



A Far from Hypothetical Risk

By Jill G. Okun
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Attorneys need to be aware that a blanket protective order may not protect a client's sensitive business documents and of the steps to take to keep confidential documents confidential.

Intervention: The Little Known Enemy of Protective Orders

Agreed protective orders under Federal Rule of Civil Procedure 26(c) and state law analogs have become a staple of litigation, especially in the data age where production of gigabytes—or even terabytes—of data are not all that

uncommon. Agreed protective orders are fairly routine in product liability, complex commercial, and intellectual property cases to protect sensitive and proprietary business information and trade secrets.

There is good reason for these agreed protective orders, also referred to as “blanket protective orders.” These days, with the dramatic increase in the volume of document production, parties—and especially defendants—simply cannot as a practical matter meet and confer to debate the need for confidentiality for every single document to be produced. Further, agreed protective orders reduce, and in some cases eliminate, discovery disputes and expedite the information-gathering stage of litigation. *Cipollone v. Liggett Group, Inc.*, 755 F.2d 1108, 1122 (3rd Cir. 1986); *Amer. Gen Energy Co. LLC v. United States*, 115 Fed. Cl. 132, 138 (2014) (“Blanket or umbrella protective orders... are frequently employed by this court and others to facilitate discov-

ery in complex cases.”). Courts regularly grant these orders without any evidentiary hearing, based on the parties’ stipulation. With the ability to fall back on a protective order to protect the confidentiality of their documents, parties are less likely to challenge document requests even when such requests are arguably irrelevant or overbroad. After all, as long as a document stays out of public view, what is the harm in producing it? Especially since nearly all civil cases settle, and the parties remain bound by their mutually agreed-to protective order, which typically calls for destruction or return of all confidential documents produced.

Well, it turns out that there is a potential harm, and a very serious one. Consider the following scenario: a plaintiff and a defendant are engaged in litigation that will require exchanging sensitive company information, including documents, which the company rules prohibit employ-



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ees from disclosing and for which employees could be disciplined. To avoid repeated discovery disputes and fights over whether requested information really satisfies Rule 26 standards of discoverability, the parties agree to a protective order that allows them, in their judgment, to designate sensitive documents as “confidential.” The case is hard-fought, resulting in a series of pre-trial motions and one or more motions for summary judgment. But similar to most civil cases, eventually the parties reach a settlement. The defendant writes a check (and grumbles about the amount), the plaintiff files a notice of dismissal (and grumbles about the amount), and the case is over. Done. Gone.

Then, while the parties are still basking in the afterglow of litigation finality, someone who is not even related to the plaintiff or the defendant files a Rule 24(b) motion to intervene (in the *closed case*) for the limited purpose of obtaining access to confidential documents in the litigation. The intervenor not only asks for documents filed under seal with the court, but the documents exchanged between the parties during discovery as well. Wait... what!? Who is this intervenor? And what right does it have to muck up litigation—including all the attendant compromises made between the parties—that it wasn’t even involved in?

This situation is far from hypothetical. It has actually happened many times in both federal and state court. Frequently an intervening party is a public interest group or a publication interested in the subject matter of the documents, which either found the case on its own, or was “tipped off” by one of the litigants. And more often than not, this procedural device has been used successfully by intervenors to unseal protective orders and unseal court documents based on the public’s right to access court records and the public’s right to know and to be protected against potential safety risks.

Accordingly, attorneys need to be aware of the risk that their blanket protective order may ultimately provide no protection for their clients’ sensitive business documents, including trade secrets, and be able to advise their clients accordingly. This article first discusses the standards for permissive intervention and for requiring disclosure of documents to intervening

parties. This article then offers suggestions on how a party can mitigate the risk of a drive-by intervenor shooting holes in an agreed protective order that the parties relied on in their litigation.

Rule 24(B) Permissive Intervention: A Primer

Federal Rule 24(b), entitled “Permissive Intervention,” provides:

- (1) In general on timely motion, the court may permit anyone to intervene who:
 - (A) Is given a conditional right to intervene by a federal statute; or
 - (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 party’s rights.

Most state courts have similar provisions in their own procedural rules.

Federal Rule 24(b) therefore involves two primary inquiries. First, an intervenor’s motion must be timely. Second, an intervenor must demonstrate a common question of law or fact with the main action. *See, e.g., Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998).

