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**UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON**

AYMAN LATIF, et al.,  <i>Plaintiffs,</i>	Case 3:10-cv-00750-BR
v.  LORETTA LYNCH, et al.,  <i>Defendants.</i>	<b>DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL CLOSURE OF ORAL ARGUMENT HEARING</b>

## INTRODUCTION

Plaintiffs have moved for partial closure of the December 9 hearing on cross-motions for summary judgment. Defendants respectfully oppose that motion in accord with Department of Justice policy set forth in 28 C.F.R. § 50.9.

## BACKGROUND

As the Court is aware, Plaintiffs have designated a significant portion of the summary judgment briefing in this matter, including nearly all information related to the specific notice given to the Plaintiffs, as confidential pursuant to the protective order entered by the Court on March 16, 2015 [Dkt. No. 182]. While that Order governs disclosures between the parties and controls the dissemination of such information during “discovery or motion practice,” Order at 1, it does not “address or encompass any use of ‘Confidential’ information at trial or other merits hearing.” *Id.* ¶ 20. Accordingly, the Order does not, by its terms, appear to restrict the use of this information at the summary judgment hearing. *See also Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (describing heightened standards for sealing in merits proceedings).

Defendants anticipate presenting argument concerning this information at the hearing on December 9, including to illustrate the adequacy of the redress procedures applied to Plaintiffs and to address whatever questions the Court may have that would require discussion of information concerning the Plaintiffs that is subject to the protective order. On November 19, Defendants approached Plaintiffs’ counsel concerning the handling of such information, and that conferral resulted in Plaintiffs’ pending motion for partial closure of the hearing.

## ARGUMENT

Department of Justice policy concerning public access to open proceedings, *see* 50 C.F.R. § 50.9, generally prohibits Government attorneys from moving for or consenting to the closure of judicial proceedings except in strictly limited circumstances (delineated in the policy). *See id.* § 50.9(c).<sup>1</sup> Pursuant to this policy, Defendants do not consent to Plaintiffs' request to hold a closed hearing.

DOJ policy is consistent with the public interest in open judicial proceedings. *See Kamakana*, 447 F.3d at 1179 (“[T]he resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the public’s understanding of the judicial process and of significant public events.”). The presumed right of access to court proceedings and documents can be overcome “only by an overriding right or interest ‘based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.’” *See Oregonian Publ’g Co. v. United States Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990) (quoting *Press–Enterprise Co. v. Superior Court*, 446 U.S. 501, 510 (1985)). The Ninth Circuit has required “specific factual findings” justifying sealing. *Kamakana*, 447 F.3d at 1179.

In general, potential stigma or embarrassment to a litigant is insufficient to justify closure. *Kamakana*, 447 F.3d at 1179 (“The mere fact that the production of records may lead to a litigant’s embarrassment, incrimination, or exposure to further litigation will not, without

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<sup>1</sup> The DOJ policy does permit certain exceptions and, thus, does not apply (*inter alia*) to circumstances where the closure of a judicial proceeding is (1) necessary to protect national security information or classified documents; and (2) for in camera inspection, consideration or sealing of documents, including documents provided to the Government under a promise of confidentiality, where permitted by statute, rule of evidence or privilege). *See* 28 C.F.R. § 50.9(e)(1) and (2). The first exception plainly does not apply to the information Plaintiff has designated as “confidential” under the protective order. While the second exception is closer in substance to the nature of the information at issue, it also does not appear to apply absent a governing statutory protection, rule of evidence, or privilege.

more, compel the court to seal its records.”). Generalized concerns about “stigma” are not specific factual findings with respect to this information that could support a closed hearing.

CONCLUSION

For the foregoing reasons, the Government does not consent to a partial closing of the hearing in order to protect information Plaintiffs have designated as “confidential” under the protective order.

Dated: December 4, 2015

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing motion was delivered to all counsel of record via the Court's ECF notification system.

*s/ Amy E. Powell*  
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AMY E. POWELL