

THE HONORABLE RICARDO S. MARTINEZ

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

THOMAS E. PEREZ, Secretary of Labor,
United States Department of Labor,

Plaintiff,

vs.

LANTERN LIGHT CORPORATION, d/b/a
ADVANCED INFORMATION SYSTEMS, a
corporation; DIRECTV LLC, a limited liability
company; and RAMON MARTINEZ, an
individual,

Defendants.

NO. 2:12-CV-01406-RSM

**MOTION TO INTERVENE BY THE
WASHINGTON WAGE CLAIM
PROJECT FOR LIMITED PURPOSE
OF CHALLENGING SEALING OF
SUMMARY JUDGMENT EXHIBITS**

Note on Motion Calendar: April 21, 2017

ORAL ARGUMENT REQUESTED

MOTION TO INTERVENE BY THE WASHINGTON
WAGE CLAIM PROJECT FOR LIMITED PURPOSE OF
CHALLENGING SEALING OF SUMMARY JUDGMENT
EXHIBITS

CASE No. 2:12-CV-01406-RSM

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I. INTRODUCTION

The Washington Wage Claim Project (“WWCP”) respectfully moves this Court for leave to intervene, pursuant to LCR 5(g)(8) and Fed. R. Civ. P. 24(b), for the limited purpose of challenging the sealing of court records in this case.

Specifically, the WWCP seeks to intervene in order to challenge the sealing of 21 exhibits attached to the cross-motions for summary judgment filed by the parties in March and April of 2015. At issue in those motions was whether defendant DirecTV LLC (“DirecTV”) was a joint employer of direct broadcast satellite television installers, as defined by the Fair Labor Standards Act of 1938 (“FLSA”), 29 U.S.C. §§ 201, *et seq.*, and whether as a joint employer DirecTV was liable for any wages found due to those installers. Based in large part on the content of these 21 sealed documents, this Court held DirecTV was a joint employer for the purposes of the claims in this case.

As explained below, the sealed summary judgment exhibits are directly relevant to the WWCP’s mission of providing greater access to justice to low-wage workers in Washington State. The WWCP therefore respectfully requests that this Court grant it leave to intervene under LCR 5(g)(8), and alternatively Rule 24(b), in order to challenge the sealing of these summary judgment exhibits.

II. STATEMENT OF FACTS

This case was brought by Thomas Perez, the Secretary of the United States Department of Labor (“the Department”), on behalf of 82 installers formerly employed by Lantern Light Corporation d/b/a Advanced Information Systems (“AIS”). *See* Dkt. # 158. In 2011, AIS contracted to provide satellite installation and upgrade services exclusively for DirecTV. *Id.* The Department filed suit, alleging AIS and DirecTV violated the Fair Labor Standards Act of 1938 (“FLSA”), 29 U.S.C. §§ 201 *et seq.*, by paying less than the federal minimum wage, failing to pay employees who worked in excess of 40 hours per week at a rate of one-and-a-half times the regular rate at which they were employed, and failing to keep and preserve accurate

1 records of employees and the wages, hours and other conditions of employment maintained by
2 them. *Id.* DirecTV’s liability to Installers was entirely dependent on whether or not DirecTV’s
3 control over AIS’s installers was so pervasive as to render AIS a mere labor contractor for
4 DirecTV, the de facto employer—and therefore, liable as a joint employer under the FLSA for
5 wages owed. *See id.*

6 When the Department moved for summary judgment on the joint employer issue, this
7 Court granted the parties’ stipulated motion to seal exhibits attached to the dispositive motions,
8 responses, and replies. Dkts. # 115, 133. In total, 21 exhibits attached to the parties’ cross-
9 motions for summary judgment were filed under seal. *See* Dkts. # 116 -120, 130, 131, 143,
10 144, 147, and 148.¹ The Department relied extensively on these sealed exhibits in its partial
11 summary judgment motion. *See* Dkt. # 121. Based in large part on the content of these 21
12 sealed exhibits, this Court ultimately found DirecTV was a joint employer for the purposes of
13 the claims in this case and granted the Department’s motion. *See* Dkt. # 158.

14 Subsequently, the parties engaged in settlement discussions, and on October 7, 2015,
15 this Court granted a Motion to Approve Consent Judgment as to DirecTV. Dkt. # 165. On
16 October 15, 2015, this Court granted a Joint Motion to Approve Consent Judgment as to the
17 remaining defendants, AIS and Ramon Martinez. Dkt. # 167.

