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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PETER VELASCO, *et al.*,

Plaintiffs,

v.

CHRYSLER GROUP LLC,

Defendant.

Case No. 2:13-cv-08080-DDP (VBKx)

REPLY IN SUPPORT OF THE CENTER FOR AUTO SAFETY'S MOTION TO INTERVENE

Date: December 1, 2014
Time: 10:00 a.m.
Judge: Honorable Dean D. Pregerson
Courtroom: 3

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INTRODUCTION

Chrysler does not dispute that the Center for Auto Safety ("the Center") has met the requirements for permissive intervention. Rather, it argues that despite the fact that the Center meets these requirements, the Court should nevertheless exercise its discretion to deny the motion to intervene. But Chrysler identifies no valid basis for doing so.

First, Chrysler declares that permitting the Center to intervene would prejudice the company's rights, but it fails to identify any prejudice whatsoever that will result from granting intervention. Instead, it argues that its rights will be prejudiced if the motion to unseal is granted. But this is not a reason to deny *intervention*. Furthermore, Chrysler's conclusory assertions that it will be prejudiced – unsupported by any facts, or even in most cases, explanation – are insufficient to meet its burden of demonstrating compelling reasons for sealing that overcome the public's interest in access to court records.

Chrysler resorts to baseless accusations that the Center's "claim that it needs access to the sealed documents . . . is demonstrably false." (Opp'n Mot. Intervene 4). According to Chrysler, a public interest organization, dedicated for years to auto safety, (*see* Ditlow Decl. [Docket No. 81] ¶¶ 2-3), has no conceivable legitimate interest in access to court records about an alleged auto safety defect, and therefore must be presumed to be seeking intervention for some "improper

purpose." (Opp'n Mot. Intervene 4). But this accusation is not only meritless; it is irrelevant. The Center seeks to vindicate *the public's* right of access to court records. This right does not require demonstration of a need for the records. Rather, the public is *presumed* to have an interest in accessing court records, an interest that may be abrogated only where the proponent of secrecy demonstrates compelling reasons for sealing. Chrysler has not done so.

Second, Chrysler insists that the Center's interests "could not possibly be more adequately represented than they already are" by the plaintiffs and the National Highway Traffic Safety Administration (NHTSA). (Opp'n Mot. Intervene 6). To the contrary, the plaintiffs stipulated to a protective order governing discovery, and – despite acknowledging that the documents filed in connection with the preliminary injunction motion should not be kept confidential – filed them under seal anyway. NHTSA, of course, has not moved to unseal them. And the possibility that NHTSA might investigate complaints of a TIPM defect – cited by Chrysler as a reason to deny intervention – only heightens the public interest in the records in this case. The documents submitted in connection with the preliminary injunction motion will not only aid in the oversight of the case and the judicial system – the interest at issue in all cases – but also the oversight of NHTSA's actions.

Third, Chrysler argues that the Center's efforts to protect the public right of

access should be denied to conserve the resources of the Court and Chrysler. (Opp'n Mot. Intervene 7-8). But the public right of access may not be compromised simply because it requires judicial resources to protect. The Center's motion to unseal in this case is not redundant: Chrysler has not yet been required to demonstrate compelling reasons for sealing the court records. Because of the stipulated protective order, this issue has never been litigated. Requiring Chrysler to satisfy the compelling reasons standard for continued sealing – and unsealing the records if they do not meet that burden – is not a waste of judicial (or Chrysler's) resources: It is merely what the law requires.

Chrysler fails to cite a single case in which a court denied intervention for the purpose of unsealing records for any of the reasons Chrysler argues should support the denial of intervention here. Chrysler has provided no valid legal basis for denying the motion to intervene. The motion should therefore be granted.

ARGUMENT

I. THE CENTER'S INTERVENTION WILL NOT PREJUDICE THE ADJUDICATION OF CHRYSLER'S RIGHTS

Chrysler's assertion that intervention will prejudice its rights is meritless. The company has failed to identify a single harm that might result from granting the motion to intervene. Moreover, its contention that the Center's asserted interest in the court records is false is both baseless and irrelevant.

