UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY

KEITH E. BARNWELL, et al., Plaintiffs, v. CORRECTIONS CORPORATION OF AMERICA, Defendant.	)	CASE NO. 08-CV-02151-JWL-DJW

MEMORANDUM IN SUPPORT OF MOTION OF PRISON LEGAL NEWS TO INTERVENE AND TO REMOVE THE SEAL FROM THE COURT-APPROVED SETTLEMENT AGREEMENT AND RELATED DOCUMENTS AND TRANSCRIPTS

Pursuant to Fed. R. Civ. P. 24(b)(1)(B) and for the reasons set forth in this Memorandum in Support, Prison Legal News moves the court for an order permitting Prison Legal News to intervene in the above-captioned action for the sole purpose of removing the seal from the court-approved settlement agreement and related documents and transcripts.

I. Facts

1. Defendant Corrections Corporation of America (hereafter CCA) is a Maryland corporation, with a principal place of business at 10 Burton Hills Boulevard, Nashville, Tennessee, and is registered and in good standing as a foreign corporation in the state of Kansas. CCA's subsidiaries employ corrections officers and other hourly non-exempt employees and operate 65 facilities in 19 states including the District of Columbia. Answer, Doc. 25, ¶ 18.

2. CCA primarily operates prisons, jails, and other detention facilities for federal, state, and local governments, and its operation of prisons and jails is almost entirely funded with taxpayer dollars through governmental contracts. Wright Declaration, ¶ 5.

3. Prison Legal News (hereafter PLN) is a project of the Human Rights Defense Center, a 501(c)(3) non-profit. Wright Declaration, ¶ 2.

4. PLN publishes an independent 56-page monthly magazine, *Prison Legal News*, and also maintains an on-line publication, https://www.prisonlegalnews.org/, by the same name. In both its print and on-line editions, PLN provides cutting edge reviews and analysis of prisoner rights, court rulings, and news about prison issues. PLN has a national focus on both state and federal prison issues, with international coverage as well. PLN provides information that enables prisoners and other concerned individuals and organizations to seek the protection and enforcement of prisoner's rights at the grass roots level. PLN's coverage includes court access, disciplinary hearings, prison conditions, excessive force, mail censorship, jail litigation, visiting, telephones, religious freedom, free speech, prison rape, abuse of women prisoners, retaliation, the Prison Litigation Reform Act (PLRA), medical treatment, AIDS, the death penalty, control units, attorney fees and much more. Wright Declaration, ¶ 3.

5. PLN reports on prison and jail issues, including particularly the private prison industry, as demonstrated by our past extensive coverage of that topic. To effectively report the outcome of this case, PLN, as a member of the news media, needs access to a copy of the settlement agreement to accurately report the terms of same. Additionally, the private prison industry claims that it can do the job cheaper. Since 80% of prison operational expenses are due to staffing costs (salaries, benefits, training, number of staff employed), private prison firms tend to make their profit by reducing employee expenses. The fact that in this case CCA reduced those expenses by violating the FLSA and failing to pay its workers what they were entitled to is noteworthy, and illustrates how the industry "saves" money. The settlement agreement would demonstrate that. Wright Declaration, ¶ 4.

6. PLN's staff learned of the *Barnwell* case from a June 10, 2009 media report in the *Chattanooga Times Free Press*: http://www.timesfreepress.com/news/2009/jun/10/hamilton-county-prison-company-settles-lawsuit/. That same day, PLN staff checked PACER and learned that the Court had sealed the settlement agreement and other related documents in the *Barnwell* case. Wright Declaration, ¶ 6.

7. PLN staff have been contacted by numerous former CCA employees who did not receive notice of the CCA FLSA settlement and do not know whether they are covered by the terms of the settlement agreement. Wright Declaration, ¶ 7.

8. PLN wants to report on the *Barnwell* case, including the settlement, because – among other things – it bears on the important public issue of private corporate management of prisons and jails. This is a matter of intense public concern because CCA's contracts to manage prisons and jails are ALL funded by public taxpayer money. Thus, taxpayers, government officials, and current and former employees of CCA who might be members of the class would be interested in PLN's reports on this case in particular and the issues it raises in general. Wright Declaration, ¶ 8.

9. In an Order dated February 5, 2009, the Court granted the parties' motion to file their Motion For Approval of FLSA Collective Action Settlement, Supporting Memorandum, and Proposed Settlement Agreement under seal, and thereafter the parties filed that motion under seal.