18 III. INTEREST OF MOVANT

19 As described in the attached Declaration of the WWCP’s Executive Director David N.
20 Mark (“Mark Decl.”), the WWCP is a non-profit organization dedicated to providing greater
21 access to justice to low-wage workers in Washington State. Wage and hour violations are
22 widespread in numerous industries, particularly those that employ low-wage, often immigrant
23 workers. The wage and hours laws are grossly underenforced, in part because law firms are
24 reluctant to take on individual, non-class-action wage claims. The WWCP’s goals include
25

26
27 ¹ The exhibits sealed at Dkts. # 130 and 131 appear identical to those sealed at Dkts. # 147 and 148.

1 increasing access to justice for low-wage workers by providing legal representation, public
2 outreach, and lawyer training. *See* Mark Dec. ¶ 1.

3 The WWCP successfully litigates many wage and hour cases under both state and
4 federal law (including cases under the FLSA). Its clients primarily consist of individuals and
5 small groups of Latino immigrants whose employers failed to pay them for all work performed
6 and/or overtime wages. The group also maintains a modest class action practice. *Id.* ¶ 1.

7 The WWCP has particular expertise in litigating the “joint employer” issue in wage and
8 hour cases. *Id.* ¶¶ 9-14. Among its other cases, the WWCP recently completed a seven-week
9 trial of a class action on behalf of approximately 120 janitors against their alleged joint
10 employer, Fred Meyer. *Id.* ¶¶ 13-14. At trial, the evidence consisted of hundreds of emails,
11 contracts, payment schedules and other evidence that went into all aspects of the business
12 practices and interrelations among Fred Meyer, the national janitorial company, and several
13 second tier subcontractors. In contrast to this case, where much of the joint-employer evidence
14 was placed under seal, all of the trial evidence in the WWCP’s case against Fred Meyer was
15 heard in open court as part of plaintiffs’ case to prove Fred Meyer was a joint employer and to
16 prove their wage and hour claims. *Id.* ¶ 14.

17 The WWCP believes that there is a strong public interest in access to the sealed
18 summary judgment exhibits in this case, because these exhibits directly relate to DirecTV’s
19 status as a “joint employer” of the installers of DirecTV’s satellite equipment, who were
20 nominally employed by another company. *See generally id.* ¶¶ 15-25. Joint employment in
21 wage and hour cases is an increasingly important matter of public interest, because more and
22 more companies use subcontracting and multi-tiered subcontracting to obtain cheap labor from
23 low-wage workers. Such low-wage workers are frequently taken advantage of, and their rights
24 egregiously violated, under conditions that a company would never be able to engage in
25 directly. *Id.* ¶ 15.

1 For example, large companies such as Fred Meyer outsource many jobs to contractors,
2 which in turn compete with each other to secure contracts by offering the lowest bid. In order
3 to survive, let alone make a profit, such contractors are forced to push wages as low as possible,
4 with the result that they often fail to comply with wage and hour laws. With a vast unskilled
5 work force compelled to work for such low-wages, downstream contractors are often willing to
6 violate the law because they have relatively little to lose and can simply abandon the business
7 when their practices come to light. *Id.* ¶ 15.

8 The cost savings allowed by outsourcing make it an attractive business model for a
9 variety of other industries, including food service, home care, agricultural, warehouse/logistics,
10 and package delivery amongst others.² A growing percentage of the mostly low-income,
11 vulnerable workforce in these industries perform labor for companies that do not directly pay
12 them, thus allowing the companies to benefit from the reduced labor costs resulting from wage
13 and hour violations, while the large companies try to insulate themselves from responsibility
14 for the violations. *Id.* ¶ 16.

15 In the WWCP's experience, the joint employment issue involves the most far-reaching
16 inquiry known to wage and hour law. It requires an analysis of almost all aspects of the
17 businesses and business relationships between two or more companies. *Id.* ¶ 17. Determining
18 whether joint employment exists is a daunting task in a wage and hour case. Open access to
19 case records, such as those under seal in this case, would mean that counsel for potential
20 plaintiffs can review a case file and will not need to start from square one in litigating an
21 extremely difficult, fact-intensive issue such as joint employer liability. *Id.* ¶ 19.