A. The Case Upon Which Chrysler Primarily Relies Is Not Applicable Here

The case upon which Chrysler primarily relies – *Smith ex. rel. Thompson v. Los Angeles Unified Dist.*, No. CV 93-7044 (RSWL) (GHKx), 2014 WL 176677 (C.D. Cal. 2014) – is not about the public right of access at all. In *Thompson*, parents of school children moved to intervene to challenge – seventeen years after it was entered and ten years after it was modified – a consent decree that settled a lawsuit alleging that the Los Angeles Unified School District failed to comply with state and federal mandates regarding special education. *See id.* at *1, *5. The court held that the movants had not met the requirements for either intervention as of right or permissive intervention. *Id.* at *11. Among other things, the motion to intervene was not timely; the movants had "not shown their interests [would] be practically impaired" if intervention was not granted; and neither party had demonstrated that there was "an independent ground for jurisdiction" over the movants' claims.[1] *Id.* None of these factors are relevant here: There is no dispute that the Center has met the requirements for permissive intervention.

Nevertheless, Chrysler relies on the *Thompson* court's statement that even if the movants in that case had met the requirements for intervention, the court would

[1] As explained in the Center's opening brief, an independent ground of jurisdiction is not even required when a party moves to intervene for the sole purpose of vindicating the public right of access.

still exercise its discretion to deny their motion. But in that case, unlike here, there was good reason to do so: Reconsidering the consent decree would cause "severe prejudice" to the parties by upsetting a settlement that had been in place for years (and for which the school district had already met "16 of 18 measurable outcomes"). *Id.* at *6, *12. Moreover, federal law provides a system for parents to challenge the special education their children receive. *Id.* at *12. Permitting parents to "litigate their individualized complaints" outside of this system by intervening – and possibly upsetting the settlement – in a decades-old lawsuit "would not be in the interests of judicial economy." *Id.*at *12.

This is the case upon which Chrysler hangs its hat. But none of the considerations at issue in *Thompson* apply here. As explained below, Chrysler has failed to demonstrate that any prejudice at all – let alone "severe prejudice" – would result from granting the motion to intervene. Nor is there any other vehicle – provided by federal law or otherwise – for the Center (or the public more generally) to seek access to court records.

B. Chrysler Fails To Identify Any Harm that Might Result from Intervention

As an initial matter, Chrysler fails to identify *any* prejudice that might result from intervention itself. The only harm Chrysler contends would befall it stems from unsealing the documents. To the extent any such harm is legally cognizable,

it should "affect not the right to intervene but, rather, the court's evaluation of the merits of the" motion to unseal. *San Jose Mercury News, Inc. v. U.S. Dist. Court--N. Dist. (San Jose)*, 187 F.3d 1096, 1101 (9th Cir. 1999) (internal quotation marks omitted).

Furthermore, as explained more fully in the reply in support of the motion to unseal, Chrysler's assertions of harm are meritless. Chrysler contends that release of the records could "compromise" its "rights to present its defense," but it makes no effort to specify how its rights could be prejudiced, nor to present any specific facts demonstrating the likelihood of such prejudice. (Opp'n Mot. Intervene 6). Such cursory assertions fall far short of demonstrating the prejudice required to overcome the strong presumption of public access to court records. *See Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (holding that a proponent of secrecy must identify "specific compelling reasons" the information should be kept secret and support those reasons with "factual findings").

Indeed, Chrysler's argument is so lacking in specificity that it is not even clear in what way the company believes its rights will be harmed. To the extent Chrysler is concerned about prejudicing the jury pool, this concern is adequately addressed through voir dire. *See Press-Enter. Co. v. Superior Court of California for Riverside Cnty.*, 478 U.S. 1, 14-15 (1986) ("[The] risk of prejudice does not automatically justify refusing public access. . . . Through *voir dire,* cumbersome as

it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict."); *Matter of Application & Affidavit for a Search Warrant*, 923 F.2d 324, 329 (4th Cir. 1991) ("[T]here are ways to minimize prejudice to defendants without withholding information from public view. With respect to the potential prejudice of pretrial publicity, . . . voir dire is of course the preferred safeguard against this particular threat to fair trial rights and can serve in almost all cases as a reliable protection against juror bias however induced." (internal quotation marks, brackets, and ellipsis omitted)); *see also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 101 F.R.D. 34, 40, 44 (C.D. Cal. 1984) (explaining that where, as here, no trial date had been set and the resolution of pretrial matters would "occupy several additional months," the court was not "concerned . . . with any danger of prejudicial pretrial publicity, for trial d[id] not loom on the horizon").

