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CALIFORNIA SUPERIOR COURT

COUNTY OF PLACER

SARAH DAVIS,

Plaintiff,

vs.

CITY OF AUBURN, WILLIAM BATTERMAN, GARY BATTERMAN, AMERICAN HONDA MOTOR COMPANY, INC., HONDA AUTOMOBILE DIVISION, AUBURN HONDA, and DOES 1-100, inclusive,

Defendants.

CASE NO. SCV9736

NOTICE OF MOTION AND MOTION BY CENTER FOR AUTO SAFETY, PATRICK M. ARDIS AND LEE T. GRIFFIN TO UNSEAL SANCTIONS DECISION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

California Rules of Court 243.1-243.2

TELEPHONIC APPEARANCE REQUESTED

Hearing Date: October 25, 2005
Time: 8:30 a.m.
Dept: To be assigned

Hon. James D. Garbolino

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I. INTRODUCTION

Movants seek to unseal the Sanctions Decision issued by this Court on October 3, 2005. In their opening brief, Movants set forth the five mandatory requirements of sealing a court record under Rule 243, and showed that the parties failed to meet them. Honda, however, has chosen to remain silent on this central issue. The omission is telling. Instead of even attempting to prove any of the five elements, Honda tries to convince the Court of a theory it created out of whole cloth: that, because the Sanctions Decision was vacated, it no longer "exist[s]" and therefore does not qualify as a "court record" to which the public's right of access – and Rule 243 – applies. This novel theory has no basis in law. Rule 243 applies to the Sanctions Decision, which must be unsealed and the Sealing Order's related provisions lifted since the parties failed to meet any of the Rule's five requirements. Contrary to Honda's assertions, the Court has the jurisdiction and authority to modify the Sealing Order to ensure that the Order conforms to the law, as well as to end other defense counsel's misuse of the Sealing Order in unrelated cases, which the Court could not have foreseen. Under Rule 243.2(h)(2), Movants certainly have standing to seek that it do so.

II. LEGAL ARGUMENT

A. RULE 243 APPLIES TO THE SANCTIONS DECISION, WHICH SHOULD BE UNSEALED.

1. *The Sanctions Decision Is a "Court Record" To Which Rule 243 Applies.*

Honda hinges its response on a magic-trick proposition: that, when the Court vacated the Sanctions Decision, the Decision somehow ceased to exist "for all purposes" and was no longer a "record" subject to Rule 243. (Opp'n 3–4). This proposition ignores reality and the plain language of Rule 243. It is incorrect as a matter of law.

The Sanctions Decision clearly meets the Rule's definition of "record," which is a "document, paper, exhibit, transcript, or other thing filed or lodged with the court." R. 243.1(b)(1). There is no requirement that the "thing" filed with the court have any particular legal status. In fact, the Rule explicitly lists items to which it does ***not*** apply, and vacated decisions are not among them. *See* R. 243.1(a)(2) (listing, among other documents, "discovery motions"); *see also Copley Press, Inc. v. Superior Court* (1992) 6 Cal. App. 4th 106, 113 (defining official court records as including

"documentation which accurately and officially reflects the work of the court, such as its orders and judgments," in particular, "all its written orders and dispositions"); *F.T.C. v. Standard Fin. Mgmt. Corp.* (1st Cir. 1987) 830 F.2d 404, 412–13 (defining "judicial records" as "documents which properly come before the court in the course of an adjudicatory proceeding and which are relevant to the adjudication"). Honda fails to cite any case law supporting its novel interpretation of Rule 243.

