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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Stephen M. McKendry, Plaintiff, v. General American Life Insurance Company, et al., Defendants.	NO. CV 96-0754-PHX-PGR **MOTION TO UNSEAL COURT RECORDS AND MEMORANDUM IN SUPPORT THEREOF** ORAL ARGUMENT REQUESTED

Movants Consumer Action, Insurance Company Accountability Network, and United Policyholders hereby move this Court to unseal the court records in this case. The defendant failed to demonstrate a compelling reason for blocking the presumptive right of public access to court records, and unsealing the records would be in the public's interest.

Movants respectfully request that their Motion to Unseal Court Records be granted to allow public access to this important information. This Motion is supported by the following Memorandum of Points and Authorities and the attached exhibits. A proposed order is attached.

DATED this 29th day of March, 2001.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Three public interest groups - Consumer Action, the Insurance Company Accountability Network, and United Policyholders - seek to unseal court records that may contain crucial evidence of insurance companies' wrongdoings. During a jury trial on his claim that Defendants unlawfully terminated his disability insurance benefits, Mr. McKendry presented evidence and expert testimony that

Defendants had entered into an arrangement that created a financial incentive to terminate the benefits of policyholders. If disclosed to the public, this evidence could provide proof and details of the arrangement.

However, the Court granted Defendants' oral motions during trial to seal two exhibits that provided proof of the arrangement, as well as Plaintiff's expert witness's testimony explaining the significance of one of the sealed exhibits. These sealing orders were unsupported by evidence demonstrating either the existence of proprietary information or the need to keep that information secret, but instead were based on the parties' stipulations concerning the need for confidentiality. Such stipulations are insufficient because there must be a factual finding that secrecy was in fact required. Because the sealing orders violate the public's presumptive right of access to the court record, Movants seek to unseal the exhibits and testimony.

STATEMENT OF FACTS

Defendant General American Life Insurance Company ("GALIC") issued a disability income insurance policy to Plaintiff, Steven McKendry. Amended Complaint ("Compl."), at ¶¶ 4-5. Mr. McKendry eventually became partially disabled and filed a claim for partial disability benefits under that policy in April 1988. Id. at ¶ 9. GALIC began paying out this claim on a monthly basis. [See Exhibit A, Trial Transcript ("Tr.") Vol. 3, 05-27-99, at 574:13-17].

At the time GALIC was paying out claims to Mr. McKendry, however, the company had begun losing money and had set aside insufficient funds to pay the disability claims made on its policies. [Exh. A at 545:4-546:5, 554:6-10]. As a result, GALIC tried to "buy out" its more expensive policies: that is, it offered to pay policyholders a lump sum now, in exchange for the policyholders' relinquishing their policies. The sum was less than the company predicted it would otherwise be obligated to pay on the policy. [Id. at 554:21-556:25].

In Mr. McKendry's case, a GALIC investigator offered $200,000 to buy-out his entitlement to the policy. [Exhibit C, Tr. Vol. 5, 06-01-99, at 1009:2-16]. After much consideration, Mr. McKendry refused, at the advice of the insurance agent who had originally sold him the policy. [Id. at 1009:12-20, 1040:22-1041:15]. When GALIC offered to buy-out Mr. McKendry's policy a second time, Mr. McKendry again declined. [Exh. C at 1010:24-1011:3].

After Mr. McKendry refused these buy-out offers, GALIC subjected him to three independent medical examinations ("IMEs") to re-evaluate the validity of his claim. [Exh. A at 587:20-594:1; Exhibit B, Tr. Vol. 4, 05-28-99, at 638:19-639:1]. GALIC had never required Mr. McKendry to have an IME before he rejected the buy-out offers. [Exh. C, at 1010:19-23]. However, the results of all three IMEs, Mr. McKendry's own treating doctor, and GALIC's medical consultant all supported Mr. McKendry's claim of disability. [Exh. A at 581:20-594:1; Exh. B at 638:19-639:1].

