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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE ESTATE OF RUBEN NUNEZ by and through its successor-in-interest LYDIA NUNEZ, ALBERT NUNEZ, AND LYDIA NUNEZ

Plaintiffs,

v.

COUNTY OF SAN DIEGO, et al.,

Defendants.

COUNTY OF SAN DIEGO et al.,

Third Party Plaintiffs,

v.

CORRECTIONAL PHYSICIANS MEDICAL GROUP, INC., a California Corporation; JORGE NARANJO, an individual; and SARAH HANSEN, an individual,

Third Party Defendants

American Civil Liberties Union of San Diego & Imperial Counties,

Intervenor.

No.: 16-CV-1412-BEN (MDD)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE MOTION TO INTERVENE, UNSEAL RECORDS, AND OPPOSE MOTIONS TO SEAL

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INTRODUCTION

The public has a right to know why Ruben Nunez died. Mr. Nunez is only one of dozens of people who died in county custody over the past several years. The public may never learn what happened in many of those cases, and there may never be any accountability for those deaths. This case stands out, however, because Plaintiffs' lawyers have unearthed documents that address responsibility for Mr. Nunez's death in excruciating detail. The sealed documents in this case could be used to inform the public about whether the contractors who provide care for pretrial detainees and other inmates are appropriately attentive to the medical needs of people whose fates we place in their hands. The information contained in those documents could help the public understand whether it can trust our government officials to ensure that a short stay in a county jail does not become a death sentence.

The public has an exceptional interest in this case, and Defendant Correctional Physicians Medical Group, Inc. ("CPMG") has failed to demonstrate any compelling reason this Court should thwart that interest. "[C]onditions in jails and prisons are clearly matters of great public importance. Penal facilities are public institutions which require large amounts of public funds, and their mission is crucial in our criminal justice system. Each person placed in prison becomes, in effect, a ward of the state for whom society assumes broad responsibility. It is equally true that with greater information, the public can more intelligently form opinions about prison conditions." *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978) (citation and quotation marks omitted). There would be no way for the public to responsibly monitor jail conditions if contractors like CPMG were able to hide their culpability for inmates' deaths behind the cloak of confidentiality.

This is not a discovery dispute, and there are no privileges at play. Independent of the parties, the public has a right to know the evidence underlying dispositive motions. That right can be overcome only in narrow circumstances not

presented by the facts of this case. Nothing submitted by CPMG justifies the extraordinary step of sealing documents that provide the foundation for a motion to vacate summary judgment and hold a public trial on accountability for the death of Ruben Nunez.

The Court should therefore allow intervention to challenge the sealing of these documents and to oppose CPMG's motions to seal as well as any conditional sealing sought by Plaintiffs in response to CPMG's demands. It should also lift the seal on documents inappropriately sealed by two Court Orders dated March 4, 2019 (ECF Nos. 375 and 376) and documents withdrawn or filed conditionally under seal on April 22 and 26, 2019 (ECF Nos. 386 and 392) (collectively "Sealed Documents").

FACTS AND PROCEDURAL HISTORY

The issues of jail deaths and San Diego County's failure to ensure the safety of mentally ill inmates have captured the attention of the local, national, and international media.[1] Mr. Nunez's death has featured prominently in this coverage.[2]

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[1] See, e.g., Kelly Davis, *Four Prisoners Dead in Six Weeks: The Crisis Unfolding in San Diego County Jails*, THE GUARDIAN, April 16, 2019, https://www.theguardian.com/us-news/2019/apr/16/four-prisoners-dead-in-six-weeks-the-crisis-unfolding-in-san-diego-county-jails; Dale Chappel, *San Diego County Targets Reporter Who Exposed Sky-High Jail Death Rate*, PRISON LEGAL NEWS, November 6, 2018, https://www.prisonlegalnews.org/news/2018/nov/6/san-diego-county-targets-reporter-who-exposed-sky-high-jail-death-rate/; Ashley Hackett, *Is San Diego County Failing its Most Vulnerable Inmate Population?*, PACIFIC STANDARD MAGAZINE, June 11, 2018, https://psmag.com/social-justice/is-san-diego-county-failing-its-most-vulnerable-inmate-population; Alex Riggins, *Death at San Diego Central Jail was Fourth Inmate Suicide This Year*" NY DAILY NEWS, November 6, 2018, https://www.nydailynews.com/sd-me-manuel-cruz-san-diego-jail-suicide-food-suffocation-20181105-story.html.