Honda's attempt to parlay the legal effect of *vacatur* – which generally deprives a decision of its preclusive or precedential value[1] – into a factual one negating the Decision's very existence, is entirely unsupported. *See In re Brandon* (1954) 131 N.Y.S.2d 204, 206 ("Void judgments or erroneous findings and decisions may be vacated and set aside, but all this is correction. Expunge means to d[e]stroy or obliterate. 'It implies not a legal act, but a physical annihilation.'") (quoting *Andrews v. Police Court* (Cal. App. 1942) 123 P.2d 128, 129). The fact that vacated decisions still factually exist is obvious, given courts' frequent citations to these opinions. *E.g., Parnell v. Adventist Health System/West* (2005) 35 Cal. 4th 595, 603 (quoting vacated decision); *Pryor v. Municipal Court* (1979) 25 Cal. 3d 238, 253 (same); *Shore v. Gurnett* (2004) 122 Cal. App. 4th 166, 175–76, 176 n.6 (discussing two vacated decisions). Indeed, courts are reluctant to expunge or withdraw orders solely because they have been vacated. As one court recently stated after vacating an order: "Because we are opposed to the destruction of court records, . . . we decline to expunge th[e] [vacated] order." *Travelers Casualty & Surety Co. v. Superior Court* (2005) 126 Cal. App. 4th 1131, 1146. *See also Oklahoma Radio Assocs. v. FDIC* (10th Cir. 1993) 3 F.3d 1436, 1437 (withdrawing opinion unwarranted because it "goes beyond the rationale of *vacatur*").

Honda cites no authority that supports its theory. In fact, the only "general principle" (Opp'n 3) that can be gleaned from the cases it cites is the unremarkable rule that a vacated decision generally lacks preclusive effect. *See, e.g., United States v. Jerry* (3d Cir. 1973) 487 F.2d 600, 607 (*vacatur* affects decision's "***legal status***"); *Wynne v. Rochelle* (5th Cir. 1967) 385 F.2d 789, 796 (when order is set aside, "prior ***status of the case*** is restored"); *Sexton v. Greer* (1977) 135 Vt. 343, 344 ("the ***case*** is

[1] *See O'Connor v. Donaldson* (1975) 422 U.S. 563, 577 n.12 (*vacatur* "deprives that court's opinion of precedential effect"); *No East-West Highway Comm. v. Chandler* (1st Cir. 1985) 767 F.2d 21, 24 ("vacated judgment has no preclusive force.").

left as if [the vacated] order had never been rendered") (emph. added). Indeed, Honda concedes that *vacatur* merely signifies that the Sanctions Decision"ha[s] no force or effect." (Opp'n 5.) There is simply no basis for claiming that a vacated order is no longer a record. Rule 243 clearly applies to the seal in this case.

2. *The Requirements of Rule 243.1 Were And Are Not Met.*

Honda does not even attempt to shoulder its affirmative burden of proving that all five requirements of Rule 243.1(d) were, and are, met. Instead, it attempts only to defend against Movants' assertions about two elements of the Rule: (1) whether there is a need for secrecy that overrides the public right of access, and (2) whether the sealing is narrowly tailored. Honda fails on both counts.[2]

a. Honda Has Failed to Prove an Overriding Interest in Secrecy, as Required by Rule 243.1(d)(1).

Because Honda has not proved a legitimate need for secrecy that overrides the public right of access, it effectively concedes that Rule 243.1(d)(1) has not been met. Instead, Honda merely challenges – unpersuasively – each of Movants' two hypotheses about the possible interest in secrecy that the parties might have asserted to try to meet Rule 243.1(d)(1).

As a threshold matter, Honda improperly implies that Movants have challenged the *Court's* interest in sealing the Sanctions Decision – protesting, for example, that the *Court* did not seek to conceal misconduct. (*See* Opp'n 6-7.) This is a false characterization of Movants' argument, because

