CAUSE NO. 155, 133B

PAUL J. CHESTNUT, etc., et al	*	IN THE DISTRICT COURT OF
	*	
Plaintiffs.	*	
	*	
vs.	*	WICHITA COUNTY, TEXAS
	*	
DAIMLER CHRYSLER, CORPORATION	*	
And MICHELIN NORTH AMERICA,	*	
INC., et al.	*	78th JUDICIAL DISTRICT
	*	
Defendants.	*	

PUBLIC CITIZEN, INC. AND THE CENTER FOR AUTO SAFETY, INC.'S PLEA IN INTERVENTION IN RESPONSE TO MICHELIN NORTH AMERICA (CANADA), INC. AND MICHELIN AMERICAS RESEARCH & DEVELOPMENT CORP'S MOTION TO TEMPORARILY SEAL RECORDS AND MOTION TO TAKE OTHER APPROPRIATE MEASURES

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, Intervenors, PUBLIC CITIZEN, INC. AND CENTER FOR AUTO SAFETY, INC., and file this their Plea In Intervention In Response To Michelin North America (Canada), Inc. And Michelin Americas Research & Development Corp's Motion To Temporarily Seal Records And Motion To Take Other Appropriate Measures, and in support thereof, would show unto the Court as follows:

PUBLIC CITIZEN, INC. is a nonprofit consumer advocacy organization founded in 1971, with 125,000 members nationwide, including over 3,000 in Texas. Public Citizen also has an office located in Austin, Texas. Throughout its more than thirty-year history, Public Citizen has taken an active role in promoting consumer health and safety and ensuring that the public is well informed about the health and safety risks of

consumer products. For example, Public Citizen played a leading role in informing the public about the defects in Firestone tires and in participating in congressional hearings to formulate an appropriate legislative response.

In addition, Public Citizen has been dedicated to principles of openness and democratic accountability since its founding, frequently advocating in favor of keeping the judicial process open to the public and opposing overbroad protective orders or orders to seal court records that restrict public access to information concerning consumer health and safety. See, e.g., Public Citizen v. Liggett, 858 F.2d 775 (1st Cir. 1988); In re Agent Orange Product Liability Litigation, 104 F.R.D. 559, 574 (E.D.N.Y. 1985), aff'd, 821 F.2d 139 (2d Cir. 1987).

THE CENTER FOR AUTO SAFETY, INC., founded in 1969 with the assistance of Consumers Union, is a nonprofit public interest research and educational organization with 15,000 members nationwide, including in Texas. The Center conducts research and analysis regarding the need for automotive safety, fuel economy and emissions improvements and safety defect recalls and files petitions with the U.S. Department of Transportation; analyzes consumer complaints and other information about automotive safety defects; and assists consumers and other members of the public seeking information about automotive safety and related issues. The Center for Auto Safety also participates in litigation to protect consumers in lawsuits concerning automotive safety, serves as a general resource for the media on automotive issues, and prepares books, articles, pamphlets and other information for the public on automotive matters.

1.00 **STATEMENT OF FACTS**

1.01 The Michelin Defendants have filed a Motion seeking effectively to close the Courtroom to the public during certain unspecified portions of the trial in the above referenced matter, which involves significant issues about safety hazards involving consumer products. The practical effect of the Michelin motion is to exclude the public from an otherwise public process involving products that could potentially affect the lives of numerous other citizens, in Texas and elsewhere.

1.02 Citing Tex. R. Civ. P. 76a, the Michelin motion specifically asks the Court to:

A. Close the Courtroom to the public during certain portions of the trial or, alternatively, to have persons in the Courtroom sign a "Courtroom Spectator Confidentiality Order";

B. Prohibit jurors from taking notes during the trial;

C. Give the jury a "cautionary instruction" as to alleged trade secrets;

D. Seal exhibits offered and accepted into evidence during the trial; and

E. Seal any portion of the trial transcript "regarding" documents the Defendants allege to be protected.

1.03 Michelin seeks the foregoing protection for exhibits and testimony that they "might" offer during their presentation of evidence at trial.

1.04 Michelin seeks to circumvent the public notice and open hearing requirements of Rule 76a by categorizing the Order they seek as a temporary order.

1.05 Although Michelin generically refer to the "irreparable damage" that would be sustained if the allegedly confidential information were disclosed publicly, the defendants do not factually identify any specific damage that they would sustain or how the dissemination of information would result in damage.

2.00 OPEN ACCESS TO COURT PROCEEDINGS

"It is clear that the courts of this country recognize a general right to inspect and copy public records and documents including judicial records and documents." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). This right of access to Court records, like the openness of court proceedings, serves to enhance the basic fairness of the proceedings and safeguards the integrity of the factfinding process. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984); Globe Newspapers Co. v. Superior Court, 457 U.S. 596, 606 (1982). In addition, the First Amendment, independent of the common law, protects the right of access to civil trials. "[T]he civil trial, like the criminal trial, 'plays a particularly significant role in the functioning of the judicial process and the government as a whole.'" Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984) (quoting Globe Newspapers, 457 U.S. at 604-05).

The common law right of the public to have open access to judicial proceedings and Court records has existed since at least 1894. See United States v. Mitchell, 386 F. Supp. 639, 641 (D.D.C. 1974). In an opinion published in 1894, it was recognized that "any attempt to maintain secrecy as to the records of this Court would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have a right of access." Ex Parte Drawbaugh, 2 App. D.C. 404, 407-08 (1894). The public's exercise of its common law access right in civil cases promotes

public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court. See 6 J. Wigmore, Evidence § 1834 (J. Chadbourne rev. 1976). As with other branches of government, the attention cast upon the judicial process by public observation diminishes possibilities for injustice, perjury, and fraud. See Littlejohn v. Bic Corp., 851 F.2d 673 (3rd Cir. 1988).

