UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

MICHAEL E. JOHNSON, *et al*.,

Plaintiffs,

v.

CORRECTIONS CORPORATION OF AMERICA,

Defendant.

Case No. 3:12-cv-00246-JGH

Electronically filed

MEMORANDUM IN SUPPORT OF PRISON LEGAL NEWS' MOTION TO INTERVENE AND UNSEAL SETTLEMENT EXHIBITS

Pursuant to Fed. R. Civ. P. 24(b), Prison Legal News seeks to intervene in the above-styled action for the purpose of requesting that the exhibits offered by the parties in support of their court-approved settlement be unsealed and thus available for public inspection.

Statement of Facts

The Defendant, Corrections Corporation of America ("CCA"), previously operated two prison facilities in Kentucky — Marion Adjust Center and Otter Creek Correctional Facility. On May 11, 2012, Plaintiffs (then-current and former employees of those CCA facilities) brought this action alleging that CCA violated the Fair Labor Standards Act and Kentucky's Wage and Hour Act by, *inter alia*, misclassifying them as exempt from FLSA's overtime provisions and, as a result, wrongfully withholding earned overtime compensation. [RE #1: Verified Class Action and Collective Action Complaint ("Compl."); RE #5: First Amended Verified Class Action and Collective Action Complaint ("First Amended Compl."); RE #25: Second Amended Verified Class Action and Collective Action Complaint ("Second Amended Compl.") at ¶¶ 2, 68-76, 77-

84; RE #54-1: Settlement Agreement, at 1.] The Plaintiffs sought "compensatory and liquidated damages," injunctive relief, and attorneys' fees. [RE #25: Second Amended Compl., at 18.]

CCA denied Plaintiffs' allegations, but stipulated to the conditional certification of current and former employees at the two facilities. [RE #23; RE #24.] Subsequent notice to qualifying individuals resulted in additional plaintiffs agreeing to join the litigation ("Opt-In Plaintiffs"). The parties thereafter reached a tentative settlement on November 4, 2013. In their Joint Motion for Final Approval of FLSA Settlement and Memorandum in Support [RE#54], the parties described the proposed agreement as follows:

> The Settlement Agreement provides that CCA will pay an amount to settle Plaintiffs' claims for unpaid wages and attorneys' fees and costs and expenses in exchange for a release of their wage and hour claims related to their employment as Assistant Shift Supervisors and Shift Supervisors under state and federal law.
>
> The settlement will be distributed to all Plaintiffs based on an equitable formula approved by all Plaintiffs and counsel that takes into account the number of weeks worked by each Plaintiff, the number of overtime hours assumed to have been worked by each Plaintiff, the salary of each Plaintiff, whether the individual participated in depositions, and whether the individual was a named or lead Plaintiff in the action.

In seeking court approval of their settlement agreement, the parties also moved to seal the exhibits supporting that agreement. [RE #55: Joint Motion to Seal Exhibits.] Specifically, the parties sought to seal the two supporting exhibits that contained "information concerning the amount that will be paid to each Plaintiff if the settlement is approved" and "information pertaining to Plaintiffs' counsel's attorneys' fees and costs." [*Id.* at 2.] According to the parties, there existed "no need" to make these exhibits a part of the public record because there "is no public interest" in their inspection. [*Id.* at 1, 2.][1] On November 27, 2013, this Court granted the

[1] Although the parties' settlement agreement provided that the agreed-upon award of attorneys' fees and costs would be $131,000, it provided no details regarding the allocation of those fees and costs. [RE #54-1: Settlement Agreement, § III.B.1.] Nor did the settlement agreement

parties' request to seal the supporting exhibits and approved their settlement agreement. [RE #57; RE #58.]

As detailed in the accompanying declaration of Mr. Paul Wright, Prison Legal News (PLN) is a project of the Human Rights Defense Center, a 501(c)(3) non-profit corporation. [*Attached* Exhibit 1: Wright Declaration.] PLN produces an independent monthly publication, *Prison Legal News*, and maintains a website both of which are devoted to providing cutting edge reviews and analysis of issues relating to prisoners' rights and other prison-related news. [*Id*. at ¶ 3.] For example, PLN has covered such varied prison-related topics as court access, disciplinary hearings, prison conditions, use of excessive force, mail censorship, jail litigation, visitation issues, and the Prison Litigation Reform Act. [*Id*.] Moreover, PLN has devoted extensive coverage to the private prison industry, including various articles about CCA. [*Id*. at ¶ 4.]

