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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Mussalina Muhaymin as Personal
Representative of the Estate of
Muhammad Abdul Muhaymin Jr.,

Plaintiff,

vs.

Ronaldo Canilao; James Clark; Oswald
Grenier; David Head; Susan Heimbinger;
Jason Hobe; Dennis Lerous; Kevin
McGowan; Ryan Nielson; Antonio
Tarango; Steven Wong; City of Phoenix,

Defendants.

Case No.: CV-17-04565-PHX-DLR

**Reply to Defendants' Motion in
Opposition to Motion to Intervene and
Petition to Unseal**

ORAL ARGUMENT REQUESTED

Defendants still decline to meet their burden to justify sealing by failing to articulate a compelling need to overcome the public's interest in access while also obscuring the standards for sealing judicial records. Defendants have asked this Court to disregard the legal standards for sealing and instead rely on a stipulated protective order despite the sealing orders being challenged by multiple intervenors. Crucially, Defendants have failed to identify record documents in which the Court balanced public right of access with party privacy as required by settled law.

I. Defendants Attempt to Shift Their Legal Burden as They Repeatedly Fail to Articulate Compelling Reasons to Justify Sealing Public Records.

As was outlined in the Motion to Intervene and Unseal, where the First Amendment right of access attaches to judicial documents, strict scrutiny applies to any restriction of that right. *See Globe Newspaper Co. v. Superior Ct. for Norfolk Cty.*, 457 U.S. 596, 606-07 (1982). To overcome such scrutiny, the party seeking to restrict access must support its sealing motion with “compelling reasons.” *Washington Post v. Robinson*, 935 F.2d 282, 287-89 (D.C. Cir. 1991). Similarly, well-established common law protections create a “strong presumption in favor of public access” to judicial records. *See Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). Defendants have not met these burdens in their motions for sealing records in this case and fail to address this shortcoming in their Oppositions.

Defendants still have not shown why documents should have been sealed in the first instance and instead rely on a protective order only meant to govern discovery to justify blanket, unwarranted sealing of subsequent records. Each of Defendants' motions to file

documents or records under seal was supported only by a vague statement that the documents and exhibits contained “confidential information and therefore public access should not be permitted.” *See, e.g.*, ECF 236 at 2. This statement does not meet the standard to justify sealing. “A party seeking to seal a judicial record bears the burden of overcoming the strong presumption in favor of public access to records by meeting the compelling reasons standard.” *Kamakana*, 447 F.3d at 1178.

Even the Stipulated Protective Order Defendants reference in their Opposition provides that for documents to be filed with the court under seal, compelling reasons must be given: “In the event a party wishes to use any Confidential Information in any papers filed in this action, that Party shall make a motion to file such papers under seal with the Court pursuant to Local Rule of Civil Procedure 5.6, that sets forth the articulated bases with specific factual findings demonstrating the compelling reasons for sealing materials attached to dispositive motions and/or the good cause for sealing other attached or used materials.” ECF 72. But again, compelling reasons for sealing the materials in this case are not apparent from the public record – in violation not only of established legal principles, but also the Stipulated Protective Order in this case. Regardless, a Stipulated Protective Order cannot restrict public access to court hearings and documents, especially when it was intended only to keep confidential personally identifiable information obtained in discovery. Nevertheless, Defendants have attempted to bootstrap the protective order into a mechanism for filing all subsequent substantive material in this case under seal.

Defendants actually cite the law in their Joint Opposition (“Although the common law right creates a strong presumption in favor of judicial access under limited circumstances (i.e., dispositive rulings), the presumption can be overcome by sufficiently important countervailing interests. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003).”) ECF 366 at 3. Yet Defendants never articulate what “sufficiently countervailing interests” should overcome the presumption of judicial access. For example, Defendants vaguely claim the Court should consider whether disclosure of material could result in “improper use” but do not define even which evidence is vulnerable to improper use, let alone identify what important interests and compelling reasons could have justified sealing.

A. The Right of Access Attaches to Civil Proceedings and Motions for Summary Judgment.

Defendants attempt to argue that because this case is a civil matter, the First Amendment public right of judicial access does not apply because “the First Amendment affords the public a right of judicial access to *criminal trials*.” ECF 366 at 2. Ninth Circuit precedent squarely forecloses this argument. *See, e.g., Courthouse News Serv. v. Planet*, 750 F.3d 776 (9th Cir. 2014); *Wood v. Ryan*, 759 F.3d 1076, 1081-82 (9th Cir. 2014), vacated on other grounds, 135 S. Ct. 21(2014) (“[W]e recently acknowledged the First Amendment right of access to civil proceedings and associated records and documents.”) (internal quotation marks omitted).