[2] See, e.g., Lisa Pickoff-White & Julie Small, *When Jail Becomes a Death Sentence*, KPBS, August 22, 2016, https://www.kpbs.org/news/2016/aug/22/when-jail-becomes-death-sentence/; Kelly Davis, *Jail Death From Excessive Water Drinking Raises Questions*, SAN DIEGO UNION-TRIBUNE, May 23, 2016, https://www.sandiegouniontribune.com/news/watchdog/sdut-nunez-water-death-2016may23-story.html; Kelly Davis, *Police Oversight Group Set to Dismiss 22 Death Cases Without Investigation*, VOICE OF SAN DIEGO, November 13, 2017, https://www.voiceofsandiego.org/topics/public-safety/police-oversight-group-set-dismiss-22-death-cases-without-investigation/; Jeff McDonald, *Family Of Inmate Sues County Over Water Death*, SAN DIEGO UNION-TRIBUNE, May 23, 2016,

At least 135 people have died in San Diego County jails over the past decade, a majority of whom "struggled with serious mental illness," like Mr. Nunez.[3] Journalists and family members have often been unable to obtain information about these deaths.[4] A 2018 report by Disability Rights California found that "San Diego jails struggled with an over-incarceration of people with mental health-related disabilities, failed to provide adequate mental health treatment to inmates, did not have in place appropriate suicide prevention practices and lacked oversight."[5]

The American Civil Liberties Union ("ACLU") is a nationwide nonprofit, nonpartisan organization with over 1,500,000 members dedicated to the defense of the guarantees of individual rights and liberties embodied in the state and federal Constitutions. Chavez Decl. ¶ 2. The American Civil Liberties Union of San Diego & Imperial Counties ("ACLU-SDIC") is an affiliate of the ACLU, with a longstanding interest in preserving the constitutional rights of persons involved in the criminal justice system and advocating for accountability and transparency in government, including but not limited to opposing the unjustified sealing of judicial records. *Id*. ¶ 3.

ACLU-SDIC has a particular interest in the Sealed Documents, because the ACLU's California affiliates, including ACLU-SDIC, have long advocated for

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https://www.sandiegouniontribune.com/news/watchdog/sdut-nunez-v-gore-2016jun15-htmlstory.html.

[3] Kelly Davis, *Four Prisoners Dead in Six Weeks: The Crisis Unfolding in San Diego County Jails*, THE GUARDIAN, April 16, 2019, https://www.theguardian.com/us-news/2019/apr/16/four-prisoners-dead-in-six-weeks-the-crisis-unfolding-in-san-diego-county-jails.

[4] Dorian Hargrove, *Sheriff's Department Refuses to Release Report on Jail Suicides*, NBC 7 SAN DIEGO, September 16, 2018, https://www.nbcsandiego.com/investigations/Sheriffs-Department-Refuses-to-Release-Report-on-Jail-Suicides-492653201.html ("Journalists aren't the only ones to complain about limited access to information from the county jails. In 2015, NBC 7 Investigates found families of loved ones who died while in custody in San Diego County jails were struggling to get information on what happened.").

[5] Davis, *Four Prisoners Dead in Six Weeks*, THE GUARDIAN, April 16, 2019 (citing Disability Rights California, *Suicides in San Diego County Jail*, April 2018).

better treatment of inmates. *Id*. ¶ 5. Moreover, the ACLU is committed to fighting to improve inmate medical care. *Id*. ¶ 6. As part of their advocacy in this area, the ACLU's California affiliates are sponsoring Assembly Bill 45, which would eliminate copays and medical equipment charges in county jails and ensure they cannot be reinstated in prison. *Id*. ¶ 7. ACLU-SDIC also successfully challenged overcrowding in San Diego jails in *Bd. of Supervisors v. Superior Court*, 33 Cal. App. 4th 1724 (1995) resulting in the imposition of population caps to prevent overcrowding. ACLU-SDIC seeks to intervene to protect the public's interest in open proceedings involving jail conditions and treatment of mentally ill inmates. Chavez Decl. ¶ 8.