The Timeliness Inquiry

At first blush, it would seem that the timeliness inquiry by definition could not be met in a case that is settled and dismissed. But the law concerning permissive intervention—at least for obtaining documents in a case—has treated the timeliness requirement very leniently, often allowing third parties to intervene to challenge protective orders years after the original case is closed.

Public Citizen v. Liggett Group, Inc., 858 F.2d 775 (1st Cir. 1988), announced a four-factor test that is generally considered the standard for determining the threshold timeliness inquiry. The factors include the following:

1. How long the intervenor knew or should have known that the parties no longer adequately protected its interest (the “timeliness” inquiry);

2. Prejudice to the existing parties from the intervenor’s delay, as well as whether intervention would impact the settlement and the intervenor’s reasons for seeking to participate;
 3. Prejudice to the intervenor if no intervention were permitted; and
 4. The existence of extraordinary circumstances.
- Id.* at 785–87.

Liggett was a wrongful death action brought by a smoker’s representative against the Liggett tobacco company. In the course of the litigation, Liggett produced documents under a protective order. After the dismissal of the case, Public Citizen Litigation Group, a group of public health organizations, sought access to certain protected discovery materials. In finding that Public Citizen’s post-judgment motion was timely, the court considered the applicable factors. Although it was undisputed that Public Citizen was aware of the litigation and the protective order, the court noted that the appropriate inquiry was “when the intervenor became aware that its interests in the case would no longer be adequately protected by the parties[.]” *Id.* at 785. In acknowledging the propriety of post-judgment intervention years after a case’s dismissal, the court found the much shorter delay by Public Citizen to be immaterial.

The court found no prejudice to Liggett because Public Citizen’s intervention related to an ancillary issue and would not disrupt the resolution of the case’s underlying merits. The court also held that the third and fourth factors weighed in favor of Public Citizen because “[t]here is a strong public interest in the documents at issue, which concern an important public health issue.” *Id.* at 787. *See also Boca Raton Cmty. Hosp. Inc. v. Tenet Health Care Corp.*, 271 F.R.D 530, 535-36 (S.D. Fla. 2010) (recognizing that delay is “not fatal” when a party moves to intervene for the sole purpose of obtaining access to documents); *Blum v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 712 F.2d 1349, 1353 (9th Cir. 2013) (“Motions to intervene for the purpose of seeking modification of a protective order in long concluded litigation are not untimely.”).

In short, the mere fact that a case has settled and been dismissed does not alone defeat a proposed intervenor’s request for

documents. Courts justify this highly permissive approach based on the notion that the public and third parties may often have no way of knowing at the time a confidentiality order is granted what relevance the settling case has to their interests.... Therefore to preclude third parties from challenging a confidentiality order once a case has been settled would often make it impossible for third parties to have their day in court to contest the scope or need for confidentiality.

Pansy v. Borough of Stroudsburg, 23 F.3d 722, 780 (3rd Cir. 1994); accord *United Nuclear Corp. v. Cranford In. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (“[The] timeliness requirement is to prevent prejudice in the adjudication of right of existing parties, a concern not present when the existing parties have settled their dispute and intervention is for a collateral purpose.”).

Although *Liggett* and its progeny were very deferential to the intervenors on the timeliness factor, that deference is not unlimited. In *Empire Blue Cross and Blue Shield v. Janet Greeson’s A Place for Us, Inc.*, 62 F.3d 1217 (9th Cir. 1995), the Ninth Circuit affirmed the district court’s denial of nonparty Aetna’s motion to intervene in the settled case to modify a protective order and gain access to confidential documents. *Id.* at 1217. In upholding the district court’s denial of Aetna’s motion to intervene, the Ninth Circuit found (1) Aetna did not seek intervention until after the parties settled their disputes, despite evidence that Aetna had known of the litigation for two years; (2) the modification sought by Aetna would prejudice the parties because the settlement could potentially “unravel” and the parties would incur great expense to review documents for patient confidentiality and attorney–client privilege; and (3) Aetna provided little, if any, excuse for its delay and did not submit an affidavit, and thus the district court’s finding that Aetna sought to freeload while others expended time and money in pursuing litigation and discovery was well supported. *Id.* at 1220. *Empire Blue Cross* appears to be an outlier and can be distinguished because Aetna, unlike Public Citizen or a newspaper, was not looking to represent the interests of the public. Further, filing an affidavit explaining the delay is a relatively easy task and in our experience generally sufficient.

