

Case No. 15-55084

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CENTER FOR AUTO SAFETY,
Intervenor-Appellant

v.

CHRYSLER GROUP LLC,
Defendant-Appellee.

Appeal from an Order of the United States District Court for the Central
District of California, Case No. 2:13-cv-08080-DDP-VBK

APPELLANT'S REPLY BRIEF

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INTRODUCTION

It is beyond dispute that both the common law and the First Amendment provide a strong presumption that court records are open to the public. Preliminary injunction motions are no different. Like other court records, they may only be sealed if there are compelling reasons to do so.

On appeal, Chrysler does not even bother arguing that it has satisfied this standard. Instead, it relies solely on its contention that the standard does not apply. According to Chrysler, preliminary injunction motions are not subject to the presumption of access because they do not “result in a final determination of the merits of a claim.” Opp’n 19. This argument cannot withstand scrutiny.

Indeed, this Court has already rejected it. *See Oliner v. Kontrabecki*, 745 F.3d 1024, 1026 (9th Cir. 2014) (refusing to exclude court records from the strong presumption of access solely because there was no final determination on the merits). In *Oliner*, and in several other cases, the Court applied the strong presumption of access to court records that did not—and, in some cases, could not—result in a final determination on the merits. *See infra*, at 7.

Despite this case law, Chrysler persists in arguing that finality matters. But the only reason it gives for this assertion is that this Court stated in *Phillips v. General Motors* that the presumption of access is rebutted when a sealed discovery document is attached to a nondispositive motion. Opp’n 16 (citing *Phillips v. Gen.*

Motors Corp., 307 F.3d 1206, 1213 (9th Cir. 2002)). But the *Phillips* exception is “narrow.” *In Re Roman Catholic Archbishop*, 661 F.3d 417, 429 (9th Cir. 2011). It does not, as Chrysler would have it, apply to all motions that do not result in a final determination on the merits. Rather, it applies only to motions that are “unrelated, or only tangentially related, to the underlying cause of action.” *Oliner*, 745 F.3d at 1026 (internal quotation marks omitted). As explained in the opening brief, that rationale simply does not apply to preliminary injunction motions. *See* Appellant’s Br. 25-28.

Even if preliminary injunction motions *were* excluded from the presumption of access, the court records here could still only be sealed if Chrysler demonstrated good cause to do so. Chrysler fell far short of meeting this burden. The record does not show *any* “specific prejudice or harm [that] will result” from unsealing a single one of the court records. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

In fact, in just the past few days, several of the previously sealed documents have been unsealed at Chrysler’s behest. *See infra*, at 27. It is undeniable that these documents do not meet the good cause standard for sealing. And yet Chrysler argued before the district court that sealing was warranted—and the district court permitted these documents to be sealed.

The district court applied the wrong standard for sealing the preliminary injunction records in this case. It then sealed records that obviously did not meet even the lower standard it erroneously applied. The district court's decision should therefore be reversed.

ARGUMENT

I. Chrysler's Portrayal of the Record is Misleading.

Throughout its brief, Chrysler takes substantial liberties with the record to paint a picture that is at best misleading and at worst simply false.

1. Chrysler states that before granting the parties' applications to seal, the district court "reviewed in camera every one of the documents sought to be filed under seal." Opp'n 6. But it cites no evidence for this proposition, and there is none in the record. The sealing orders themselves do not state that the court conducted a document-by-document review before entering them, nor does anything else in the record.

Chrysler notes that the district court did not seal all of the documents the parties asked it to seal. Opp'n 7. But the company fails to mention that the only documents the court did not seal were the plaintiffs' application to seal their reply and the proposed order granting that application. This does not indicate a document-by-document review of the preliminary injunction records themselves. Chrysler's contention that it does is misleading.

2. Even more galling, Chrysler repeatedly asserts variations of the contention that at the time of sealing, the district court made a “specific determination that there was good cause to file the discovery documents at issue under seal.” Opp’n 27. More specifically, Chrysler states that the court “concluded that . . . most of the documents could be filed under seal because they contained confidential commercial information.” Opp’n 6. But there is absolutely no basis for this in the record—in fact, the record suggests precisely the opposite.

All four sealing orders are perfunctory. *See* ER 140, 199, 231; SER 9. None gives any reason at all for why the documents must be sealed. And they certainly don’t contain any reference to confidential commercial information. Chrysler’s suggestion to the contrary is simply false.

One of the orders states only that “the court orders the memorandum in opposition to motion for preliminary injunction (docket number 61) placed under seal.” ER 199. No reference to good cause whatsoever. Chrysler, of course, does not cite this order.

