

# **EXHIBIT 1**

FILED \_\_\_\_\_ LODGED \_\_\_\_\_  
RECEIVED \_\_\_\_\_ COPY \_\_\_\_\_  
JAN 29 2002  
CLERK U S DISTRICT COURT  
DISTRICT OF ARIZONA  
BY \_\_\_\_\_ DEPUTY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Stephen McKendry, ) No. 96-CV-0754-PHX-PGR  
Plaintiff, ) ORDER  
vs. )  
General American Life Insurance )  
Company, )  
Defendant. )

Three public interest groups - Consumer Action, the Insurance Company Accountability Network, and United Policyholders, seek limited intervention to unseal court records that may contain "crucial" evidence of defendant insurance companies' wrongdoings. Accordingly, pending before this Court are: (1) Motion for Leave to Intervene by Consumer Action, Insurance Accountability Network and, United Policyholders (hereinafter collectively movants) (Doc. 252); movants' Motion to Unseal Court Records (Doc. 253); and (3) defendants' Motion to Strike the Movants' Motion to Unseal (Doc. 255).

264

1           **BACKGROUND**

2           This matter was originally filed by Steven McKendry in 1996  
3 and alleged bad faith and breach of contract. The matter was  
4 removed from Maricopa County Superior Court and placed on this  
5 Court's docket in March 1996.

6           After a relatively long discovery and motion process, the  
7 matter was tried before a jury beginning on May 25, 1999. After  
8 a ten day trial, the jury reached a verdict in favor of the  
9 plaintiff against defendants for \$150,000.00 in past benefits;  
10 \$200,000.00 in mental and emotional distress; punitive damages  
11 against defendant General American in the sum of \$10,200,000.00  
12 and punitive damages against Paul Revere Life Insurance in the  
13 sum of \$6,800,000.00.

14           Defendants filed post-trial motions. On March 31, 2000,  
15 this Court denied the defendants' Motion for Judgment as a Matter  
16 of Law; granted defendants' Motion for New Trial and/or  
17 Remittitur; and, vacated the jury verdict, judgment and ordered a  
18 new trial on both liability and damages. On August 2, 2000, the  
19 parties filed a stipulation to dismiss the action with prejudice.

20           Accordingly, the movants filed the pending Motion to  
21 Intervene and Motion to Unseal two exhibits on March 29, 2001.  
22 The movants argue that during the jury trial for defendants  
23 unlawful termination of plaintiff's disability insurance  
24 benefits, plaintiff presented evidence and expert testimony that  
25 defendants had entered into an arrangement that created a  
26 financial incentive to terminate the benefits of policyholders.

27           During the trial defendant made an oral motion to seal two  
28 exhibits that purportedly provided proof of the arrangement, as

1 well as plaintiff's expert witness testimony explaining the  
2 significance of one of the sealed exhibits. More specifically,  
3 the movants wish to unseal two agreements between defendants: a  
4 claims management agreement and a quota share reinsurance  
5 agreement.

6 The claims management agreement apparently provided for  
7 defendant Revere to administer defendant Great American Life  
8 Insurance Company's (GALIC) disability claims. The agreement  
9 provided for Revere to earn a fee that was calculated as a  
10 percentage of the change in GALIC's reserves. If the amount held  
11 in reserve decreased, the payments to Revere increased, when  
12 payments terminated on policyholders' claims.

13 Under the quota share reinsurance agreement between the two  
14 companies, defendant Revere agreed to reinsure a block of GALIC's  
15 business, thereby assuming the risk of loss on those policies.  
16 Under this agreement, Revere was to earn a percentage of the  
17 premiums paid by policy holders.

18 Both of the exhibits embodying these agreements, as well as  
19 plaintiff's expert testimony regarding one of these exhibits,  
20 were sealed.

21 Movants argue that the order sealing the exhibits was  
22 unsupported by evidence demonstrating either the existence of  
23 proprietary information or the need to keep the information  
24 secret, but instead were based on the parties' stipulations  
25 concerning the need for confidentiality. Moreover, movants  
26 suggest such stipulations are insufficient because there must be  
27 a factual finding that secrecy is required and the order violates  
28 the public's presumptive right of access to the court record.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**DISCUSSION**

**A. Intervention**

Federal Rule of civil Procedure 24(b)(2) permits intervention in an action "when an applicant's claim or defense and the main action have a question of law or fact in common...In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Defendants argue that intervention under these circumstances is inappropriate because the parties stipulated dismissal with prejudice, thus divesting this Court of jurisdiction. It is on this basis that they move to strike the Motion to Unseal. This argument is without merit.