10. In an Order dated February 12, 2009, the Court approved the parties' sealed settlement. Paragraph A of the Order Approving Settlement Agreement provides as follows: "Terms in this APPROVAL ORDER that appear in 'all caps' shall have the meaning assigned to them in the SETTLEMENT AGREEMENT." Thus, in order to understand the precise terms of what the

Court has approved, it is necessary to see the Settlement Agreement, but that is impossible because the Court also granted the parties' motion to keep that document, as well as related documents, under seal.

II. Argument

A. Intervention

Rule 24(b), Fed. R. Civ. P., governs permissive intervention and provides, in pertinent part, as follows:

> **(b) Permissive Intervention.**
>
> (1) In General.
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> On timely motion, the court may permit anyone to intervene who:
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> . . . . .
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.
>
> . . . . .
>
> (3) Delay or Prejudice.
>
> In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24(b).

The Supreme Court has admonished courts to avoid a rigid construction of Rule 24. *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 505-506, 61 S.Ct. 666 (1941). Rule 24(b) "provides among other things that upon timely application anyone may be permitted to intervene in an action when the applicant's claim or defense and the main action have a question of law or fact in common." *Kelley v. Summers*, 210 F.2d 665, 673 (10th Cir. 1954). In order to intervene, a movant must show that "(1) the application is timely; (2) there are common questions of law and fact between the movant's claim and the underlying action; and (3) the

intervention will not unduly delay or prejudice adjudication of rights of the original parties." *Ames v. Uranus, Inc.*, 1992 WL 281399 (D. Kan. 1992).

"While it is true that an application for intervention must be timely, '[t]imeliness is to be determined from all the circumstances,' and 'the point to which the suit has progressed … is not solely dispositive.' *NAACP v. New York*, 413 U.S. 345, 365-66, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648 (1973)." *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), *cert. denied sub nom, American Special Risk Ins. Co. v. Rohm & Haas Co.*, 498 U.S. 1073 (1991). "The most important circumstance in this case is that intervention is not on the merits, but for the sole purpose of challenging [sealed documents]." *Id.* In addition, PLN has filed this motion while the Court is still maintaining jurisdiction over the settlement and within weeks of learning of the existence of this case and the sealed settlement. Thus, PLN's motion to intervene is timely.

Where a collateral litigant seeks permissive intervention solely for the purpose of obtaining access to sealed materials in a court's file, "a particularly strong nexus of fact or law between the two suits is not necessary." *Cunningham v. Subaru of Amer. Corp.*, 155 F.R.D. 205 (D. Kan. 1994) (motion to intervene to obtain discovery materials subject to a protective order), *aff'd*, 54 F.3d 787 (10th Cir. 1995). "The right to intervene to challenge a closure order is rooted in the public's well-recognized right of access to public proceedings." *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000). "[A]ny party challenging a confidentiality order 'meet[s] the requirement of Fed. R. Civ. P. 24(b)(2) that their claim must have "a question of law or fact in

common" with the main action.' *Pansy v. Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994)." *Id.* at 998.[1]

Finally, the intervention of PLN will not prejudice the parties to this litigation. Prejudice is "a concern not present when the existing parties have settled their dispute and intervention is for a collateral purpose." *United Nuclear Corp.*, 905 F.2d at 1427.

B. Sealing

There is a general common law right to inspect and copy public records and documents, including judicial records and documents. *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978). "The public has a fundamental interest in understanding disputes that are presented to a public forum for resolution." *Sibley v. Sprint Nextel Corp.*¸ 254 F.R.D. 662, 667 (D. Kan. 2008). The interests of the public in open court records "are presumptively paramount[.]" *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980). But judicial documents may be sealed if the "'countervailing interests heavily outweigh the public interests in access.'" *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (quoting *Rusford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)), *cert. denied*, 128 S.Ct. 897 (2008). The burden of proof lies with the party seeking to rebut the presumption. *Id.*

On one hand, the courts must balance the factors supporting public disclosure of judicial documents, such as "the general interest in understanding disputes that are presented to a public forum for resolution" and "the public's interest in assuring that the courts are fairly run and judges are honest." *Crystal Grower's Corp.*, 616 F.2d at 461. On the other hand, courts must weigh the countervailing factors that may demonstrate a compelling interest in secrecy, such as

[1] Because the Court's order to seal various documents in the Court's file impedes PLN's ability to gather news, PLN has standing. *Journal Pub. Co. v. Mechem*, 801 F.2d 1233, 1235 (10th Cir. 1986).

"trade secrets, the identity of informers, and the privacy of children," *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002), and "the doctrines of attorney-client privilege and work product immunity." *See also Nixon*, 435 U.S. at 598; *United States v. McVeigh*, 119 F.3d 806, 813-814 (10th Cir. 1997), *cert. denied sub nom, Dallas Morning News v. U.S.*, 522 U.S. 1142 (1998).

