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(Motion to Practice Pro Hac Vice Granted July 2, 2001)
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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 **SUPPLEMENTAL REPLY IN SUPPORT OF MOTION TO INTERVENE AND MOTION TO UNSEAL COURT RECORDS**

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTERVENORS MEET THE REQUIREMENTS OF PERMISSIVE INTERVENTION UNDER RULE 24(b).

Movants seek intervention for the limited purpose of unsealing court records. In response, Defendants claim that Movants have not satisfied the requirements of Rule 24(b) because there are no common questions of law or fact and because the Motion is untimely. Defendants' Response in Opposition to Motion to Intervene and Motion to Unseal Court Records ("Suppl. Response"), at 2-7. Both of these claims are without merit.

First, the Ninth Circuit does not require a strong commonality nexus for limited-purpose interventions. Beckman Indus., Inc. v. International Ins. Co., 966 F.2d 470, 474 (9th Cir.) ("There is no reason to require such a strong nexus of fact or law when a party seeks intervention only for the purpose of modifying a protective order."), cert. denied, 506 U.S. 868 (1992). See also San Jose Mercury News, Inc. v. United States Dist. Court, 187 F.3d 1096, 1100 (9th Cir. 1999) (citing Beckman in noting that defendants, opposing motion to intervene to challenge secrecy order, declined to challenge commonality); accord Pansy v. Borough of Stroudsberg, 23 F.3d 772, 777-78 (3d Cir. 1994) (holding commonality requirement satisfied whenever third party objects to confidentiality order). The common questions of law or fact here involve the issue of whether the court record has been sealed in accordance with Ninth Circuit requirements. This

satisfies the low standard of commonality for limited-purpose interventions.[1]

Second, this Circuit's three timeliness factors council in favor of permitting intervention.[2] Regarding the first factor, Movants seek only to lift the sealing orders that were issued during trial, which would leave the ultimate settlement undisturbed. Intervention would therefore not threaten the finality of the settlement. See Beckman, 966 F.2d at 473 (holding that court's entry of final judgment does not undercut movants' request for limited intervention); see also Pansy, 23 F.3d at 779 (noting the "growing consensus among the courts of appeals that intervention to challenge confidentiality orders may take place long after a case has been terminated").

The second timeliness factor also favors intervention, because intervention in this settled case would not prejudice the parties. "Rule 24(b)'s timeliness requirement is to prevent prejudice in the adjudication of the rights of existing parties, a concern not present when the existing parties have settled their dispute and intervention is for a collateral purpose." United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990), cert. denied, 498 U.S.

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1 Defendants' discussion of Movants' lack of pending claim against Defendants, and the lack of "geographical nexus," see Suppl. Response at 3-4, is a red herring, because neither of these elements is required by Rule 24(b). Defendants cite no precedent to the contrary.

2 This Circuit's timeliness factors are as follows: 1) the stage of the proceeding at which an applicant seeks to intervene; 2) the prejudice to other parties; and 3) the reason for and length of the delay. San Jose, 187 F.3d at 1100-01.

1073 (1991). Similarly, the First Circuit held:

> It is . . . important to note that postjudgment intervention is not altogether rare. . . . [Intervenor's] motion pertains to a particularly discrete and ancillary issue, as demonstrated by the fact that the merits of the case have been already concluded and are no longer subject to review. Because Public Citizen sought to litigate only the issue of the protective order, and not to reopen the merits, we find that its delayed intervention caused little prejudice to the existing parties . . . .