In order to effectively and adequately report the outcome of this FLSA case, PLN, as a member of the news media, needs access to the supporting exhibits referenced in the parties' settlement agreement. Specifically, PLN seeks to review the settlement amounts paid to the plaintiffs in this case to determine the actual financial costs incurred by CCA for its Kentucky operations. These amounts are particularly newsworthy because providers of private prison services, including CCA, tout their purported ability to house inmates for a lower per-inmate cost than the state in order to secure valuable state prison contracts. Given that approximately 80% of prison operation expenses are due to staffing costs (*e.g.*, salaries, benefits, training, *etc.*), private prison firms seek to minimize those costs in order to maximize profits. The fact that, here, CCA incurred settlement expenses for what Plaintiffs claimed were systemic violations of the FLSA is relevant (as is the amount of those expenses) to the ongoing political dialogue about whether

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otherwise identify the amount paid by CCA to the Plaintiffs, either collectively or individually. [*See id*. at §§ III.C.1-5.]

private prison operators seek to minimize their costs improperly and whether their claimed operational costs adequately reflect their resolution of legal claims. [*Id*. at ¶ 7.]

Argument

I. THE COURT SHOULD ALLOW PRISON LEGAL NEWS TO INTERVENE FOR THE LIMITED PURPOSE OF SEEKING TO UNSEAL THE PARTIES' SETTLEMENT EXHIBITS.

A. The Requirements For Permissive Intervention Are Present Here.

Fed. R. Civ. P. 24(b) establishes the circumstances under which an individual may be permitted to intervene in an action. Specifically, Fed. R. Civ. P. 24(b)(1)(B) provides that intervention may be permitted where the movant timely seeks intervention and "has a claim or defense that shares with the main action a common question of law or fact." Thus, "[u]nder Rule 24(b), a court ruling on a motion for permissive intervention must assess three factors: (1) whether the request to intervene is timely; (2) whether the proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact"; and (3) "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 760 (6th Cir. 2013) (citing Fed. R. Civ. P. 24(b)(1)(B); 24(b)(3)). As is detailed below, all of the factors necessary for permissive intervention are met here.

1. PLN's request to intervene is timely.

As an initial matter, "t]he determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances." *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990) (citing *Bradley v. Milliken,* 828 F.2d 1186, 1191 (6th Cir.1987)). In making that determination, courts should consider the following factors:

> (1) [T]he point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during

> which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Id. (listing factors relevant to timeliness of requests to intervene "of right" under Rule 24(a)) (citation omitted). Here, a consideration of these factors supports the conclusion that PLN's request to intervene is timely.

Specifically, this suit concluded by way of a court-approved settlement on November 27, 2013. [RE #58.] But the limited basis for which PLN seeks to intervene — to unseal the exhibits offered in support of the settlement agreement — is unrelated to the merits of the underlying action and did not arise until the Court, simultaneous to its approval of the settlement agreement, granted the parties' additional request to seal the settlement exhibits from public view. [RE #57.] Thus, PLN is seeking to intervene in this matter *less than ten weeks* after the Court's ruling implicating its substantial First Amendment interest in this matter. *See Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177-79 (6th Cir. 1983) (public right to access applicable to civil trials); *see also In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 474 (6th Cir. 1983) (recognizing "the presumptive right of the public to inspect and copy judicial documents and files") (citations omitted). Such a *de minimus* lapse of time between the operative ruling and the present motion does not (and cannot) unduly prejudice the original parties. Because there are no unusual circumstances present that militate against intervention, and because the remaining factors weigh in favor of finding that PLN's request is timely, this factor is met.

2. PLN possesses a claim that shares with the main action a common question of law or fact.

The second factor necessary to establish permissive intervention is that the proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In construing this provision, "courts generally have interpreted their discretion ... broadly and have held that it can be invoked by nonparties who seek to intervene for the sole purpose of challenging confidentiality orders." 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1911 (3d ed. 2007). Moreover, "there is no stringent showing required under Rule 24(b) that [the] claim [supporting intervention] must have a strong nexus of common fact or law" particularly where, as here, intervention is sought to challenge the confidentiality of documents. *Id*. at 164 (citing *In re Franklin National Bank Securities Litigation,* 92 F.R.D. 468, 471 (E.D.N.Y.1981), *aff'd,* 677 F.2d 230 (2d Cir.1982)); *see also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994) ("[T]he procedural device of permissive intervention is appropriately used to enable a litigant who was not an original party to an action to challenge protective or confidentiality orders entered in that action.").