A settlement agreement retained under seal in a court's files and approved by a federal judge "is presumptively a public document." *Jessup*, 277 F.3d at 930. "The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps nudge the parties to agree to." *Id.* at 929.

In a well-reasoned decision, the Eastern District of Virginia granted a newspaper's motion to intervene and to unseal an FLSA settlement agreement. *Boone v. City of Suffolk*, 79 F. Supp.2d 603 (E.D. Va. 1999). Furthermore, Judge Vratil denied a motion to file an FLSA settlement agreement under seal, rejecting the parties' argument that "the confidentiality of the awards is a material element of the settlement agreement and that without such confidentiality, the agreement might fail, leading to additional litigation which would deplete both public and private resources." *West v. First Franklin Financial Corp.*, 2007 U.S. Dist. LEXIS 30963 (D. Kan., Apr. 25, 2007). Judge Vratil held that "[s]uch speculative harm is insufficient to overcome the presumptively paramount public interest in transparency in this case, especially since the parties seek Court approval of the class settlement." *Id.* Many other federal district courts have followed this approach and have either denied motions to seal or granted motions to unseal FLSA settlement agreements that were either presented to or approved by the courts. *See Stalnaker v. Novar Corp.*, 293 F. Supp.2d 1260 (M.D. Ala. 2003) (Thompson, J.); *Pessoa v. Countrywide Home Loans, Inc.*, 2007 WL 1017577 (M.D. Fla., Apr. 2, 2007) (Glazebrook, M.J.); *Perry v. National City Bank*, 2008 WL 427771 (S.D. Ill., Feb. 14, 2008) (Herndon, C.J.);

Yaklin v. W-H Energy Serv., Inc., 2008 WL 4951718 (S.D. Tex., Nov. 17, 2008) (Jack, J.); *Prater v. Commerce Equities Mgt. Co.*, 2008 WL 5140045 (S.D. Tex. Dec. 8, 2008) (Rosenthal, J.); *Hanson v. Wells Fargo Bank, N.A.*, 2009 WL 1490582 (S.D. Fla., May 26, 2009) (Ryskamp, J.). *Cf. Bartelloni v. DeCastro*, 2007 WL 2155646 (S.D. Fla., July 26, 2007) (Cohn, J.) (rejecting a claim that confidentiality was a material term of settlement justifying sealing settlement agreement but deferring a final ruling until parties considered their options). *But see Xavier v. Belfor USA Group, Inc.*, 2008 WL 4862523 (E.D. La., Sept. 23, 2008) (sealing court filings containing names of opt-in plaintiffs in FLSA collective action in order to protect the plaintiffs from unlawful retaliation).

Here, the Court did not explain its reasons for granting the parties' joint motion to file the settlement agreement and related motions under seal. *See* Doc. 225. Thus, it is impossible for PLN to address directly the issues the Court considered. However, it is clear that the seal order was not intended to protect plaintiffs from retaliation because the consents filed by the opt-in plaintiffs are all available to the public on PACER. Nor does the seal appear to protect any privacy interests of children or similarly vulnerable people. It is also difficult to conceive how the terms of this settlement agreement of a wage and hour lawsuit could implicate any trade secrets. Moreover, because the *Barnwell* settlement agreement was negotiated between adverse parties, this case cannot involve any issues of attorney-client privilege or work product. The most obvious factor favoring the seal is the argument that confidentiality was a material term upon which one or both parties insisted. But the courts that have considered that argument have routinely rejected it as insufficient to heavily outweigh the paramount public interest in open judicial records. *See, e.g., Bank of America Nat'l Trust Savings Assn. v. Hotel Rittenhouse*

Assoc., 800 F.2d 339, 346 n.4 (3d Cir. 1986); *West v. First Franklin Financial Corp.*, 2007 U.S. Dist. LEXIS 30963 (D. Kan., Apr. 25, 2007).

For these reasons, PLN respectfully requests that the Court unseal the settlement agreement, the motion to file under seal, the motion for court approval of the settlement agreement, all exhibits attached to those documents, and the transcripts of the hearings, if any were held, in which the Court considered the parties' motions to seal or the fairness of the settlement. This would specifically include the following sealed documents: Doc. 224 (and all five exhibits attached thereto), Doc. 226, and Doc. 227.

III. Conclusion

For the foregoing reasons, PLN respectfully requests that the Court grant this motion to intervene and to unseal the settlement agreement and related motions, briefs, and transcripts, if any.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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