Public Citizen v. Liggett Grp., Inc., 858 F.2d 775, 786 (1st Cir. 1988), cert. denied, 488 U.S. 1030 (1989). In short, because Movants seek only to unseal the trial record, rather than to re-litigate the merits of the underlying case, the timing of the proposed intervention would not prejudice the parties.[3]

The third timeliness factor – the reason for and length of the delay – also favors Movants. Movants submitted their Motions within weeks of receiving the complete trial transcript of the underlying litigation, which shows Defendants' oral request for a sealing order and the Court's oral granting of the motion. Because the parties did not brief the sealing issue, and the Court did not issue written

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[3] Defendants' claim of prejudice based on their reliance on the sealing orders in agreeing to settlement, Suppl. Response at 6, goes to the merits of the Motion to Unseal, rather than the Motion to Intervene:

> [C]ourts have recognized that, "assuming an intervenor does assert a legitimate, presumptive right to open the court record . . . , the potential burden or inequity to the parties should affect not the right to intervene but, rather, the court's evaluation of the merits of the applicant's motion to lift the protective order."

San Jose, 187 F.3d at 1101 (quoting Public Citizen, 858 F.2d at 787). This issue is therefore addressed infra, at 10 (discussing the Motion to Unseal).

findings, there were no other means for Movants to ascertain the basis for the sealing orders. See Mem. Supp. Mot. Unseal, at 3-10 (relying on various volumes of the trial transcript).

The limited nature of the requested intervention further weighs in favor of the third timeliness factor. Courts are particularly inclined to allow some amount of delay in these cases. San Jose, 187 F.3d at 1101 ("Indeed, delays measured in years have been tolerated where an intervenor is pressing the public's right of access to judicial records."); EEOC v. National Children's Ctr., Inc., 146 F.3d 1042, 1047 (D.C. Cir. 1998) ("[C]ourts have afforded this requirement considerable breadth when the movant seeks to intervene for the collateral purpose of challenging a confidentiality order"); United Nuclear Corp., 905 F.2d at 1427 (upholding intervention three years after case settled, finding most important factor that intervention was not on merits, but for sole purpose of challenging protective order); Public Citizen, 858 F.2d at 785 (noting that "[n]umerous courts have allowed third parties to intervene . . . , many involving delays measured in years rather than weeks"); e.g. Beckman, 966 F.2d at 471 (approving intervention to challenge protective order two years after settlement reached); Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir.) (permitting third party to challenge protective order three years after end of underlying litigation), cert. denied, 379 U.S. 900 (1964). In sum, there has been no delay in this case, but even if there had, intervention would still be warranted.

Defendants' exclusive reliance on Empire Blue Cross and Blue Shield v. Janet Greeson's A Place for Us, Inc., 62 F.3d 1217 (9th Cir. 1995), for the contrary proposition, Suppl. Response at 4-6, is unavailing, because it is entirely distinguishable from the case at bar. The case had been filed by Empire Blue Cross against A Place For Us ("APFU") for fraudulent insurance billing. Aetna, which had known of the underlying litigation against APFU for two years, waited to file a similar lawsuit against APFU until the day that the Empire Blue Cross parties agreed to settle. When a protective order was entered as part of the Empire Blue Cross settlement, Aetna attempted to intervene to gain access to the "voluminous" discovery. The court denied the motion to intervene because it found that Aetna had purposefully waited to act, "hoping to freeload upon the massive amounts of time and money the other parties expended in pursuing discovery." 62 F.3d at 1219.

Here, by contrast, Movants are not attempting to manipulate the system to benefit their own lawsuit, but instead represent the public interest in obtaining access to the sealed materials. Further, far from remaining inactive, Movants filed their motion within weeks of obtaining the complete trial transcript of the underlying litigation, which contains the only known record of the issuance of the sealing orders.

Movants therefore meet the commonality requirement and all timeliness factors. In light of the public interest in this case, and the limited purpose of the

intervention sought, Movants respectfully request that the Court permit Movants to intervene.

II. DEFENDANTS HAVE FAILED TO REBUT MOVANTS' PRESUMPTIVE RIGHT OF ACCESS TO TRIAL RECORDS.

In justifying the merits of the sealing orders, Defendants rely almost entirely on the protective order issued earlier in the case and their claims of competitive disadvantage that originally supported that order. Suppl. Response at 9-12. These arguments are insufficient, because protective orders are governed by a lower standard than sealing orders and in any event, Defendants have failed to submit any evidence in support of their claim of competitive disadvantage.