The other three orders—proposed orders, drafted by the parties, that the court simply signed off on—contain a single, formulaic reference to “good cause appearing.” ER 140, 231; SER 9. None of these orders identifies what that good cause was, let alone gives any indication that the court actually considered whether the public’s interest in access was outweighed by whatever unspecified interest

there might be in secrecy. An unexplained, obligatory reference to good cause is not sufficient to seal court records under any standard. *See Foltz*, 331 F.3d at 1130 (explaining that the district court is “require[d]” to “identify and discuss the factors it considered in its good cause examination” (internal quotation marks omitted)).¹

3. Chrysler’s characterization of the *Velasco* plaintiffs’ position on sealing is similarly problematic. Chrysler states that “[a]t no point did Plaintiffs seek to challenge” its designation of any of the documents it produced in discovery as confidential “under the procedure set forth in the protective order.” Opp’n 6. Chrysler conveniently omits, however, that the plaintiffs explicitly informed the district court that they thought the records submitted in connection with the preliminary injunction motion should *not* be sealed. ER 135.

4. Chrysler’s discussion of its own actions in response to the TIPM defect is also misleading. Chrysler states that it authorized a limited safety recall “[a]round the same time” as the Center petitioned the National Highway Traffic Safety Administration (NHTSA) to open a defect investigation into the TIPM-7. Opp’n 11. In fact, Chrysler’s recall was five days after the Center filed its petition.

¹ Moreover, the district court’s opinion on the Center’s motion to unseal makes no mention of having previously found good cause for sealing. One would think if the court had already ruled on the issues the Center raised, it would have said so.

ER 263. If the timing of the recall was, as Chrysler contends, entirely based on its own internal investigation, this is quite the coincidence.

And Chrysler leaves out the fact that, in its opposition to the preliminary injunction motion, Chrysler told the court that the recalled vehicles were “very different” from Chrysler’s other models, such that there was no reason to believe other cars suffered the same safety defect. ER 153, 166. But after the court denied the motion, the company turned around and recalled additional vehicles. ER 279.

Chrysler suggests that the district court repeatedly and carefully considered whether there was good cause for sealing, and that there’s no need for public access to these documents anyway because there’s no safety issue here. But the record does not support Chrysler’s characterization. This Court should disregard Chrysler’s attempt to rewrite history in its favor.

II. PRELIMINARY INJUNCTION MOTIONS MAY NOT BE SEALED WITHOUT COMPELLING REASONS FOR SECRECY.

A. The Presumption of Public Access Applies Fully to Preliminary Injunction Motions.

Chrysler argues that preliminary injunction motions should be exempt from the presumption of access that applies to most court records by default, solely because preliminary injunction motions do “not result in a final determination on the merits of a claim.” Opp’n 19.

But finality is not—and has never been—a requirement of the public right of access. The Court has repeatedly applied the presumption of access to motions that *do not* result in a final determination on the merits. *See, e.g., United States v. Index Newspapers LLC*, 766 F.3d 1072, 1085 (9th Cir. 2014) (“[T]he public does have presumptive First Amendment rights of access to . . . filings related to motions to unseal.”); *CBS, Inc. v. U.S. Dist. Court*, 765 F.2d 823, 826 (9th Cir. 1985) (holding that a prisoner’s *post-trial* motion to reduce his sentence was subject to the presumption of access); *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1176 (9th Cir. 2006) (applying the presumption to motions for summary judgment that were, in large part, denied); *In re Midland Nat. Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115, 1118 (9th Cir. 2012) (applying presumption of access to summary judgment motions even though case settled before the motions were decided).

Indeed, this Court has explicitly rejected the argument that court records may be excluded from the presumption simply because they do not result in a final determination. *See Oliner*, 745 F.3d at 1026-27. The presumption of access applies to voir dire, bail proceedings, preliminary hearings—none of which results in a final determination on the merits. *See Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 10 (1986) (preliminary hearings); *Seattle Times Co. v. U.S. Dist. Court*, 845

F.2d 1513, 1517 (9th Cir. 1988) (bail proceedings); *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982) (voir dire).