Common Claim or Defense

Once the timeliness inquiry is addressed, a court must consider whether an intervenor has a claim or defense in common with a question of law or fact in the main action. Fed. R. Civ. P. 26(b)(i)(B). Initially, someone would think that this factor would be difficult to meet. After all, which overlapping factual or legal issue could an intervenor, whose sole aim is to modify a protective order, possibly have in common with a private litigant pursuing a legal claim on the merits? Given that the private litigant agreed to the protective order, aren’t the private litigant’s and the intervenor’s interests inherently antagonistic?

But yet again courts take a very deferential view of this factor, and the “consensus” of federal law is that intervention for the purpose of challenging a protective order satisfies the common question requirement. As stated in *Pansy*:

As to the district court’s finding that the Newspapers have not shown that their claim has anything in common with a question of law or fact in the case, the district court ruled contrary to a forming consensus in the federal courts. We agree with other courts that have held the 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. 23 F.3d at 778 (citing cases).

The Pleading Requirement

Assuming that the timeliness and common question factors are satisfied, Rule 24(c), titled “Notice and Pleading Required,” provides that a motion for intervention must state the grounds for intervention “and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.”

“Pleading” is specifically defined in Federal Rule 7(a) as a complaint, a third-party complaint, a reply to an answer, or an answer to a complaint, counterclaim, cross-claim, or third-party complaint. One might assume, therefore, that the “pleading” to be attached to an intervenor’s motion would resemble one of the pleadings in Rule 7(a), having, among other things, a series of short, plain statements in paragraph form. And in fact, some courts have held that

they would expect as much. *See, e.g., Craft v. Heckler*, No. 84-93, 1986 U.S. Dist. Lexis 22223, at *8–9 (D. Mont. July 28, 1986).

In our experience, however, courts often take a more lax view about how to define a “pleading,” especially in the context of a motion to intervene solely to modify a protective order and for which a formal “pleading” may not be as appropriate. For example, Rule 24(c) may be satisfied by a brief that supports vacating a protective order, or unsealing filed documents, which discloses the same factual information that we would expect to be in a “pleading.” Not only have we been on the wrong end of a court order taking a (very) liberal view about what constitutes a “pleading,” but many courts have indicated that Rule 24(c) is not to be strictly construed when not strictly construing it will not result in prejudice. *See, e.g., Spring Constr. Co. v. Harris*, 614 F.2d 374, 376–77 (4th Cir. 1980) (“[A]lthough some cases have held that intervention should be denied when the moving party fails to comply strictly with the requirements of Rule 24(c), the proper approach is to disregard non-prejudicial technical defects.”); *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 313–15 (6th Cir. 2005) (noting weight of authority taking a “permissive” view of Rule 24(c) and holding that a district court abused its discretion in rejecting a motion to intervene based on its failure to attach a pleading when “neither party has ever claimed that any prejudice would result from granting the motion to intervene” and “the parties are clearly on notice as to [intervenor’s] position and arguments”); *Hill v. Kansas Gas Serv. Co.*, 203 F.R.D. 631, 634 (D. Kan. 2001) (holding that Rule 24(c) requires a pleading or “other equivalent information”).

The Battle Begins

As noted above, permissive intervention to challenge a protective order and seek documents tends to be granted liberally, and it is practically a foregone conclusion when a public interest group proposes to intervene. Further, a district court’s decision is reviewed for an abuse of discretion. *See, e.g., Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011); *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470 (9th Cir. 1992). Once interven-

tion is granted, the intervenor’s quest for access to the desired documents begins on the merits.

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Court Records

Given the nature of agreed protective orders, it is typical for many documents to be filed under seal throughout the pendency of a case. Courts, however, are a public forum, and thus the public has a right of access to judicial records and documents under common law and the First Amendment. *Nixon v. Warner Commcns.*, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents.”). This right rests on, among other things, “the citizen’s desire to keep a watchful eye on the workings of public agencies” and “a newspaper publisher’s intention to publish information concerning the operation of government.” *Id.* at 598. Nonetheless, this right is not unfettered and may be outweighed in certain circumstances:

“court files might have become a vehicle for improper purposes,” such as the use of records to gratify spite, promote public scandal, circulate libelous statements or release trade secrets. 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.

Kamakana v. City and Cty. of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006) (citations omitted).