Here, PLN's sole basis for seeking intervention is to challenge the confidentiality conferred upon the parties' settlement exhibits in this FLSA case. As noted above, PLN's status as a news publication (coupled with its interest in reporting upon the details of the parties' settlement in this case) present this Court with the significant legal question concerning the appropriateness of the continued confidentiality of those documents. *See Meyer Goldberg, Inc., of Lorain v. Fisher Foods, Inc.*, 823 F.2d 159, 163 (6th Cir. 1987) ("While a district court has supervisory power over its own records and files, its discretionary powers to seal these records is not insulated from review merely because the judge has discretion in this domain because of the

long-established legal tradition which recognizes the presumptive right of the public to inspect and copy....") (internal quotations and citations omitted); *see also id*. (recognizing that "both civil and criminal trials are presumptively open proceedings *and open records are fundamental to our system of law*.") (emphasis added). Thus, because PLN seeks to vindicate a substantial right of access to judicial records, and because courts routinely consider such legal claims sufficient under Fed. R. Civ. P. 24(b) to satisfy the "common question of law" requirement for permissive intervention, this element is likewise satisfied.

3. Intervention will not unduly delay or prejudice the adjudication of the original parties' rights.

The final consideration in deciding whether (or not) to grant permissive intervention is deciding whether the intervention, if granted, would result in undue delay or prejudice to the original parties. Fed. R. Civ. P. 24(b)(3). Here, there is no reasonable argument that granting PLN permissive intervention for the limited purpose of challenging the confidentiality of the parties' settlement exhibits would unduly delay the proceedings. These proceedings have already concluded by way of the parties' settlement agreement, and PLN does not seek to re-litigate any issues relating to the merits of the underlying claims or challenge the validity of the parties' settlement agreement. Rather, PLN seeks only to assert a collateral claim regarding the validity of shielding the parties' settlement exhibits from public view. Because granting PLN's request to intervene for this limited purpose would not require the parties to revisit substantive issues regarding their underlying claims and defenses, and because PLN's request is submitted less than ten weeks after the documents at issue were sealed (and while the Court retains continuing jurisdiction over the settlement agreement), granting PLN's request for permissive intervention would not result in undue delay *See e.g.*, *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d

1424, 1427 (10th Cir. 1990) (allowing permissive intervention three years after settlement for the purpose of gaining access to discovery materials subject to protective order).

Similarly, allowing PLN to intervene for a limited purpose would not result in undue prejudice to original parties in this case. Several courts to have considered the issue have concluded that where, as here, the parties have fully resolved their dispute and the basis for intervention relates solely to a "collateral purpose" such as challenging a confidentiality order, there is no undue prejudice. *Id.* (noting that Rule 24(b)'s timeliness requirement designed "to prevent prejudice in the adjudication of the rights of the existing parties" but that the potential for such prejudice is "not present when the existing parties have settled their dispute and intervention is for a collateral purpose."); *see also Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 786 (1st Cir. 1988) (holding that because proposed intervenor "sought to litigate only the issue of the protective order, and not to reopen the merits, we find that its delayed intervention caused little prejudice to the existing parties in this case."); *Liberte Capital Grp., LLC v. Capwill*, 126 F. App'x 214, 220-21 (6th Cir. 2005) (unreported) (finding district court abused its discretion in denying permissive intervention where movant's basis for intervention "would presumably have the sole effect of asking the district court to revisit its decision in an unopposed order and to apprise the judge of case law affecting the order."). For the foregoing reasons, PLN's request for permissive intervention is timely, is based upon a claim that shares a common question of law with the underlying action, and would not result in undue delay or prejudice to the original parties. As such, PLN's request for permissive intervention for the limited purpose of challenging the confidentiality of the parties' settlement exhibits should be granted.

II. THE COURT SHOULD UNSEAL THE EXHIBITS OFFERED IN SUPPORT OF THE FAIR LABOR STANDARDS ACT SETTLEMENT REACHED IN THIS MATTER.

In addition to seeking to intervene in this case, PLN also requests that the parties' settlement exhibits be unsealed and thus available for public inspection. In doing so, PLN asserts the "long-established legal tradition" that recognizes "the presumptive right of the public to inspect and copy judicial documents and files." *Nixon v. Warner Communications,* 435 U.S. 589, 597 (1978); *see also* I*n re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 473 (6th Cir. 1983). Admittedly, the public's right to inspect judicial documents is not absolute and courts may, in the exercise of their supervisory authority, deny access under certain circumstances. *Nixon*, 435 U.S. at 598. But in deciding those questions, the legal presumption in favor of openness, "[i]f not overpowering ... is nonetheless strong and sturdy." *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987). "Only the most compelling reasons can justify non-disclosure of judicial records." *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d at 476 (citing *Brown & Williamson,* 710 F.2d at 1179–80; *United States v. Myers,* 635 F.2d at 952)).