Chrysler's only response to this overwhelming authority is that in *Phillips*, this Court stated that "when a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public's right of access is rebutted." *Phillips*, 307 F.3d at 1213. Chrysler seizes on the word "nondispositive." But rather than examine *Phillips* to determine the scope of the exception it announced, Chrysler turns to Black's Law Dictionary. Black's Law, Chrysler notes, defines "dispositive" as "bring[s] about a final determination." Opp'n 19 (internal quotation marks omitted). Therefore, Chrysler argues, under *Phillips* all motions that do not "result in a final determination on the merits of a claim" are excluded from the presumption of access to court records. But this argument places far more weight on *Phillips* than it can bear.

Chrysler entirely ignores the fact that *Phillips* was about a discovery motion. *Phillips*, 307 F.3d at 1209. While court records have traditionally been open to the public, discovery has not. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). "Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action," and is therefore never even submitted to a court. *Id.* And discovery *motions* are often even "further removed" from a cause of action than discovery materials themselves.

Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986). The motion in *Phillips*, for example, was filed precisely because the plaintiffs thought that the information the defendant had produced was irrelevant. *See Phillips*, 307 F.3d at 1209. It would be strange indeed if the presumption of access applied to documents to which it would otherwise be inapplicable, simply because they were filed in court as evidence of their irrelevance. *Phillips*' statement about nondispositive motions must be read in this light. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) (explaining that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute" and looking to the "context" of the opinion to determine what a contested quotation meant).

Judges have a dual role in litigation—they adjudicate cases, but they also manage them. *See* Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 Sup. Ct. Rev. 169, 194. Motions like summary judgment motions, motions to dismiss, and preliminary injunction motions involve the merits of a case and invoke the Article III power of the court. *See, e.g., Burlington N. R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1072 (9th Cir. 1991) (delegation of preliminary injunction decision to magistrate judge was "an inexcusable abdication of judicial responsibility and a violation of article III of the Constitution"). Motions like discovery motions, motions to extend time, and other administrative motions often do not. *See Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1415 (9th Cir. 1991)

(delegation to magistrate judge of decisions on “routine discovery matter[s]” does not violate Article III).

In referring to nondispositive motions, *Phillips* was not adding a new requirement of finality to the public right of access. Rather, it was using the word nondispositive as shorthand for the kind of case management motions judges must regularly decide that have nothing to do with the actual adjudication of the merits of a case. *See* Opp’n 24 n.6 (conceding that “dispositive” is often used as a “vernacular buzzword” and that motions for preliminary injunction are frequently treated as dispositive motions (internal quotation marks omitted)).

There is no presumption of access to the documents attached to these kinds of motions because such documents “are often unrelated, or only tangentially related, to the underlying cause of action,” and therefore the “public has less of a need” for them. *Kamakana*, 447 F.3d at 1179 (internal quotation marks omitted). As this Court made clear in *Oliner*, where this rationale does not apply, neither does the *Phillips* exception.

Oliner rejected the argument that the *Phillips* exception should apply to court records whenever they do not result in the “determination of a particular claim on the merits” or “eliminate such a claim from the case.” *Oliner*, 745 F.3d at 1026 (internal quotation marks omitted). The Court explained that “[t]he *rationale underlying* the” *Phillips* exception—“namely that the . . . court records attached

only to non-dispositive motions . . . are often unrelated, or only tangentially related, to the underlying cause of action”—“d[id] not apply” to the records at issue in that case. *Id.* (internal quotation marks omitted and emphasis added).

Therefore, the Court held, the compelling reasons standard governed—regardless of whether there was a final determination on the merits. *Id.* Finality had nothing to do with it.

Chrysler argues that this Court’s decisions in *Foltz* and *Kamakana* support its position, but in fact these cases cut the other way. Opp’n 20. In *Foltz*, the Court clarified that the *Phillips* exception does not apply to summary judgment motions. *Foltz*, 331 F.3d at 1135. Why? Because although “much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action, [t]he same cannot be said for materials attached to a summary judgment motion.” *Id.* (internal quotation marks omitted). Similarly, it cannot be said for preliminary injunction motions. These motions *require* a showing of likelihood of success on the merits. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agric.*, 415 F.3d 1078, 1092 (9th Cir. 2005). Therefore, evidence submitted with them is necessarily “related[] to the underlying cause of action,” *Foltz*, 331 F.3d at 1135.

Kamakana, likewise, explained that the presumption of access “applies fully to dispositive” motions, not because they result in a “resolution of a dispute on the

merits” per se, but rather because this resolution “is at the heart of the interest in ensuring the public’s understanding of the judicial process and of significant public events.” *Kamakana*, 447 F.3d at 1179 (internal quotation marks omitted). It is the public’s understanding of the judicial process—not the final determination in and of itself—that matters. As explained in the opening brief, preliminary injunction decisions represent an extraordinary exercise of judicial power with the potential to significantly impact the parties and the public. *See* Appellant’s Br. 26-28. They, too, are “at the heart of the interest in ensuring the public’s understanding of the judicial process and of significant public events.”

