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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Karen Cosgrove, a single person, Plaintiff, v. National Fire & Marine Insurance Company, a foreign insurer, Defendant.	No. CV-14-02229-PHX-HRH **MEMORANDUM IN SUPPORT OF UNITED POLICYHOLDERS' MOTION TO UNSEAL AND REINSTATE COURT RECORDS** ORAL ARGUMENT REQUESTED

United Policyholders moves the Court to unseal and reinstate its partial summary judgment opinion of April 10, 2017 (Docket No. 171) and related minute entry (Docket No. 170). The opinion, which was sealed and vacated at the insistence of the insurance company, does not meet the requirements for sealing or vacatur. To the contrary, the law and the public interest demand that it be reinstated and made available to the public.

BACKGROUND

On April 10, 2017, this Court issued a twenty-page opinion that granted Plaintiff's motion for partial summary judgment against Defendant National Fire & Marine Insurance Company (the "Insurance Company"). The Court held that the Insurance Company's misconduct estopped it from asserting certain coverage defenses. Specifically, the Insurance Company had obtained certain information from the attorney whom the Insurance Company had hired to represent the policyholder, and it improperly sought to use that information to escape coverage.

Law360, a widely circulated legal publication, reported on the decision. *See* Ex. 1 to Declaration of Dustin Cho in Support of United Policyholders' Motion to Unseal and Reinstate ("Cho Decl."). Insurance trade publications and attorneys also published updates and client alerts discussing the Court's opinion. *See, e.g.*, Cho Decl. Ex. 2. One commentator wrote that in light of the decision, insurance defense counsel must vigilantly ensure that they do not reveal privileged information to insurers if the information may bear on an insurer's coverage defense. *See* Cho Decl. Ex. 3 at 2.

More than three weeks after the Court issued its opinion, Plaintiff and Defendant filed a three-sentence "Stipulation and Request to Vacate and Seal Certain Orders." The pro forma filing stated only that the parties had reached a proposed settlement and asked the Court to vacate and seal the order and related minute entry. *See* Cho Decl. Ex. 4 (Docket No. 173). The filing did not provide any other explanation. *See id.* The next day, on May 5, 2017, the request was approved, and the opinion and minute order were vacated and sealed. *See* Cho Decl. Ex. 5 (Docket No. 174).

ARGUMENT

The Insurance Company's effort to hide this Court's decision flies in the face of well-established precedent. The Insurance Company's filing failed to disclose the relevant law to the Court and instead suggested that its request was simply pro forma. Accordingly, the Court's partial summary judgment and related minute order should be unsealed and reinstated. The public has a right to access court records absent a "compelling reason" to seal them. No compelling reason exists in this case. Indeed, the Insurance Company failed to articulate any reason at all to seal the Court's decision. The order and minute entry also should be reinstated. Again, no reason for vacatur exists, and the Insurance Company failed to articulate any. The public has a strong interest in and a fundamental right to the opinion, its legal analysis, and its persuasive and precedential authority.

I. The Order Should Be Unsealed.

The Court's partial summary judgment opinion and related minute entry should be unsealed because no "compelling reason" exists to seal them. The Insurance Company failed to provide any reason to do so and likely misled the Court by filing its request.

A. The Insurance Company Failed to Provide Any Basis for Sealing.

Courts "start with a strong presumption in favor of access to court records." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). That is because United Policyholders and other members of the public have a First Amendment and common law "right to inspect and copy public records and documents." *Nixon v. Warner*

Commc'ns, Inc., 435 U.S. 589, 597 (1978). The scope of that right includes access to judicial records. *Id.*

A court must keep its records unsealed and publicly available unless the party seeking to seal "overcome[s] this strong presumption" by "articulat[ing] compelling reasons supported by specific fact[s]." *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). The party seeking to seal must articulate the specific factual basis for the compelling reasons and cannot rely on "hypothesis or conjecture." *Id.* at 1179.[1]

The Insurance Company fell far short of demonstrating "compelling reasons" to seal Docket Nos. 170 and 171. The Insurance Company could not have carried its heavy burden if it had tried. Courts have found "compelling reasons" to exist only with respect to highly sensitive material or in unusual circumstances. As the Ninth Circuit explained in *Kamekana v. City & County of Honolulu*: "In general, 'compelling reasons' sufficient

[1] The public's right of access to judicial decisions is especially strong. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("Judicial precedents are . . . valuable to the legal community as a whole. They are not merely the property of private litigants . . . ."); *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006) ("Redacting portions of opinions is one thing, secret disposition is quite another."); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny."); *United States v. Ressam*, 221 F. Supp. 2d 1252, 1262–64 (W.D. Wash. 2002) (upholding a right of access even when national security interests were at stake in part because "there is a venerable tradition of public access to court orders, not only because of the inherent value in publicly announcing a particular result, but because dissemination of the court's reasoning behind that result is a necessary limitation imposed on those entrusted with judicial power").

to outweigh the public's interest in disclosure and justify sealing court records exist when such 'court files might have become a vehicle for improper purposes,' such as the use of records to gratify spite, promote public scandal, circulate libelous statements, or release trade secrets." 447 F.3d at 1179 (quoting *Nixon*, 435 U.S. at 598). Importantly, *Kamekana* makes clear that "a litigant's *embarrassment, incrimination, or exposure to future litigation will not, without more, compel the court to seal*." *Id*. (emphasis added).

