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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

PHL VARIABLE INSURANCE COMPANY,

Plaintiff,

v.

THE SHELDON HATHAWAY FAMILY INSURANCE TRUST, by and through its Trustee, DAVID HATHAWAY

Defendant,

-and-

WINDSOR SECURITIES, LLC, a Nevada limited liability company,

Intervenor Defendant.

JOSEPH M. BELTH'S MOTION TO UNSEAL THE SUMMARY JUDGMENT RECORD AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Case No. 2:10-cv-00067-RJS-BCW

Honorable Robert J. Shelby

Magistrate Judge Brooke C. Wells

STATEMENT OF PRECISE RELIEF SOUGHT AND SPECIFIC GROUNDS FOR MOTION

Pursuant to the common law and the First Amendment, intervenor Joseph M. Belth moves the Court to unseal the portions of the summary judgment record that were filed under seal pursuant to the stipulated protective order entered in this case. This motion is supported by the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

There is no indication from the public record why the majority of the summary judgment record is sealed. Although the Court entered a protective order stipulated to by the parties, the record in the case includes no public findings explaining why a need for confidentiality outweighs the public's right of access to these judicial records. Accordingly, intervenor Belth respectfully requests that the Court unseal the summary judgment record in its entirety or make specific findings on the public record as to why the need for confidentiality outweighs the public's right to access judicial records as to some or all of the records.

BACKGROUND

PHL brought this action to rescind a life insurance policy in the amount of four million dollars that it had issued to Sheldon Hathaway because, it alleged, Hathaway and intervenor defendant Windsor Securities, LLC (Windsor) made material misrepresentations in Hathaway's application for the insurance. Specifically, PHL alleges that the application significantly overstated retiree Sheldon Hathaway's income and net worth, misrepresented that financing would not be used to pay the premiums on the policy, and misrepresented that he had no intention to transfer the policy to a third party who had no interest in his continued life. The latter two misrepresentations implicated Hathaway's involvement in a stranger-originated life

insurance (STOLI) scheme, "in which a third-party investor obtains a life insurance policy for someone even though the third party has no interest in the continued life of the insured." ECF No. 195 at 2. Utah state law prohibits a person from obtaining "an interest in the proceeds of an insurance policy unless that person has or expects to have an insurable interest" in the continued life of the insured. Utah Code Ann. § 31A-21-104(2)(b).

On August 22, 2011, Magistrate Judge David Nuffer entered a stipulated protective order governing the exchange of confidential information in discovery. (ECF No. 67). On August 27, 2012, Windsor moved the Court to remove the confidentiality designation from a deposition transcript (ECF Nos. 121-123); PHL did not oppose this motion, and the motion was granted on December 26, 2012. (ECF No. 176). On September 17, 2012, PHL and Windsor cross-moved for summary judgment.[1] Windsor filed its opening and reply papers and exhibits, and its opposition to PHL's motion for summary judgment, entirely under seal. (ECF Nos. 128-130, 153, 155, 160, 164, 179). On November 21, 2012, Windsor filed under seal a motion to strike or in the alternative, for leave to file a surreply to PHL's reply brief. (ECF Nos. 168-169). PHL's opposition to this motion and Windsor's surreply are also under seal. (ECF Nos. 178, 179).

PHL filed its opening motion papers (save for five exhibits) and its opposition to Windsor's motion (except for one exhibit) publicly. (ECF Nos. 131-136, 154). However, the remainder of its summary judgment filings—including its reply papers in support of its summary judgment motion and final memorandum in support of its motion—were filed under seal. (ECF Nos. 163, 183).

[1] Defendant The Sheldon Hathaway Family Trust, to which Hathaway transferred ownership of the policy, joined in Windsor's motion for summary judgment.

On January 3, 2013, the Court heard oral arguments on the parties' summary judgment motions. On December 2, 2013, the Court issued an opinion and order granting PHL's motion for summary judgment and denying Windsor's motion, and ordering rescission of the life insurance policy and that PHL was entitled to retain the premiums already paid by Windsor as a matter of equity. (ECF No. 195). The defendants' motion to alter or amend the judgment is pending.

ARGUMENT

I. Under Both the Common Law and the First Amendment, The Public Has a Presumptive Right of Access to Summary Judgment Records.

Both the common law and the First Amendment provide the public a right of access to judicial records, particularly those pertinent to the disposition of a case. Here, both the common law and the First Amendment support unsealing the summary judgment record.

First, under the common law, court records "are presumptively available to the public." *United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997) (citing *Nixon v. Warner Comm'ns*, 435 U.S. 589, 602 (1978)); *see also Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (affirming district court's holding that there was no basis for sealing the complaint or any other documents filed in civil action). "[P]arties should not routinely or reflexively seek to seal materials upon which they predicate their arguments for relief, particularly dispositive relief such as summary judgment." *Lucero v. Sandia Corp.*, 495 Fed. App'x 903, 913 (10th Cir. 2012) (unpublished). Of particular significance here, "[w]here documents are used to determine litigants' substantive legal rights, a strong presumption of access attaches." *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1242 (10th Cir. 2012) (citation and internal quotation marks omitted).