B. No Policy Reason Justifies Excluding Preliminary Injunction Motions from the Public Right of Access.

Chrysler trots out a parade of horrors it asserts will occur if preliminary injunction motions are not excluded from the presumptive right of access. But the vast majority of courts to have considered the issue—including numerous courts in this Circuit—have already held that the presumption applies to preliminary injunction motions. *See* Appellant’s Br. 28-30. Some of these decisions were decades ago. And yet there is no indication that these rulings have resulted in any of the problems Chrysler speculates might occur.

1. Chrysler argues that if the public has a presumptive right of access to preliminary injunction motions, there will be an increase in meritless motions because parties will attempt “to gain leverage . . . by threatening the release of the

other side’s confidential discovery documents.” Opp’n 18. But parties that are inclined to abuse the public right of access can do so—or, at least, try to—regardless of whether it applies to preliminary injunction motions. Most court records are subject to this presumption. And it is just as easy to file, say, a frivolous summary judgment motion as it is to file a frivolous motion for preliminary injunction. There is no reason to think excluding preliminary injunction motions from the presumption of access will make any difference.

Moreover, Rule 11 allows courts to strike motions that are meritless or filed “for an[] improper purpose”—and to sanction the party that filed them. Fed. R. Civ. P. 11(a). The solution to the filing of improper, meritless motions is not to limit the public right of access to meritorious motions. It’s to strike improper motions and sanction those who file them.

2. Chrysler argues that the Center proposes to replace what is now a bright-line rule with a number of “amorphous,” unworkable “tests.” Opp’n 23-24. That is simply not the case. The snippets Chrysler pulls out of context from the Center’s brief do not propose any sort of test—amorphous or otherwise. They simply explain why the *Phillips* exception does not apply to preliminary injunction motions. What the Center proposes is that this Court reaffirm what the law already requires: Preliminary injunction motions are subject to the presumptive public right of access. This is, in fact, a bright line rule.

C. The Presumption of Access Applies to the Preliminary Injunction Motion in this Case.

Chrysler argues that even if in general, preliminary injunction motions should be subject to the presumption of access, the motion in this case should not. *See* Opp'n 25-27. But the motion in this case is precisely the kind of motion to which the presumption of access should apply. *See* Appellant's Br. 32-34.

First, Chrysler's contention that the preliminary injunction motion here was not "closely connected to the merits" of the case is absurd. Opp'n 25. The *Velasco* plaintiffs' claim is that there is a dangerous safety defect in the TIPM-7. ER 14. The preliminary injunction motion argued that Chrysler owners must be warned that there is a dangerous safety defect in the TIPM-7. *See* ER 88; *id.* at 152 (Chrysler's brief in opposition to the motion explaining that "[t]he vast majority of documents" the plaintiffs submitted with their motion "deal with the investigation" into the safety of the TIPM-7). The claim in the preliminary injunction motion is the same as the claim on the merits. Chrysler's suggestion to the contrary is without merit.²

² Chrysler's contention that the plaintiffs themselves acknowledged that the preliminary injunction motion was "divorced from the merits of their claims" is false. Opp'n 26. Although the plaintiffs stated that a preliminary injunction "would avoid pre-judging the merits of the parties' dispute," they continued on to explain that if the district court granted the preliminary injunction "[t]he issue of who is at fault and who should pay for TIPM replacements can await a full trial." ER 98. The plaintiffs did not concede that the preliminary injunction motion was
(Footnote continued on following page.)

Second, Chrysler questions whether there is a safety issue with the TIPM-7 in the first place. Opp’n 26-27. But since the *Velasco* lawsuit has been pending, Chrysler has issued *two* safety recalls because the TIPM-7s in the recalled vehicles could cause these vehicles to “stall without warning, . . . increas[ing] the risk of a crash.” ER 194, 279. There can, therefore, be no dispute that there is a defect.

Third, Chrysler notes that “the case could easily have continued without the motion ever being filed at all.” Opp’n 26 (quoting the district court’s opinion (ER 8)). But that is equally true of motions to dismiss and motions for summary judgment—indeed, it is true of most everything that happens in a case besides trial. That cannot be the basis for exclusion from the presumption of access.