There are two sets of Sealed Documents. The first set includes all of the documents that were sealed by Magistrate Judge Dembin in two Orders dated March 6, 2019 (ECF Nos. 375 and 376), which granted CPMG's January 28, 2019 request to file documents under seal (ECF No. 338), and Plaintiffs' February 5, 2019 request to file conditionally under seal (ECF No. 346), respectively. The second set includes all of the documents withdrawn or filed conditionally under seal by Plaintiffs on April 22, 2019 and April 29, 2019 (ECF Nos. 386 and 392). The two sets overlap. Together, they include, *inter alia*, Plaintiffs' Points and Authorities in Support of the Motion to Vacate Order Granting Summary Judgment; a binder of email chains and documentation produced from CPMG as a Supplemental Response to Plaintiff's Request for Production; excerpts of transcripts from the depositions of CPMG's owner and two of its employees; a Psychiatric Peer Review Intake and Follow-up; and CPMG Journal Club Meeting Minutes from January 12, 2016. (ECF No. 385-3.)

The documents at the heart of this motion came to the attention of Plaintiffs and the Court under extraordinary circumstances. Many of the Sealed Documents contain email correspondence between the County of San Diego and CPMG, concerning the circumstances of Mr. Nunez's death and related matters. (ECF 337-

1). Plaintiffs asked for such communications during discovery, but did not receive these documents from either the county or CPMG. *Id*. Instead, CPMG informed Plaintiffs that it had no documents that were responsive to the request. *Id*. Plaintiffs only became aware of these communications because CPMG had publicly filed them in another jail death case, *Nishimoto v. County of San Diego*, case no. 16-CV-01974-BEN-LL. *Id*. Plaintiffs did not learn about these emails until after the Court entered summary judgment in favor of CPMG on section 1983 claims for failure to train and failure to supervise and discipline, having found that Plaintiffs did not provide sufficient evidence to support these claims. (ECF No. 322.) Because the documents had been publicly filed in *Nishimoto*, Plaintiffs filed them publicly in this case too, as exhibits in support of their initial motion to vacate the summary judgment order. (ECF No. 337.) Having failed to disclose these documents, CPMG waited nearly three weeks before moving to seal them once they were filed in this case. ECF. No. 338. Plaintiffs then moved to have them filed conditionally under seal "out of an abundance of caution." (ECF No. 353 at 1:7-8.)

These documents, which were publicly filed in this case on January 7, 2019, remained publicly available on the ECF docket for nearly two months, until Magistrate Judge Dembin ordered them sealed on March 6, 2019 without explanation or reasoning. (ECF Nos. 375 and 376.) The documents remain publicly available in the *Nishimoto* case docket, *Nishimoto v. County of San Diego*, case no. 16-CV-01974-BEN-LL, ECF No. 119-1, and CPMG filed some of them publicly as exhibits in support of its opposition to Plaintiffs' motion to vacate the partial summary judgment order. (ECF No. 340-4.)

Another key subset of the Sealed Documents has an equally unusual history. After Plaintiffs discovered the email correspondence about Mr. Nunez's death, they submitted those documents in support of their motion to vacate summary judgment and to refer to Magistrate Judge Dembin for an evidentiary hearing. (ECF No. 337.) Magistrate Judge Dembin then permitted Plaintiffs to depose three witnesses. (ECF

374.) Plaintiffs took the depositions of Steven Mannis, Nicolas Badre and Sanjay Rao in March of 2019. At the conclusion of Roa's deposition, CPMG and Plaintiffs had an on-record conversation in which they disagreed about what portions of the deposition transcripts could be marked "Confidential." Decl. of Julia Yoo, ECF. No. 399 ("JY Decl.") at ¶ 12. Rather than reach agreement in the moment, CPMG stated that "we don't have to figure it out today … The record's not going to be printed up for quite a while, but, again, we're going to press for it to be marked confidential and pursuant to the protective order." *Id*. The parties never did reach an agreement about the confidentiality of the documents. *Id*. CPMG failed to notify the court reporting service about which portions of the transcripts, if any, should be marked "confidential" before the service completed the deposition transcriptions and mailed them to the parties. *Id*. at ¶¶ 13-14. The transcripts were not marked "confidential." *Id*. at ¶ 14.

When Plaintiffs filed their motion to vacate the partial summary judgment order as to Defendant CPMG, they publicly filed the deposition transcripts as exhibits in support of the motion. (ECF Nos. 385-6; 385-7 and 385-9.) At that point, CPMG wrote to the court reporting service stating that it was designating each of the witnesses' deposition transcripts "confidential" in their entirety. *JY Decl.* ¶ 17. It asked Plaintiffs to withdraw the exhibits and refile under seal, threatening sanctions. *Id*.

