an exhibit on at least two previous occasions, *see*
11 *Low*, ECF Nos. 118, 120; *Cohen*, ECF Nos. 35, 36, and that unlike in the case of the
12 deposition testimony, the video does contain imagery that is not fully captured by
13 the transcript. The Court thus **GRANTS** Plaintiff’s application to file Exhibit L in
14 video form.

15 Third, in Exhibit M to Plaintiff’s opposition to Defendant’s motion for
16 summary judgment, Plaintiff proffers a video of a former TU “top instructor,” James
17 Harris, seemingly advertising a non-TU related real estate investment scheme called
18 “WebForce.” In his application, Plaintiff provides no rationale for why this video
19 should be filed as an exhibit. *See* Pl. App. 3. In Plaintiff’s opposition to Defendant’s
20 motion for summary judgment, Plaintiff relies on this video once, to support the
21 proposition in the factual background section of his brief that “the ‘instructors’
22 [Defendant] hired for TU were primarily high-pressure salesmen.” Pl. MSJ Opp. 6.
23 (In the same section of his brief, Plaintiff also points to other evidence that Mr. Harris
24 was a convicted felon. *Id.*) Plaintiff offers no explanation, either in this application
25 or in his briefing, of how the “Webforce” video is relevant evidence for the
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1 purposes of deciding Defendant's motion for summary judgment.⁶ The Court thus
2 **DENIES** Plaintiff's application to file Exhibit M in video form.

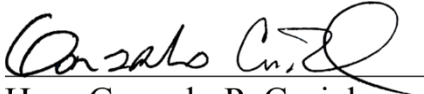
3 **CONCLUSION**

4 Accordingly, **IT IS HEREBY ORDERED** that:

- 5 1. Media Intervenors' motion to intervene and for an order modifying
6 the stipulated First Amended Protective Order to remove the
7 confidentiality designations to portions of the videotaped depositions,
8 *Cohen*, ECF No. 233, is **DENIED**.
- 9 2. Defendants' motion to amend the protective order operative in both
10 *Low* and *Cohen* to (1) prohibit the filing of any videotaped deposition,
11 unless under seal; and (2) bar the dissemination of any videotaped
12 deposition, *Low*, ECF No. 485/*Cohen*, ECF No. 238, is **GRANTED**.
- 13 3. Plaintiff's *ex parte* application for leave to file electronic exhibits,
14 *Cohen*, ECF No. 230, is **GRANTED** as to Exhibit L, and **DENIED** as
15 to Exhibits D and M. Specifically, counsel is allowed to non-
16 electronically file, via thumb drive, an electronic file of TU-
17 PLTF02441 – YouTube video found here:
18 <http://www.youtube.com/watch?v=465T6EDzoH0>, which
19 corresponds to Forge Decl., Exhibit L (the "Main Promotional
20 Video").

21 **IT IS SO ORDERED.**

22
23 Dated: August 2, 2016

24 
25 Hon. Gonzalo P. Curiel
26 United States District Judge

27 ⁶ Similarly, Plaintiff omits any discussion of Exhibit M altogether in his reply. *See*
28 Pl. App. Reply.