Here, the judicial documents at issue include two exhibits filed by the parties in support of their FLSA settlement agreement. One exhibit contains "information concerning the amount that will be paid to each Plaintiff" pursuant to the settlement, and the other contains "information pertaining to Plaintiffs' counsel's attorneys' fees and costs." [RE #55: Joint Motion to Seal Exhibits.] These exhibits, offered in support of the parties' proposed settlement agreement, lie at the heart of the "long-established legal tradition" of allowing public access to judicial records because only with full access to the documents upon which courts rely in making decisions may the public "effectively monitor the activities" of the court. *Pratt & Whitney Canada Inc. v. United States*, 14 Cl. Ct. 268, 273 (1988); *see also Boone v. City of Suffolk, Va.*, 79 F. Supp. 2d

603, 609 (E.D. Va. 1999) ("[I]n a FLSA action, where federal law requires court approval for fairness before any settlement can be executed, the public has an interest in determining whether the Court is properly fulfilling its duties when it approves a back-wages settlement agreement.")

Here, the Court's order granting the parties' request to seal the settlement exhibits did not articulate its justification for doing so. [RE #57.] Thus, PLN is unable to adequately address all of the potential bases upon which that decision rested. However, PLN argues that it cannot conceive, based upon the parties' own descriptions of the exhibits, that any permissible basis exists to overcome the strong presumption of openness applicable to judicial records. For example, despite the parties' assertion that there "is *no public interest* in allowing the public" access to the information contained in the exhibits, PLN (and the public) clearly possess strong interests not only in the ability to inspect judicial records relied upon by the Court in approving the parties' FLSA settlement, but also in the monies paid by CCA to resolve these claims. As noted above, PLN closely tracks the assertions of those in the private prison industry, including CCA, who allege that private prison providers can deliver prison services to state and local governments at a lower cost than the governments themselves. Of course, monetary settlements to employees of such private companies is highly relevant to that ongoing public debate and, as such, is a matter of utmost public concern.

Similarly, the claims of harm the parties asserted in seeking to seal the exhibits consisted of the avoidance of protracted litigation, mitigation of disruption in the workplace, and minimization of the risk of "copycat" lawsuits. [RE #55: Joint Motion to Seal Exhibits, at 2.] But those conclusory assertions are merely speculative and thus insufficient to provide the "compelling" justification necessary to warrant restricting the public's access to the judicial records. *See Womack v. Delaware Highlands AL Servs. Provider, LLC*, 2012 WL 1033384 (D.

Kan. Mar. 27, 2012) ("The party seeking to overcome the presumption [of openness for judicial records] ... must come forward with evidence as to the nature of the public or private harm that would result if it were so filed.") (internal quotations and citations omitted).

As further support for its assertion that the parties' settlement exhibits should be unsealed, PLN points to a ruling on nearly identical facts in *Barnwell, et al. v. Corrections Corporation of America*, Civil Action No. 08-cv-02151 (D. Kan. Aug. 27, 2009) (unreported). [*Attached* Exhibit 2: *Barnwell* Order.] There, as here, various plaintiffs sued CCA for alleged violations of the Fair Labor Standards Act. [*Id.* at 1.] And there, as here, the original parties reached a court-approved settlement agreement that included sealing various documents, including the agreement itself and the supporting documents. [*Id*. at 1-2.] And in that case, PLN also sought to intervene for the purpose of unsealing the parties' settlement agreement and related documents. [*Id*. at 1.] There, the district court granted PLN's request to intervene and further granted, in part, the request to unseal the documents at issue. [*Id*. at 2 n.1; 7.] In doing so, the court distinguished between those "judicial records" that had been filed with the court as part of the settlement agreement from any unfiled transcripts or other documents. The court granted PLN's request as it related to the filed, judicial records relating to the settlement agreement (including the settlement agreement itself) because it found that the original parties failed to establish any "compelling" justification to overcome the presumption of openness relating to those judicial records. [*Id*. at 4-6.] Here, as in *Barnwell*, PLN seeks to unseal the parties' exhibits *filed with the court* in support of their court-approved FLSA settlement agreement. And as in *Barnwell*, the original parties cannot overcome the strong presumption in favor of openness that attaches to the judicial records at issue. Thus, PLN's request to unseal those exhibits should be granted.

Conclusion

PLN should be permitted to intervene in this action for the limited purpose of challenging the continued confidentiality of the exhibits offered in support of the parties' settlement agreement. PLN's request for intervention is timely, asserts a claim that, when properly construed, shares a common question of law with the underling action, and would not result in undue delay or prejudice to the original parties. Moreover, because PLN (and the public) enjoy a long-standing right to inspect judicial records that can only be restricted for "the most compelling" reasons, and because no such compelling reasons are present here, PLN's motion to intervene and unseal the settlement exhibits should be granted in full.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2014, I electronically filed this document with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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