The court reporting service quickly sent an email to all parties stating that it had prepared standard transcripts because it had not received notification of which portions should be designated "confidential" after the on-record "disagreement and discussion" about the confidentiality of the records, which suggested "that only portions of [the] transcripts contained potentially confidential information, that additional action would be taken to identify where and how the designation would apply, and that [the service] would be notified prior to the record being printed up." *Id*. at ¶ 18. CPMG never responded to Plaintiffs' request that it provide a basis for

its decision to designate every page of the deposition as containing "confidential sensitive information." *Id*. at ¶ 19, 20. Nevertheless, Plaintiffs, once again acting "out of an abundance of caution," moved to have the documents filed conditionally under seal. (ECF No. 391 at 1:14-15.) CPMG then filed its own motion to file the documents under seal. (ECF No. 397.) The Court has not acted on these motions, but the documents are currently under seal. (ECF Nos. 392, 398.)

Excerpts of the Sealed Documents that have been quoted in publicly filed briefs make clear that the documents contain information addressing significant problems in the treatment of mentally ill inmates in San Diego County. For example, in the immediate wake of an article about San Diego jail deaths that featured Mr. Nunez's case, Dr. Alfred Joshua, the County Medical Director, wrote a series of scathing emails to Dr. Steven Mannis, the owner of CPMG. Dr. Joshua informed Dr. Mannis that "CPMG has put the Sheriff's department at risk with the lack of clinical quality assurance and training," and later elaborated that "[t]his is not a blame issue but a serious problem with the quality of CPMG providers due to a lack of clinical oversight." (ECF 337-1 at 6:3-5, 6:20-22.) Later, in apparent reference to Mr. Nunez's death, Dr. Johnson noted that a CPMG doctor "saw the inmate in clinic and noted the history of psychogenic polydipsia but did not tell medical or deputies nor document an alert for water restriction … [q]uite frankly, your lack of administrative and clinical control as well as lack or even knowing the facts that your CPMG providers were directly involved… is disheartening and aggravating."[6] *Id*. at 7:2-10.

The Sealed Documents also include a "Termination for Cause Notice" issued by the County of San Diego indicating that the county terminated its contract with CPMG because of a series of jail deaths, including Mr. Nunez's. *Id*. at 7-8. The termination notice indicates that CPMG "hires resident psychiatrists who have not

[6] As the Court is aware, psychogenic polydipsia is the mental illness from which Mr. Nunez suffered that can cause people to drink lethal amounts of water.

completed residency in psychiatry … [which has resulted] in three notable lawsuits against the Sheriff's department where CPMG providers' clinical decisions and deviations from Sheriff Protocols resulted in the death of inmates." *Id*. at 8:10-16.

The Sealed Documents are important for the public not only because of the negative light they shed on CPMG, but also because of what they say about the administration of the county which, according to the "Termination Cause Notice" for CPMG, decided to end its relationship with CPMG only after the contractor's behavior resulted in at least three inmate deaths and corresponding lawsuits. *Id*.

ARGUMENT

A. The Court Should Grant Leave for ACLU-SDIC to Intervene for the Purpose of Challenging the Inappropriate Sealing of Records and Opposing the Motions to Seal.

ACLU-SDIC is a proper intervenor for purposes of opposing the sealing of records in this case. "Nonparties seeking access to a judicial record in a civil case may do so by seeking permissive intervention under Rule 24(b)(2)." *San Jose Mercury News, Inc. v. United States Dist. Ct.*, 187 F.3d 1096, 1100 (9th Cir. 1999); *see also Doe v. City of San Diego*, No. 12-CV-689-MMA-DHB, 2014 WL 1921742, at *1 (S.D. Cal. May 14, 2014). Every "circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality" or sealing of judicial records. *EEOC v. National Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998).

