

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

PAUL McMANN,

Plaintiff,

v.

JOHN DOE,

Defendant.

No. 1:06-cv-11825-JLT

**MEMORANDUM IN SUPPORT OF PUBLIC CITIZEN  
LITIGATION GROUP'S MOTION TO INTERVENE**

Pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, Public Citizen Litigation Group ("PCLG") has moved for leave to intervene for the limited purpose of seeking public disclosure of two motions filed by plaintiff Paul McMann in this case (Docket Nos. 2 & 3), along with any papers filed in support of the motions. PCLG intends to assert its First Amendment and common-law right of access to the judicial records on which this Court relied in deciding the case.<sup>1</sup>

**BACKGROUND**

Plaintiff Paul McMann sued John Doe, the anonymous defendant in this case, for defamation based on Doe's operation of a website criticizing McMann at

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<sup>1</sup> PCLG is a public interest law firm located in Washington, D.C. It is a division of Public Citizen, a nonprofit advocacy organization with approximately 100,000 members nationwide. PCLG litigates cases at all levels of the federal and state judiciaries, as well as before federal regulatory agencies. It specializes in health and safety regulation; consumer rights, including class actions and access to the courts; open government; and the First Amendment, including Internet free speech.

<http://www.paulmcmann.com/>. Mem. Op. at 1-3 (Oct. 31, 2006). Seeking to identify Doe, McMann filed two ex parte motions for leave to subpoena GoDaddy.com and Domains by Proxy, Inc. (collectively, “GoDaddy”), jointly operated companies that registered the paulmcmann.com domain name and hosted the website. *Id.* at 2-3. This Court denied both motions and dismissed the case for lack of subject-matter jurisdiction. *Id.* at 3, 7. Both motions were filed under seal.

Six days after the case was dismissed, McMann filed a new complaint against Doe in the Superior Court of Arizona, alleging essentially the same facts as those alleged in this case, and sent a subpoena to GoDaddy seeking Doe’s identity. Doe responded by retaining PCLG and filing a motion to quash in the Arizona court, on which oral argument is scheduled for January 17, 2007.

PCLG sought to obtain a copy of McMann’s motions in this Court, but was unable to do so because the documents were filed under seal. PCLG now moves to intervene for the limited purpose of asking that the motions be unsealed. Doe has consented to this motion. McMann’s counsel would not consent.

### **ARGUMENT**

Federal Rule of Civil Procedure 24(b) allows a Court to grant third parties permission to intervene in a case. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 787 (1st Cir. 1988). Courts, including the First Circuit, “routinely have found that third parties have standing to assert their claim of access to documents in a judicial proceeding.” *Id.* The First Circuit has noted that, in civil cases, “intervention . . . is an effective mechanism for third-party claims of access to information generated through

judicial proceedings.” *Id.* at 783; *see, e.g., Anderson v. Cryovac, Inc.*, 805 F.2d 1, 3-4 (1st Cir. 1986); *In re Globe Newspaper Co.*, 729 F.2d 47, 50 n.2 (1st Cir. 1984). Indeed, “every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders.” *EEOC v. Nat’l Children’s Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). In *Liggett Group*, for example, the First Circuit upheld a district court order granting Public Citizen permission to intervene to challenge a protective order. 858 F.2d at 784.

PCLG has a particular interest in gaining access to these filings because it is currently representing defendant John Doe in an almost identical lawsuit filed by McMann in Arizona. Access to the arguments and evidence submitted by McMann in this Court would reveal the strength of McMann’s likely showing in the Arizona litigation and may create a basis for impeachment of McMann’s evidence there. Access to McMann’s filings here may also support a motion for attorneys’ fees under Arizona Rule of Civil Procedure 11 and Arizona Revised Statutes § 12-349 against McMann for bringing repeated litigation based on evidence already rejected as baseless by this Court.

PCLG is also concerned with the larger issue of Internet anonymity raised by this case, an issue of substantial importance to the public. PCLG has represented either parties or *amici curiae* in cases in many state and federal courts involving the anonymity of Internet speakers and the use of the courts’ processes to reveal the identities of those speakers. Both mainstream news stories and scholarly law review articles have in recent years examined the question addressed by the Court in this case: what evidentiary showing a plaintiff must make prior to gaining access to the identity of an anonymous

Internet critic. See, e.g., Laura Smitherman, *Internet Postings Targeted in Court: At Stake is Anonymity of Those Who Make Disparaging Remarks*, *Baltimore Sun*, Nov. 2, 2005, at A1; Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 *Comm. L. & Pol'y* 405 (2003). Moreover, other courts have recently struggled with the proper standard to apply in these cases. See, e.g., *Best Western Int'l, Inc. v. Doe*, No. 06-1537, 2006 WL 2091695 (D. Ariz. July 25, 2006); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). PCLG and other members of the public cannot fully understand this Court's decision and evaluate its rationale without knowing what arguments and evidence were presented to the Court.

Finally, PCLG is concerned with issues of open government and access to the courts, and thus has an interest in this Court's policy of sealing ex parte filings. PCLG has handled numerous cases concerning the right of public access to litigation documents, including *Public Citizen v. Liggett Group*, 858 F.2d 775; *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983); *Cardiac Pacemakers, Inc. v. Aspen II Holding Co.*, No. 04-4048, 2006 WL 3043180 (D. Minn. Oct. 24, 2006); *Chao v. Estate of Frank Fitzsimmons*, 349 F. Supp. 2d 1082 (N.D. Ill. 2004); *In re Am. Historical Ass'n*, 62 F. Supp. 2d 1100 (S.D.N.Y. 1999); *In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985); and *Hammock v. Hoffmann-LaRoche*, 142 N.J. 356 (1995). As explained in the accompanying Memorandum in Support of Public Citizen Litigation Group's Motion to Unseal, the Court's policy is in conflict with the right of access to judicial records guaranteed by the common-law and the First Amendment.

## CONCLUSION

This Court should grant PCLG's motion to intervene under Rule 24(b).

Respectfully submitted,

/s/ Mark D. Stern

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December 23, 2006

**CERTIFICATE OF SERVICE**

I certify that, on December 23, 2006, I electronically filed this Memorandum in Support of Public Citizen Litigation Group's Motion to Intervene with the Clerk of the Court by using the CM/ECF system, which will automatically serve notice of electronic filing on the following:

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