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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

REGGIE D. COLE, Plaintiff, v. CITY OF LOS ANGELES et al., Defendants.	Case No. 11-CV-03241-CBM (AJWx) Case No. 12-CV-01332-CBM (AJWx) Case No. 13-CV-07244-CBM (AJWx) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF NON-PARTY JOURNALIST JESSICA PISHKO TO INTERVENE AND UNSEAL**
OBIE S. ANTHONY, III, Plaintiff, v. CITY OF LOS ANGELES et al., Defendants.	[Notice of Motion and Motion to Intervene and Unseal and [Proposed] Order Filed Concurrently Herewith] Date: January 26, 2016 Time: 10:00 a.m. Judge: Hon. Consuelo B. Marshall Courtroom: 2

OBIE S. ANTHONY, III,

Plaintiff,

v.

COUNTY OF LOS ANGELES, et al.,

Defendants.

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I. INTRODUCTION

Non-party journalist Jessica Pishko ("Pishko") seeks to intervene in the above-captioned actions for the limited purpose of obtaining an order unsealing three exhibits filed with the Court by plaintiffs Reggie D. Cole ("Cole") and Obie S. Anthony, III ("Anthony") (collectively, "Plaintiffs") in connection with their opposition to a motion for summary judgment filed by defendants, including the City of Los Angeles, in late 2014. The court records at issue—Plaintiffs' Exhibits 141, 214, and 215—were electronically docketed under seal on December 31, 2014 in *Reggie D. Cole v. City of Los Angeles, et al.*, Case No. 11-CV-03241-CBM (AJWx) (the "*Cole* Matter") as ECF No. 141. Pishko respectfully requests that the Court enter an order immediately unsealing those exhibits.

Members of the public and the press, like Pishko, have both a constitutional and a common law right to access court records in civil proceedings. *See Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) (recognizing a First Amendment right of access to civil proceedings and records); *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978) (recognizing a common law right to inspect and copy judicial records and documents). Those rights of access apply fully to Plaintiffs' Exhibits 141, 214, and 215, which are documents that were filed with and considered by the Court in connection with its ruling on a dispositive motion. And, because those records were filed in a case involving allegations of misconduct

on the part of law enforcement that, according to Plaintiffs, resulted in their wrongful conviction, the public has a particularly powerful interest in obtaining access to them. *See*, *e.g.*, *Smith v. United States Dist. Court for Southern Dist.*, 956 F.2d 647, 650 (7th Cir. 1992) (citations omitted) (emphasizing that "[t]he appropriateness of making court files accessible is accentuated in cases where the government is a party . . . .").

For the reasons set forth herein, Pishko respectfully urges this Court to enter an order granting her motion to intervene and directing the Clerk of the Court to immediately unseal Plaintiffs' Exhibits 141, 214, and 215 (ECF No. 141).

II. FACTUAL BACKGROUND

Pishko is an accomplished freelance journalist based in San Francisco, California, who reports on the criminal justice system. She has written articles covering aspects of the California prison system that have appeared in a variety of publications including *Boston Review*, *Guernica*, the *Columbia Journalism Review*, *Pacific Standard*, *The New Republic*, *Vice,* and *The Atlantic*. Pishko is currently working on a forthcoming article for publication in *Rolling Stone* about Plaintiffs' convictions for first-degree murder, their release from prison, and their subsequent civil lawsuits against, among others, the City and County of Los Angeles.

In 1995, Plaintiffs Cole and Anthony were convicted in the first-degree murder of Felipe Gonzales Angeles. ECF 118 at 2, 10.[1] Despite sentences of life in prison

[1] Unless otherwise stated, all electronic docket references herein are to the docket in the *Cole* Matter (Case No. 11-CV-03241-CBM (AJWx)).

without the possibility of parole, Plaintiffs were eventually freed. *Id.* at 10–11. Cole was released from prison in 2009, after his conviction was set aside on the basis of ineffective assistance of counsel. *Id.* at 11. Anthony was released from prison in 2011 after a Los Angeles County Superior Court judge granted his petition for post-conviction relief, finding that his conviction "was based on materially false evidence and suppression of material evidence favorable of innocence, and that the combination of all errors clearly established a reasonable probability of a different outcome." *Id.* at 11.