In addition, information obtained by a GALIC investigator, who interviewed Mr. McKendry's supervisor and met with Mr. McKendry, supported Mr.

McKendry's claim for disability payments. [Exh. A at 584:3-587:9]. GALIC continued to make monthly payments on Mr. McKendry's disability claims.

In light of GALIC's financial troubles, GALIC asked another insurance company, Paul Revere ("Revere"), for assistance. [Exh. A at 548:1-549:3-11]. Revere examined GALIC's books to determine whether it could improve GALIC's profitability. [Exh. A at 553:8-12]. A Revere employee admitted that one way to improve profits was to re-evaluate policyholders' claims and terminate benefits. [Exh. B at 647:7-16]. GALIC ultimately authorized Revere to administer its disability claims, including Mr. McKendry's. [Exh. A at 569:23-25; Exhibit. E, Tr. Vol. 7, 06-03-99, at 1483:1-18]. The arrangement between the two companies went into effect in May 1994, at which time Mr. McKendry was receiving about $5,000 per month in disability benefits. [Exh. A at 567:18-19; 574:15-17; 602:3-4].

Soon thereafter, Revere referred Mr. McKendry's file to Revere's medical director. The director was told: "This insured is on residual and has been on claim for <u>seven and a half years</u>. . . It appears IME supports impairment . . . . Do we need another IME?" [Exh. A at 596:18-597:6 (emphasis in original), 601:19-23]. In response, Revere's medical director wrote, "I think it's time to take a different path." [<u>Id.</u> at 598:19]. Revere thus determined that it would subject Mr. McKendry to a fourth IME.

Rather than sending Mr. McKendry back to any of the physicians who had previously examined him, [<u>id.</u> at 640:2-12], the medical director recommended that Mr. McKendry see a neuropsychiatrist, who would look for evidence of "fictitious malingering." [Id. at 599:3-24]. Revere's neuropsychiatrist did not find such evidence. [Exh. B at 632:16-18]. Instead, the neuropsychiatrist determined that Mr. McKendry was managing to function at work. [Id. at 626:22-632:15].

On that basis, Revere's claims department judged that Mr. McKendry no longer qualified for disability payments. [Id. at 630:12-631:13]. Thus, despite all other physicians' agreement that Mr. McKendry qualified for disability payments, the lack of any other information in Mr. McKendry's file that supported denying the claim, and the surveillance evidence and interview that supported Mr. McKendry's claim, [id. at 633:12-19], Revere's claims department decided to terminate Mr. McKendry's policy -- based solely on the neuropsychiatrist's opinion. [Id. at 639:2-5, 641:14-642:15].

Mr. McKendry then filed a complaint in this Court against GALIC and Revere, Compl., at ¶ 7, alleging that the companies had terminated his disability insurance benefits in bad faith. Compl., at ¶¶ 16-24. The claim was based on alleged violations of industry-wide standards, which establish that an insurance company should deal fairly and in good faith with its policyholders, treat its policyholders' interests with equal regard to its own interests, act reasonably and fairly in investigating and evaluating claims, and make claims decisions without regard to their effect on company profitability. Compl. ¶¶ 19-22; [Exh. A at 538:12-539:17, 540:7-10].

At the center of the case were two agreements between GALIC and Revere: a claims management agreement and a quota share reinsurance agreement. [Exh. E at 1471:10-13]. As described in greater detail below, both of the exhibits embodying these agreements, as well as Plaintiff's expert testimony about one of these exhibits, were later sealed. [Exhibit D, Tr. Vol. 6, 06-03-99, at 1114:17 - 20, 1115:4-5; Exh. E at 1509:3-5, 1509:9].