Fourth, Chrysler suggests that the court records in this case should be sealed because the company relied on the blanket protective order, entered at the beginning of discovery, and on the district court’s sealing orders, entered when the parties filed their preliminary injunction papers. Opp’n 27. This is preposterous. Chrysler could not have “*reasonably* relied” on the protective order. *Id.* (emphasis added). As this Court has explained, it is not reasonable for parties to rely on blanket protective orders like the one in this case because they are entered without

(Footnote continued from previous page.)

unrelated to the merits; they simply stated that there were additional merits issues—not addressed by the preliminary injunction motion—that could be decided later.

requiring a “particularized showing of good cause with respect to any individual document.” *Foltz*, 331 F.3d at 1138.

Even more absurd is Chrysler’s contention that it “relied on the district court’s specific determination that there was good cause to file the [documents submitted in connection with the preliminary injunction motion] under seal.” Opp’n 27. Most of these documents were filed by the plaintiffs. Chrysler does not explain how it could possibly have relied on orders sealing documents someone else filed. Moreover, as explained above, Chrysler’s assertion that the district court made a “specific determination” of good cause is misleading. The court signed proposed orders, drafted by the parties, that simply stated—without more—that there was “good cause appearing.” This is not a sufficient basis to seal court records. *See Foltz*, 331 F.3d at 1130. Any reliance on it, therefore, was unreasonable.

Finally, Chrysler contends that the district court’s denial of the preliminary injunction motion was not “an exercise of judicial power” and therefore the public has less of a need for access to the evidence on which it was based. Opp’n 26. But both the grant and the denial of a motion are exercises of judicial power. And both are subject to public accountability. *See, e.g., Kamakana*, 447 F.3d at 1176 (applying the presumption of public access to motions for summary judgment that were, in large part, denied). As the Second Circuit has explained, the “public’s

ability to scrutinize” even judicial “inaction . . . helps assure its confidence in the orderly administration of justice.” *United States v. Erie Cnty.*, 763 F.3d 235, 240 (2d Cir. 2014).

Such scrutiny is particularly important here. Chrysler told the district court that Chrysler owners didn’t need a warning because the evidence demonstrated that the safety defect did not extend beyond vehicles the company had already recalled. Perhaps based on this characterization, the court denied the preliminary injunction. But just a couple months later, Chrysler recalled more vehicles for the same problem. Particularly given that the court did not issue a written opinion, the public can’t know whether it properly denied the preliminary injunction motion unless the evidence submitted along with the motion is unsealed. *See* Appellant’s Br. 33. If the evidence does not suggest that a warning was necessary, “the public can be confident that the judge’s failure to intervene [was] appropriate,” but if the evidence demonstrates a threat to public safety, “legitimate questions could be raised about the court’s inaction.” *Erie*, 763 F.3d at 240-41.³

³ Chrysler’s contention that the district court “did not see anything in the documents that would require Chrysler to notify its customers of a safety issue” is misleading. Opp’n 26. The court’s only explanation for denying the preliminary injunction motion was that it “could not come to any solid conclusion as to what” the documents “prove”—*not* that the court found nothing in the documents to demonstrate a safety issue. ER 11.

III. CHRYSLER DID NOT SHOW GOOD CAUSE, LET ALONE COMPELLING REASONS, TO SEAL THE COURT RECORDS IN THIS CASE.

A. The District Court’s Conclusion That There Was Good Cause to Seal the Court Records is Entirely Unsupported by the Record.

Even if the good cause standard did apply, Chrysler did not satisfy it. There is no dispute about what that standard requires. To demonstrate good cause, Chrysler “bears the burden, for each particular document it seeks to protect, of showing that *specific* prejudice or harm will result if” the documents are not sealed. *Foltz*, 331 F.3d at 1130 (emphasis added). As demonstrated in the opening brief, Chrysler clearly has not met this burden. *See* Appellant’s Br. 34-47. The district court abused its discretion in holding otherwise. *See id.*

Wisely, Chrysler does not contend that the district court’s opinion on its own demonstrates that there is a sufficient basis to seal the court records. *See* Appellant’s Br. 36-38, 41-47. Instead, Chrysler relies on the declaration of James Bielenda, a manager of product investigations at Chrysler. Opp’n 30. Chrysler asserts that this declaration “provides a detailed factual basis sufficient to support the district court’s determination as to each of the documents at issue.” *Id.* But this assertion is demonstrably false. Chrysler itself admits that the declaration discusses the court records only “in general terms.” *Id.* at 7. These “general terms” are woefully insufficient to demonstrate good cause for sealing.