Given the significant public interest in monitoring its own government, there is a strong presumption in favor of access that can only be overridden if the party seeking to maintain a judicial record under seal meets the “compelling reasons” standard. *Id.* at 1177. The “compelling reasons” standard derives from the principle that resolution of disputes on the merits, whether by trial or summary judgment, is at the very heart of the public’s understanding of the judicial process and as such, it is open to the public. *Id.* at 1179. The standard requires the party seeking to seal documents to delineate compelling reasons supported by specific factual evidence for each document that it wants sealed. The party must demonstrate the specific harm that will result if a document is disclosed and that the privacy concern outweighs public access and policies favoring disclosure such as the “public interest in understanding the judicial process.” *Kamakana*, 447 F.3d at 1178. This is a stringent standard, which rejects hypothesis, conjecture, or conclusory assertions of harm. *Ctr. for Auto Safety v. Chrysler Grp. LLC*, 809 F.3d 1092, 1096–97 (9th Cir. 2016). The court then must conscientiously balance the competing interests of the public and party that wants to keep judicial records sealed. *Id.* at 1097.

When the documents at issue arguably relate to an ongoing risk to public health or safety, the public’s interest in access to judicial records is particularly strong. *See Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983) (“The public has a strong interest in obtaining the information contained in the court record” when the “litigation potentially involves the health of citizens.”); *In re Air Crash at Lexington Ky.*, No. 5:06-CV-316, 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.”); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 38 (C.D. Cal. 1984) (“[T]he interest in access to court proceed-

ings in general may be asserted more forcefully when the litigation involves matters of public concern.”).

Given the higher standard for maintaining the confidentiality of “judicial records,” courts have recognized that not all documents filed with a court demand this greater scrutiny. Because the compelling reasons standard is predicated on open and public access to the courts and adjudications on the merits, many courts have limited the compelling reasons inquiry to those court-filed (and sealed) documents used to resolve cases on the merits, i.e., dispositive motions. *Ctr. for Auto Safety*, 809 F.3d at 1099 (records attached to motions that are “not related” or only tangentially related to the merits of a case are not subject to the strong presumption of access). Indeed, a few courts have gone so far as to hold that documents filed in support of undecided dispositive motions are not subject to the heightened scrutiny because they do not constitute part of the adjudicatory process. These courts have drawn a distinction between “adjudicative records”—documents actually considered by a court for adjudication—and nonadjudicative records—documents that are filed with the court but are not ultimately relied on by the court to adjudicate a dispute—and they have only required the compelling reasons standard for adjudicative records. A record may be nonadjudicative *even though it was filed with a court.* *Aviva USA Corp. v. Vazirani*, 902 F. Supp. 2d 1246, 1274 (D. Ariz. 2012), *aff’d*, 632 F. App’x 885 (9th Cir. 2015) (holding that records submitted with a motion for summary judgment should remain sealed, even though there was “some doubt” pertaining to whether they amounted to trade secrets, because the court did not rely on them in resolving the dispositive motion); *Garber v. Pharmacia Corp.*, No. 03-1519, 2009 U.S. Dist. Lexis 97536, at *7 (D.N.J. Oct. 20, 2009) (“Since the Court did not base its decision to grant the motion for summary judgment on anything in those documents, the documents are not properly considered part of the ‘judicial record’... [and] are not subject to the public access doctrine.”); *Bennett v. Smith Bundy Berman Britton*, PS, 291 P.3d 886, 887–88 (Wash. 2013) (en banc); *Pursuit Partners, LLC v. UBS AG*, No. 05-CV-84013452, 2011 Conn. Super. Lexis

1809, at *8–9 (Conn. Super. Ct. July 13, 2011) (holding that a document filed with a motion to compel was not an adjudicative record because “[t]he Court does not need to rely on the actual UBS email itself to determine the litigants’ substantive rights in this pre-trial discovery skirmish”); see also *Kinder v. Meredith Corp.*, No. 14-cv-11284, 2015 U.S. Dist. Lexis 190201, at *5 (E.D. Mich. Sept. 8, 2015) (identifying documents “relevant to an adjudicatory process” as including “argument on the record in open court, publishing of a written opinion, etc.”).

This distinction has by no means been universally accepted. However, if an intervenor requests disclosure of most records filed with a court under seal, a case party should strongly consider raising the adjudicative versus nonadjudicative distinction to limit the number of documents for which it will have to provide a “compelling reason” for continued secrecy.