A. The Common Law Presumption of Access Attaches to Trial Records.

As stated in Movants' opening brief, to overcome the presumption of public access to court records, parties must demonstrate a "sufficiently important" and "compelling" countervailing basis for secrecy. Mem. Supp. Mot. Unseal, at 13-14. Unlike this high standard, protective orders are based on a lesser showing of "good cause." Fed. R. Civ. P. 26(c). See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32-36 (1984) (holding discovery materials not subject to the common law right of access to judicial records). Thus, a finding of good cause relevant to a protective order -- which was in fact absent in this case and did not contemplate trial testimony -- cannot substitute for a finding that

compelling reasons exist to seal trial records.

B. Defendants Have Not Met Their Burden to Justify Sealing Court Records.

Nor have Defendants presented any basis for this Court to conclude that "compelling" interests exist to justify the sealing of the trial records in this case. Preliminarily, Defendants' arguments concerning competitive disadvantage are insufficient because they are unsupported by any evidence. Defendants' only response to Movants' Motion to Unseal is a series of bare assertions regarding the harm that might result from disclosure. Suppl. Response at 9-12. Astonishingly, Defendants have failed to submit any actual evidence to prove that these assertions are true; instead, they rely entirely on the legal arguments of counsel regarding facts that are not before this Court. The claims are therefore pure speculation, and they fail to meet the Ninth Circuit's standard, which requires "articulable facts known to the court." Valley Broadcasting Co. v. United States Dist. Court, 798 F.2d 1289, 1293 (9th Cir. 1986). Cf. Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 663 (3d Cir. 1991) (finding even stale affidavits insufficient); Tavoulareas v. Washington Post Co., 93 F.R.D. 24, 28-29 (D.D.C. 1981) (relying on affidavit of Mobil's director). The Court should refuse these claims on that basis alone.

Even taking Defendants' claims at face value, they do not show that serious harm would result from disclosure of the sealed materials. See Andrew Corp. v. Rossi, 180 F.R.D. 338, 341 (N.D. Ill. 1998) (holding that standard of

confidential business information requires proof of clearly defined, very serious injury). In fact, Defendants fail to discuss the expert witness' testimony at all. Regardless, confidential information is a particularly weak ground on which to claim secrecy. "[B]usiness information alleged to be confidential 'is not entitled to the same level of protection from disclosure as trade secret information.'" Westinghouse Elec., 949 F.2d at 663 (internal citations omitted). Although Defendants briefly refer to their claims in support of a protective order regarding information that "may constitute trade secrets," Suppl. Response at 9-10 (emphasis added), they have failed here even to address the issue of whether trade secrets actually exist. In any event, Defendants must meet a high standard to prove the existence of a trade secret. See Restatement of Torts § 757.

Further, the information Defendants seek to protect is likely to be stale and of little competitive value. Defendants have not presented any evidence to suggest that the information exposed during the trial, held years ago, reveals their current operations, and therefore have not proved a current need for secrecy. See Westinghouse Elec., 949 F.2d at 663 (stating that defendants must present current evidence to show how public dissemination of the pertinent materials now would cause the competitive harm claimed); United States v. IBM Corp., 67 F.R.D. 40 (S.D.N.Y. 1975) (holding that because information three to fifteen years old revealed little about defendant's current operations, it was not

entitled to protection).[4]

Perhaps because Defendants cannot produce evidence of a legitimate interest in secrecy, they instead attempt to diminish Movants' interest in disclosure by arguing that Movants have no "legitimate need" for the information contained in the sealed materials.[5] Suppl. Response at 13-14. This argument fails, however, because the public interest in obtaining access to information regarding an unfair insurance practice that may affect insurance policyholders nationwide is significant, see Mem. Supp. Mot. Intervene, at 3-5, and clearly outweighs Defendants' interest in secrecy.