Defendants also try to imply that the subject motion in this case was a non-dispositive motion, even though the motion was one for summary judgment and therefore a

dispositive motion to which the presumption of judicial access applies. It is well-established in the Ninth Circuit that a “strong presumption of access to judicial records applies fully to dispositive pleadings, including motions for summary judgment and related attachments.” *Kamakana*, 447 F.3d at 1179. Thus, “[t]he ‘compelling reasons’ standard is invoked even if the dispositive motion, or its attachments, were previously filed under seal or protective order.” *Id.* (citing *Foltz*, 331 F.3d at 1136).

B. Good Cause is the Standard for Information Adduced in Discovery, not Evidence Entered into the Record in Merits Adjudications.

Importantly, the Ninth Circuit has explicitly held that “the presumption of access is not rebutted where documents which are the subject of a protective order are filed with the court as attachments to summary judgment motions’ and that ‘to retain any protected status for documents attached to a summary judgment motion, the proponent must meet the ‘compelling reasons’ standard and not the lesser ‘good cause’ determination.” *Id.* at 1177 (quoting the magistrate judge’s reference to *Foltz*, 331 F.3d at 1135).

In their Joint Opposition, Defendants claim the court found good cause for sealing. Defendants seem to confuse and substitute the good cause standard applied in discovery proceedings with the compelling reasons standard required for merits determinations. If a filing is unrelated to the merits of the case, the party may only meet a good cause standard for restricting the public’s right to access the information. Conversely, if the filing is directly related to the merits of the case or is determinative of the litigant’s substantive rights, then a party must meet a higher burden of showing that compelling reasons exist to overcome the presumption of the public’s right of access. *See, e.g., The*

Center for Auto Safety v Chrysler Group, LLC, 809 F.3d 1092 (9th Cir. 2016). The materials sealed here relate to Defendants’ Motion for Summary Judgment, a dispositive motion determining substantive rights, so the compelling reasons standard applies. Defendants have failed to even show good cause, and undoubtedly have not articulated compelling reasons for sealing as the law requires.

C. Stipulation to a Protective Order Is Not Synonymous with Sealing.

The parties stipulating to a protective order does not justify sealing the summary judgment records in this case. Furthermore, by implying that parties stipulated to sealing, it appears Defendants are attempting to shift their legal burden of justifying why records should be sealed to members of the public to show why they should be unsealed. As already outlined above, that is not the law. Although the parties stipulated to a protective order, Defendants claim that sealing was also somehow stipulated is a mischaracterization of the facts, as evidenced by Plaintiff’s motions in opposition to sealing on the record. *See, e.g.*, ECF 248 and ECF 277. Regardless, parties in a public judicial forum cannot bargain away the public’s right to access public hearings and records. *See San Jose Mercury News*, 187 F.3d at 1101.

II. Muslim Advocates Has Standing.

As already outlined in the underlying motion, courts have long recognized that members of the public have standing to vindicate the public’s right of access to judicial proceedings and documents. *See Globe Newspaper*, 457 U.S. at 609 n.25 (“[R]epresentatives of the press and general public must be given an opportunity to be

heard on the question of their exclusion [from judicial proceedings.]” (internal marks and citation omitted).

Furthermore, the Ninth Circuit has made clear there is no reason to require a nexus of fact or law when a party seeks to intervene only for the purpose of unsealing records. *See Beckman Indus. v. Int’l Ins. Co.*, 966 F.2d 740, 473-74 (9th Cir. 1992) (holding inapplicable to limited intervention Rule 24(b)’s prongs regarding independent jurisdictional basis or common question of fact or law). Muslim Advocates meets this standard for limited intervention.

Despite Defendants’ claim, neither Muslim Advocates nor Plaintiff must have alleged religious discrimination claims for Muslim Advocates to assert common law and First Amendment rights as permissive intervenors under FRCP 24(b). In any event, even if Muslim Advocates did need to show an interest based in plaintiff’s pleadings – which it does not – Plaintiff’s suit alleges civil rights violations and Muslim Advocates is a national civil rights advocacy organization that works on the very subject matter of Plaintiff’s claims. Plaintiff filed civil rights claims not only under Title II of the ADA and the Arizona Civil Rights Act alleging discrimination based on Mr. Muhaymin’s disability, but also under 42 U.S.C. § 1983 alleging violations of Mr. Muhaymin’s Fourth and Fourteenth Amendment Rights to be free from unreasonable seizure and use of excessive, unreasonable force. As a non-profit organization fighting for the civil rights of American Muslims, Muslim Advocates seeks access to these court records that may implicate the safety of members of the Muslim community who engage with Phoenix law

enforcement and that will shed light on how the judicial system is handling this case regarding law enforcement's treatment of members of the Muslim community.