1. *Chrysler Has Not Demonstrated that the Records Contain Confidential Commercial Information that May Be Sealed.*

Before the district court, Chrysler relied almost exclusively on its contention that the documents at issue should be sealed because they contain trade secrets. *See* ER 253-258. Perhaps recognizing the weakness of this claim, the company's argument has shifted on appeal: Chrysler now argues that all of the court records—even those the district court declined to seal on the basis of trade secret—warrant sealing because they contain “confidential research, development, or commercial information,” regardless of whether that information satisfies the definition of a trade secret. Opp'n 32. But this argument gets the company no further.

Chrysler must still, at the very least, show (1) that the information is, in fact, confidential; *and* (2) that disclosure of each document will result in a *specific* prejudice or harm. *See Foltz*, 331 F.3d at 1131. There is no evidence in the record that Chrysler met *either* of these requirements. Whether Chrysler's contention is that the documents contain trade secrets or that they contain other confidential commercial information, the problem remains the same: Chrysler provided nothing more than bare assertions that disclosure of the court records would harm the company. *See* Appellant's Br. 38-41. Such conclusory assertions, entirely “unsubstantiated by specific examples or articulated reasoning, do not satisfy” even the good cause standard. *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992).

1. Although the Bielenda declaration describes Chrysler's corporate confidentiality policies "in general terms," it provides no information about the confidentiality of the specific court records at issue. *See* ER 268-69. The declaration states that employee access to its engineering documents is on a "need to know basis." ER 269 (internal quotation marks omitted). But it gives no indication of how many employees "need to know" the information in these documents, whether all the information sealed in this case falls within this category, or whether any of the information contained within the court records is already publicly available.

This is not the "particular and specific demonstration of fact" required to demonstrate good cause. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981) (internal quotation marks omitted). And courts have repeatedly held that similar assertions of confidentiality do not satisfy the good cause standard. *See, e.g., Deford v. Schmid Products Co.*, 120 F.R.D. 648, 653 (D. Md. 1987) (declining to seal documents where the affidavit in support of sealing made only general assertions that the company's research was confidential, but failed to address any of the specific documents at issue in the case); *Parsons v. Gen. Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980) (good cause standard was not met where affidavits stated that disclosure was "limited to the technical and engineering

staffs” but did not specify “how many persons work on these staffs” or describe “specific controls” on the particular information at issue).

In fact, the court records appear to contain information that is not actually confidential. For example, the records contain photographs of the TIPM-7—a part that is installed in millions of Chrysler vehicles available to the public. Opp’n 30. These photographs could be taken by anyone with a camera that wishes to take apart a power module. They also appear to be available on NHTSA’s website. As we pointed out in our opening brief, this is not confidential information.

Appellant’s Br. 37.⁴

2. Even if the court records do contain confidential information, Chrysler has not identified any *specific* harm that would result from disclosure. It did not do so before the district court. And it has not done so here.

⁴ These photographs are included in just one of many documents publicly available via NHTSA’s online docket for its investigation into the TIPM-7 defect. The docket is available at <http://www-odi.nhtsa.dot.gov/acms/cs/documentList.xhtml?docId=DP14004&docType=INV>.

The pictures of what appear to be the “insides of TIPM-7s,” Opp’n 30, are available at <http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM473913/INRD-DP14004-61138P.pdf>, on pages 333-36.

It appears that the docket also contains other information that Chrysler contends is confidential. For example, it contains warranty data, field report summaries, and a database of vehicles and their TIPM part numbers. *Compare* ER 255-58 (sealed documents contain information about “issues in the field and the investigation that led to the recall of certain vehicles,” “warranty analysis,” and a TIPM Part Matrix).

Take, for example, Exhibits A, C, D, E, F, G, I, J, K, N, P, R, and T to the Stein declaration. Although it appears that these exhibits contain many different kinds of information—information regarding Chrysler’s defect investigation, test proposals, warranty analysis, internal email communications, photographs of TIPMs—the Bielenda declaration lumps them all together. ER 267-68. The only reason it gives for sealing all these documents is that they “contain detailed information about testing and analysis” that, if disclosed, “would enable competitors to refine their own product evaluation, remediation, and improvement procedures without incurring the costs normally required for independent development of such procedures.” ER 268.