No compelling reasons are present here. The sealed docket entries contain *no* factual information that is not otherwise present in the unsealed portion of the record, let alone factual information for which there is a "compelling reason" to keep secret. The opinion contains no information that could be characterized as a "trade secret." Indeed, the motions and briefs that relate to Docket Nos. 170 and 171 remain unsealed, along with the rest of the docket. These unsealed documents include *all* the factual information in the sealed opinion and minute entry. Moreover, the availability of the opinion to the public for nearly a month before the Insurance Company sought to seal it belies any claim that it contains highly sensitive and confidential information.

The Insurance Company likewise violated Local Rule 5.6. That rule provides that "[n]o document may be filed under seal in an unsealed civil action except pursuant to an order by the Court" after a "motion or stipulation . . . set[s] forth a clear statement of the facts and legal authority justifying the filing of the document under seal." Local Rule 5.6(a), (b). The Insurance Company failed to provide any evidence or state any facts or legal authority that would justify sealing.

Nor can the Insurance Company overcome the public interest by claiming that unsealing might upset the parties' expectations as expressed in their settlement. As the Ninth Circuit explained in *San Jose Mercury News, Inc. v. U.S. District Court—Northern District (San Jose)*, "The right of access to court documents belongs to the public, and the Plaintiffs were in no position to bargain that right away." 187 F.3d 1096, 1101 (9th Cir. 1999); *see also Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1569 (11th Cir. 1985) (per curiam) (holding that the district court abused its discretion in sealing records, despite the fact that "the settlement might not have been reached" absent sealing).

B. The Insurance Company Failed to Disclose the Applicable Legal Standard.

The Insurance Company's failure to disclose directly adverse precedent likely misled the Court. As demonstrated above, the Ninth Circuit has established a high standard for sealing court records. The Insurance Company failed to disclose that controlling legal standard, which clearly is not satisfied in this case. Indeed, the Insurance Company did not cite any legal authority in its request to seal, despite the express requirements of Local Rule 5.6.

The Insurance Company's motive is transparent: It sought to suppress the Court's legal conclusions from the public. Those legal conclusions were adverse to its interests and provided valuable precedent for policyholders. *See* Cho Decl. Ex. 1. Selectively burying adverse precedent is the opposite of a "compelling reason" to seal a case. *Cf. Wilson*, 759 F.2d at 1571 ("The defendant's desire to prevent the use of this trial record in other proceedings is simply not an adequate justification for its sealing."). The Court's

opinion also provided important ethical guidance for lawyers appointed by insurers. *See* Cho Decl. Ex. 3 at 2. This case presents exactly the type of public interest that warrants keeping a detailed, reasoned opinion in the public domain. *See Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096–97 (9th Cir. 2016); *Kamakana*, 447 F.3d at 1178–79.

Insurance companies are repeat litigants with enormous interest in the development of case law that is favorable to insurers. By contrast, insurance policyholders are typically one-time litigants with an incentive to settle on favorable terms but with little interest in the law's development. *See* Eugene R. Anderson et al., *Out of the Frying Pan and Into the Fire: The Emergence of Depublication in the Wake of Vacatur*, 4 J. App. Prac. & Process 475, 475 (2002). Where, as here, a court's decision concerns a fundamental aspect of the insurance relationship—the right to unbiased counsel—sealing the court's legal reasoning harms the public.

II. The Orders Should Be Reinstated.

The Insurance Company likewise has failed to articulate any basis for vacatur. United Policyholders requests that the Court reinstate Docket Nos. 170 and 171 pursuant to Federal Rule of Civil Procedure 60(b). That rule permits the Court to correct its vacatur order based on mistake, inadvertence, inequity, or for any other reason that justifies relief. *See* Fed. R. Civ. Proc. 60(b)(1), (5), (6).

District courts may vacate their own judgments "when the equities so demand."[2] The equities demonstrate the need to reinstate Docket Nos. 170 and 171. Courts in the Ninth Circuit have repeatedly rejected efforts to vacate judicial rulings where the parties seek such vacatur to facilitate settlement.[3] That rule holds even when the proposed settlement is contingent on obtaining vacatur. As one court has explained, the public interest does not "allow[] a losing party to 'buy an eraser for the public record'" or "to use a motion to vacate to potentially benefit itself in a future case" by "'bury[ing]' a[n adverse] ruling." *Ayotte v. Am. Econ. Ins. Co.*, No. 09-CV-57, 2014 WL 5018613, at *2 (D. Mont. Oct. 2, 2014).[4] The same logic applies here. The Insurance Company failed to show that the equities favored vacating the Court's opinion.

