IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

UNITED STATES OF AMERICA ex rel. JOSHUA HARMAN,	)	
Plaintiff,	)	Civil Action No. 2:12-CV-89
v.	)	
TRINITY INDUSTRIES, INC, and TRINITY HIGHWAY PRODUCTS, LLC,	)	
Defendants.	)	

BRIEF IN SUPPORT OF MOTION TO UNSEAL OF THE CENTER FOR AUTO SAFETY AND THE SAFETY INSTITUTE

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INTRODUCTION AND SUMMARY

This brief is filed in support of the Motion to Unseal of proposed intervenors the Center for Auto Safety and The Safety Institute ("the Nonprofit Intervenors"), who are seeking access to the sealed court records in this case. (A Motion to Intervene is being filed contemporaneously with this motion.)

As explained more fully in the accompanying Motion to Intervene, the Nonprofit Intervenors have a strong interest in obtaining information regarding the subject matter of this case; in particular, the safety of the ET-Plus guardrail end terminal manufactured by defendants Trinity Industries, Inc., and Trinity Highway Products, LLC ("Defendants").

Under established law in the Fifth Circuit (and elsewhere), court records may only be sealed "sparingly" upon a finding that the need for secrecy that outweighs the public's presumptive right of access to court records. *See, e.g.*, *U.S. v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 690 (5th Cir. 2010); *SEC v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993). In this case, the court file contains numerous documents under seal and unavailable to the public, including motions to dismiss and for summary judgment (and attached exhibits). So far as can be determined by undersigned counsel, these documents were sealed without reference to, or consideration of, the public's presumptive right of access to court records. That is especially problematic where, as here, the documents at issue concern an important matter of public safety.

In light of the strong public interest in access to the sealed court records, Nonprofit Intervenors respectfully ask this Court to unseal the records in this case or, at a minimum, require the party (or parties) seeking secrecy to prove why their need for secrecy outweighs the public's presumptive right of access to the records of judicial proceedings.

STATEMENT OF RELEVANT FACTS

This case involves popular guardrail end terminals that have been installed throughout the country in all fifty states. Doc. 1, Compl. ¶ 12 (Mar. 6, 2012). The Relator in this case, Joshua Harman, alleges that the current version of the particular guardrail at issue—the Trinity ET-Plus—is defective and has caused or contributed to numerous serious injuries and deaths. *Id.* ¶¶ 11-12. The ET-Plus is manufactured and sold by defendants Trinity Industries, Inc., and Trinity Highway Associates, LLC, under license from Texas A&M University. *Id.* ¶ 6.

Relator further alleges that, between 2002 and 2005, Defendants altered the original design of the ET-Plus and concealed that alteration from the Federal Highway Administration and state Departments of Transportation. *Id.* ¶¶ 9-10. Nonetheless, Defendants allegedly sold hundreds of thousands of redesigned ET-Plus terminals for use across the United States and abroad. *Id.* ¶ 12.

This case went to trial in July 2014. After several days of trial, this court declared a mistrial and ordered the action set for retrial. In its Order of July 18, the Court stated that both parties, "through sharp practices or inadvertent error," had "created an environment where [the] jury could not render a fair and impartial verdict." Doc. 384, Order, at 2 (July 18, 2014). A status conference has been set for August 18, 2014. *Id.*

ARGUMENT

THE SEALING OF COURT RECORDS IN THIS CASE VIOLATES THE PUBLIC'S FIRST AMENDMENT AND COMMON-LAW RIGHT OF ACCESS TO JUDICIAL RECORDS.

I. Court Records May Only Be Sealed Upon a Showing of a Compelling Need for Secrecy that Outweighs the Public's Strong Interest in Access.

A. The Public Has a Presumptive Right of Access to Court Records.

The U.S. Supreme Court has recognized a public right of access to court records that is rooted in both federal common law and the First Amendment. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). In the Fifth Circuit, any decision to seal a court record "must be made in light of the 'strong presumption that all trial proceedings should be subject to scrutiny by the public.'" *U.S. v. Holy Land*, 624 F.3d at 690 (quoting *U.S. v. Ladd*, 218 F.3d 701, 704 (7th Cir. 2000)). The Fifth Circuit has further explained that "the power to seal court records must be used sparingly in light of the public's right to access." *U.S. v. Holy Land*, 624 F.3d at 690. *See also SEC v. Van Waeyenberghe,* 990 F.2d 845, 848 (5th Cir. 1993) ("Although the common law right of access to judicial records is not absolute, 'the district court's discretion to seal the record of judicial proceedings is to be exercised charily.'") (quoting *Federal Savings & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987)).