The declaration does not explain how other car companies might benefit from knowing the repair history of a single Chrysler vehicle or how photographs of TIPMs could possibly help competitors improve their testing procedures. Opp’n 30-31. In fact, Chrysler doesn’t explain how a single one of these documents could help its competitors.⁵

Its treatment of the other sealed records is no better. The declaration states, for example, that the TIPM Part Matrix should be sealed because it “contains commercially sensitive information.” ER 266. That’s it. This conclusory

⁵ The declaration does not even specify which exhibits contain what information. *See* ER 267.

assertion, without any explanation, let alone evidence, is plainly insufficient to meet the requirement of a particularized demonstration of harm. So too is the declaration's statement that emails between Chrysler and Continental, the supplier of the TIPM-7, "reveal Continental's testing analysis and problem-solving capabilities, which competitors could use to improve their processes." ER 268. Which processes? The declaration doesn't say. How? The declaration provides no answer.⁶

This is not the "detailed factual basis" Chrysler's brief promises. To the contrary, the Bielenda declaration provides *no* factual basis for sealing. It just repeatedly restates the definition of competitive harm and asserts that it applies here. But as the opening brief explains, court records cannot be sealed on this basis. *See* Appellant's Br. 36-40. "A factually unsupported contention that research could potentially be used by a competitor, and the competitor would benefit by not having to incur the expense of conducting the research, is insufficient to establish" good cause. *Ohio Valley Env'tl. Coal. v. Elk Run Coal Co.*, 291 F.R.D. 114, 121 (S.D.W. Va. 2013).

⁶ The declaration's assertion that "Chrysler Group and Continental . . . have agreed to keep each other's proprietary business information confidential" does not help matters, because the declaration does not assert that the court records fall within the scope of this agreement. ER 268. Chrysler has never argued that there is a confidentiality agreement protecting these documents, let alone provided a copy to the court.

Chrysler’s brief on appeal adds nothing to this analysis. It simply parrots the declaration’s assertion that unsealing the records will cause competitive harm—without providing any further information about how, specifically, this might occur. Opp’n 32. Such conclusory assertions of harm cannot support the sealing of court records, even under the good cause standard. *See Foltz*, 331 F.3d at 1131 (explaining that “broad, conclusory allegations of potential harm” are insufficient (internal quotation marks omitted)).

2. *There is No Basis for Concluding that Unsealing the Documents Would Be Unfair to Chrysler.*

The district court held that although some of the court records likely do not contain trade secrets, they could nevertheless be sealed based on “policy considerations”—essentially, the court was concerned that unsealing the documents would somehow be unfair to Chrysler. ER 10. As explained in the opening brief, this rationale is not a legally sufficient reason to seal court records and, moreover, it is entirely without support in the record. Appellant’s Br. 41-47.

Chrysler all but concedes this point. The company quotes the district court’s opinion, but does not even attempt to refute the Center’s arguments for why it is wrong. *See* Opp’n 34.

3. *The District Court Failed to Balance the Public's Interest in Disclosure with Chrysler's Asserted Interest in Secrecy and Failed to Consider Whether the Documents Could Be Redacted.*

Chrysler asserts that the district court “weighed” the public’s interest in disclosure against Chrysler’s interest in secrecy. Opp’n 29. But there is nothing in the district court opinion to support this contention. Nowhere did the court even mention balancing these interests, let alone actually do it. Nor did the court consider whether the court records that were sealed in their entirety could instead be redacted. This alone is sufficient reason to conclude that the court abused its discretion. *See* Appellant’s Br. 47-49.

B. Chrysler Does Not Even Argue That There Are Compelling Reasons to Seal the Documents.

On appeal, Chrysler has abandoned its contention that there are compelling reasons to seal the documents submitted in connection with the preliminary injunction motion. The company makes no effort to argue the point in its brief. Rather, Chrysler relies solely on its argument that the compelling reasons standard does not apply.⁷

⁷ Because it erroneously held that the good cause standard applies, the district court did not decide whether Chrysler had satisfied the compelling reasons standard. *See* ER 11-12. But it did strongly suggest that the showing Chrysler presented would be insufficient to meet that standard. *See id.* (explaining that under the compelling reasons standard, the district court would grant Chrysler “much less deference” and would “subject [the company’s] alleged trade secrets to significantly more scrutiny”).

But the compelling reasons standard does apply here, and Chrysler has not met it. Under the common law, the proponent of sealing must “articulate compelling reasons supported by specific factual findings” and demonstrate “that these specific interests overc[ome] the presumption of access by outweighing the public interest in understanding the judicial process”—“without relying on hypothesis or conjecture.” *Kamakana*, 447 F.3d at 1178, 1181 (internal quotation marks omitted). And under the First Amendment, a party that wishes to seal documents must show not only a “compelling interest,” but also a “high probability” that this interest would be harmed if the documents are disclosed and that “there are no alternatives to closure that would adequately protect the compelling interest.” *Perry v. Brown*, 667 F.3d 1078, 1088 (9th Cir. 2012) (internal quotation marks omitted).