To the extent Chrysler is worried that unsealing the court records could harm its reputation more generally, the Ninth Circuit has made clear that such a concern is legally insufficient to overcome the public right of access. "The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records." *See Kamakana*, 447 F.3d at 1179.

Chrysler argues that the plaintiffs' allegations of a safety defect are "unfounded and unproven at this point." (Opp'n Mot. Intervene 5 (emphasis omitted)). That may be so, but it does not diminish the public's right to access the records in this case. Courts have repeatedly applied the public right of access in cases where no court has held – and, in some cases, no court ever will hold – a party liable for wrongdoing. (*See* Reply Supp. Mot. Unseal 19-20 (citing *Kamakana*, 447 F.3d at 1175-76; *In re McClatchy Newspapers, Inc.*, 288 F.3d 369 (9th Cir. 2002); *Anthracite Capital, Inc.*, 492 B.R. 162, 178 (Bankr. S.D.N.Y. 2013); *California ex rel. Lockyer v. Safeway, Inc.*, 355 F. Supp. 2d 1111 (C.D. Cal. 2005); *In Matter of Search of Premises Knows As: L.S. Starrett Co.*, No. 1:02M137, 2002 WL 31314622, at *4 (M.D.N.C. Oct. 15, 2002); *Wiggins v. Burge*, 173 F.R.D. 226, 230 (N.D. Ill. 1997)).

Chrysler's argument that the documents "will not tell the whole story," (Opp'n Mot. Intervene 6), is unavailing. There is no exception to the public right of access for court records a corporation believes are "incomplete" or "not in proper context," (*Id.* at 5). (*See* Reply Supp. Mot. Unseal 22-23(citing *Press-Enter. Co. v. Superior Court of California for Riverside Cnty.*, 478 U.S. 1, 4 (1986); *United States v. Gen. Motors Corp.*, 99 F.R.D. 610, 612 (D.D.C. 1983)). And, of course, the documents related to Chrysler's "research," "actions," and "internal strategies" with respect to the TIPM, (Opp'n Mot. Intervene 6), are

entirely within Chrysler's control. If Chrysler truly believes the sealed court records are one-sided, the solution is simple: Chrysler can release whatever other documents it believes are necessary to provide a complete story.

Thus, Chrysler has failed to identify any harm sufficient to overcome the public right of access to court records, let alone any prejudice that could result from intervention itself.

C. Chrysler's Accusation that the Center's Asserted Need for the Documents is False is both Baseless and Irrelevant

Perhaps recognizing that it cannot demonstrate any legally cognizable prejudice that would result from the Center's intervention, Chrysler resorts to attacking the Center's motives. (*See, e.g.*, Opp'n Mot. Intervene 1 ("[The Center]'s stated need to access to sealed documents is non-existent, and its stated intentions on what it plans to do with the information is [sic], at best, suspect."). But this argument also lacks merit.

The Center is seeking to vindicate the *public* right of access. Although the Center does, in fact, have a strong interest in obtaining the records, the extent to which the Center needs the records is actually irrelevant. The public right of access is exactly that: public. Chrysler's suggestion that the Center is not entitled to the court records if it does not have a demonstrable need for them "erroneously reverses the burden" with respect to the sealing of documents. *California ex rel.*

Lockyer v. Safeway, Inc., 355 F. Supp. 2d 1111, 1124 (C.D. Cal. 2005). It is not the Center's burden to demonstrate a need for the documents. *See id*. Courts "strongly presume the public's interest in access." *Id.* Rather, the burden is on Chrysler to demonstrate compelling reasons for overcoming this interest. *Id.*; *Kamakana*, 447 F.3d at 1179. It has not done so.