Finally, as a national legal and media advocacy group that aims to protect the civil rights of Muslims and all people, Muslim Advocates has an interest in learning how members of its community (including those who are Black and/or disabled) are treated by employees of the Phoenix Police Department. It is potentially significant that Defendants filed motions to seal records in this case, but not in *Stickney v. City of Phoenix, et al.*, 2:20-cv-01401-SMB, another civil rights and wrongful death action against the City of Phoenix and individual Phoenix police officers currently pending in this district. Muslim Advocates also repeats here that police body camera footage in this case revealed that Defendant officers mocked Mr. Muhaymin minutes before his death as he pleaded "Please Allah" (the Arabic word for God used by Muslims). This case is of interest to Muslim Advocates, its work, and its mission.

III. This Motion Is Timely.

Courts routinely allow intervention for unsealing purposes even after lengthy delays. *San Jose Mercury News, Inc. v. U.S. Dist. Court – N. Dist. (San Jose)*, 187 F.3d 1096, 1100-01 (9th Cir. 1999) ("delays measured in years have been tolerated where an intervenor is pressing the public's right of access to judicial records.").

Defendants rely on a misguided claim that Muslim Advocates is bound by an alleged party agreement to the terms of a Stipulated Protective Order to argue that the motion is untimely. Not only is Defendants' reliance on the Stipulated Protective Order a

distraction from the fact that a protective order doesn't warrant blanket sealing, Defendants' argument on timeliness also fails to address that the records at issue were sealed as recently as two weeks before this initial motion was filed. Defendants' assertions related to the Protective Order presume that the public should have been able to see into the future and determine that the Court would automatically seal records and hearings that are normally open to the public. Defendants make that claim despite the protective order itself indicating that there would be a separate process for sealing records. Importantly, as argued above, a protective order can properly seal information adduced in discovery yet yield to public access considerations once that information is attached as evidence to judicial records seeking adjudication of rights. Thus, there would have been no reasonable expectation that records related to a summary judgment motion would have been sealed. Again, the protective order does not necessitate the sealing of all documents, exhibits, and hearings related to the motion for summary judgment. To argue that it does not only obscures and conflates the different procedures and standards required for protective orders and sealing, but again puts the burden on the public to anticipate years in advance that a judge would seal all documents and hearings in a case in which a protective order was entered for the sole purpose of keeping personal identifying information confidential through discovery – an entirely unreasonable expectation. Nevertheless, this motion for intervention comes only two weeks after the court's sealed summary judgment decision and is therefore timely.

IV. Redactions Are the Appropriate Measure Where There Is Confidential, Personally Identifiable Information.

Even if there is some confidential material in the record, “redaction is an adequate alternative to closure... and it is preferred given our strong tradition of open court proceedings.” *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1095 (9th Cir. 2014); *see also Foltz*, 331 F.3d at 1137.

From the publicly accessible records in this case, there are no indications that compelling interest exists nor that any alternatives to sealing were considered. Although Defendants claim to retain an active interest in the confidentiality protections afforded under Rule 26(c) and the terms of the Protective Order, Defendants still have not shown why a less restrictive measure from sealing (such as redactions) was not pursued here. Rather than moving for wholesale sealing, it is Defendants’ burden to identify what confidential information they believe should be redacted.

The documents filed in these proceedings are judicial records of significant interest to the American public. Insofar as Defendants claim an interest in preventing the disclosure of these documents because they might reveal personal identifying information about the Defendants, redaction – as opposed to blanket sealing – is the appropriate way to reconcile these competing interests. For these reasons, the Court should lift the blanket seal on these proceedings and require Defendants to provide sufficiently specific justifications for their requested sealings or redactions. *See, e.g., In re Fort Totten Metrorail Cases*, 960 F. Supp. 2d 2, 11-12 (D.D.C. 2013) (ordering the parties to redact minors’ personal identifying information from settlement documents, so that the

documents – to which the public had a right of access – could be filed on the public docket).

In sum, Muslim Advocates has moved to intervene for the limited purpose of unsealing documents and in response, Defendants have not explained what compelling reasons they had to justify sealing to overcome the public’s right to judicial access nor why more narrowly tailored measures such as redaction were not more appropriate.

CONCLUSION

For the foregoing reasons and for the reasons stated in Putative Intervenor Muslim Advocates’ Motion to Intervene and Unseal Records, Muslim Advocates respectfully requests this Court to grant the motions.

Respectfully submitted this 8th day of October, 2021.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2021, I electronically filed the foregoing with the Clerk of the Court for the U.S. District Court, District of Arizona, using the ECF system. A Notice of Electronic Filing will be served to all attorneys of record in this matter; therefore, paper copies of the foregoing have not been provided by postal mail or personal delivery.

Respectfully Submitted,

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