Chrysler falls far short of either of these standards. As explained above, the only evidence Chrysler submitted in support of sealing—the Bielenda declaration—does not identify with particularity any specific harm that would occur if the documents were disclosed, let alone provide specific factual findings demonstrating that harm. The declaration does not even provide good cause for sealing. It cannot, therefore, meet the compelling reasons standard.

C. The Recently Unsealed Documents Provide Additional Evidence that the District Court Abused Its Discretion in this Case.

After filing its opposition brief in this appeal, Chrysler asked the district court to unseal three of the documents at issue. *See* SER 1. And just a day before this reply was due, Chrysler filed unsealed copies of another three documents that the court had previously sealed. *See* SER 10. This eleventh-hour change of heart—and the accompanying flurry of unsealing in the district court—only confirms what the Center has been saying all along: There was no valid basis for sealing these documents in the first place.

For example, one of the now-unsealed documents is the district court’s order granting Chrysler’s application to seal its opposition papers on the preliminary injunction motion. SER 8-9. This order simply lists the names of the documents to be filed under seal—names that are publicly available on the docket—and orders them sealed.

Another is an email from one Chrysler employee to another requesting that they “touch base on TIPM shortly.” SER 14. Before the district court, Chrysler stated that this email “discuss[es] trade secrets,” and that its disclosure “would be harmful to Chrysler” because it “contain[s] detailed information about testing and analysis undertaken by” the company, from which its competitors could benefit. ER 255-56. This statement is clearly false. The email states that “[p]rogress has been slow” on the TIPM issue and requests a meeting. This is not a trade secret.

A third is an email from Chrysler's attorney to the *Velasco* plaintiffs' counsel stating that in his view, Chrysler's recall of certain 2011 model-year vehicles mooted the preliminary injunction motion. SER 16. It describes, in very general terms, the problems with the TIPM that the plaintiffs wanted Chrysler to be ordered to warn its customers about. It contains no information that could even conceivably be considered confidential commercial information (or anything else that might justify sealing).

Nevertheless, Chrysler told the district court that there was not only good cause but "compelling reason[]" to seal this email "because of [its] reference to, and discussion of, the properly-sealed exhibits." ER 252-53, 258. But the email doesn't refer to a single exhibit. This rationale, therefore, is plainly false.

Chrysler contends that the district court "reasonably concluded that Chrysler had established good cause for keeping the documents sealed." Opp'n 29. But it is undeniable that none of the recently unsealed documents meet the good cause standard—and that, at least in some cases, Chrysler's asserted reasons for sealing them were obviously false. And yet the district court permitted all of these documents to be sealed. ER 2-3, 13. The sealing of these court records—which so clearly do not meet even the good cause standard—sheds even more doubt on Chrysler's arguments for sealing and the district court's decision to go along with them.

Chrysler asks this Court not to “second guess” the district court’s decision. Opp’n 35 (internal quotation marks omitted). But the district court applied the wrong standard. And, even under the lesser standard it erroneously applied, the court’s decision was entirely without support in the record. As the handful of recently unsealed documents makes clear, the court sealed records that do not meet the requirements for sealing—under any standard. This Court should not let a decision that so compromises the public right of access to court records stand. The district court abused its discretion, and its decision should therefore be reversed.

IV. THE MOTION TO INTERVENE SHOULD HAVE BEEN GRANTED.

Chrysler concedes that if the district court’s decision on the motion to unseal is reversed, its decision on the motion to intervene must also be reversed. *See* Opp’n 14 n.3. But as explained in the opening brief, the motion to intervene should have been granted either way. *See* Appellant’s Br. 49-50. As this Court has made clear, a motion for permissive intervention is the proper vehicle for pursuing a motion to unseal. *See San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1100 (9th Cir. 1999). To deny intervention because unsealing is denied is to put the cart before the horse: Intervention should be granted before the motion to unseal is even considered. The district court’s denial of the motion to intervene should therefore be reversed.

CONCLUSION

The district court's order denying the Center for Auto Safety's motion to intervene and its motion to unseal should be reversed and remanded with directions to grant the Center permissive intervention and to unseal all of the court records filed in connection with the *Velasco* plaintiffs' motion for preliminary injunction.

Respectfully submitted,

Dated: May 14, 2015

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