The common-law presumption of public access can be overcome only where the party seeking the seal can "articulate a real and substantial interest that justifies depriving the public of access to the records that inform [the judicial] decision-making process." *Eugene S. v. Horizon Blue Cross Blue Shield of N.J.*, 663 F.3d 1124, 1135-36 (10th Cir. 2011) (quoting *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011)); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (party seeking sealing must demonstrate "with specificity" that "disclosure will work a clearly defined and serious injury" to it).

Second, the public also enjoys a qualified First Amendment right of access to civil proceedings because public civil proceedings serve "as outlets for community concern, hostility, and emotions, … provide[] a check on courts[,] … [and] promote true and accurate fact finding." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178-79 (6th Cir. 1983) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571, 592, 596 (1980)) (internal quotation marks omitted); *see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006); *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988); *Publicker*, 733 F.2d at 1061; *In re Continental Illinois Secs. Litig.*, 732 F.2d 1302, 1309 (7th Cir. 1984); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1984); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983).

The Tenth Circuit applies the "experience and logic" test used by the Supreme Court in *Press-Enterprise Co. v. Superior Court of California for the County of Riverside*, 478 U.S. 1, 7-9 (1986), to determine whether access should be afforded to particular categories of court records under the First Amendment. *McVeigh*, 119 F.3d at 812. Under that test, the court considers "(1) whether the document is one which has historically been open to inspection by the press and the

public; and (2) 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* (citing *Press-Enterprise*, 478 U.S. at 8).

Summary judgment papers fall well within the First Amendment right of public access under the "experience and logic" test because "summary judgment adjudicates substantive rights and serves as a substitute for a trial," *Rushford*, 846 F.2d at 252, *See also Lugosch*, 435 F.3d at 121 ("[A]n adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny." (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982))). And because the court must decide a summary judgment motion on the basis of evidence that would be admissible at trial, Fed. R. Civ. P. 56(c)(4), public access to that evidence plays "a significant positive role" in "understand[ing] the circumstances that gave rise" to the court's decision. *McVeigh*, 119 F.3d at 813. Thus, several courts of appeals have held that the public enjoys a qualified right of access under the First Amendment to dispositive motion proceedings and filings. *See Lugosch*, 435 F.3d at 121; *Rushford*, 846 F.2d at 253; *In re Continental*, 732 F.2d at 1309.

Because the right of public access under the First Amendment is even stronger than under the common law, *Rushford*, 846 F.2d at 253, closure of proceedings and sealing of court records can be overcome "only if 'closure is essential to preserve higher values and is necessary to serve that interest.'" *McVeigh*, 119 F.3d at 812-13 (quoting *Press-Enterprise Co. v. Superior Court of Calif., Riverside County*, 464 U.S. 501, 510 (1984)). Even then, denial of public access is permitted only when "there is no less restrictive way to serve that" interest. *Publicker*, 733 F.2d at 1070.

Here, there is no indication from the record that the parties attempted to justify the sealing of significant portions of the summary judgment record, or that the Court made the requisite findings of fact that disclosure of the sealed records would cause "a clearly defined and serious injury" to either party. *Id.* at 1071. Thus, sealing of the summary judgment record is not permissible under either the common law or the First Amendment.

II. The Strong Public Interest in Deterring Consumer Fraud in Life Insurance Transactions Requires Unsealing of the Court Records.

The failure to justify sealing and the benefits attendant to public oversight of the courts support unsealing the summary judgment records in this case. Beyond that, the subject matter of the case and the particular nature of the allegations heighten the public interest in this action and further warrant unsealing the summary judgment record.

STOLI schemes have attracted considerable attention from the insurance industry, financial speculators, and regulators alike in recent years, with some commentators drawing comparisons between their increased prevalence and the growth of the subprime mortgage market in the mid-2000s.[2] In a STOLI transaction, an investor pays the premiums on a life insurance policy for an individual and is entitled to receive the death benefit upon the insured's passing.[3] The insured typically receives a cash payment upfront for agreeing to participate in the

[2] *See* Leslie Scism, *Regulators Rein in Murky Life Policies*, The Wall Street Journal, June 21, 2010, http://online.wsj.com/news/articles/SB10001424052748704324304575306440620747882?mod=WSJ_PersonalFinance_PF2&mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052748704324304575306440620747882.html%3Fmod%3DWSJ_PersonalFinance_PF2#articleTabs%3Darticle.