"In exercising its discretion to seal judicial records, the court must balance the public's common law right of access against the interests favoring nondisclosure." *Van Waeyenberghe*, 990 F.2d at 848. The "strong presumption" against the sealing of court records may only be overcome by a "compelling reason" for secrecy that outweighs the public's strong interest in accessing the court documents. *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). *See also Joy v. North,* 692 F2d at 893, 897 (2d Cir. 1982) (unsealing court records where movant had failed to demonstrate "the most compelling reasons" that disclosure would

cause injury).

As one court in this district has stated, a party seeking to seal a court record "bears a heavy burden of showing that a sealing order is necessary to protect important countervailing values, and '[o]nly the most compelling reasons can justify non-disclosure of judicial records.'" *Bianco v. Globus Med., Inc.,* 2014 WL 3422000 (E.D. Tex. July 14, 2014) ((quoting *In re Knoxville News–Sentinel Co*., 723 F.2d 470, 476 (6th Cir. 1983)). To meet its "heavy burden," the proponent of secrecy must present "*articulable facts* known to the court, not . . . unsupported hypothesis or conjecture." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (emphasis added).

Once a compelling need for secrecy has been proven, the court must make "*specific factual findings* that outweigh the general history of access and the public policies favoring disclosure." *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (emphasis added; internal quotation marks and citations omitted); *see also In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2005) ("[O]nly the most compelling reasons can justify the non-disclosure of judicial records."); *In re Providence Journal Co.*, 293 F.3d 1, 11 (1st Cir. 2002) (applying compelling reason standard); *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) ("Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.").

A desire to avoid public scrutiny of alleged wrongdoing is not a sufficient legal basis for waiving the public's right of access to court records. As one appellate court has explained, "[t]he 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." *Foltz*, 331 F.3d at 1136.[1]

B. The Public's Right of Access to Court Records Is Heightened Where, as Here, the Sealed Records Contain Information Concerning Public Safety.

Courts have uniformly held that the public's interest in access to court records is strongest when those records concern public safety. For example, in *Brown & Williamson Tobacco v. FTC*, 710 F.2d 1165 (6th Cir. 1983), the trial court had sealed judicial records relating to the content of tar and nicotine in various brands of cigarettes. The Sixth Circuit vacated the lower court's orders, emphasizing the strong public interest "in knowing the accurate 'tar' and nicotine content of the various brands of cigarettes on the market." *Id.* at 1180-81.

Similarly, in *United States v. General Motors*, 99 F.R.D. 610 (D.D.C. 1983), the court weighed the public's interest in disclosure of documents regarding auto safety against an auto manufacturer's interest in avoiding adverse publicity. The court found that General Motors's embarrassment from unsealing the record was *not* a substantial and serious harm that "justif[ied] concealing what would otherwise be in the public domain altogether." *Id.* In granting the motion to unseal, the court emphasized that the "greater the public's interest in the case the less acceptable are restraints on the public's access to the proceedings." *Id.* (citation omitted).

[1] It does not appear that the Fifth Circuit has ever articulated any exceptions to the public's presumptive right of access to court records. Some courts have held that the presumption of access does not apply to "sealed discovery documents attached to nondispositive motions" to the extent such documents are "unrelated, or only tangentially related, to the underlying cause of action." *See Kamakana*, 443 F.3d at 1179 (internal citations omitted). With regard to such documents, the relevant standard for sealing is the good cause requirement of Fed. R. Civ. P. 26(c).

C. Compelling Reasons for Secrecy Are Required Even if the Documents in Question Were Filed Under Seal Pursuant to a Protective Order.

Compelling reasons for secrecy are required even where the documents in question were filed under seal pursuant to a discovery protective order. The reason is simple: Whereas discovery materials are subject to the relatively lenient "good cause" standard of Federal Rule of Civil Procedure 26(c), court records are subject to a much more stringent standard that requires the court to balance the need for secrecy against the public's presumptive right of access. Thus, where court records contain documents designated confidential in discovery, they may only be filed under seal upon a showing of compelling need for secrecy *and* particularized judicial findings of same.

So held the Ninth Circuit in *Foltz*, 331 F.3d at 1127-28, where discovery was governed by stipulated protective orders. After several years of litigation, the parties agreed to a confidential settlement and requested that the court file be sealed. *Id.* at 1128. When the district court granted the request, non-party public interest groups and litigants in other cases intervened in order to unseal the records. *Id.* at 1128-29. On appeal, the Ninth Circuit directed the district court to release all records for which compelling reasons for continued secrecy had not been demonstrated. *Id.* at 1139.