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[4] It would also be inappropriate to base secrecy orders on potential injury to good will or reputation. Westinghouse Elec., 949 F.2d at 663 (holding presumption of access not rebutted where likely that defendant was most concerned about potential embarrassment, injury to reputation, and public image); see also Phillips v. General Motors Corp., 126 F. Supp. 2d 1328, 1332-33 (D. Mont. 2001) (holding arguable loss of good will insufficient to trigger the protection of Rule 26(c)). As the Seventh Circuit stated:

> Many a litigant would prefer that the subject of the case . . . be kept from the curious (including its business rivals and customers), but the tradition that litigation is open to the public is of very long standing. . . . What happens in the halls of government is presumptively public business.

Union Oil Co. v. Leavell, 220 F.3d 562, 567-68 (7th Cir. 2000) (citations omitted).

[5] Defendants attempt to distinguish Public Citizen on the ground that that case involved a public health issue. Suppl. Response at 3-4. However, "[w]hile no such health risk is involved here, the presumption in favor of a public proceeding . . . is heightened by the public's interest in the behavior of a utility touching the lives of a huge number of people." Gelb v. American Tel. & Tel. Co., 813 F. Supp. 1022 (S.D.N.Y. 1993).

Finally, Defendants' alleged reliance on the sealing order is insufficient to justify the sealing orders. See, e.g., Beckman, 966 F.2d at 476 (allowing modification of protective order despite defendant's claim of reliance); Olympic Refining Co., 332 F.2d at 264 (same). Defendants should be aware that district courts retain jurisdiction over the sealing orders they issue, and therefore can modify those orders. Beckman, 966 F.2d at 473; see also General Motors, 126 F. Supp. 2d at 1333 (rejecting reliance claim where good cause had not been proven; defendant "cannot claim surprise at established precedent").

> The parties' reliance on an order . . . should not be outcome determinative . . . . "[E]ven though the parties to [a] settlement agreement have acted in reliance upon that [protective] order, they [do] so with knowledge that under some circumstances such orders may be modified by the court."

Pansy, 23 F.3d at 790 (citations omitted). Thus, Defendants have failed to produce evidence or sufficient reasons to keep the records sealed.

C. If the Court Determines that Some Secrecy is Warranted, the Court Should Redact the Trial Materials to Remove the Allegedly Confidential Material and Unseal the Remaining Portions.

Even if the Court finds that certain information in the court records should be sealed, it should not permit overbroad secrecy. See Encyclopedia Brown Prods., Ltd. v. Home Box Office, Inc., 26 F. Supp. 2d 606, 614 (S.D.N.Y. 1998) (warning against sweeping protection of documents). Here, Defendants list sweeping categories of information contained in the agreements that they seek to keep secret. E.g. Suppl. Response at 11 (citing "information regarding . . . denial of claims"). The categories appear to encompass information that in no

way qualifies as legitimately confidential. In addition, Defendants make no arguments that address the expert testimony that Movants seek to unseal. Thus, Defendants have failed to present sufficient grounds to seal the trial records in their entirety. At the least, then, the Court should redact those portions of the documents that warrant protection, and otherwise allow access to the trial materials. See United States v. Amodeo, 44 F.3d 141, 147 (2d Cir. 1995) (ordering redaction of court record to allow access to appropriate portions); e.g. In re Rezulin Prods. Liab. Litig., 2000 WL 1839744, at *2 (S.D.N.Y. Dec. 13, 2000) (ordering redaction of highly confidential information, including specific dollar amounts and chemical formulas); Pratt & Whitney Canada Inc. v. United States, 14 Cl. Ct. 268, 275 (Cl. Ct. 1988) (ordering portions of court records kept in camera, providing access to portions not disclosing trade secrets).

CONCLUSION

For the foregoing reasons, Movants respectfully request that the Court grant its Motion to Intervene and Motion to Unseal Court Records.

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DATED this 20th day of November, 2001.

TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.

By Rebecca E. Epstein

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ORIGINAL to CLERK and COPY of the foregoing mailed by overnight delivery this twentieth day of November 2001; to:

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