[2] Instead of proving that Rule 243 is met, Honda states that other courts should extend full faith and credit to the Sealing Order. (Opp'n 4-5.) That issue is simply not before this Court, which must decide instead whether the Order is unlawful and should therefore be modified. Even if full faith and credit were at issue, it would not apply because the Sealing Order is invalid. *See Thomas v. Washington Gas Light Co.* (1980) 448 U.S. 261, 282-83; 18 James Wm. Moore, et al., Moore's Federal Practice § 130.02, 130.04[3] (2005) (full faith and credit does not apply to an invalid court order). On a similar basis, the U.S. Supreme Court – in a case Honda fails to address – held that a Michigan court order that attempted to control evidentiary issues in other states was "not entitled to full faith and credit, because it impermissibly interferes with [other state courts'] control of litigation brought by parties who were not before the [issuing] court." *Baker v. General Motors* (1998) 522 U.S. 222, 239 n.12. In addition, as Honda concedes, full faith and credit does not apply to orders that violate public policy. (Opp'n 5.) Here, as Movants have shown, the Sealing Order violates public policy by suppressing evidence and concealing the Court's findings of misconduct. (Mot. 12-13, 14-15.) Like the injunction rejected in *Smith v. Superior Court* (1996) 41 Cal. App. 4th 1014, the Sealing Order suppresses evidence by precluding an expert witness from testifying in unrelated cases and, worse, even prevents parties from arguing the issue to presiding courts. (Mot. 14.)

what is at issue here is whether the *parties* proved an interest in secrecy sufficient to meet the requirements of Rule 243.1(d).

As to the substantive issue of the parties' interest in secrecy, Honda first disputes Movants' theory that facilitating settlement and/or the parties' stipulation was its basis for seeking secrecy – but it does not directly deny that this was so. Instead, Honda coyly points out that the Sealing Order itself contains no express reference to settlement or stipulation, and suggests that the Court issued the Sealing Order -- presumably without the parties' involvement – solely because it was persuaded to reverse the Sanctions Decision on the merits. (*See, e.g.*, Opp'n 6.) This characterization is simply untrue. The court record reveals that within one week of the Sanctions Decision being issued, Honda drafted a stipulation between the parties – which its counsel signed on October 11, 2002 -- agreeing to file the Sealing Order on the condition that the terms of settlement were met. (Ex. 1.)[3] This stipulation incontrovertibly reveals that the *parties* proposed the Sealing Order (and apparently did so without briefing the Court on the requirements of Rule 243) -- a far cry from the Court issuing the Order *sua sponte* upon reversing its findings about Mr. Gratzinger's misconduct on the merits. Honda's portrayal to the contrary is simply not credible.

Second, Honda protests that it did not seek the Sealing Order to conceal misconduct – again, without proving any alternative, legitimate interest in secrecy. Honda claims that the Order does not conceal Mr. Gratzinger's conduct because it allows parties to question him about the incident. (Opp'n 6.) This argument rings hollow because defense counsel across the country – including the firm that retained Mr. Gratzinger in this case -- routinely argue, often successfully, that the Sealing Order precludes plaintiffs from questioning Mr. Gratzinger about the events that took place in *Davis*. (E.g. Ex. K.) In addition, Honda's argument ignores the ***public***, which has no access to Mr. Gratzinger and is likely to be prevented from even learning about the underlying conduct because the Sanctions Decision

[3] Exhibits 1 and 2 are appended to the Micheletti Declaration filed herewith. References to Exhibits A-L refer to the Exhibits filed with Movants' opening brief.

is sealed. Regardless, it is Honda's burden to prove its legitimate reason for the seal. That, it has failed to do.[4]

b. Honda Has Failed to Prove that the Sealing Order is Narrowly Tailored, as Required by Rule 243.1(d)(4).

The only other element that Honda addresses of Rule 243.1(d)'s five requirements is whether the seal is narrowly tailored. R. 243.1(d)(4). Movants have shown that the Sealing Order is so overbroad that it violates constitutional free speech rights and exceeds the Court's jurisdiction and authority. (Mot. 10-15.) Honda fails to prove otherwise.[5]

i. Honda Has Failed to Prove That The Sealing Order Does Not Violate Free Speech Rights.