Likewise, in *San Jose Mercury News, Inc., v. U.S. District Court*, 187 F.3d 1096, 1101 (9th Cir. 1999), the parties stipulated to a protective order in a sexual harassment suit against a police department. When a non-party newspaper moved to intervene to unseal the records, the defendant police department objected on grounds that the records contained information that had been designated confidential pursuant to a stipulated protective order. *Id.* The Ninth Circuit dismissed the defendant's argument, holding that "[t]he right of access to court documents belongs to the public, and the [parties] were in no position to bargain that right away." *Id.* at

1101. *See also Kamakana*, 447 F.3d at 1179 (holding that a "'good cause' showing alone will not suffice to fulfill the 'compelling reasons' standard that a party must meet to rebut the presumption of access to dispositive pleadings and attachments") (quoting the good-cause requirement of Fed. R. Civ. P. 26(c)).

D. The Presumption of Public Access Is Fully Applicable in Cases Filed Under the False Claims Act.

Finally, there can be no doubt that the presumption of public access applies with full force in the *qui tam* context, notwithstanding the so called "seal" provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3730(b)(2)-(3). Pursuant to those provisions, where a "relator" initiates an action on behalf of the United States, the complaint must *initially* be filed under seal to give the government time to determine whether to intervene in the action. *See ACLU v. Holder*, 652 F. Supp. 2d 654, 58-59 (E.D. Va. 2009) (discussing "seal provisions" of False Claims Act). Once that period has expired, however, absent a showing of "good cause" for an extension, the complaint must be unsealed, and the presumption of public access to court records applies for the remainder of the proceedings. *See, e.g.*, *U.S. ex rel. Harry Barko v. Halliburton Co.*, 2014 WL 929430, (D.D.C. 2014) (refusing to seal court record in *qui tam* case based on "strong presumption in favor of presumption of public access").

Indeed, if anything, the presumption of public access operates with even *greater* force in the *qui tam* context than in an ordinary civil action. This is because, as one court has observed, "[b]y definition, a [*qui tam*] complaint alleges a fraud upon the public fisc." *U.S. v. King Pharms., Inc*., 806 F Supp. 2d 833, 840 (D. Md. 2011). In light of the public's inherent interest in the outcome of *qui tam* actions, the sealing of court records in such cases is improper even where the United States has declined to prosecute the action and the relator has moved to dismiss the complaint. *Id*. *See also United States ex rel. Herrera v. Bon Secours Cottage Health Servs.*,

665 F. Supp. 2d 782, 785 (E.D. Mich. 2008) ("The presumption of public access is particularly strong when record pertains to matters of public concern, such as allegations of fraud against the Government.") (quoting *Under Seal v. Under Seal*, 227 F.3d 564 (4th Cir. 1994)); *United States ex rel Costav, Baker & Taylor, Inc.*, 955 F. Supp. 1188, 1190 (N.D. Cal. 1997) ("The legislative history of the FCA makes abundantly clear that Congress did not intend that the government should be allowed to prolong the period in which the file is sealed indefinitely."); *U.S. ex rel. Durham v. Prospect Waterproofing, Inc*., 818 F. Supp. 2d 64, 69 (D.D.C. 2011) (recognizing "a strong presumption against sealing court pleadings that are relevant to the litigation of FCA claims because the public has a right to access the filings").

* * *

In short: Judicial records are subject to a strong presumption of public access that may only be overcome upon a showing of compelling need for secrecy based on articulable facts, not mere conjecture. Only where such a showing has been made, and the court has made specific findings that secrecy is warranted, may a court record be sealed—and this is so even where the court record contains documents that were designated confidential pursuant to a stipulated protective order. Against this background, we now address the court records at issue in this case.

II. Court Records in This Case Appear to Have Been Sealed Without Any Showing of a Compelling Need for Secrecy or Any Findings that the Need for Secrecy Outweighs the Public's Presumptive Right of Access.

