

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NISSAN MOTOR CO., *et al.*, )  
)  
Plaintiffs-Appellees/Cross-Appellants, )  
)  
v. )  
)  
NISSAN COMPUTER CORPORATION, ) Nos. 02-57148, 03-55017,  
) 03-55044 and 55236  
Defendant-Appellant/Cross-Appellee, )  
)  
and )  
)  
THE INTERNET CENTER, )  
)  
Defendant. )

**MOTION OF PUBLIC CITIZEN  
FOR LEAVE TO INTERVENE FOR LIMITED PURPOSE  
OF UNSEALING APPELLANT’S BRIEF AND EXCERPTS OF RECORD**

Public Citizen seeks leave to intervene in this appeal for the limited purpose of unsealing appellant’s brief and the Excerpts of Record that have been filed in these appeals, for the following reasons:

1. Public Citizen is a Washington, DC-based public interest organization which has approximately 125,000 members, including about 35,000 in the Ninth Circuit. Since its founding in 1971, Public Citizen has urged citizens to speak out about corporations, government agencies, and unions, and it has advocated a variety of protections for the rights of consumers, citizens and employees to encourage them to

voice their views. Along with its efforts to encourage public participation, Public Citizen has brought and defended numerous cases involving the First Amendment rights of citizens who participate in public debate. Public Citizen has represented parties, and filed amicus briefs, in numerous cases involving Internet free speech. *E.g.*, *Taubman v. Mishkoff*, 319 F3d 770 (CA6 2003); *Dendrite v. Doe*, 342 NJSuper 134, 775 A2d 756 (NJApp 2001); *Batzel v. Cremers*, 333 F.3d 1018 (CA9 Cir); *TMI, Inc. v. Maxwell*, Nos. 03-20243 and 03-20291 (CA5); *Equidyne v. Doe*, No. 03-1671 (CA3); *Crown Pontiac v. Ballock*, No. CV-02.C-1001-S (NDAla); *Falwell v. Cohn*, 2003 WL 751130 (WDVa 2003); *Hollis-Eden Pharmaceuticals v. Doe*, GIC 759462 (CalSuper San Diego). Public Citizen has also been among the leaders in developing the law governing public access to court records and discovery materials, both by intervening in litigation, *e.g.*, *Public Citizen v. Liggett Group*, 858 F2d 775 (CA1 1988); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F2d 1165 (CA6 1983); *In re American Historical Ass'n*, 62 FSupp2d 1100 (SDNY 1999); *In re Agent Orange Prod. Liab. Litig.*, 104 FRD 559 (EDNY), *aff'd*, 821 F2d 139 (CA2 1987), and by urging changes in the Federal Rules and statutes governing such matters.

2. Because it is concerned about the implications of this case for free speech on the Internet, Public Citizen sought leave to file a memorandum as amicus curiae in partial support of appellant Nissan Computer Company for a stay pending appeal.

That motion was denied simultaneously with denial of the stay, but without prejudice to seeking leave to file as amicus curiae on the merits. Public Citizen is in the final stages of preparing its brief as amicus curiae in support of one aspect of NissanComputer's appeal of the final judgment and injunction that were entered against it for diluting the Nissan trademark. Because NissanComputer's brief was served on August 5, 2003, Public Citizen's motion and proposed brief must be served no later than August 12, 2003.

On August 5, 2003, Public Citizen's counsel Mr. Levy asked Neil Greenstein, Esquire, counsel for NissanComputer, to send his opening brief and the Excerpts of Record by overnight delivery so that Mr. Levy could review them in preparation of his own brief. This request was consistent with the reason why Rule 29 of the Federal Rules of Appellate Procedure was amended recently to allow amici a few extra days after the filing of the brief of the party that they support, both to avoid duplication of argument and to permit amici to serve more truly their function as friends of the Court. In addition, Public Citizen intended to review the key parts of the record, that were expected to be in the Excerpts, to better tailor its legal arguments to the facts of the case. Although Public Citizen's counsel had been able to examine some parts of the record in the course of preparing his proposed amicus brief in support of the motion for a stay, counsel wanted to be able to conduct a more thorough review for

his brief on the merits. Mr. Greenstein responded that he would be willing to provide the requested documents were it not for the fact that he had filed both of them under seal.