There is ample support for movant's argument that courts recognize Rule 24(b) intervention as a proper method to modify a protective order. See *Beckman v. International Insurance Co.*, 966 F.2d 470, 472 (9<sup>th</sup> Cir. 1992)<sup>1</sup>; see also *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-784 (1<sup>st</sup> Cir. 1988) (Rule 24 is correct course for third parties to challenge protective orders); *Meyer Goldberg, Inc. of Lorain v. Fisher Foods*, 823 F.2d 159, 162 (6<sup>th</sup> Cir. 1987) (recognizing 24(b) intervention as proper method for nonparty to seek protected materials). This Court must next address whether the requirements of Rule 24(b)

---

<sup>1</sup> The Court notes that *Beckman* is distinguishable from the facts of this case in that the *Beckman* movants sought six deposition transcripts covered by a blanket protective order issued during the discovery phase of litigation. 996 F.2d at 471. Most importantly, the *Beckman* movants sought to use the transcripts in conjunction with state court actions involving the same issues addressed in the transcripts and agreed to use the transcripts "in accordance with the protective order" previously issued. *Id.*

1 intervention for the purpose of litigating a claim on the merits  
2 are applicable to the limited type of intervention sought here.

3 As briefly discussed above, permissive intervention  
4 ordinarily requires independent jurisdictional grounds. See  
5 *Beckman*, 966 F.2d at 473; see also *Balke v. Pallam*, 554 F.2d 947,  
6 955-56 (9<sup>th</sup> Cir. 1977). Here, however, an independent  
7 jurisdictional basis is not required because movants do not wish  
8 to litigate a claim on the merits. See *Beckman*, 966 F.2d at 473.  
9 This Court retains the power to modify a protective order even if  
10 the underlying suit is dismissed. See *id.*; see also *United*  
11 *Nuclear Corp. v. Cranford*, 905 F.2d 1424, 1427 (10<sup>th</sup> Cir.  
12 1990) (court retains power to modify a protective order even if  
13 underlying suit is dismissed); *Public Citizen v. Liggett Group,*  
14 *Inc.*, 858 F.2d 775, 783-784 (1<sup>st</sup> Cir. 1988) (analogizing to power  
15 to modify an injunction, court ruled that district court retained  
16 power to modify protective order after judgment). Movants do not  
17 ask the this Court to rule on additional claims or seek to become  
18 parties to the action. They merely ask this Court to exercise  
19 that power which it already has, the power to modify an order.  
20 Accordingly, intervention will be permitted, but limited to the  
21 movants request to unseal records.<sup>2</sup>

#### 22 B. Unsealing records

23 The information sought by movants was subject to a pretrial  
24 protective order, issued upon good cause during the discovery  
25 phase of the litigation to protect proprietary information. The

---

26  
27 <sup>2</sup> The Court notes the defendants Motion to Strike the movants Motion to  
28 Unseal relies on the fact that movants had not been granted intervention, and  
were thus not properly before the Court. In light of the limited intervention  
granted by this Court, the Motion to Strike is moot.

1 issuance of this protective order is ultimately controlling to  
2 this Court's analysis because a new trial was ordered, in part,  
3 because the exhibits in question were erroneously admitted into  
4 evidence. "Having carefully reevaluated its prior evidentiary  
5 rulings, the Court concludes that it did indeed erroneously admit  
6 evidence that, taken in the aggregate, substantially prejudiced  
7 the defendants." (March 31, 2000, Order p. 5).

8 District courts have substantial discretion in modifying, or  
9 declining to modify, protective orders. See *Nixon v. Warner*, 435  
10 U.S. 589, 598; see also *WRIGHT AND MILLER*, 8 FEDERAL PRACTICE AND  
11 PROCEDURE, § 2044.1 p. 1569. Generally, neither the public nor  
12 the press has a general First Amendment or common law right to  
13 inspect discovery documents, under the Supreme Court decision in  
14 *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984).

15 Defendants claim that the exhibits and testimony must remain  
16 protected because they contain proprietary information. If the  
17 exhibits were provided to movants it would result in direct harm  
18 to Paul Revere. Specifically, defendants argue that competitors  
19 could use this information to impair its relationship with  
20 General American and its other clients. Paul Revere's competitor  
21 can use this information to lure General American away from Paul  
22 Revere by using the information in the Agreement to create a  
23 claims administration agreement and/or reinsurance that is more  
24 attractive to General American. Other companies may use this  
25 information to create a claims administration agreement and/or  
26 reinsurance package that is more attractive to General American.

27 A protective order may be issued upon a showing of good  
28 cause. Fed.R.Civ.P. 26(c). The foregoing assertions were deemed

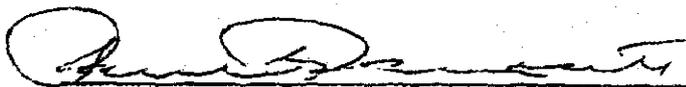
1 good cause when the protective order was first issued during  
2 discovery and remain so at this time.

3 IT IS ORDERED that movants' Motion to Intervene (Doc. 252)  
4 is GRANTED for the limited purpose of unsealing the requested  
5 documents.

6 IT IS FURTHER ORDERED that the movants' Motion to Unseal  
7 Records (Doc. 253) is DENIED.

8 IT IS FURTHER ORDERED that defendants' Motion to Strike  
9 (Doc. 255) is DENIED as moot.

10  
11 DATED this 24<sup>th</sup> day of January, 2002.

12  
13 

14 Paul G. Rosenblatt  
15 United States District Judge  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28