During the course of this hotly contested litigation, numerous court records were filed under seal. *E.g.*, Doc. 247, Defs.' Mot. for Summ. J. (June 13, 2014); Doc. 260, Pl.'s Mot. for Partial Summ. J. (June 14, 2014). Based on undersigned counsel's review of the record, it appears that this occurred without any showing of need for secrecy or any specific judicial

findings that the need for secrecy outweighed the public's presumptive right of access to court records. *E.g.*, Doc. 275, Order Granting Leave to File Under Seal (June 16, 2014); Doc. 340, Order Granting Pl.'s Mot. to Seal Its Mot. for Partial Summ. J. (July 8, 2014); Doc. 342, Order Granting Leave to File Under Seal (July 8, 2014). Instead, it appears that these records were sealed simply because they contained, or made reference to, documents that were designated confidential pursuant to the parties' stipulated protective order. To the extent this occurred, the sealing orders are invalid.

As explained above, the fact that court records contain materials designated confidential during the discovery process does not mean that they may be filed under seal. Discovery materials are governed by the "good cause" requirement of Rule 26(c)—a relatively lenient test that allows discovery to be designated confidential without any consideration of the public's interest in access to the materials. The standard applicable to court records is far more stringent, however; as explained above, not only does this standard require a showing of compelling need for secrecy, but it also requires a court to balance the need for secrecy against the public's presumptive right of access to the materials *and* the public's interest in access to the particular court records at issue.

Thus, as one court has concluded, a mere showing of good cause "will not, without more, satisfy the 'compelling reasons' test applicable to court records." *Kamakana*, 443 F.3d at 1180; *Foltz*, 331 F.3d at 1135-36; *see also Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002); *Bank of Am. Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343-44 (3d Cir. 1986) (holding that discovery, "which is ordinarily conducted in private[,] stands on a different footing than does a motion filed by a party seeking

action by the court," because "a motion or a settlement agreement filed with the court is a public component of a civil trial"). [2]

What this means in practice is that, when a court record contains, or makes reference to, materials that have been designated "confidential" in discovery, it may only be sealed if the party seeking secrecy can first prove to the court that a compelling need for secrecy outweighs the public interest in access. Only after such proof has been presented, and the court has made specific findings, that the compelling need test has been met, may a court record be sealed.

So far as can be determined, none of this happened in this case. All the court records must therefore be unsealed unless the party seeking secrecy can satisfy the stringent test for the sealing of court records. The Court "need not document compelling reasons to *un*seal; rather the proponent of sealing bears the burden with respect to sealing. A failure to meet that burden means that the default posture of public access prevails." *Kamakana*, 447 F.3d at 1181-82 (emphasis in original).

The Fifth Circuit has sanctioned this approach. In *Van Waeyenberghe*, 660 F.2d at 847, the district court sealed a final order of permanent injunction and a court transcript without taking into account the public's presumptive right of access. The Fifth Circuit found that the district court abused its discretion by failing to weigh the competing interests prior to sealing the final order and court transcript.

[2] Even if the sealed documents here were designated confidential under the protective order, it does not appear from the record that, with the exception of one document, Trinity has demonstrated that its confidential designation of the documents it produced in discovery meet even the "good cause" standard. *See* Doc. 126, Opp. to Defs.' Mot. for Protective Order (Feb. 21, 2014); Doc. 135, Order Granting Mot. for Protective Order (Feb. 26, 2014). And if the more lenient "good cause" standard for confidentiality was not met here, the higher bar for sealing records certainly has not been met either.

"First," the *Van Waeyenberghe* Court observed, "the district court made no mention of the presumption in favor of the public access to judicial records." *Id*. at 849. "Second," the Fifth Circuit stated, "the district court did not articulate any reasons that would support sealing the final order." Instead, the district court had merely noted that the public had other means of obtaining access to the underlying information contained in the sealed records. The Court of Appeals rejected this rationale, noting that "the public's right to information does not protect the same interests at the right of access is designed to protect." *Id.* "'Public access [to judicial records]," the Court emphasized, "serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness." *Id*. (citation omitted). In light of these important goals underlying the right of public access to judicial records, the Fifth Circuit concluded that the fact that the public had other means of accessing the information contained in the sealed court records was irrelevant and ordered that the records immediately be unsealed.

The same result is warranted here. Even if the public had other means of obtaining access to the information contained in the sealed court records—which it does not—the unwarranted sealing of court records undermines public trust in the judicial process and deprives the public of its ability to ascertain the fairness of the judicial system. Unless there is a demonstrable and compelling need for secrecy that outweighs the public's presumptive right of access to the records of this case, they should and must be unsealed.

CONCLUSION

For the foregoing reasons, the Court should unseal the court records in this case or, at a minimum, require the party (or parties) seeking secrecy to prove why their need for secrecy outweighs the public's presumptive right of access to the records of judicial proceedings.

Respectfully submitted,

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