Honda does not, and cannot, show that the Sealing Order sufficiently protects free speech rights. Honda tries to distinguish the entire line of free-speech precedent cited by Movants in two ways, neither of which are persuasive. First, it flatly states that, unlike the documents at issue in some of those cases, the Sanctions Decision was not widely disseminated before the Sealing Order was filed. (*Id.*) This is simply untrue. The details of the Decision were published in the *Sacramento Bee* and Adjuster.com, both of which are still publicly available; and copies are possessed by Movants and plaintiffs' attorneys across the country who have sought to refer to the Sanctions Decision in cases in which Mr. Gratzinger has served as an expert witness. (Mot. 3-5.) Second, Honda again floats the theory that, because the Sanctions Decision was vacated, it is not a "court record" – and therefore any decision upholding the public's First Amendment right of access to open court proceedings and court records do not apply.

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[4] To the extent that Honda suggests that the Sanctions Decision was sealed to prevent improper use, such a speculative concern is not a legitimate overriding interest in secrecy. *See Valley Broadcasting Co. v. United States Dist. Court* (9th Cir.1986) 798 F.2d 1289, 1293 (right of access can only be overcome on basis of articulated facts, not unsupported hypothesis or conjecture); *In re Video-Indiana, Inc.* (7th Cir. 1982) 672 F.2d 1289 (same); *see also In re First Energy Shareholder Derivative Litig.* (N.D. Ohio 2005) 219 F.R.D. 584, 587 (refusing to grant protective order based on defendants' speculation that discovery would be impermissibly leaked). If accepted, fear of "misuse" would justify – indeed, require – similarly broad sealing orders over ***all*** vacated decisions. Were this so, Code of Civil Procedure Section 128(a)(8), which governs appellate courts' granting *vacatur*, should give some indication that measures like the Sealing Order should be issued upon granting *vacatur*. Nowhere is such language found, *see* C.C.P. § 128(a)(8); nor has Honda cited any proof that courts routinely (or ever) grant orders like the Sealing Order upon granting *vacatur*.

[5] Honda tries to argue that the Sealing Order is narrowly tailored by again pointing out that the Sealing Order technically allows discussion of Mr. Gratzinger's underlying conduct. (Opp'n 8.) This point fails for the reasons set forth *supra*, Part I.B.1.

(Opp'n 10.) As shown above, however, the vacated Sanctions Decision *is* a court record. *Supra*, Part I.A. Regardless, Honda's assertion that the free-speech holdings are limited only to information obtained from non-vacated decisions is incorrect. *See Bartnicki v. Vopper* (2001) 532 U.S. 514, 527-28 ("[I]f a newspaper lawfully obtains ***truthful information*** . . . then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.") (emph. added) (internal citations omitted).[6] Thus, Honda's arguments do not counter the significant precedent cited by Movants. In addition, they fail even to address the fact that the Sealing Order's ban on publication and destruction requirement violate free speech rights by imposing censorship, prompting self-censorship, and interfering with the public's right to read and receive. (*See* Mot. 11-12.).

ii. *Honda Has Not Disputed That The Sealing Order is Overbroad Because It Exceeds the Court's Authority.*

Honda does not attempt to rebut Movants' proof that the Sealing Order exceeds the Court's authority by attempting to bind other courts and absent parties. (Mot. __.) The Sealing Order fails the test of Rule 243.1(d)(4) on this basis alone.

iii. *The Sealing Order is Not Narrowly Tailored Because It Applies to the Public and Because Less Restrictive Alternatives Could Adequately Protect Against Other Parties' Improper Use of the Vacated Decision.*

Honda claims as a general matter that the Sealing Order is narrowly tailored because its terms are necessary to prevent "other parties" from improperly using the vacated Sanctions Decision. (Opp'n 1, 9-10.) Even if Honda could prove a basis for fearing parties' misuse (which it has not), and assuming that its concern is that parties would improperly portray the Sanctions Decision as not vacated, the narrowly tailored solution would have been to widely publish the *vacatur* order. *E.g., Circle K Corp. v. United States*, 1996 WL 904545, at *7 (Fed. Cl. Ct. 1996). In addition, Honda's argument does not even address why the *public* is required to destroy copies and forbid publication of the Decision. Therefore, "improper use," standing alone, does not justify the breadth of the Sealing Order.

