

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Clarksburg Division

THEODORE HOSAFLOOK,

Plaintiff,

v.

Civil Action No. 1:17-cv-00028
(Judge Irene M. Keeley)

OCWEN SERVICING, LLC,

Defendant.

**MEMORANDUM IN SUPPORT OF MOTION OF PUBLIC CITIZEN,
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES,
WEST VIRGINIA CONSUMER PROTECTION ALLIANCE, AND
WEST VIRGINIA ASSOCIATION FOR JUSTICE
FOR LEAVE TO INTERVENE
FOR THE LIMITED PURPOSE OF SEEKING
TO UNSEAL COURT RECORDS**

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, Public Citizen, National Association of Consumer Advocates, West Virginia Association for Justice, and West Virginia Consumer Protection Alliance have moved for leave to intervene for the limited purpose of seeking public access to portions of the summary judgment record that were filed under seal, Plaintiffs' Exhibit M, and the Court's memorandum opinion denying the parties' motions.

Background

In support of his motion for partial summary judgment, Plaintiff submitted a document that he had obtained from Defendant pursuant to a protective order. As required by that order, he submitted the document under a temporary seal, pending the Court's decision about whether the seal should become permanent. Defendant never moved to have the exhibit placed under a permanent seal, although it sought that relief in a document styled as an "opposition" to

temporary sealing. Thus, Defendant never placed the public on notice that it was asking for permanent sealing. At the pretrial conference, the Court told the parties that it had decided against granting summary judgment to either side; it issued a thirty-eight-page opinion explaining the reasons for its ruling. At the same time, the Court acceded to Defendant's request that the exhibit to the summary judgment papers be placed under a permanent seal, and also stated, *sua sponte*, that the summary judgment decision itself would be maintained under seal. By an email on the same date, the Clerk sent the parties a copy of the ruling and stated that it had been filed under seal. Thus, there was never any public notice that permanent sealing of either document was under consideration.

The parties settled the litigation before trial. After judgment was entered based on that settlement, Plaintiff moved to reopen the case to the limited extent of unsealing the summary judgment opinion. The Court denied the motion on the ground that Plaintiff had willingly accepted the settlement, including all of the court's rulings that had preceded the settlement, and had "failed to sustain the heavy burden" of justifying relief under Rule 60(b) of the Federal Rules of Civil Procedure for undoing a preliminary ruling which, the Court suggested, had become part of the final judgment which would, therefore, have to be reopened for the motion to succeed. DN 182, at 13. The Court acknowledged that both the common law and the First Amendment give the public a presumptive right of access to court records, but it did not address those rights because it was only a **party**, not a member of the public, that made the request to unseal. This ruling was published by Westlaw at 2019 WL 3432412 (N.D.W.Va. July 30, 2019).

Interest of Movants

Movants are four non-profit entities that represent the interests of consumers and consumer advocates. They seek to intervene for the limited purpose of moving to unseal the two

court records to aid consumers and their counsel in understanding their rights and in understanding the Court's decision on summary judgment. Public Citizen played an active role in the enforcement of the public right of access in many of the cases cited in the text on pages 4 to 5 of this memorandum.

Public Citizen is a nonprofit research, education and advocacy organization that represents consumers' interests before Congress, the executive branch, and the courts. For the past three decades, it has played an active role in the enforcement of the public right of access to court records in both federal and state courts.

The National Association of Consumer Attorneys ("NACA") is a non-profit corporation whose members are private- and public-sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information-sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Its members, as representatives of homeowners across the nation, have witnessed firsthand the negative impact of unfair and abusive practices in the mortgage market, from unscrupulous origination practices to the assembly-line practices of the mortgage servicing industry, which deprive consumers of a meaningful opportunity to defend their homes from foreclosure.

The West Virginia Association for Justice ("WVAJ") is a private, non-profit organization consisting of attorneys licensed in the State of West Virginia who represent, among other clients, citizens of the State of West Virginia injured and/or harmed by the wrongful conduct of others. The Membership of WVAJ is particularly interested in the protections to be afforded ordinary West Virginians and in securing for them the benefits and protections enshrined in the State

Constitution, the West Virginia Code, and decisions of the courts. The issues raised in the documents sealed by the United States District Court for the Northern District of West Virginia in this case have significant implications for West Virginia citizens and their legal rights under the law given that the Defendant Ocwen Loan Servicing was engaged in willful and systemic misconduct in servicing mortgage loans in the State of West Virginia.

The West Virginia Consumer Protection Alliance (“CPA”) is a non-profit, grassroots advocacy organization committed to preserving citizens and workers access to the civil justice system and protecting West Virginia citizens’ Seventh Amendment right to trial. The Seventh Amendment protects the rights of West Virginia and ensures that its citizens can hold wrongdoers accountable for harm, including, *inter alia*, the willful and systemic misconduct in servicing mortgage loans in the State of West Virginia. The CPA is particularly interested in protections for West Virginia citizens and their rights and interests as consumers and workers and their access to the courts.