Apparently, the reason for filing under seal was that, in the district court, the parties operated under a “blanket” protective order – an entirely consensual protective order under which parties were entitled to stamp discovery documents confidential at will, and there was no adversary testing of the need for confidentiality. Thereafter, when discovery materials were attached or referenced in papers filed in court, those documents were filed under seal, again without any adversary testing or judicial evaluation of the need for confidentiality. Consequently, a large portion of the documents filed below in support of or in opposition to the cross-motions for summary judgment were filed under seal. And a significant number of documents included in the Excerpt of Record, and discussed in NissanComputer’s brief, had been filed under seal below and hence Mr. Greenstein, pursuant to Circuit Rule 27-13, filed both documents under seal.

3. Public Citizen has a particularized interest in this case because of both its continuing involvement in the development of the law concerning the trademark significance of Internet domain names, and because of its specific involvement in this case. Although examination of the sealed matter will come too late for the amicus

brief that is now under preparation, Public Citizen also anticipates seeking leave to file an amicus brief in opposition to NissanMotor's appeal from the rulings on its claims for trademark infringement and cybersquatting.<sup>1</sup> Moreover, the general public has a continuing interest in viewing the record on which this Court makes decisions in cases involving Internet free speech. This is a proper basis for allowing limited intervention. *Hagestad v. Tragesser*, 49 F.3d 1430, 1432 (9th Cir.1995)

4. Both the common law and the First Amendment create a strong presumption of access to NissanComputer's brief and to the Excerpt of Record. This Court's most recent opinion applying the common law right of access is *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F3d 1122, 1130 (CA9 2003); the First Amendment was recognized as an alternative source of authority for criminal proceedings in *Richmond Newspapers v. Virginia*, 448 US 555, 580 (1980), and the courts have extended that decision to written papers as well as oral proceedings, *Associated Press v. District Court*, 705 F2d 1143, 1145 (CA9 1983), and to civil as well as criminal proceedings. *Westmoreland v. CBS*, 752 F2d 16, 23 (CA2 1984); *Publicker Indus. v. Cohen*, 733

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<sup>1</sup>If counsel's examination of the brief and excerpts of record reveal material that so warrants, Public Citizen may seek leave to file a supplemental amicus brief, but this motion should be granted regardless of whether counsel later decides that such a motion is appropriate and regardless of whether the Court later concludes that such a motion should be granted.

F2d 1059, 1070 (CA3 1984).<sup>2</sup>

"In this circuit, we start with a strong presumption in favor of access to court records". *Foltz*, 331 F3d at 1135. That strong presumption applies here because many of the documents in the Excerpts of Record were filed below in connection with dispositive motions, and the entire Excerpts of Record has been filed here as the portion of the appellate record on which this Court will be asked to dispose of this appeal, which is surely "dispositive" for purposes of the *Foltz* standard. *Id.* at 1136. So, too, does NissanComputer's brief inherently relate to a dispositive proceeding.

5. In order to overcome the presumption favoring disclosure, NissanMotor must, "for each particular document it seeks to protect, . . . show[] that specific prejudice or harm will result if no protective order is granted." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F3d 1122, 1130 (CA9 2003) (reversing district court's denial of sealed court records to plaintiffs engaged in collateral litigation); *see also Public Citizen v. Liggett Group*, 858 F2d 775, 776-78 (CA1 1988). But no showing of the need for confidentiality has ever been made with respect to the need to keep any of this material under seal. Nor has there ever been a judicial determination of the need for confidentiality with respect to even a single one of the documents at issue, even

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<sup>2</sup> In *San Jose Mercury News, Inc. v. United States Dist. Court* 187 F.3d1096, 1100 (CA9 1999), this Court left open the question whether *Richmond Newspapers* applies to civil proceedings.

in the district court. The parties simply designated as confidential whatever they wanted, and Judge Pregerson never approved or disapproved the withholding of any individual document; he just accepted the parties' desire to proceed under seal.

6. Because Public Citizen had to prepare its brief as amicus curiae without being able to review the Excerpt of Record or even the brief of appellant NissanComputer, and will have to file its brief before a ruling on this motion can be made and the unsealed materials (if any) provided, Public Citizen should be allowed the opportunity to file a supplemental brief in light of the unsealed materials. But regardless of whether that relief is granted with respect to scheduling and briefing, the Court should unseal the Brief of Appellant and the Excerpt of Record filed in this case.

6. Counsel for NissanComputer, Neil D. Greenstein, Esquire, has indicated that his client consents to this motion. Immediately after learning of the sealing, counsel for Public Citizen asked counsel for NissanMotor, Wayne Barsky, Esquire, to consent to this motion, but Mr. Barsky has been unable to secure a response from his client in time to reply to the request before this motion is being filed.

### **CONCLUSION**

Public Citizen should be granted leave for limited intervention, and the Brief of Appellant and the Record Excerpts should be unsealed.

Respectfully submitted,

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