1. Court Records Are Presumptively Public Regardless of Whether There Is a "Need" for Them

Even if the Center's "claimed need for the sealed documents is," as Chrysler (wrongly) contends, "non-existent" (Opp'n Mot. Intervene 5), the Center would still be entitled to the documents under the public right of access to court records. In arguing to the contrary, Chrysler "misapprehend[s] the nature of the public interest at stake." *Lockyer*, 355 F. Supp. 2d at 1124. "The public interest undergirding the common law right of access to court records does not turn on whether the details of a particular case" are useful or interesting to the public (or to any particular party seeking to vindicate the public right of access). *Id.* Nor does it turn on whether the proponent of secrecy "has deemed the available information sufficient," such that further information from court records is unnecessary. *Id.* Rather, the common law right of access is "rooted in the need for openness in a democratic society." *Id.* That is, the interest is that *all* court proceedings and *all* court records be open to the public. As Oliver Wendell Holmes explained, "[i]t is

desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884). A member of the public may therefore request that records be unsealed for any reason or for no reason at all. Unless the proponent of sealing can articulate compelling reasons the record should be confidential, the presumption of access applies. *See Kamakana*, 447 F.3d at 1179.

2. There is No Evidence the Records Will Be Used for Improper Purposes

The presumption of access to court records may not be defeated simply by suggesting that the party seeking records has a less than altruistic motive. Even if it were the case, as Chrysler contends, that the Center's "intentions are not as altruistic as it wants this Court to believe," (Opp'n Mot. Intervene 3), that would be irrelevant. The public right of access does not depend on the motive of the party seeking documents. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006) ("[W]e believe motive generally to be irrelevant to defining the weight accorded the presumption of access." (internal quotation marks omitted)); *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995) ("It is true that

journalists may seek access to judicial documents for reasons unrelated to the monitoring of Article III functions. Nevertheless, assessing the motives of journalists risks self-serving judicial decisions tipping in favor of secrecy."). To overcome the presumption of public access, a proponent of secrecy must demonstrate not that the party seeking access has ignoble reasons, but rather that the documents will be "*use[d]* . . . to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." *Kamakana*, 447 F.3d at 1179 (emphasis added).

Chrysler has made no such demonstration. It has not identified, for example, any documents that contain "admittedly false allegations that could realistically be used for libelous purposes." *Selling Source, LLC v. Red River Ventures, LLC*, No. 2:09-CV-01491-JCM, 2011 WL 1630338, at *7 (D. Nev. Apr. 29, 2011). Indeed, the vast majority of the records at issue are documents created by Chrysler itself. Nor – as explained in the reply supporting the motion to unseal – has Chrysler identified with particularity any information that constitutes a trade secret. The Center is concerned – based on numerous complaints from vehicle owners (Ditlow Decl. ¶ 5) – that certain Chrysler vehicles may have a safety defect, and seeks to inform the public about that defect. "Such a public interest cannot be swatted away by calling it a desire for 'public [scandal],' or a form of 'private spite,' or any of the other labels that [Chrysler] offers." *See Kelly v. Wengler*, 979 F. Supp. 2d

1243, 1246 (D. Idaho 2013).

3. The Center Has a Strong Interest in the Court Records

Contrary to Chrysler's contention, the public – and the Center – have a strong interest in the court records at issue.[2] The plaintiffs allege that a major car company concealed a dangerous safety defect that could affect millions of drivers, and the parties have submitted – in connection with the preliminary injunction motion – documents that could shed light on that allegation. The public has a strong interest in automobile safety, and the Center is devoted to protecting that interest. *Cf. Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983) (holding that "[t]he public has a strong interest in obtaining the information contained in the court record," where the "litigation potentially involves the health of citizens"); *In re Air Crash at Lexington, Ky.*, No. CIV A 506-CV-316-KSF, 2009 WL 1683629, at *8 (E.D. Ky. June 16, 2009) ("[T]he public interest in a plane crash that resulted in the deaths of forty-nine people is quite strong, as is the public interest in air safety.").