Documents Exchanged During Discovery

Unlike court records, there is no presumption of public access to documents produced in discovery. The reason is fairly obvious: whereas the public arguably has an interest in documents filed with a court as a means of monitoring the court’s activity, no such interest exists for documents merely exchanged between the parties as part of litigation. See, e.g., *Bond v. Utreras*, 585 F.3d 1061, 1073–74 (7th Cir. 2009) (“[W]hile the public has a presumptive right to access discovery materials that are filed with the court, used in a judicial proceeding or otherwise ‘constitute judicial records,’ the same is not true of materials produced during discovery, but not filed with the court. Generally speaking, the public has no constitutional, statutory or common law right of access to *unfiled* discovery.”); *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (“[W]hile appellants may enjoy the right of access to pleadings, docket entries, orders, affidavits or depositions *duly filed*, appellants’ common-law right of access does not extend to information collected through discovery which is not a matter of public record.”); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 6 (1st Cir. 1986) (“*Seattle Times* has foreclosed any claim of an absolute public right of access to discovery materi-

als.”); *Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343 (3d Cir. 1986) (“[P]retrial 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.”).

As held by the Supreme Court, the public’s right of access is limited to historically public sources of information, and documents produced in discovery that are not admitted into evidence are not a traditional source of public information. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). Although the presumption to the right of access does not apply to documents freely produced in discovery, they remain open to sharing or disclosure by the receiving party unless a protective order is in place. *San Jose Mercury News Inc. v. U.S. District Court – Northern District (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999).

The standard for maintaining the confidentiality granted by a protective order is “good cause” as enunciated in Federal Rule of Civil Procedure 26(c). While a blanket protective order allows the party to designate documents as confidential freely as an initial matter, upon challenge, the party must meet the good cause showing required by Rule 26(c). *Cipollone*, 785 F.2d at 1122 (“[T]he burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order, any other conclusion would turn Rule 26(c) on its head.”).

Although the burden of establishing “good cause” is lower than for compelling reasons, some courts have held that good cause needs to be demonstrated for each document, with a showing of *specific prejudice or harm* if the document is disclosed. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981). To be sure, this is not a universal view; other courts have analyzed whether good cause exists by category of documents, rather than examining each individual one, especially in cases that have a substantial volume of produced documents. See, e.g., *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1137 (9th Cir. 2003); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 894 (E.D. Pa. 1981); *Cook Inc. v. Boston Sci. Corp.*, 206 F.R.D. 244, 247 (S.D. Ind. 2001). But it is a

very real risk if you have a court that wants to err on the side of disclosure.

Are Your Trade Secrets Secure?

Most often, the true turf war revolves around trade secrets and other proprietary information. Although the Supreme Court has recognized that the common law right of access is subordinate to a court’s duty

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to “ensure that its records” are not used as “sources of business information that might harm a litigant’s competitive standing,” *Nixon*, 435 U.S. at 597, case law on trade secrets is a mixed bag—often offering little comfort.

In re Elec. Arts, Inc., 298 F. App’x 568, 570 (9th Cir. 2008), holds that potential disclosure of a trade secret itself constitutes a “compelling reason” to seal evidence in support of a dispositive motion. Similarly, *Aviva* supports protecting sensitive business information when disclosure would harm the producing party’s competitive standing. 902 F. Supp. 2d at 1274. More spe-

cifically, in *Phillips v. Ford Motor Co.*, 2016 U.S. Dist. Lexis 176826, at *3 (N.D. Cal. Dec. 20, 2016), the court recognized that (1) the details of product testing are valuable because a manufacturer could suffer competitive harm if they were publicly disclosed; and (2) the need to avoid competitive disadvantage in contract negotiations and undercutting by competitors is a com-

Statements that competitors would gain an unfair advantage if certain documents were disclosed without detailed explanations of how the competitors could effectively use the information to their advantage are often found insufficient.

elling reason that justifies sealing specific pricing and cost information. *See also U.S. v. Celgene Corp.*, No. 10-3165, 2016 U.S. Dist. Lexis 156828, at *16 (C.D. Cal. Aug. 23, 2016) (finding that the defendant has found “good cause” for keeping the information confidential when “disclosure of Defendant’s analyses of prescription data, business and marketing plans and business relationships with Envision would, at this juncture, enable Defendant’s competitors to profit from Defendant’s private and commercial information and possibly put Defendant at a competitive disadvantage”).

While the general principles for maintaining the confidentiality of trade secrets can be clearly stated—and in fact are fairly favorable to those seeking to keep documents confidential—applying these legal precepts to maintain confidentiality is rife with obstacles.