[6] Honda's allusion to court rules that prohibit parties' citation of unpublished court orders (Opp'n 10-11) is inapposite, because these rules do not gag the *public* from publishing or retaining such orders. The basis for Movants' claim that the Sealing Order violates free speech rights is its prohibition on all publication of the Sanctions Decision, as well as its mandate that the public must destroy copies. (Mot. ___.)

B. THE COURT HAS JURISDICTION TO MODIFY THE UNLAWFUL PROVISIONS OF THE SEALING ORDER, AND SHOULD DO SO.

Honda claims that the Court does not have jurisdiction to modify the Sealing Order – despite its continuing power to hold parties and the public in contempt for violating it – and that the Court is not responsible for correcting the Order's misinterpretation by other courts, counsel, and Mr. Gratzinger, all of which "should be of no consequence to this Court." (Opp'n 11-12.) These arguments contradict established law, as well as principles of judicial economy and fundamental fairness.

1. *The Court Has Jurisdiction to Modify its Own Order.*

It is well established that resolving the merits of litigation does not deprive courts of jurisdiction to modify orders that are still in effect. "A continuing decree or injunction directed to events to come is subject always to adaptation . . . . [A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong." *United States v. Swift & Co.* (1932) 286 U.S. 106, 114-15. Citing this decision, the First Circuit stated:

> [T]he district court necessarily had the power to enforce the order, at any point while the order was in effect, ***including periods after judgment***. . . . [V]iolation of the protective order during its lifetime would have exposed the parties to contempt liability. Correlative with this power to enforce, the district court necessarily also retained power to modify the protective order in light of changed circumstances.

Public Citizen v. Liggett Grp., Inc. (1st Cir. 1988) 858 F.2d 775, 782 (emph. added); *accord In re Agent Orange Litig.* (2d Cir. 1987) 821 F.2d 139, 145. The cases Honda cites (Opp'n 8) merely stand for the proposition that trial courts cannot rule on substantive issues after plaintiffs voluntarily dismiss the case. This rule is not inconsistent with courts' retaining jurisdiction over orders that have continuing effects on absent parties and the public after a case is resolved.

Indeed, Honda's own actions in this case belie its argument that the Court lost jurisdiction to modify the Sealing Order the moment the parties settled the case. First, Honda authored a stipulation providing that the Court should retain jurisdiction after the Sealing Order was filed in the event that the settlement terms were not met. (Ex. 1.) Further, Honda agreed to Paragraph C of the Sealing Order,

which expressly states that the Court will unconditionally retain jurisdiction over it: "[The Sanctions Decision] will remain sealed ***except upon further order of this Court.***" (Ex. C, ¶ C) (emph. added). Honda cannot claim to be surprised by – much less to object to – the Court's exercising the power implicit in this provision.

2. *The Court Should Modify Provisions of the Order That Are Unlawful And/Or Have Become "Instruments of Wrong."*

Consistent with its jurisdictional authority, the Court also is "responsible" (Opp'n 11) for modifying the Sealing Order so that it complies with the law and is no longer misinterpreted. It would be irresponsible indeed for this Court to ignore the fact that the Sealing Order has given rise to considerable litigation.[7] *See Swift, supra*, 286 U.S. at 114-15. In fact, it would contradict the principles of judicial economy and fundamental fairness to allow such problems to fester.

C. MOVANTS HAVE STANDING TO REQUEST *VACATUR* OF PARAGRAPHS D, G, I, J, K, AND L, WHICH ARE BASED ON THE SEAL IN PARAGRAPH C.

Honda asserts that Movants must move to intervene or for reconsideration to challenge Paragraphs D, G, I, J, K, and L. Yet Honda does not – and cannot – dispute Movants' standing under Rule 243.2(h)(2) to move to vacate Paragraph C, which seals the Sanctions Decision. Because the remaining challenged paragraphs are clearly based on the seal in Paragraph C, Movants equally have standing to challenge them.