Chrysler argues that it would be "absurd" for the Center to assert a public right of access to the court records in this case because "NHTSA is already investigating" the alleged TIPM defect. (Opp'n Mtn. Intervene 4). This argument

[2] Of course, as explained above, the Center is not required to demonstrate such an interest: The general interest in ensuring public access to court records is sufficient to support the Center's motions to intervene and unseal.

is mystifying given that, as Chrysler concedes, NHTSA only launched its inquiry after the Center petitioned it to do so. (*See* Bielenda Decl. ¶¶ 7-8). Chrysler's position appears to be that now that the Center has succeeded in persuading NHTSA to open a review of its defect petition, the Center's work is done and it should go quietly on its way. But several facts make clear that ongoing oversight by the public and public interest organizations like the Center is imperative, regardless of what action NHTSA ultimately takes. These facts only strengthen the Center's need for public access to the documents and, therefore, its basis for intervention.

First, NHTSA's review of the Center's defect petition does not guarantee that the agency will open a formal investigation.[3] Until the agency makes that determination, the Center will continue to supplement its petition by providing as much information about the alleged defect as possible. (Ditlow Decl. ¶ 8).

[3] Under the Safety Act, "any interested person may file a petition" requesting that ODI "begin a proceeding *to decide whether to*" open a formal defect investigation. 49 USC § 30162 (emphasis added); *see also* NHTSA, *Motor Vehicle Safety Defects and Recalls: What Every Vehicle Owner Should Know* at 8 (DOT HS 808-795, May 2011), at http://www-odi.nhtsa.dot.gov/recalls/documents/MVDefectsandRecalls.pdf (explaining phases of NHTSA's investigative process and noting that "[i]f the petition is granted, a defect investigation is opened"). The ODI Resume issued for DP 14-004 clearly states that the only agency "Action" being taken currently is that "[t]he petition will be evaluated for a grant or deny decision." Ditlow Decl., Dkt. 81-2, Ex. C. Likewise, the ODI's Information Request to Chrysler states that it "has opened [a] Defect Petition to review allegations." Dkt. 96-3 at 1.

Second, a recent congressional report sheds light on critical flaws in NHTSA's investigatory process and underscores the need for education, oversight, and advocacy by organizations such as the Center. The House Committee on Energy and Commerce recently released the report of a staff investigation into why NHTSA had failed for seven years to identify an ignition switch defect in General Motors vehicles, which contributed to at least 13 fatalities. Staff of H. Comm. on Energy & Commerce, 113th Cong., *Report on the GM Ignition Switch Recall: Review of NHTSA* (Sept. 16, 2014).[4] The committee identified "numerous failures" that "prevented" NHTSA from "taking timely action," including that the agency had "failed to investigate or even explore the link between" factors that had contributed to a fatal crash, *id.*; "failed to track or identify similarities in three independent investigations it commissioned of crashes," *id.* at 3; and "failed to follow up on information provided to" it due to a "lack of understanding of the vehicle systems and functions implemented in response to the agency's own standards," *id.* at 3. The Committee concluded that "NHTSA . . . lacked the focus and rigor expected of a federal safety regulator. The agency's repeated failure to identify, let alone explore, the potential defect theory related to the ignition switch – even after it was spelled out in a report that the agency commissioned – is

[4] This report is available online at http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/Hearings/OI/20140915GMFootnotes/NHTSAreportfinal.pdf

inexcusable." *Id.* at 44.

Moreover, the Committee noted that, as of September 2014, "there [was] no evidence, at least publicly, that anything has changed at the agency. No one has been held accountable and no substantial changes have been made. NHTSA and its employees admit they made mistakes but the lack of urgency in identifying and resolving those shortcomings raise questions about the agency's commitment to learning from this recall." *Id.* at 41. In light of this report, Chrysler's suggestion that the Center's motion to intervene should be denied because "[t]he handling of the alleged TIPM defect is best left to . . . NHTSA," (Opp'n. Mot. Intervene 6), falls flat.