There is ample case law rejecting trade secret claims on the grounds that the pro-

ponent’s explanations were too generalized and conclusory, failed to provide specific details of harm or prejudice for each document, or did not demonstrate how a competitor could use the information to its advantage, or the information was stale and efforts for maintaining confidentiality alone are insufficient to preserve secrecy. In *AmerGen Energy Co., LLC v. United States*, 115 Fed. Cl. 132, 147 (2014), the court declined to seal records designated confidential under a blanket protective order when “rather than articulat[ing] the specific prejudice or harm that will flow from disclosure of specific confidential or proprietary information, plaintiff has instead grouped hundreds of pages of exhibits and testimony into general categories and offered broad, vague and conclusory generalizations with respect to these materials.” In *King Pharm., Inc. v. Eon Labs, Inc.*, No. 04-CV-5540, 2010 U.S. Dist. Lexis 102703 (E.D.N.Y. Sept. 28, 2010), the court similarly denied a request to seal records, finding that the company’s assertion that “internal strategies regarding how it develops and markets its products could potentially be copied... are precisely the kind of broad allegation of harm unsubstantiated by specific examples or articulated reasoning that fails to satisfy” the “good cause” standard. *See also Deford v. Schmid Products Co.*, 120 F.R.D. 648, 653 (D. Md. 1987) (rejecting argument that sharing information with other litigants was improper and declining to protect documents when the supporting affidavit made only general assertions that the company’s research was confidential, but failed to address any of the specific documents at issue).

Statements that competitors would gain an unfair advantage if certain documents were disclosed without detailed explanations of how the competitors could effectively use the information to their advantage are often found insufficient. *Hodges v. Apple, Inc.*, No. 13-cv-1128, 2013 U.S. Dist. Lexis 164674, at *2 (N.D. Cal. Nov. 18, 2013) (concluding that Apple’s unsupported assertion that competitors would gain an “unfair advantage” if they obtained its “proprietary business, engineering and design information” did not meet the compelling reasons standard because it failed to explain “how a competitor would use the information to obtain an unfair advantage”); *Ohio Valley*

Env’tl Coalition v. Elk Run Coat Co. Inc., 291 F.R.D. 114, 121 (S.D.W. Va. 2013) (“[A] factually unsupported contention that research could potentially be used by a competitor and the competitor would benefit by not having to incur the expense of conducting the research is insufficient to establish actual and severe financial and competitive harm.”); *Whitecrypton Corp. v. Arxan Tecs., Inc.*, No. 15-cv-754, 2016 U.S. Dist. Lexis 31108, at *4 (N.D. Cal. Mar. 9, 2016) (refusing to seal court records based on mere assertion that documents “could lead to competitors gaining an unfair advantage by employing [the information] to interfere with existing and prospective business relationships”). *Waterkeeper All., Inc. v. Alan & Kristin Hudson Farm*, 278 F.R.D. 136, 143 (D. Md. 2011), is an especially disturbing case. There the court found the following claims, made by Perdue, insufficient grounds to seal court records:

[Perdue’s chick assessment form] reveals information on how it conducts its business unknown to competitors and represent[ing] the culmination of many years of experimentation... and if made public, a competitor could simply adopt the form without having to spend the time and effort necessary to devise and perfect its own form or other data-tracking system.

The court reasoned that the defendant did not demonstrate “exactly ‘what identifiable, significant harm’” the defendant would suffer by disclosure. *Id.*

In *Dunbar v. Google Inc.*, No. 5:12-cv-3305, 2012 U.S. Dist. Lexis 177058 (N.D. Cal. Dec. 12, 2012), Google claimed that there was good cause to seal portions of a plaintiff’s motion for leave to amend, which “[d]escribed how Google scans for, uses, and scores data in connection with its Gmail system, including for the delivery of personalized advertising,” and argued that such “methods” were “proprietary procedures that Google designed and implemented at substantial cost for its own business purposes.” Google maintained that disclosing them “would allow... competitors to examine the mechanisms that Google designed for its own proprietary use, thereby providing... competitors with an unfair advantage in designing their own systems.” *Id.* at *70. The court rejected Google’s motion, finding that Google had

failed to explain how disclosure...will provide Google's competitors with insight into Google's "mechanisms for scanning emails such that those competitors will have unfair advantage in designing their own systems" or "hackers and spammers the ability to use this information to circumvent Google's virus and spam prevention procedures." *Id.* at *71.