Movants' knowledge of the information contained in this part of the record is necessarily limited. However, during the course of the trial, other witnesses testified in open court about these exhibits, and the expert's secret testimony was summarized during closing argument, which was not sealed. Based on this testimony and argument, it appears that the sealed exhibits and testimony reveal the following:

The claims management agreement, admitted into evidence as Exhibit 62(a), [Exh. A at 441:21-443:7], apparently provided for Revere to administer GALIC's disability claims. [Exh. E at 1483:1-8, 14-18]. Significantly, among other provisions, the agreement provided for Revere to earn a fee that was calculated as a percentage of the change in GALIC's reserves.[1] [Id. at 1485:22-1486:1]. If the amount held in the reserves decreased, the payment to Revere increased. [Id. at 1488:12-17, 1489:11-15]. Because the reserves would

[1] Insurance companies are required by law to maintain reserves to pay legitimate claims. The amount of money held in reserve, which the company cannot spend, reflects the amount that the company estimates it will be obligated to pay on future claims. [Exh. A at 556:10-17].

decrease, and payment to Revere would increase, when payments were stopped on policyholders' claims, [id. at 1489:8-15], Revere had a financial incentive to terminate policyholders' coverage.

This fee provision was critical to Mr. McKendry's successful case. Apparently, Plaintiff's expert witness testified that, under the fee provision, if the amount held in reserve for Mr. McKendry was $600,000, GALIC would pay Revere $3,600 to administer his claim; if Revere closed Mr. McKendry's claims, however, GALIC would pay Revere $180,000. [Exhibit F, Vol. 10, 06-08-99, at 1889:9-14]. Thus (the expert apparently testified), the claims management agreement provided a significant financial incentive to Revere to cut off claims. [Id. at 1995:5-8]. This testimony was highly relevant to Mr. McKendry's claim of bad-faith termination of his benefits.

Meanwhile, under the quota share reinsurance agreement between the two companies, Revere agreed to reinsure a block of GALIC's business, thereby assuming the risk of loss on those policies. [Exh. E at 1474:9-20]. Under this agreement, which was admitted without objection as Exhibit 62, [id. at 1482:17-20], Revere was to earn a percentage of the premiums paid by policyholders. [Id. at 1476:16-1477:1, 1481:15-20]. Because premium payments are waived when claims are open, [id. at 1481:21-1482:13, Revere again had a financial incentive to close claims.

After Exhibits 62 and 62(a) were admitted, Defendants moved to seal them, and to seal the testimony of the expert witness for Plaintiff, who had testified about Exhibit 62(a). Defendants first requested to seal Exhibit 62(a), stating simply: "It is proprietary. We'd like to keep it that way."[2] [Exh. D at 1114:17-20, 1115:4-5]. Plaintiffs did not object, and the Court thereupon granted the request. Id. Later, when Defendants moved to seal Exhibit 62, they again proffered a single sentence in support: "That was the one with proprietary information." [Exh. E at 1508:24-1509:2]. Plaintiff stipulated to Defendants' next request to seal, and the Court again granted the motion.[3] [Id. at 1509:3-5].

Defendants then made an oral motion to seal the trial testimony of Dr. Mark Reiser, the expert witness who testified for Plaintiff about the arrangement between the two companies. [Exh. E at 1509:6-8]. Defendants requested that

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[2] During the colloquy with the Court on June 2, 1999, concerning Defendants' oral motion to seal the exhibit, Defendants referred to exhibit "63, and maybe A and B, or 63 and 63(a)." [Exh. D at 1115:1]. Defendants appear to have intended to refer to Exhibit 62(a), as indicated by their specific request that the Court seal the claims management agreement, [id. at 1114:25], and by the court docket sheet for that day, which reflects only the sealing of Exhibit 62(a). [See Exh. H docket sheet excerpted from P.A.C.E.R., at 19].