[7] Despite Honda's attempt to downplay them, the examples cited by Movants show that the Sealing Order has generated litigation and been misused. First, in *Maxwell v. Ford Motor Co.*, although the court stated that *Davis* "has no relation to the one currently before the court," it still forbade plaintiff from asking Mr. Gratzinger about the Sanctions Decision's underlying facts, based on the Sealing Order. (Ex. K, at 2-3.) Second, the motion to exclude references to the *Davis* conduct in *Ricci v. Volvo Car Corp., et al.*, was denied, and is an example of needless litigation about the Sealing Order. (Ex. L.) Third, in *March v. Mazda*, the defense moved to revoke the plaintiff's attorney's *pro hac vice* status because the attorney discussed the sanctioning of Mr. Gratzinger with the presiding court, which was based on the publicly available *Sacramento Bee* article and was relevant to rebut the defense's mischaracterization of the *Davis* misconduct as unproven allegations. (Ex. 2, at 6-8.) This shows how the Sealing Order has been misused to threaten plaintiffs with sanctions for referring to a publicly available source. Fourth, the defense motion in *Choi v. Toyota Motor Corp.* improperly portrays the Sealing Order as rendering Mr. Gratzinger's conduct "ambigu[ous]" (Ex. G, at 6), illustrating the confusion sown by the Order.

The fact that Paragraphs D, G, I, J, K, and L are based on the seal is clear. First, the language of Paragraphs D and I refer directly to sealing the Sanctions Decision: Paragraph D is explicitly based on the seal, and Paragraph I orders all copies of the Decision sealed and destroyed.[8] Second, the purpose of all six paragraphs is to extend secrecy over the Decision, which is the purpose of the seal; they go far beyond measures required merely to enforce the *vacatur* order.[9]

Indeed, were the Court to vacate only Paragraph C, it would frustrate the purpose of Rule 243 because the seal would effectively remain in place: copies of the Decision would still be sealed; courts and parties would still be prevented from referring to or testifying about the Decision; and the public would not be able to retain copies or disseminate them. Because Paragraphs D, G, I, J, K, and L are inextricably linked with the seal ordered in Paragraph C, Movants have standing to challenge these provisions under Rule 243.2(h)(2), and the Court should re-examine them under the framework of that Rule.[10]

III. CONCLUSION

The Court should reject Honda's unsupported theory that a vacated decision ceases to exist for any purpose and is no longer a "court record" to which the public's right of access – and Rule 243 – applies. Because Honda has not – and cannot – prove that the five requirements of the Rule are not met, Movants respectfully request that the Court unseal the Sanctions Decision, including vacating the provisions based on and extending the seal (Paragraphs D, G, I, J, K, and L).

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[8] Paragraph D states that "because the Order is vacated and sealed," no one can testify about the Sanctions Decision. (Ex. C, ¶ D.) Paragraph I seals copies of the Decision, and orders copies destroyed based on that seal: "All copies of the vacated order, ... *are permanently sealed ... and all recipients of this order shall destroy ... copies*." (*Id.*, ¶ I) (emph. added).

[9] Paragraph G, which forbids courts and parties from referring or citing to the vacated Decision, contradicts routine practice regarding vacated orders, *see supra* Part I.A. Paragraphs J and K, which mandate the destruction of copies of the Sanctions Decision, and Paragraph L, which bans publication of the Sanctions Decision, prevent virtually all access to and communication about the vacated Decision, which courts do not – and cannot constitutionally – order upon *vacatur* alone. *See supra* Part I.A; *see also Cox Broadcasting Co. v. Cohn* (1975) 420 U.S. 469, 495 ("[T]he States may not impose sanctions on the publication of truthful information contained in official court records ***open to public inspection***.") (emph. added).

[10] Even if the Court finds that Movants do not have standing to raise these arguments, this Court should exercise its inherent authority to reconsider the Sealing Order. *See Le Francois v. Goel* (2005) 35 Cal. 4th 1094, 1104.

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DATED: August 1, 2018

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