22 The WWCP believes that sealed records in joint employment cases such as this one
23 directly impact non-party employees of the principals to this litigation, and further believes that
24 these records are equally important to members of the public who are involved with one or

25 ² See Catherine Ruckleshaus, et al., "WHO'S THE BOSS: Restoring Accountability for Labor Standards in
26 Outsourced Work," National Employment Law Project (2014), *available at*
27 [http://www.nelp.org/content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-
Outsourced-Work-Report.pdf](http://www.nelp.org/content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf) (last accessed on 03/21/17).

1 more of the parties in similar subcontracting arrangements elsewhere. Members of the public
2 who work directly or indirectly for one or more parties in a case have a strong interest in access
3 to records bearing on joint employment issues. Moreover, because many corporations use the
4 same or substantially similar contracting agreements around the country, employees working
5 for companies other than those in a particular lawsuit also have a substantial interest in
6 knowing under what circumstances a company will owe duties as a joint employer. *Id.* ¶ 18.

7 In the WWCP's view, the sealing of records, such as the exhibits in this case, threatens
8 to impede low-wage workers' ability to analyze the potential strength of joint employment
9 claims. This, in turn, affects the willingness of attorneys to represent such clients, as well as
10 the difficulty of litigation once the cases are filed. *Id.* ¶ 19. *See also id.* ¶¶ 21, 23 (explaining
11 how the sealed records in this case appear similar to the "type of evidence [the WWCP] relied
12 upon in the recent *Espinoza* trial," and that such evidence "is extremely relevant to our and
13 others' representation of low-wage workers, many of whom are employed under similar
14 outsourcing arrangements.").

15 But beyond that, in the WWCP's view, unsealing the records in this case is important in
16 light of the significant public importance underlying the joint employer doctrine. Whether a
17 company complies with this country's wage and hour laws is not just of concern to low-wage
18 workers; it also matters to members of the community who care about how services, such as
19 those provided by janitors or cable/satellite TV installers, reach them. This issue can also be of
20 concern to shareholders of large companies that engage in outsourcing and wish to determine to
21 whom they may owe duties as a joint employer to ensure they are complying with applicable
22 laws, as well as to the press that may wish to report on the issues affecting both employees and
23 consumers. *Id.* ¶ 24.

24 For all these reasons, the WWCP believes that the sealing of the records in this case
25 prevents access to materials of significant public concern, a concern that goes to the core of the
26 WWCP's mission. If employers are allowed to bar the public from learning the full nature and
27

1 extent of their wrongdoing, it will impede other workers from obtaining the compensation they
 2 need and deserve. It will also impede the WWCP from fulfilling its mission of increasing
 3 access to justice for low-wage workers. The WWCP therefore respectfully requests that this
 4 Court unseal the summary judgment exhibits in this case.

5 IV. ARGUMENT AND AUTHORITY

6 A. Local Court Rule 5(g)(8) Authorizes The WWCP To Intervene.

7 Local Court Rule 5(g)(8) provides that “[a] non-party seeking access to a sealed
 8 document may intervene in a case for the purpose of filing a motion to unseal the document.”
 9 The language of the local rule is unequivocal and not subject to any restrictions. Therefore, the
 10 WWCP respectfully requests this Court grant its motion to intervene pursuant to LCR 5(g)(8).

11 B. Alternately, The WWCP Meets The Standard For Permissive Intervention Under 12 Federal Rule Of Civil Procedure 24(b).

13 It is well established that “[n]onparties seeking access to a judicial record in a civil case
 14 may do so by seeking permissive intervention under Rule 24(b)(2).” *San Jose Mercury News v.*
 15 *U.S. Dis. Court-N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999). Where, as here, the
 16 WWCP does not seek to litigate a claim on the merits, but rather seeks to intervene for the
 17 limited purpose of challenging the sealing of court records, an independent jurisdictional basis
 18 and a common question of fact or law are not required. *Id.* at 1100. *See also Beckman Indus.,*
 19 *Inc. v Int’l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992) (holding an independent jurisdictional
 20 basis and strong nexus of fact or law are not required where an intervenor merely seeks to
 21 challenge a protective order, because the intervenor is merely asking the court to exercise a
 22 power it already has: the power to modify its order); *Kamakana v. City and Cnty. of Honolulu*,
 23 447 F.3d 1172, 1176 (9th Cir. 2006) (nonparty granted permissive intervention for limited
 24 purpose of modifying protective order and challenging sealing of court records).

25 1. The Motion To Intervene Is Timely.

