IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PAUL McMANN, Plaintiff, v. JOHN DOE, Defendant.	No. 1:06-cv-11825-JLT

REPLY TO DEFENDANTS' OPPOSITION TO PUBLIC CITIZEN LITIGATION GROUP'S MOTION TO INTERVENE

Public Citizen Litigation Group ("PCLG") moved to intervene in this case pursuant to Rule 24(b) of the Federal Rules of Civil Procedure for the limited purpose of seeking public disclosure of sealed documents filed by plaintiff Paul McMann. In his response, McMann argues that PCLG's motion came too late because the case has already been closed. Plaintiff's position is contrary to controlling precedent from the First Circuit. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 784-87 (1st Cir. 1988).

ARGUMENT

Although a court may, at least in some circumstances, properly deny a non-party's motion to intervene to argue the *merits* of a case after the case has already been closed, this general rule does not apply where the purpose of intervention is to seek access to court documents. *Id.* at 786 n.10. When intervention is for the sole purpose of asserting the public interest in open judicial records, courts routinely allow intervention months or years after the case has been dismissed. *See id.* at 781. Indeed, there is a "growing

consensus among the courts of appeals that intervention to challenge confidentiality orders may take place long after a case has been terminated." *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998); *see Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 779 (3d Cir. 1994) (citing cases).

In *Public Citizen v. Liggett Group*, the First Circuit conclusively rejected the position advocated by plaintiff here. 858 F.2d at 784-87. The court in *Liggett* allowed Public Citizen to intervene for the purpose of seeking public dissemination of judicial documents twelve weeks after the case had been closed. *Id.* As the court noted in *Liggett*, "[n]umerous courts have allowed third parties to intervene in cases directly analogous to this one, many involving delays measured in years rather than weeks." 858 F.2d at 785; *see, e.g., Nat'l Children's Ctr., Inc.*, 146 F.3d at 1047 (allowing intervention two years after the case had settled); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (allowing intervention three years after settlement).

Defendant will suffer no prejudice from PCLG's intervention for the purpose of seeking access to documents. A motion to unseal is a "particularly discrete and ancillary issue" that "will not disrupt the resolution of the underlying merits." *Liggett*, 858 F.2d at 786; *see also United Nuclear Corp.*, 905 F.2d at 1427 ("Rule 24(b)'s timeliness requirement is to prevent prejudice in the adjudication of the rights of the existing parties, a concern not present when the existing parties have settled their dispute and intervention is for a collateral purpose."). Moreover, restricting access under these circumstances would seriously impede the public's presumptive right of access to judicial records because, once a case is closed, the public would be left without a mechanism to vindicate

its rights. *See Pansy*, 23 F.3d at 780 ("[T]o preclude third parties from challenging a confidentiality order once a case has been settled would often make it impossible for third parties to have their day in court to contest the scope or need for confidentiality.").

Without allowing PCLG to intervene in this case, the public would have no way to assert its interest in seeing the documents that were the basis of the Court's decision. PCLG filed its motions to intervene and to unseal less than eight weeks after the case had been closed, a period far shorter than that in other cases in which intervention has been allowed. Moreover, neither PCLG nor the defendant was aware of the pendency of the case or of the sealed documents until the case had already been dismissed. Indeed, McMann made no effort to notify John Doe of the pending case against him, despite the fact that Doe's email address was clearly listed in a large bold font on the disputed website. Having withheld notice of the action from Doe, plaintiff should not be allowed to benefit from the fact that the case was closed before a motion to unseal could be filed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on January 19, 2007, I electronically filed the foregoing brief 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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