Following their release from prison, Cole and Anthony each filed civil suits seeking damages for the conduct that led to their convictions. Cole asserted two causes of action. The first was a 42 U.S.C. § 1983 claim against Los Angeles Police Department detectives Marcella Winn ("Winn") and Pete Razanskas ("Razanskas") for alleged violations of his rights under the Fourth and Fourteenth Amendments. *See* ECF 194 at 2. The second was a claim under 42 U.S.C. § 1982, a *Monell* claim, against the City of Los Angeles. *Id.* (Winn, Razanskas, and the City of Los Angeles will hereafter be referred to as the "City Defendants"). Anthony filed separate lawsuits against the City Defendants (Case No. 12-CV-01332-CBM (AJWx)), as well as the County of Los Angeles and the Los Angeles County District Attorney's Office (Case No. 13-CV-07244-CBM (AJWx)), asserting claims under 42 U.S.C. § 1983.

On December 8, 2014, the City Defendants filed a Notice of Motion and Motion for Summary Judgment as to Plaintiffs' Complaint or, in the Alternative,

Partial Summary Judgment (the "City Defendants' MSJ"). *See* ECF No. 107. On December 23, 2014, Plaintiffs filed a joint opposition to the City Defendants' MSJ (the "MSJ Opposition"). *See* ECF Nos. 118 and 119.

Also on December 23, Plaintiffs filed an *ex parte* application with the Court seeking an order permitting them to file certain exhibits in support of their MSJ Opposition under seal. *See* ECF No. 122. Included in that application was a request to seal Plaintiffs' Exhibits 141, 214, and 215. *Id*. According to another document filed by Plaintiffs, those three exhibits consist of: (1) "Internal Affairs findings into Winn's misconduct in this case dated April 12, 2013" (Exhibit 141); (2) "LAPD Manual Sec. Vol. 4, Sec 733.10 & 733.20 Re Informants p. 434 dated 1994" (Exhibit 214); and (3) "LAPD Informant Manual Revised 2008" (Exhibit 215). *See* ECF No. 119 at 5-7. As the basis for their request to seal those documents, Plaintiffs cited "protective orders entered into by the parties . . . ." *See* ECF No. 122 at 2.

On December 31, 2014, the Court issued an order granting in part and denying in part Plaintiffs' application to seal (the "Sealing Order"). *See* ECF No. 125. With respect to the three exhibits that are the subject of this Motion, the Court granted Plaintiffs' application to seal for "good cause." *See id*. Plaintiffs' Exhibits 141, 214, and 215 were docketed, under seal, that same day. *See* ECF No. 141.

On July 23, 2015, the Court issued an order granting in part and denying in part the City Defendants' MSJ. *See* ECF No. 194. Specifically, the Court denied the City Defendants' MSJ as to Cole's First Cause of Action under 42 U.S.C. § 1983 against

Razanskas and Winn. *Id.* at 4-6. It found genuine issues relating to whether Winn and Razanskas withheld material or exculpatory evidence, influenced eyewitness identifications, and deliberately fabricated evidence. *Id.* at 4-5. The court granted the City Defendants' MSJ for Cole's Second Cause of Action under 42 U.S.C. § 1983 against the City of Los Angeles (the "*Monell* Claim"). *Id*. at 6-8. In so ruling, the Court disposed of Cole's only remaining claim against the City of Los Angeles. *Id*.[2]

III. ARGUMENT

A. Pishko's motion to intervene should be granted.

It is well settled that intervention is the appropriate mechanism for members of the media and the public to assert their constitutional and common law rights to access court records in a given case. *See San Jose Mercury News, Inc. v. United States Dist. Court – N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999) (granting writ of mandate and vacating district court order denying newspaper's motion to intervene); *see also Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000) (recognizing "intervention as the logical and appropriate vehicle by which the public and the press may challenge" sealing and other closure orders).