[3] During pretrial proceedings, Plaintiff refused to consent to a confidentiality order regarding the agreements between GALIC and Revere, based in part on public policy grounds. [Exh. I, Transcript of Status Hearing, 06-02-97, at 18:11-20:16]. The Court, however, ordered Defendants to produce the documents in redacted form, and granted a protective order keeping the documents secret from all third parties, and requiring the documents returned at the end of the case. [Exh. J, Order, Civ. 96-0754 (D. Ariz.), 06-04-97, at 7]. Although the Court examined the documents in camera, it appears not to have made any findings regarding the proprietary information contained in these documents. See id. Later, Plaintiff informally challenged Defendants' classification of the information as proprietary, and Defendants appear ultimately to have produced the documents to Plaintiff in unredacted form. [See Exh. D at 1112:15-22].

the Court seal Dr. Reiser's testimony on the sole ground that "he's the one that made comments as to the [sealed] exhibit." [Id.] Upon the stipulation of Defendants and Plaintiff on this matter, the Court immediately granted this third request. [Id. at 1509:9].

On June 8, 1999, the jury returned a verdict in favor of Plaintiff, and awarded him $17 million in punitive damages and $350,000 in past benefits and mental and emotional distress. That judgment was entered on June 9, 1999.[4]

Movants in this case are three public interest organizations that promote public education about, and reform of, the insurance industry. They seek to

[4] On March 31, 2000, the Court denied Defendants' Motion for Judgment as a Matter of Law, finding:

> The jury could have reasonably concluded that this was not merely a case in which the defendants terminated the plaintiff's benefits based on apparently reputable, although conflicting, medical evidence, but was rather a case of reprehensible conduct that included both a premeditated attempt over a period of years to terminate the plaintiff's benefits for any plausible reason, regardless of the harm to the plaintiff in order to increase profits, and an attempt to conceal that conduct.

[Exh. G, Order, Civ. 96-0754 (D. Ariz.), March 31, 2000, at 4]. The Court further rejected Defendants' claim that the jury's verdict was clearly contrary to the weight of evidence, [id. at 5], and their claim that the jury instructions were erroneous, [id. at 7]. However, the Court granted Defendants' motion for a new trial. [Id., at 9]. Among other grounds, the Court found that it had improperly admitted the portion of the expert witness' testimony in which he expressed his opinion concerning the amount of the supplemental fee if Mr. McKendry's benefits were terminated. [Id. at 6-7]. The Court held that the admission of this evidence was improper solely because Plaintiff untimely disclosed this information to Defendants under Fed R. Civ. P. 26(a)(2)(c). [Id.] Ultimately, the matter was settled before a new trial began.

unseal the record because the proof and explanation of the arrangement between Defendants, contained in the two sealed exhibits and sealed testimony, is directly relevant to the mission of each organization. Especially in light of Revere's admission at trial that its handling of Mr. McKendry's claim was still the norm for similarly situated policyholders, [Exh. B at 648:13-24], this information would be valuable to Movants, who could use it to promote public education and demand reform in the insurance industry. The public would obtain similar benefits from having access to this information, in addition to using the knowledge to make more informed consumer decisions.

ARGUMENT

The right of access to court records is well-established and can only be overcome by a particularized demonstration of a compelling need for secrecy. Once the proponent of secrecy has met that heavy burden, the trial court must determine whether the potential harm of disclosure overcomes the strong presumption in favor of public access. The court must then make specific factual findings of that harm and articulate its reasoning.

In this case, none of the conditions for sealing any portion of the record has been met. Specifically, Defendants failed to prove the existence of any confidential or proprietary information contained within the exhibits and testimony, much less an interest in secrecy sufficient to counter the powerful public interest in disclosure. In addition, the Court did not articulate any findings to support its sealing orders. In light of the significant public interest in the underlying case and the lack of any evidence or findings to support the sealing orders, unsealing of the exhibits and expert witness's testimony is appropriate.

I. INTERVENORS HAVE A PRESUMPTIVE RIGHT OF ACCESS TO THE TRIAL MATERIALS IN THIS CASE UNDER FEDERAL COMMON LAW AND THE FIRST AMENDMENT.

"A trial is a public event . . . [and] what transpires in the courtroom is public property." Craig v. Harney, 331 U.S. 367, 374 (1947). On the basis of this principle, the Supreme Court has determined that the public has a common-law right of access to judicial records. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).