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[2] *Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1168 (9th Cir. 1998); *see also Dilley v. Gunn*, 64 F.3d 1365 (9th Cir. 1995) (the "touchstone of vacatur is equity").

[3] *See, e.g., RE2CON, LLC v. Telfer Oil Co.*, No. 10-cv-786, 2013 WL 1325183, at *6 (E.D. Cal. Mar. 29, 2013) ("The parties have voluntarily mooted this case through settlement. . . . Because the public interest outweighs any hardship to the parties, plaintiffs' motion to vacate is DENIED."); *Travelers Prop. Cas. Co. of Am. v. AF Evans Co.*, No. C10-1110, 2013 WL 12120452, at *2 (W.D. Wash. Feb. 15, 2013) (denying a motion to vacate because, although both parties agreed to the motion, "[i]t appears [the insurance company] is motivated by a desire to eliminate precedent that could be used against it in future cases"); *Visto Corp. v. Sproqit Techs., Inc.*, No. C-04-651, 2006 WL 3741946, at *6 (N.D. Cal. Dec. 19, 2006) (Chen, U.S.M.J.) ("[T]here is a strong public policy reason which militates against allowing a party to hedge its bet by seeking a . . . ruling from a court and then, if unhappy with that ruling, obtaining a vacatur . . . .").

[4] *See also, e.g., Gardner v. CafePress Inc.*, Nos. 13-CV-1108, 14-CV-792, 2015 WL 13427727, at *2 (S.D. Cal. Jan. 9, 2015) ("[P]re-judgment settlement-contingent vacatur presents serious systemic concerns."); *Tumulty v. FedEx Ground Package Sys., Inc.*, No. C04-1425, 2007 WL 896035, at *3 (W.D. Wash. Mar. 22, 2007) ("[T]he Court declines to vacate its rulings in this case based on the parties' agreement to condition their

(continued…)

The Insurance Company's failure to articulate any equitable reason or evidence supporting vacatur demonstrates its inability to do so. At bottom, the Insurance Company intended to seal an adverse ruling to prevent it from being used in future litigation. The Supreme Court has held that courts cannot allow parties to use the "extraordinary remedy of vacatur" as "a refined form of collateral attack on the judgment." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26–27 (1994). "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.* (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)).[5] Judicial precedents are a public good. Parties cannot selectively seal and vacate decisions to bias the law in their favor.

Courts well understand the insurance industry's strategy of "refined" collateral attack on adverse precedent. As the court in *Gardner v. CafePress, Inc.* explained, "Institutional litigants, facing the prospect of similar litigation in the future, have an

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settlement on a vacatur order. To do so would effectively allow [parties] to 'buy an eraser' for unfavorable rulings in this Court.").

[5] *See also Bonner*, 513 U.S. at 28 (holding that litigants should not be able to "roll the dice" in court and then "wash[] away" any "unfavorable outcome . . . by a settlement-related vacatur"); *Bates v. Union Oil Co. of Cal.*, 944 F.2d 647, 650 (9th Cir. 1991) (holding that the "district court is not required to vacate a judgment pursuant to settlement because, otherwise, 'any litigant dissatisfied with a trial court's findings would be able to have them wiped from the books'" (quoting *Ringsby Truck Lines, Inc. v. W. Conference of Teamsters*, 686 F.2d 720, 721 (9th Cir. 1982))).

incentive to 'buy and bury' decisions unfavorable to their position," and "[o]pposing litigants who do not have this incentive can use it as an opportunity to obtain higher settlement rewards by agreeing to vacatur." Nos. 13-CV-1108, 14-CV-792, 2015 WL 13427727, at *2 (S.D. Cal. Jan. 9, 2015). Similarly, the court in *Travelers Property Casualty Co. of America v. AF Evans Co.* explained that although both parties agreed to file a joint motion for vacatur, the insurance company "is the one with skin in the game, facing the real threat of future coverage and bad faith litigation—bad precedent for which it would prefer to 'erase from the public record'"; moreover, "[i]t was a small price for the [insured] to pay to agree not to oppose [the insurance company's] vacatur motion." No. C10-1110, 2013 WL 12120452, at *2 (W.D. Wash. Feb. 15, 2013). Commentators have likewise noted the insurance industry's effort to use this improper tactic. *See generally* Eugene R. Anderson et al., *supra*; *see also, e.g.*, Michael W. Loudenslager, *Erasing the Law: The Implications of Settlements Conditioned Upon Vacatur or Reversal of Judgments*, 50 Wash. & Lee L. Rev. 1229, 1230 (1993) ("One area in which this problem predominates is insurance litigation."); Jill E. Fisch, *The Vanishing Precedent: Eduardo Meets Vacatur*, 70 Notre Dame L. Rev. 325, 354, 356 (1994) ("There is clear evidence of insurance companies purposefully using vacatur in precisely this way . . . .").

CONCLUSION

For the foregoing reasons, United Policyholders respectfully moves this Court to unseal and reinstate the partial summary judgment opinion (Docket No. 171) and related minute entry (Docket No. 170).

November 3, 2017

Respectfully Submitted,

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