Courts have also taken a hard line on protecting older information. While staleness of the information for which protection is sought is not an absolute bar to sealing, "it is a factor which must be overcome by a specific showing of present harm." *Amer. Gen Energy*, 115 Fed. Cl. at 141 (holding that the "age of the information" in dispute, "nearly all of which came into existence before the year 2000, weighs in favor of requiring disclosure."); *Koch v. Greenberg*, No. 07-Civ-9600, 2012 U.S. Dist. Lexis 58608, at *13 (S.D.N.Y. Apr. 13, 2012) ("[G]enerally a court will not protect several year old information without a specific explanation of the harm that would be caused by disclosure."); *DeFord v. Schmid Prods Co.*, 120 F.R.D. 648, 653 (D. Md. 1987) ("[E]ven assuming that the information Schmid seeks to protect generally falls within the category of confidential information, only a speculative showing of potential harm has been made. The bulk of the documents sought are over ten years old.>").

Depending on the facts of your case and the documents that you hope to keep confidential, an intervenor's motion for the limited purpose of accessing your confidential material may well be an uphill battle.

Measures to Help Keep Confidential Documents Protected

Given the numerous landmines that could obliterate your ability to keep sensitive commercial documents away from public view, what steps can you take to avoid such a result?

First consider the likelihood, or at least possibility, that the documents to be sought in discovery will arouse public attention. Do they relate to public safety or do they concern a public company or some potentially newsworthy topic? If so, the risk of a motion for limited intervention is clearly heightened. In such circumstances, it may be beneficial to move for a protective order and seek a court deter-

mination of "good cause" for your client's confidential documents. This approach will be more costly, at least in the early stages of the case, but it will provide the safeguard of a "good cause" finding as well as an opportunity to educate your judge on the importance of document protection as well as the appropriate scope of discovery. Moreover, once you have litigated and have a protective order, your reliance on that protective order becomes a factor in your favor against an intervenor's attempt to obtain your confidential documents. *See, e.g., United States v. Morales*, 807 F.3d 717, 723 (5th Cir. 2015) ("Reliance here weighs against modification. Private Counsel relied on the protective order when providing the government with these two documents[.]"); *Perry v. Brown*, 667 F.3d 1078, 1086-87 (9th Cir. 2012) (denying motion to unseal based on reliance on a litigated protective order). In *Skydive Ariz., Inc. v. Quattrocchi*, No. 05-2656, 2009 U.S. Dist. Lexis 128418, at *27-29 (D. Ariz. Feb. 2, 2009), the court denied the intervenor's motion to unseal a settlement agreement because the "protective order was specifically relied on in the Defendants' decision to produce the Settlement Agreement; that is a compelling enough reason to support secrecy in light of the fact that there is no collateral litigation or compelling public interest." A blanket protective order is far less likely to offer you the protection of a litigated protective order, decided by the court. *Mendez v. City of Gardena*, 222 F. Supp. 3d 782, 790 (C.D. Cal. 2015) ("[R]eliance on a blanket protective order is less [than a litigated protective order] because it is inherently overinclusive."); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (same).

If you decide, for whatever reason, not to litigate the protective order up front, you should expend the time to scrutinize carefully the documents that you designate as confidential. Designating too many documents or mistakenly designating documents "confidential" can be a costly mistake. Once an intervenor is able to itemize a sampling of confidentially designated documents that on their face are not proprietary, are not trade secrets, or have been previously disclosed, you will have lost substantial credibility and will likely be on the losing side of the motion.

Once you are in the fight and have to defend your confidential designations, filing complete and thorough affidavits is essential. It is imperative to articulate with specificity why each document, or at least each homogeneous category of documents, is a trade secret or otherwise proprietary. Further, you must be able to show the court, with some precision (not a conclu-

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sory assertion), how each document can be used by a competitor against your client as well as the likelihood that it will happen (countering any assertion of speculation). The more details and examples you can provide to demonstrate actual prejudice, the greater your chance of preserving confidentiality.

Finally, another weapon in the arsenal to protect your client's confidential documents is to remove your opposing party from assisting a potential intervenor. That party has seen the documents and can be a forceful advocate against the confidentiality of your documents. Thus, when settling your case, consider including in the settlement agreement a provision that prohibits that party from directly or indirectly participating or assisting another in any post-settlement proceeding.

Good luck!