The Ninth Circuit has long recognized the common-law right of access to judicial records. E.g., San Jose Mercury News, Inc. v. United States D., 187 F.3d 1096, 1102 (9th Cir. 1999); Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995); Valley Broadcasting Co. v. United States D., 798 F.2d 1289, 1293-94 (9th Cir. 1986). The Ninth Circuit has specifically held that there is a strong presumption of public access to civil proceedings. San Jose, 187 F.3d at 1102.

Movants also have a First Amendment right of access to the exhibits and testimony. The Supreme Court has recognized this First Amendment right of access in the context of criminal cases. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603-07 (1982). The Court has further indicated that the same First Amendment right adheres to civil trials. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980) (not reaching issue, but noting that "historically both civil and criminal trials have been presumptively open"); id. at 599-600 (Stewart, J., concurring).

Although the Ninth Circuit has not directly ruled on whether the First Amendment right of access extends to civil trials or records in civil cases, Hagestad, 49 F.3d at 1434 n.6, most circuits agree that the policy supporting access to the criminal justice system applies with equal force to civil proceedings. E.g., Brown v. Advantage Engineering, Inc., 960 F.2d 1013, 1016 (11th Cir. 1992); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 252-54 (4th Cir. 1988); In re Continental Illinois Securities Litig., 732 F.2d 1302, 1308-09 (7th Cir. 1984); Publicker Inds., 733 F.2d at 1070 (quoting Globe Newspaper, 457 U.S. at 604-05); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1176-79 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); see also In re the Iowa Freedom of Information Council, 724 F.2d 658, 661 (8th Cir. 1983).[5]

II. THE PRESUMPTIVE RIGHT OF ACCESS TO COURT RECORDS MAY ONLY BE OVERCOME BY COMPELLING REASONS SUPPORTED BY PARTICULARIZED FACTUAL FINDINGS.

To overcome the presumption of access under the common law, Defendants must demonstrate a "sufficiently important" and "compelling" countervailing interest in secrecy. San Jose, 187 F.3d at 1102; Hagestad, 49

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[5] State courts within this circuit agree with the analyses of their federal counterparts. E.g., NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 358 (Cal. 1999) (holding that reasoning in criminal context "suggests that the First Amendment right of access . . . encompasses civil proceedings as well", and noting that "every lower court opinion of which we are aware that has addressed the issue" has decided same).

F.3d at 1434. If the proponents of secrecy meet that heavy burden, the Court must then "weigh 'the interests advanced by the parties in the light of the public interest and the duty of the courts.'" Valley Broadcasting, 798 F.2d at 1294 (quoting Nixon, 435 U.S. at 602).

The factors relevant to a "determination of whether the strong presumption of access is overcome include the public interest in understanding the judicial process . . . ," Erection Co., 900 F.2d at 170 (citation omitted), and the public interest involved in the substance of the underlying case. E.g., Brown & Williamson, 710 F.2d at 1180-81; Van Etten v. Bridgestone/Firestone, Inc., 117 F. Supp. 2d 1375, 1380 (S.D. Ga. 2000); In re Agent Orange Prod. Liability Litig., 104 F.R.D. 559, 573-74 (E.D.N.Y. 1985), aff'd, 821 F.2d 139 (2nd Cir.), cert. denied, 484 U.S. 953 (1987); In Re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 101 F.R.D. 34, 38 (C.D. Cal. 1984); United States v. General Motors Corp., 99 F.R.D. 610, 612 (D.D.C. 1983).

Finally, if the Court finds that the presumption of access has been rebutted by a proven compelling interest in secrecy, it must "articulate the factual basis for its ruling, without relying on hypothesis or conjecture." Hagestad, 49 F.3d at 1434 (citing Valley Broadcasting, 798 F.2d at 1295). "It is vital for a court clearly to state the basis of its ruling, so as to permit appellate review of whether relevant factors were considered and given appropriate weight." Valley Broadcasting, 798 F.2d at 1294.