The common law and the first amendment have long placed a limit on a trial court's discretion to seal court documents in civil cases. See, e.g., Publicker Indus., 733 F.2d at 1066; Brown & Williamson Tobacco Corp. V. FTC, 710 F.2d 1165, 1177-79 (6th Cir. 1983); and International Union v. Garner, 102 F.R.D. 108, 111 (M.D. Tenn. 1984). In the context of trials, the burden of proving "good cause" is much greater. To justify sealing a record at trial, the harm of disclosure must be substantial and serious, the sealing order must be narrowly drawn and precise, and there must be no alternative means of protecting the interest in confidentiality which intrudes less directly on the interests of public access. See, e.g., United States v. General Motors Corp., 99 F.R.D. 610, 612 (D.D.C. 1983).

The rationale behind access is to allow the public an opportunity to assess the correctness of court decisions and to ensure those public trials relating to issues of public safety are not shielded from public scrutiny. See, e.g., Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985) (refusing to seal the record in an automotive design case where there was no showing of a "compelling governmental interest" or that the effort was "narrowly tailored to that interest"). Texas law also recognizes that the public has a right to be present in the courtroom for all proceedings in the trial of a case. Dallas Morning News v. Fifth Ct. of Appeals, 842 S.W.2d 655 (Tex. 1992).

3.0 **MICHELIN HAS FAILED TO FOLLOW THE PROCEDURE DELINEATED IN TEXAS RULE OF CIVIL PROCEDURE 76a.**

Texas Rule of Civil Procedure 76a sets forth the procedure that must be followed when, as here, a party seeks to seal court records. The rule requires the issuance of a public notice regarding the nature of the cases and the records sought to be sealed, and requires that a public hearing be held on the motion not less than fourteen days after the motion is filed and the notice posted. Tex. R. Civ. P. 76a(3) & (4). Michelin has not made even the slightest pretense of observing the mandatory procedure. Under the guise of requesting an order that would only "temporarily" seal court records, Michelin has filed its motion to seal court records and to restrict access to the trial only days before trial is to begin. Not only does Rule 76a not countenance the truncated procedure Michelin has followed, which denies the public the required information and adequate time to address adequately its interest in access to court records and the trial itself, but the rule already addresses the procedure for obtaining a "temporary" order along the lines requested here. Rule 76a(5) specifically provides that a temporary sealing order may issue only after public notice has been provided as required by Rule 76a(3) and only after the hearing dictated by Rule 76a(5) has transpired. Cf. Compaq Computer Corp. v. Lapray, 75 S.W.3d 669, 671 (Tex. Ct. App. 2002) (noting the correct procedure for obtaining a temporary sealing order). Rule 76a does not provide for any exceptions to this process.

4.00 <u>MICHELIN HAS FAILED TO DEMONSTRATE A COMPELLING NEED FOR SECRECY.</u>

Apart from the deeply flawed process Michelin has pursued, it has also failed to make the showing required by Rule 76a to justify the extraordinary order it requests. Again, the rule is clear. Trial exhibits are court records and, as such, "are presumed to be open to the general public." Tex. R. Civ. P. 76a(1). A temporary sealing order may only be issued upon a showing of <u>all</u> of the following:

(a) A specific, serious and substantial interest which clearly outweighs:

   (1) this presumption of openness;

   (2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) No less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

<u>Id.</u> Michelin has failed to make this showing.

Michelin's motion, including attached affidavits, are consistent in their use of the catch phrase "irreparable damage." Neither Michelin's motion nor the attached affidavits, however, specifically identify facts indicating how the dissemination of the information at issue would result in damage, what that damage might be, or whether or not the damage would be immediate and irreversible. Michelin likewise fails to demonstrate that the information sought to be protected could or would be used by a competitor to alter their own product or process, that the use of the information would enable a competitor to create a superior product, and/or that damage sustained by the Defendant, if any, would be immediate.

Indeed, neither the motion nor the affidavits even address the specific trial exhibits that Michelin seeks to seal; instead, they refer generically to evidence produced pursuant to an earlier protective order entered by the Court without any discussion of the particular harm associated with disclosure of the particular documents plaintiffs have chosen to introduce at trial. The affidavits were not even prepared for this motion, but instead, were submitted nine months ago in connection with proceedings concerning the protective order. Michelin's similar conclusory allegations regarding the absence of a less restrictive means than sealing court records and limiting public access to the trial also fail to pass muster both under Rule 76a and Texas precedents. See, e.g., Compaq, 75 S.W.3d at 675.

5.00 **THE PUBLIC INTEREST**

Aside from the fact that the defendants have failed to meet the burden necessary to seal the courtroom or the records in question, there is an overriding public interest in the full and complete dissemination of the documents sought to be hidden from the public.

This case is but one example of the impact that a failed tire on a 15 passenger van can have on the lives of the vans' occupants and their families. To the extent that the procedures and processes addressed in the documents at issue contributed in the design or manufacture of a defective tire and vehicle, the entire family of tires manufactured at that same facility could very well be similarly defective, as could the vehicles designed and manufactured by the automotive company in question. Disclosure of this information could very well save lives and prevent further injury to consumers.

6.00 **CONCLUSION**

The relief sought by the Michelin is inconsistent with the fundamental right that U.S. citizens have to have access to courts and court proceedings and contrary to the specific procedures set forth in Texas Rule of Civil Procedure 76a and substantive showing demanded by that rule.

Michelin has wholly failed to offer solid proof of a compelling need for the court system to close its doors to the public and to participate in a process designed to hide rather than openly share consumer safety information with the public.

The consuming public has an overwhelming need and right to have access to consumer product information that could result in the prevention of death and injury.

Respectfully submitted,

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