Third, manufacturers do not always disclose known safety defects to NHTSA, even when relevant information is uncovered in litigation. Thus, the fact that NHTSA has requested "broad categories of documents and information from Chrysler," (Bielenda Decl. at ¶ 9), does not guarantee that the agency will receive a complete set of all Chrysler documents that are relevant to the alleged TIPM defect – or even all documents produced in litigation. Earlier this year, for example, General Motors agreed to pay a record $35 million penalty for failing to report a known safety defect to the agency. NHTSA 18-14, *General Motors Agrees to Pay Maximum $35 Million Penalty for Violating Federal Safety Laws in Chevrolet*

Cobalt Investigation (May 16, 2014).[5] NHTSA later learned that information about the defect had been revealed in discovery in a lawsuit, but still not reported to the agency. *See* Remarks prepared for David Friedman, Acting Administrator, NHTSA, GM Consent Order Press Conference, Friday, May 16, 2014.[6]

Fourth, consistent with the role it has played in obtaining several important safety recalls, the Center is regularly called on to testify before Congress on auto safety issues – including concerns about NHTSA's performance as the nation's auto safety regulator. (*See* Ditlow decl. ¶¶ 2-3). For example, Clarence Ditlow, the Center's Executive Director, testified at a Senate Committee hearing on NHTSA's handling of the Toyota sudden unintended acceleration problem. *Toyota's Recalls and the Government's Response: Hearing Before the S. Comm. on. Commerce, Science & Transportation*, 111th Cong. (2010) (Statement of Clarence Ditlow, Executive Director, Center for Auto Safety).[7] Based on his review of NHTSA investigations of consumer complaints involving sudden acceleration, Mr. Ditlow testified that the Early Warning Reporting System

[5] This document is available online at http://www.nhtsa.gov/About+NHTSA/Press+Releases/2014/ci.DOT-Announces-Record-Fines,-Unprecedented-Oversight-Requirements-in-GM-Investigation.print.

[6] This document is available online at http://www.nhtsa.gov/staticfiles/administration/pdf/presentations_speeches/2014/DF-GM-consent-order-news_05162014.pdf.

[7] This document is available online at http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=1c6bb866-8a96-4f79-b6ac-84a6a0e805f5

NHTSA had developed was not working effectively, and that Toyota had been able to "exploit[ ]" "significant weaknesses in the NHTSA enforcement program" for several years until a fatal crash caused by sudden unintended acceleration was finally caught on video. *Id.* at 2, 6. Regardless of whether NHTSA ultimately takes any action on the alleged TIPM-7 defect, obtaining access to the sealed court records will assist the Center in testifying before Congress in any future hearings. (*See* Ditlow Decl. ¶ 10).

In sum, Chrysler's argument that the Center has no legitimate role to play in investigating the alleged TIPM defect because NHTSA "is already investigating" cannot be reconciled with NHTSA's recent shortcomings. NHTSA's seven-year failure to identify the GM ignition switch defect makes plain that *more* oversight by the public and public interest groups is needed if public safety and consumers' rights are to be protected – not less. To that end, the Center will continue to independently evaluate the safety of the TIPM based both on the consumer complaints it receives and any court documents that are unsealed, and to educate both NHTSA and the public accordingly. (Ditlow Decl. ¶ 10).

II. NEITHER THE PLAINTIFFS NOR NHTSA ADEQUATELY REPRESENTS THE CENTER'S INTEREST IN THIS CASE.

Neither the plaintiffs nor NHTSA adequately represents the Center's interest in intervening in this case – the vindication of the public's interest in access to

court records. To the extent Chrysler's argument is predicated on the plaintiffs' and NHTSA's efforts in support of automobile safety, it misunderstands the interests at stake in the Center's motion. The Center is, of course, concerned about the safety of the TIPM. But it does not seek to intervene in this action on the merits – that is, it does not seek to weigh in on that issue. Rather, it is intervening solely to vindicate the public right of access to court records. Neither the plaintiffs nor NHTSA is representing this interest.