Argument

The Fourth Circuit has recognized, under both the common law and the First Amendment, that court records are presumptively open for public inspection, and that intervention is the proper procedural mechanism for seeking unsealing, and it has allowed intervention for the purpose of seeking unsealing. *E.g.*, *Company Doe v. Public Citizen*, 749 F.3d 246, 257 (4th Cir. 2014); *Stone v. University of Maryland Med. System Corp.*, 855 F.2d 178, 180 (4th Cir. 1988). Many other state and federal courts have similarly upheld the right of third parties, including movant Public Citizen, to seek intervention to seek unsealing. *Flynt v. Lombardi*, 782 F.3d 963, 966 (8th Cir. 2015); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 657 (3d Cir. 1991); *Public Citizen v. Liggett Grp.*, 858 F.2d 775, 783 (1st

Cir.1988); *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 144 (2d Cir. 1987); *Rocky Mt. Bank v. Google, Inc.*, 2010 WL 11545710, at *2 (N.D. Cal. Jan. 27, 2010), *rev'd on other grounds*, 428 Fed. App'x. 690, 692 (9th Cir. 2011); *Cardiac Pacemakers, Inc. v. Aspen II Holding Co.*, 2006 WL 3043180, at *2 (D. Minn. Oct. 24, 2006); *Chao v. Estate of Fitzsimmons*, 349 F. Supp. 2d 1082, 1085 (N.D. Ill. 2004), *opinion clarified*, 2004 WL 3094821 (N.D. Ill. Dec. 9, 2004); *Verni ex rel. Burstein v. Lanzaro*, 404 N.J.Super. 16, 960 A.2d 405 (2008); *Hammock by Hammock v. Hoffman-LaRoche*, 142 N.J. 356, 662 A.2d 546 (1995).¹

Permissive intervention under Federal Rule of Civil Procedure 24(b) is the appropriate mechanism for non-parties to an action to seek access to judicial records. *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (citing *Public Citizen v. Liggett Group*, 858 F.2d at 783). *See also In re Grand Jury Subpoena*, 836 F.2d 1468, 1470 (4th Cir. 1988) (permissive intervention would have been proper way for nonparty to civil litigation to seek access to deposition transcripts subject to protective order). 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.”

Here, the motion to intervene is timely, inasmuch as no “adjudication of the rights of the existing parties” will be prejudiced by movants' intervention at this time. *United Nuclear*, 905 F.2d at 1427 (timeliness “to be determined from all the circumstances”) (quoting *NAACP v. New York*, 413 U.S. 345, 365-66 (1973)). When Public Citizen first learned about this case and the sealed records on October 21, it promptly contacted counsel for the parties to ask about the basis

¹ *See also Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896–98 (7th Cir.1994); *Brown v. Advantage Eng'g*, 960 F.2d 1013, 1015–16 (11th Cir. 1992); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990); *Meyer Goldberg, Inc. of Lorain v. Fisher Foods*, 823 F.2d 159, 162 (6th Cir. 1987); *Martindell v. Int'l Tel. & Tel. Corp.*,

for sealing. Levy Affidavit ¶¶ 3, 4. It, in turn, alerted the other intervenors to the issue. This motion is made barely three weeks later.

Intervention for the purpose of seeking unsealing has often been allowed after a case is settled, *Jessup v. Luther*, 227 F.3d 993, 995 (7th Cir. 2000), even months or years after the case ended, e.g., *Flynt*, 782 F.3d at 967 n.2 (one year after the case ended); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 776 (3d Cir. 1994) (six months after case ended). Likewise, “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.” *Public Citizen v. Liggett Group*, 858 F.2d at 786 (allowing intervention for purpose of moving to unseal nearly three months after district court judgment); *Rushford v. New Yorker Magazine*, 846 F.2d 249, 252 (4th Cir. 1988) (five months after district court judgment). For example, in *Stephens v. County of Albemarle*, 422 F. Supp. 2d 640, 643 (W.D. Va. 2006), an individual was allowed to seek the unsealing of a judicial record — in that case, the terms of a sealed settlement agreement — five years after the case ended, and in *Chao v. Estate of Fitzsimmons*, 349 F. Supp. 2d 1082, 1084 (N.D. Ill. 2004), *opinion clarified*, 2004 WL 3094821 (N.D. Ill. Dec. 9, 2004), intervention to seek unsealing of compliance reports was granted twenty years after the case had settled.

Finally, movants are well-positioned to represent the public’s right of access, given their strong interest in educating consumers about consumer lawyers and aiding consumer lawyers in using the courts to enforce those rights, including with respect to debt collection.

CONCLUSION

The motion of Public Citizen, National Association of Consumer Advocates, West Virginia Association for Justice, and West Virginia Consumer Protection Alliance for leave to

594 F.2d 291, 294 (2d Cir. 1979).

intervene for the limited purpose of seeking unsealing should be granted.

Respectfully submitted,

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November 13, 2019

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the CM/ECF participants registered to receive service in this action.

/s/ Anthony J. Majestro