A court's duty to weigh the balance of interests is heightened in a case where the parties stipulated to secrecy. Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 899 (7th Cir. 1994) ("[W]here the rights of the litigants come into conflict with the rights of the media and public at large, the trial judge's responsibilities are heightened. In such instances, the litigants' purported interest in confidentiality must be scrutinized heavily."); Bridgestone/Firestone, Inc., 2001 WL 66270, at *3 (S.D. Ind. Jan. 26, 2001) (noting that where parties agree to secrecy, "we have an especially weighty responsibility").[6]

III. THE PUBLIC'S RIGHT OF ACCESS TO THE TRIAL MATERIALS HAS NOT BEEN OVERCOME IN THIS CASE.

In this case, the requirements for sealing the record have not been met. Defendants did not even attempt to prove that the sealed exhibits and testimony contain proprietary information. Instead, they proffered a mere sentence to the Court with respect to each item, stating that the material contained or referred to proprietary information. [Exh. D at 1114:17 - 20, 1115:4-5; Exh. E at 1508:24 - 1509:8]. Thus, Defendants failed to articulate any particularized reasons to

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[6] In recognition of this principle, a state in this circuit recently adopted a new court rule prohibiting parties in litigation from sealing court documents by agreement. The rule, which applies to civil litigation, requires courts to make specific findings, including that there is an overriding interest that overcomes the right of public access to the record. Cal. Rules of Court, 243.1, effective Jan. 1, 2001.

support sealing the record, [see id.], much less present sufficient proof that their interest in secrecy outstrips the public interest in disclosure.[7]

In light of the absence any articulated argument or proof from Defendants, the Court lacked the necessary information to make specific findings to support the sealing order, as required by law. Instead, the Court granted the motions to seal during trial, upon Plaintiff's consent. Given the absence of any written findings by the Court and of any factual presentation by the parties, apparently the interests in disclosure were not weighed against those in secrecy, as the Ninth Circuit requires. See Valley Broadcasting, 798 F.2d at 1294.[8]

The unsupported sealing orders are especially troubling in light of the significant public interest in the underlying litigation and Revere's admission that its handling of Mr. McKendry's claim, which the jury in this case found was in bad-faith, was typical of Revere's claims administration and was still ongoing at

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[7] Indeed, the fact that Defendants did not move to seal Plaintiff's closing argument, in which counsel summarized the expert witness's sealed testimony, [see Exh. F at 1889:9-14, 1995:5-8], is itself proof of a less than compelling interest in secrecy. Plaintiff's counsel's summary of the sealed testimony already being in the public domain effectively destroys any argument in support of a sealing order. See In re Starr, 986 F. Supp. 1159, 1162 (E.D. Ark. 1997) (unsealing record, noting underlying issues had "already been placed in the public domain and the confidentiality of these . . . matters would therefore not be breached by . . . disclosure"), appeal dismissed, 152 F.3d 741 (8th Cir. 1998).

[8] The Court's issuance of a protective order during the discovery phase of this case, see supra n.2, is irrelevant. The Court did not make findings regarding its issuance of the protective order. [See Order, Exh. J at 7]. Regardless, the standard of good cause under Rule 26(c), which governs discovery, is significantly lower than the standard for sealing court trial records. See Seattle Times Co. v. Reinhart, 467 U.S. 20, 33 (1984).

the time of trial. [Exh. B at 648:13-24]. The two sealed exhibits appear to provide proof of the agreements that lay at the core of Plaintiff's claim regarding Defendants' bad-faith dealings. Similarly, the sealed expert testimony appears to provide an explanation of the arrangement that would likely assist the public in understanding the exhibits. [See Exh. F at 1889:9-14, 1995:5-8].

Because these court materials, taken together, could educate the public about potential abuses in the insurance industry, the public's right of access in this case is particularly strong. If appropriate weight is given to the public interest in this case when balancing the competing interests, the sealing of these court materials becomes clearly inappropriate.

CONCLUSION

For the foregoing reasons, Movants respectfully request that the Court grant their Motion to Unseal.

DATED this 29th day of March, 2001.

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U.S. District Judge
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