

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MAUI JIM, INC., an Illinois Corporation,)
)
Plaintiff,)
)
v.)
)
SMARTBUY GURU ENTERPRISES, a)
Cayman Island Company, MOTION)
GLOBAL LTD., a Hong Kong Company,)
SMARTBUYGLASSES SOCIETÀ A)
RESPONSABILITÀ LIMITATA, an)
Italian Company, SMARTBUYGLASSES)
OPTICAL LIMITED, a Hong Kong)
company,)
)
Defendants.)

No. 1:16 CV 9788

Hon. Marvin E. Aspen

**MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO INTERVENE**

Professor Rebecca Tushnet has moved for leave to intervene pursuant to Federal Rule of Civil Procedure 24(b) for the limited purpose of unsealing portions of the court record in this case—specifically, the redacted portions of the Court’s opinion granting in part and denying in part the parties’s cross-motions for summary judgment, DN 506, and portions of the parties’ cross-motions and oppositions and their supporting papers. DN 430, DN 431, DN 432, DN 433, DN 435, DN 436, DN 437, DN 438, DN 452, DN 500, DN 501. Professor Tushnet’s proposed motion to unseal is filed contemporaneously with this motion. The proposed motion to unseal asserts a public right of access, under both the common law and First Amendment, to certain portions of the redacted opinion on summary judgment and of the materials filed in support and opposition to the parties' cross-motions for summary judgment.

BACKGROUND

Professor Tushnet is the Frank Stanton Professor of First Amendment Law at Harvard Law School, where she specializes in intellectual property, consumer protection, and the First Amendment. She previously taught at the Georgetown University Law Center and the NYU School of Law. Before teaching, she specialized in intellectual property law as a practicing attorney at Debevoise & Plimpton, after clerking for Chief Judge Becker of the United States Court of Appeals for the Third Circuit and Justice Souter on the United States Supreme Court. Professor Tushnet's publications in the area of trademark law include the casebook *ADVERTISING AND MARKETING LAW* (2d ed., 2014, with Eric Goldman); *An Antitrust Framework for False Advertising*, Iowa L. Rev. (forthcoming 2021) (with Michael Carrier); *Shoveling a Path After Star Athletica*, 66 UCLA L. Rev. 1216 (2019); *Registering Disagreement: Registration in Modern American Trademark Law*, 130 Harv. L. Rev. 867 (2017); *Fixing Incontestability: The Next Frontier?*, 23 B.U. J. Sci. & Tech. L. 434 (2017); *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 92 Notre Dame L. Rev. 381 (2017); *What's the Harm of Trademark Infringement?*, 49 Akron L. Rev. 627 (2015), and *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. Penn. L. Rev. 1305 (2011).

Professor Tushnet also publishes the 43(B)log, which is devoted to false advertising issues and other subjects of intellectual property (and sometimes more general) interest, and which averages tens of thousands of readers per month and is one of the top 100 law blogs according to the ABA Journal. This past fall, Professor Tushnet blogged about the Court's summary judgment ruling in this case. See "*sunglasses reseller liable for (c) infringement, maybe TM/false advertising/tortious interference*", <https://tushnet.com/2020/09/10/sunglasses-reseller-liable-for-c-infringement-maybe->

tm-false-advertising-tortious-interference/. At several points in her analysis, she expressed frustration about redactions from the Court's opinion that made it hard both to assess the reasoning for the Court's various rulings, and to ascertain the precedent that the ruling would set for future litigation of similar issues. She elaborates on these concerns in her attached affidavit.

Following the Court's ruling on the cross-motions for summary judgment, the parties settled the case, which was dismissed pursuant to a stipulation on August 25, 2020. Through counsel, Professor Tushnet wrote to counsel for both plaintiff and defendants, asking them to consent to a motion to intervene and a motion to unseal; counsel for plaintiff responded that his client would not consent; counsel for defendants never responded.

ARGUMENT

The Supreme Court and the United States Court of Appeals for the Seventh Circuit have repeatedly upheld the public right of access to judicial records. E.g., *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978); *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002); *Union Oil Co. v. Leavell*, 220 F.3d 562 (7th Cir. 2000); *Grove Fresh Distributors v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir.1994); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984). And “the most appropriate procedural mechanism [for third parties to obtain access to court proceedings and documents] is by permitting those who oppose suppression of the material to intervene for that limited purpose.” *In re Associated Press*, 162 F.3d 503, 506-509 (7th Cir. 1998). “[T]hose who seek access to sealed proceedings or documents have a right to be heard in a manner that gives full protection of the asserted right.” *Jessup*, 227 F.3d at 993 998; *accord Bond v. Utreras*, 585 F.3d 1061, 1068 (7th Cir. 2009); *Grove Fresh*, 24 F.3d at 895-896. See also *Public Citizen v. Liggett Group, Inc.*, 858 F.2d

775, 783 (1st Cir. 1988)).

Rule 24(b)(1) provides, in pertinent part, that "[o]n timely motion, the court may permit anyone to intervene who: ... (B) has a claim or defense that shares with the main action a common question of law or fact." The Seventh Circuit, following other courts of appeals, has held that "[t]here is no reason to require such a strong nexus of fact or law when a party seeks to intervene only for the purpose of modifying a protective order." *Jessup*, 227 F.3d at 997–998 (7th Cir. 2000), citing *Beckman Indus. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir.1992); and *Pansy v. Stroudsburg*, 23 F.3d 772, 778 (3d Cir.1994).

Here, the motion to intervene is timely, inasmuch as it is made within six months after the case was resolved. Indeed, the Eighth Circuit permitted intervention for this purpose a full year after a case was dismissed, *Flynt v. Lombardi*, 782 F.3d 963, 967 (8th Cir. 2015); *see also San Jose Mercury News, Inc. v. U.S. Dist. Ct.--N. Dist. (San Jose)*, 187 F.3d 1096, 1101 (9th Cir. 1999) (noting that "delays measured in years have been tolerated where an intervenor is pressing the public's right of access to judicial records."); *Pansy*, 23 F.3d at 780 (intervention six-and-a-half months after case was settled). And because Professor Tushnet seeks to intervene for the limited purpose of unsealing the summary judgment record, rather than to contest the merits of the litigation, intervention will not prejudice the parties. *See United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (concern about "prejudice in the adjudication of the rights of the existing parties" is "not present when the existing parties have settled their dispute and intervention is for a collateral purpose"); *Pub. Citizen*, 858 F.2d at 786 ("The fact that a suit has gone to judgment does not in any sense militate against the public's right to prosecute a substantiated right to see the records of a particular case.").

Finally, although it is not part of the test for intervention, Professor Tushnet is particularly well positioned to represent the public's right of access. Professor Tushnet has a strong interest in pursuing the redacted information in furtherance of her academic work on the subject, and she intends to continue to write about the case and thereby educate the legal community and the public at large.

CONCLUSION

For the foregoing reasons, the Court should grant Professor Tushnet's motion to intervene under Federal Rule of Civil Procedure 24(b) for the limited purpose of moving to unseal portions of the summary judgment opinion and moving papers in this case.

Respectfully submitted,

/s/ Paul Alan Levy

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Attorneys for Movant Rebecca Tushnet

March 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this date, I am providing service to counsel for plaintiffs and defendants, as follows, by filing this motion and accompanying papers by ECF, which will effect service on all parties.

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March 8, 2021

/s/ Paul Alan Levy