Generally speaking, Rule 24 of the Federal Rules of Civil Procedure governs non-party intervention in civil lawsuits. And "every court of appeals to have

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[2] An order dismissing Anthony's claims against the City Defendants pursuant to a settlement agreement was entered on April 3, 2015. *See* ECF No. 178. An order dismissing his claims against the County of Los Angeles and the Los Angeles County District Attorney's Office pursuant to a settlement agreement was entered on November 5, 2015. *See* ECF No. 206.

considered the question has come to the conclusion that Rule 24 is sufficiently broad-gauged to support a request of intervention for the purpose of challenging confidentiality orders." *Id*. at 997 (citations omitted). Because members of the press and the public have a "right to intervene to challenge a closure order" that "is rooted in the public's well-established right of access to public proceedings," *id*., Pishko asserts that she is entitled to intervene in this matter, as of right, either pursuant to Rule 24(a), or otherwise.[3] Alternatively, Pishko requests that she be permitted to intervene under Rule 24(b). *See San Jose Mercury News*, 187 F.3d at 1100 ("Nonparties seeking access to a judicial record in a civil case may do so by seeking permissive intervention under Rule 24(b) . . . ."); *see also EEOC v. National Children's Ctr.*, 146 F.3d 1042, 1045–46 (D.C. Cir. 1998) (holding that "third parties may be allowed to permissively intervene under Rule 24(b) for the limited purpose of seeking access to materials that have been shielded from public view either by seal or by a protective order").[4]

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[3] Under Rule 24(a), intervention as of right is authorized by "anyone" who, *inter alia*, "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

[4] To invoke Rule 24(b), the "putative intervenor must ordinarily present: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *EEOC*, 146 F.3d at 1046. Where, as here, intervention is sought for the limited purpose of challenging a sealing or closure order, courts take a "flexible approach" to these requirements that acknowledges the "longstanding 'tradition of public access to court records,'" and provides "an avenue for third parties 'to have their day in court to contest the scope or need for confidentiality.'" *Id*. at 1046 (citations omitted); *see also, e.g.*, *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1353 (9th Cir. 2013) ("[M]otions to

Because Pishko satisfies Rule 24's requirements for intervention, and because "'[r]epresentatives of the press and general public must be given an opportunity to be heard on the question of their exclusion from . . . [court] proceedings or access to documents,'" the Court should grant Pishko's motion to intervene. *Jessup*, 227 F.3d at 997 (quoting *Associated Press v. Ladd,* 162 F.3d 503, 508 (7th Cir. 1998)) (reversing district court's order denying newspaper's motion to intervene to unseal settlement agreement).

B. The press and public have a First Amendment right to access Plaintiffs' Exhibits 141, 214, and 215.

In *Courthouse News Service*, the Ninth Circuit joined a number of other federal courts of appeals in recognizing a right of access "to civil proceedings and associated records and documents" rooted in the First Amendment. 750 F.3d at 785–86; *see also Wood v. Ryan*, 759 F.3d 1076, 1081–82 (9th Cir. 2014). The First Amendment right of access thus applies to, among other things, "summary judgment motions and documents relied upon in adjudicating them." *Newsday LLC v. County of Nassau*, 730 F.3d 156, 164 (2d Cir. 2013); *see also Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) ("[T]he more rigorous First Amendment standard should . . . apply to documents filed in connection with a summary judgment motion in a civil case.").

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intervene for the purpose of seeking modification of a protective order in long-concluded litigation are not untimely."); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994).

Where, as here, the presumption of openness afforded by the First Amendment applies, it "may be overcome *only* by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court of California* ("*Press-Enterprise I*"), 464 U.S. 501, 510 (1984) (emphasis added); *see also Oregonian Publ'g Co. v. United States Dist. Court*, 920 F.2d 1462, 1466–67 (9th Cir. 1990) (explaining that, consistent with *Press-Enterprise I*, when a court is reviewing whether to seal court documents, "the party seeking access is entitled to a presumption of entitlement of disclosure," and writing that the burden is on the "party seeking closure . . . to present facts supporting closure and to demonstrate that available alternatives will not protect his rights").

When requesting that Exhibits 141, 214, and 215 be sealed, Plaintiffs made no such showing. *See* ECF No. 122. To the contrary, Plaintiffs filed an *ex parte* application to seal those exhibits that merely cited "protective orders entered into by the parties." *Id.* at 2. Neither Plaintiffs, nor the City Defendants identified any interest—let alone a compelling, overriding interest—that would justify sealing Exhibits 141, 214, and 215. *See id.*; *compare with Press-Enterprise I*, 464 U.S. at 510.