Chrysler argues that the plaintiffs have "been vigilant about ensuring that documents sealed from public view are actually worthy of such treatment." (Opp'n Mot. Intervene 7). As evidence of the plaintiffs' vigilance, Chrysler contends that when the plaintiffs filed their preliminary injunction motion, "Chrysler Group had to again justify to Plaintiffs that its designation of certain documents as 'confidential' . . . was proper under the Court's protective order." (*Id.*). As an initial matter, there is nothing in the record to support this factual assertion. Chrysler has not submitted a declaration – or any other evidence – demonstrating that it justified its confidentiality designations to the plaintiffs.

More importantly, court records may not be kept secret simply because the parties agree that secrecy is justified – or, as here, because the party that believes sealing is unjustified has nevertheless chosen not to move to unseal. The Ninth Circuit considered a similar issue in *San Jose Mercury News*. 187 F.3d 1096 (9th

Cir. 1999). In that case, the plaintiffs sought discovery of an investigative report commissioned by the defendants, which the defendants refused to produce. *See id.* at 1098. Eventually, the parties reached a "compromise": The defendants produced the report, but did so pursuant to a stipulated protective order that kept it confidential. *Id.* at 1098 & n.1. The San Jose Mercury News moved to intervene to unseal the report. *Id.* at 1098. The Ninth Circuit explained that once the plaintiffs consented to the protective order, they no longer "effectively represented" the interests of the newspaper because they were no longer seeking to vindicate the public's right of access to court records. *Id.* at 1101.

The same is true in this case: The plaintiffs consented to a stipulated protective order and have not challenged the sealing of documents submitted in conjunction with the preliminary injunction motion – despite stating that they believe these documents ought to be public and, in fact, consenting to the Center's motion to unseal. (*See* Stip. Prot. Order [Docket No. 35] ¶5; Am. Application To Seal Evidence [Docket No. 51] at 2). It is thus apparent that the Center's interest in vindicating the right of public access to court records is not adequately represented by the plaintiffs. *See San Jose Mercury News*, 187 F.3d at 1101; *see also Ford v. City of Huntsville*, 242 F.3d 235, 240-41 (5th Cir. 2001) (holding that because "[t]he original parties . . . jointly moved for the confidentiality order," they did not adequately represent the interest of a proposed intervenor seeking that

documents be unsealed). This makes sense: The plaintiffs are primarily concerned with winning their case, not with the public's right of access to the records filed therein. The plaintiffs therefore do not – and perhaps cannot – adequately represent the Center's interest in vindicating the public right of access. *Cf. Schiller v. City of New York*, No. 04 CIV. 7921(KMK) (JC), 2006 WL 2788256, at *3 (S.D.N.Y. Sept. 27, 2006) ("[T]here is no reason to believe that the Times' concerns are coextensive with those of the plaintiffs such that the Times' interests would be adequately represented by plaintiffs' counsel. Plaintiffs' counsel, after all, agreed to the protective order in the first place .").

Nor are the Center's interests adequately represented by NHTSA. NHTSA, of course, is not a party to this litigation. Nor has it sought to intervene to unseal the court records. The agency therefore can do nothing to ensure that the public right of access is upheld in this case.

If anything, as discussed above, NHTSA's possible involvement heightens the public interest in access to the court records in this case. One of the primary justifications for the public right of access is "the interest of citizens in 'keep[ing] a watchful eye on the workings of public agencies.'" *Kamakana*, 447 F.3d at 1178 (quoting *Nixon*, 435 U.S. at 598) (alteration in original). NHTSA is one such agency. "The presumption in favor of access" to court records "is even greater where," as here, "the case is a matter of public business." *U.S. ex rel. McCoy v.*

California Med. Review, Inc., 133 F.R.D. 143, 148 (N.D. Cal. 1990); *see also California ex rel. Lockyer v. Safeway, Inc.*, 355 F. Supp. 2d 1111, 1124 (C.D. Cal. 2005) ("[T]he State's representation of the public's interest in access to a proceeding involving the State's allegations of *harm to the public* weighs especially heavily in favor of access."). Access to the court records in this case will not only serve the general interest in overseeing and understanding the judicial process that underlies the public right of access in every case; it will also give the public more information to evaluate the safety of the TIPM-7 and therefore a greater basis to evaluate whatever action NHTSA takes (or fails to take).

