IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Stephen McKendry,

Plaintiff,

vs.

General American Life Insurance Company,

Defendant.

No. 96-CV-0754-PHX-PGR

ORDER

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)**.

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BACKGROUND

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

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

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

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

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

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

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

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

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

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

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 (9th Cir. 1992)[1]; *see also Public Citizen v. Ligget Group, Inc.*, 858 F.2d 775, 783-784 (1st 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 (6th 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)

[1] 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.

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

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

B. Unsealing records

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

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[2] The Court notes the defendants Motion to Strike the movants Motion to 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.

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

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

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

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

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

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

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

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

DATED this 24th day of January, 2002.

Paul G. Rosenblatt
United States District Judge