In the context of Exhibit 214, LAPD Manual Sec. Vol. 4, Sec 733.10 & 733.20 Re Informants p. 434 dated 1994, it is difficult to see how anyone could make a showing that secrecy is justified. The Los Angeles Police Department itself has

placed an updated version of the same document online for public review (*see* http://www.lapdonline.org/lapd_manual/volume_4.htm#702). In regard to the other two exhibits, as explained in greater detail below, significant public interest in their disclosure exists given the subject matters they touch upon and that official misconduct is alleged.

That the City Defendants, including the City of Los Angeles, agreed to the sealing of those exhibits is irrelevant. Indeed, as the Ninth Circuit has observed, "[w]hen wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate," making a court's careful scrutiny of a sealing request more, not less, vital when it is supported by the government. *Leigh*, 677 F.3d at 900 (explaining that courts "cannot rubber-stamp an access restriction simply because the government says it is necessary"). Because the parties have not met their burden under the First Amendment to justify sealing Exhibits 141, 214, and 215, those records should be immediately unsealed.

C. The press and the public have a common law right to access Exhibits 141, 214, and 215.

In addition to their constitutional right of access, the press and the public have a separate and independent right "to inspect and copy public records and documents, including judicial records and documents," under the common law. *Nixon*, 435 U.S. at 597; *see also United States v. Index Newspapers LLC*, 766 F.3d 1072, 1084 (9th Cir. 2014). That "common law right extends to both criminal and civil cases," and,

as the Ninth Circuit has expressly found, to "documents filed in connection with motions for summary judgment." *San Jose Mercury News*, 187 F.3d at 1102 (citations omitted) ("While we have never squarely held that the federal common law right of public access extends to materials submitted in connection with motions for summary judgment in civil cases prior to judgment, we conclude that the unbroken string of . . . [cited cases] leaves little doubt as to the answer. What doubt remains, we dispel for the Ninth Circuit today."). Indeed, the Ninth Circuit has held that the common law's strong presumption of access applies even more strongly to documents that are filed or submitted in connection with summary judgment and other dispositive motions than it does to nondispositive motions. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006).

Because a dispositive motion "adjudicates substantive rights and serves as a substitute for trial," *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135–36 (9th Cir. 2003) (citations omitted) (internal quotation marks omitted), "[t]hose who seek to maintain the secrecy of documents attached to dispositive motions must meet the high threshold of showing that 'compelling reasons' support secrecy," *Kamakana*, 447 F.3d. at 1180 (citations omitted). To satisfy that standard, the party requesting sealing "must articulate[] compelling reasons supported by specific factual findings, that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process." *Id.* at 1178–79 (citations omitted) (internal quotation marks omitted). "After considering

these interests, if the court decides to seal certain judicial records, it must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Id.* at 1179 (citations omitted) (internal quotation marks omitted). "The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records." *Id.* (citations omitted).

Because Exhibits 141, 214, and 215 were submitted as evidence in support of Plaintiffs' opposition to a dispositive motion—namely, the City Defendants' MSJ—any sealing of those exhibits must satisfy the stringent "compelling reasons" standard applicable in the Ninth Circuit; a mere "good cause" showing will not suffice. *See Kamakana*, 447 F.3d at 1180 (writing that while a "'good cause' showing will suffice to seal documents produced in discovery" and will "keep sealed records attached to nondispositive motions," such a showing "will not, without more, satisfy a 'compelling reasons' test").

As discussed above, neither Plaintiffs, nor the City Defendants, have identified or can identify any "compelling reason" that would "outweigh the general history of access and the public policies favoring disclosure" here. *See* ECF No. 122 at 2. To the contrary, as set forth below, the public has a particularly strong interest in obtaining access to Exhibits 141, 214, and 215 that weighs heavily in favor of unsealing. For these reasons, the common law provides an additional and independent basis for the Court to immediately unseal Exhibits 141, 214, and 215.