As no party is currently adequately representing the public's interest in access to court records, the Center should be granted permission to intervene.

III. JUDICIAL ECONOMY DOES NOT COUNSEL AGAINST INTERVENTION

Judicial economy is not a valid basis to deny intervention here. It appears that – due to the stipulated protective order – the Court has not yet considered whether there are compelling reasons to maintain each document under seal. There is no authority for Chrysler's suggestion that the public right of access may be denied simply because it will require judicial resources to adjudicate it. Adjudicating any claim takes time. If judicial economy were a sound justification for refusing to entertain legitimate claims that a right has been violated, courts

could simply refuse to hear any (or all) claims. This is, of course, not the rule: Judicial economy is not a valid basis for denying adjudication of a right. *See Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 553-54 (1990) ("[C]oncern about judicial economy, to the extent that it supports respondent's position, remains an insufficient basis for departing from our longstanding commitment to preserving a litigant's right to a jury trial."); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. R.H. Weber Exploration, Inc.*, 605 F. Supp. 1299, 1303 (S.D.N.Y. 1985) ("[H]owever desirable the conservation of judicial resources and the avoidance of unnecessary expense to the litigants and loss of time to them and their witnesses, such purpose may not serve to deprive a party asserting a valid claim of his right to a prompt adjudication of the claim.").

Chrysler's argument that unsealing the court records is unnecessary because the Court "has already considered, and will continue to consider, what notice" putative class members should be given about a possible TIPM defect, (Opp'n Mot. Intervene 7), is puzzling. Presumably, whatever class notice might ultimately be issued, it will not contain all of the documents filed in connection with the preliminary injunction motion. Furthermore, contrary to Chrysler's suggestion, (*id.*), not all members of the public are putative class members. Rather, the proposed class comprises those who leased or purchased certain Chrysler vehicles in certain years in certain states. (Second Am. Compl. ¶ 97). Notice thus cannot

substitute for the public's general right of access to court documents.

Nor does NHTSA's request for documents from Chrysler serve as an adequate substitute for this right. As explained above, a government agency's involvement in a matter, in fact, heightens the public interest in accessing court records related to that matter. Moreover, there is no reason to believe that the public will gain access to the documents in the court record simply because NHTSA has requested documents from Chrysler. Chrysler has stated that it will request that many of the documents it submits to NHTSA remain confidential. (Bielenda Decl. ¶ 10). Therefore, a motion to unseal may be the only way to ensure that the court records subject to the public's right of access are actually publicly accessible. And, even if the documents at issue here were publicly available through NHTSA, that would only serve to weaken any justification for keeping them confidential in this case. *See, e.g.*, *Dhiab v. Obama*, No. CV 05-1457 (GK), 2014 WL 4954458, at *7 (D.D.C. Oct. 3, 2014) ("[W]hen the sealed facts are already public, maintaining documents under seal is only appropriate when, despite what the public already knows, the documents' release would *still* give rise to a substantial probability of harm."); *Elbertson v. Chevron, U.S.A., Inc.*, No. CIV.A. H-10-0153, 2010 WL 4642963, at *2 (S.D. Tex. Nov. 9, 2010) ("[W]hen, as here, the public has already had access to documents, that is a factor weighing in favor of continued public access.").

Again, Chrysler seems to misunderstand the right of public access to court documents: Absent compelling reasons to seal, the public is entitled to access any court record for any reason. It is well-settled that "[n]onparties seeking access to a judicial record in a civil case may do so by seeking permissive intervention." *San Jose Mercury News*, 187 F.3d at 1100. Chrysler has not cited – and the Center has not found – any authority for the proposition that such intervention may be denied simply because it is more efficient not unseal the documents.

CONCLUSION

The Center's motion to intervene should be granted.

Dated this 17th day of November, 2014

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