[3] Asher Hawkins, *Should Strangers Be Able to Profit From Your Death?*, Forbes, Sept. 11, 2009, http://www.forbes.com/2009/09/11/stoli-stranger-originated-life-insurance-personal-finance-stoli.html.

transaction.[4] Because of the insured's intent, at origination, to transfer the policy to a stranger with no interest in the insured's continued well-being, STOLI transactions have been criticized for upending the traditional objectives of life insurance as a means to provide financial protection for family members in the event of an insured's death and transforming it to an investment vehicle in which speculators stand to profit from the insured's death.[5]

The profit motivation has led to increased fraudulent transactions in which "[insurance] agents inflated applicants' wealth to mislead insurers … into issuing the multimillion-dollar policies favored by investors,"[6] mirroring the allegations presented in this case. That risk of fraud, in turn, increases the cost of life insurance for all consumers, particularly the elderly.[7] Moreover, individuals who purchase inflated STOLI policies may be unable to procure additional life insurance to protect their families because insurance companies will consider them over-insured.[8] Further, as here, consumers are exposed to the risk of civil lawsuits by insurance companies seeking to rescind fraudulent policies.[9] Indeed, more than half of the states have passed, or are considering, legislation to curb the abuses posed by STOLI schemes.[10]

Because of the strong public interest in preventing fraudulent STOLI transactions, the public has a strong interest in access to the summary judgment record, both the filings and the oral argument transcript, that underpin the Court's grant of summary judgment in favor of PHL.

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[4] *Id.*
[5] *Id.*
[6] Scism, *supra* n.3.
[7] *See* Ohio Department of Insurance, *Consumer Tips*, http://www.insurance.ohio.gov/Newsroom/Tips/Pages/STOLI.aspx.
[8] *Id.*; *see also* California Department of Insurance, *Seniors: Senior Advisory on STOLI or Spinlife Life Insurance Schemes*, http://www.insurance.ca.gov/0150-seniors/0100alerts/strangerownedlifeins.cfm.
[9] Ohio Department of Insurance, *supra* n.8; California Department of Insurance, *supra* n.10.
[10] Hawkins, *supra* n.4.

"[T]here is a profound public interest when matters of … consumer fraud are involved." *Hammock v. Hoffman-LaRoche, Inc.*, 662 A.2d 546, 558 (N.J. 1995); *see also United States v. Contents of Nationwide Life Ins. Co. Account No. X0961 in name of Warshak*, No. C-1-05-196, 2006 WL 971978, at *4 (S.D. Ohio Apr. 12, 2006) (unpublished) (finding allegations of consumer fraud to "implicate matters of obvious public concern" that warranted unsealing of all pleadings filed in action). Disclosure of the facts and legal arguments presented by the parties will inform public understanding of, and allow the public to better assess various legislative and regulatory responses to, the risks posed by the type of STOLI scheme alleged in this case.

III. The Parties Have No Legitimate Countervailing Interest that Justifies Sealing the Summary Judgment Papers.

The parties do not appear to have articulated a specific interest in sealing the summary judgment records on the summary judgment motions, nor is there anything in the public record supporting the sealing of the records. Courts recognize "the content of the information at issue, the relationship of the parties, or the nature of the controversy" as interests that may rebut the presumption of public access. *Publicker*, 733 F.2d at 1073-74 (citing trade secrets, attorney-client privilege, or lawsuits to enforce non-disclosure agreements as examples of cases in which sealing of records might be warranted); *see, e.g.*, *Eugene S.*, 663 F.3d at 1136 (granting motion to seal appendix in which "[n]early every document … includes the name of, and/or personal and private medical information relating to" minor); *Lugosch*, 435 F.3d at 125 (recognizing attorney-client privilege as possible "compelling reason" to deny public access to records); *In re Iowa Freedom of Information Council*, 724 F.2d at 664 (affirming sealing of trade secrets). To the extent that any of those interests are present in this case, the parties have failed to meet their burden that sealing is appropriate.

Moreover, "the parties cannot overcome the presumption against sealing judicial records simply by pointing out that the records are subject to a protective order." *Helm*, 656 F.3d at 1292; *see Lugosch*, 435 F.3d at 126 ("[U]mbrella [protective orders] should not substantively expand the protection … countenanced by the common law of access."). As Local Civil Rule 5-2(a) states: "A stipulation, or a blanket protective order that allows a party to designate documents as sealable, will not suffice to allow the filing of documents under seal." Indeed, Windsor's unopposed and successful motion to lift the confidentiality designation accorded to a deposition transcript (ECF Nos. 121 -123) suggests that the parties may have over-designated as confidential, and thus filed improperly under seal, other portions of the summary judgment record.

Accordingly, the parties should be required to show with specificity that the need for confidentiality of any portion of the summary judgment record outweighs the public's presumptive right of access. This Court should unseal any record for which the parties fail to meet this burden.

IV. The Parties' Failure to Comply With District of Utah Civil Rule 5.2 Warrants Unsealing the Summary Judgment Record.

The principle of public access is enshrined in the Court's local rules regarding sealing of court records. *See* D. Utah Civ. R. 5-2(a) ("The records of the court are presumptively open to the public."). The record does not indicate whether the parties complied with the rule's requirements before filing their summary judgment memoranda and exhibits under seal, including, among other things, filing a motion to seal and demonstrating good cause for denying public access, *id.*, or filing an attorney declaration that the sealed materials "are privileged or protectable as a trade secret or otherwise entitled to protection under the law and that the sealed

filing has been narrowly tailored to protect only the specific information truly deserving of protection." *Id.* 5-2(e)(3). Accordingly, the Court should unseal the summary judgment record.

CONCLUSION

For the foregoing reasons, the Court should grant Belth's motion to unseal the summary judgment record in this case.

Respectfully submitted,

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