D. The public has a particularly powerful interest in obtaining access to the sealed exhibits.

The public interest in obtaining access to court records is exceedingly high in cases involving allegations of official misconduct. As the Seventh Circuit has explained, "[t]he appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch." *Smith*, 956 F.2d at 650 (citing *F.T.C. v. Standard Financial Management Corp.*, 830 F.2d 404, 410 (1st Cir. 1987)).

The official misconduct at issue here, according to the Plaintiffs, led to their wrongful imprisonment for well over a decade. Such misconduct, if proven, would amount to a serious breach of the public's trust, and a fundamental malfunction of the criminal justice process. *See United States v. De Watson*, 792 F.3d 1174, 1183 (9th Cir. 2015) ("Our legal tradition has always followed Blackstone's principle that 'it is better that ten guilty persons escape than that one innocent suffer.'" (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *358)). The public interest in this case is heightened by the additional fact that Winn has been accused of suppressing material evidence in a civil suit filed by another individual, Susan Mellen, who was convicted but later deemed factually innocent of murder. *See* Stephen Ceasar, *Woman*

Wrongfully Convicted of Murder Sues City, LAPD Detective, L.A. TIMES, Apr. 23, 2015, archived at http://perma.cc/4DJ3-826F.

Affording public access to the sealed exhibits will not only provide the public with a more complete understanding of the basis for the allegations made by Plaintiffs, it will assure the public that justice is being administered fairly and correctly in Plaintiffs' civil suits. *See Richmond Newspapers v. Va.*, 448 U.S. 555, 572 (1980) (internal quotation marks omitted) ("[It] is not unrealistic even in this day to believe that public inclusion . . . hopefully promotes confidence in the fair administration of justice.").

E. To the extent sealing of any portion of Exhibits 141, 214, or 215 is found to be justified by a compelling, overriding interest, any sealing order must be no broader than necessary to serve that interest, and supported by specific factual findings.

Assuming, *arguendo*, that Plaintiffs or the City Defendants could identify some compelling, overriding interest that would overcome the public's constitutional and common law rights of access with respect to some portion of Exhibits 141, 214, or 215, an assertion Pishko would challenge, any order sealing those records must be narrowly tailored and courts must consider alternatives to sealing. *See Press-Enterprise I*, 464 U.S. at 510, 511, 513 (1984) (writing that, in the context of a transcript of a *voir dire* proceeding in which jurors have some protectable privacy interest in their answers, "[t]he trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be

protected"). Put another way, any such sealing order must be *no broader than necessary* to address the specific, compelling interest identified. *See Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (Government action "is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy"). Ordinarily, to satisfy the requirement of narrow tailoring, redaction—not wholesale sealing—is necessary. *See Index Newspapers*, 766 F.3d at 1095, 1096 (citations omitted) (writing that, in regard to the documents specified in the opinion that the First Amendment right of access attached to, "redaction is an adequate alternative to closure, and it is preferred given our strong tradition of open court proceedings"); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 66 (4th Cir. 1989) (explaining that narrow tailoring requires courts to consider alternatives to sealing, which "ordinarily involves disclosing some of the documents or giving access to a redacted version").

Further, any order sealing any portion of Exhibits 141, 214, and/or 215 must be supported by written "findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510. In the context of the common law right of access, the Ninth Circuit has "emphasized that it is vital for a court clearly to state the basis of its ruling, so as to permit appellate review of whether relevant factors were considered and given appropriate weight." *EEOC v. Erection Co.*, 900 F.2d 168, 170 (9th Cir. 1990) (citations omitted) (internal quotation marks omitted); *see also Hagestad v. Tragesser*, 49 F.3d 1430, 1434-1435 (9th Cir. 1995) (quoting *EEOC v. Erection Co.,* 900 F.2d at 169)

(noting that the Ninth Circuit has "reversed an order to seal court documents and remanded where the district court failed 'to articulate any reasoning or findings underlying its decision to seal the decree'").

IV. CONCLUSION

For the reasons set forth above, Pishko respectfully requests that the Court grant her motion to intervene, enter an order requiring the Clerk of the Court to immediately unseal Exhibits 141, 214, and 215 in their entirety, and award any additional relief that the Court deems just.

Dated: December 28, 2015

s/Katie Townsend
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