26 When faced with a motion to intervene for the purpose of unsealing court records, the
 27 only question is whether the proposed intervention is timely. The Ninth Circuit considers three

1 factors to determine whether a motion to intervene is timely: “(1) the stage of the proceeding at
 2 which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for
 3 and length of [any] delay.” *San Jose Mercury News*, 187 F.3d at 1100-01. Of these three
 4 factors, whether the existing parties would be prejudiced is “the most important consideration
 5 in deciding whether a motion for intervention is untimely.” *United States v. State of Oregon*,
 6 745 F.2d 550, 552 (9th Cir. 1984) (quoting 7A C. Wright & A. Miller, *Federal Practice and*
 7 *Procedure* § 1916 (1972)). When the requested intervention will “complicate the issues and
 8 prolong the litigation,” there is prejudice to the other parties from the delay in seeking leave to
 9 intervene. *United States v. State of Wash.*, 86 F.3d 1499, 1504 (9th Cir. 1996).

10 Here, permitting the WWCP to intervene for the limited purpose of unsealing
 11 documents will not prejudice the original parties. The WWCP does not seek to intervene in the
 12 merits of the lawsuit or to participate in any way. It seeks intervention only because, as
 13 explained above, that is the procedural vehicle by which it may request access to court records
 14 that—in its view—ought to be public. Because the proceedings are complete, there is no
 15 possibility the WWCP’s intervention will cause disruption or delay in the proceedings. *See*
 16 *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011)
 17 (finding it significant that intervention would not cause disruption or delay proceedings);
 18 *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (explaining
 19 that where intervention is limited to the “collateral purpose” of seeking access to court
 20 documents, “prejudice in the adjudication of the rights of the existing parties” is not a concern);
 21 *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 786 (1st Cir. 1988) (stating “if the desired
 22 intervention relates to an ancillary issue and will not disrupt the resolution of the underlying
 23 merits, untimely intervention is much less likely to prejudice the parties.”).

24 As to the remaining two factors, the WWCP only recently learned about the sealing of
 25 these significant exhibits. Having learned of their existence, the WWCP acted promptly to
 26 obtain legal counsel and file motions to intervene and unseal. Moreover, in the context of

1 requests to unseal documents, “delays measured in years have been tolerated where an
2 intervenor is pressing the public’s right of access to judicial records.” *San Jose Mercury News*,
3 187 F.3d at 1101; *see also S.E.C. v. AOB Commerce, Inc.*, No. CV 07-4507 (CAS), 2013 WL
4 5405697, at *1 (C.D. Cal. Sept. 23, 2013) (permitting intervention for the purpose of unsealing
5 documents five years after the case settled). Therefore, the fact that this case was resolved in
6 October 2015 is not a bar given the nature of this motion to intervene.

7 2. There Is No Independent “Common Question Of Law Or Fact” Requirement
8 Where Intervention Is Sought For The Limited Purpose Of Challenging Court
9 Records.

10 As noted above, the Ninth Circuit has repeatedly upheld the intervention of nonparties
11 for purposes of challenging a protective order in cases where there was no common question
12 except the propriety of the order. *See Kamakana*, 447 F.3d at 1176; *San Jose Mercury News*,
13 187 F.3d at 1100. In doing so, it has characterized its own caselaw as “holding that . . . [a]
14 strong nexus of fact or law [is] not required where [an] intervenor merely seeks to challenge a
15 protective order.” *San Jose Mercury News*, 187 F.3d at 1100 (citing *Beckman*, 966 F.2d at 473-
16 74).

17 The reason for this is clear: If courts insisted that intervenors seeking court records raise
18 a common question with the main action beyond the question of whether the records should be
19 sealed, there would be no way for members of the public to gain access to records unless they
20 had some personal interest in the case. This would vitiate the public’s right of access to court
21 records. *See Kamakana*, 447 F.3d at 1178-80 (explaining the importance of and justification
22 for the common law right of access to judicial records).

23 Accordingly, the WWCP’s contention that records in this case should be unsealed is
24 sufficient to support its motion for intervention.

25 **V. CONCLUSION**

26 For the foregoing reasons, the WWCP respectfully requests that this Court grant this
27 motion to intervene for the limited purpose of seeking public access to sealed documents.

1 RESPECTFULLY SUBMITTED AND DATED this 24th day of March, 2017.

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I, Beth E. Terrell, hereby certify that on March 24, 2017, 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 following:

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