The typical requirements for permissive intervention do not apply with literal precision to motions seeking access to judicial records. For such motions, courts "adopt generous interpretations of Rule 24(b) because of the need for 'an effective mechanism for third-party claims of access to information generated through judicial proceedings.'" *Id.* Although permissive intervention "ordinarily requires independent jurisdictional grounds," in this instance "an independent jurisdictional basis is not required" because ACLU-SDIC does not seek "to litigate a claim on the

merits," but instead asks "the court only to exercise that power which it already has" to protect the public's access to judicial records. *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992); *see also National Children's Ctr.*, 146 F.3d at 1047 ("An independent jurisdictional basis is simply unnecessary when the movant seeks to intervene only for the limited purpose of obtaining access to documents covered by seal"); *Doe*, 2014 WL 1921742, at *1 (to challenge sealing of records, "an applicant need not have an independent ground for jurisdiction"). Intervention is also appropriate because this motion is timely and shares a common issue of law or fact with the main action.[7] *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994). The Court should therefore allow ACLU-SDIC to intervene for purposes of opposing the sealing of files in this case and defending the public's right of access to judicial records. *Doe*, 2014 WL 1921742, at *1 (granting motion to intervene and unseal court records)

B. Defendants Have Not Met the Demanding Requirements of Either the First Amendment or the Common Law to Justify the Wholesale Sealing of Dispositive Motions.

The records of civil cases are presumptively open to the public, under the First Amendment or the "common law right of access to records." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). The openness of judicial proceedings is essential to their legitimacy. "The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element

[7] ACLU-SDIC has standing to challenge the sealing of records in this case. *Pansy*, 23 F.3d at 777. A formal pleading is unnecessary to seek access to judicial records, *Beckman*, 966 F.2d at 474-75, especially in light of the imminent hearing date on May 20, 2019 for the motion to vacate summary judgment, the urgency of the issue, and the delay that would result from requiring a complaint and responsive pleadings. To expedite the Court's review, ACLU-SDIC has made a combined motion to intervene and oppose sealing of records. *Cf. San Jose Mercury News*, 187 F.3d at 1099 (allowing expedited review by mandamus in case about "access to judicial records" because "delay entailed by a direct appeal can constitute an irreparable injury").

of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification." *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (quoted in *United States v. Stoterau*, 524 F.3d 988, 1012 (9th Cir. 2008)). Accordingly, "[t]he presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice." *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (citation and quotation marks omitted).

Although the Ninth Circuit has not yet confirmed the First Amendment applies to civil court records, *San Jose Mercury News*, 187 F.3d at 1102, other circuits have held the First Amendment protects access to such records, especially dispositive motions such as summary judgment. *See, e.g., Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006) ("documents submitted to a court in support of or in opposition to a motion for summary judgment are judicial documents to which a presumption of immediate public access attaches under both the common law and the First Amendment"); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) ("rigorous First Amendment standard" governs public access to "documents filed in connection with a summary judgment motion in a civil case"). There is good reason to believe the Ninth Circuit would likewise hold the First Amendment protects access to dispositive motions in civil cases. *See Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003) (citing *Rushford*, 846 F.2d at 252, for the proposition that once "documents are made part of a dispositive motion," they "no longer enjoy protected status 'without some overriding interests in favor of keeping the discovery documents under seal'").

Under the First Amendment, any "denial of access" to dispositive motions "must be necessitated by a compelling government interest and narrowly tailored to

serve that interest." *Rushford*, 846 F.2d at 253. A court must make "specific, on-the-record findings that sealing is necessary" to preserve a compelling interest and that sealing "is narrowly tailored to achieve that aim." *Lugosch*, 435 F.3d at 124. For the reasons explained in this brief, CPMG has not shown that sealing the records at issue in this motion is narrowly tailored to any compelling interest. Moreover, the magistrate judge's orders granting leave to file under seal contain no explanation or reasoning. (ECF Nos. 375, 376.) Neither order makes any "specific, on-the-record findings" as to why sealing the records was necessary, as required by *Lugosch*. *Id*. The sealing orders therefore violate the First Amendment.

However, the Court need not decide whether the First Amendment applies, because CPMG has not met the strict standard for abridging the common law right of access to judicial records. *See Hagestad*, 49 F.3d at 1434 n.6. Under the common law, the Ninth Circuit enforces "a strong presumption in favor of access" to judicial records that may be overcome only 'on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture.'" *Hagestad*, 49 F.3d at 1434; *see also Foltz*, 331 F.3d at 1135 ("In this circuit, we start with a strong presumption in favor of access to court records."). The "strong presumption of access to judicial records applies fully to dispositive pleadings, including motions for summary judgment and related attachments … because the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the 'public's understanding of the judicial process and of significant public events.'" *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (quoting *Valley Broadcasting Co. v. United States Dist. Ct.*, 798 F.2d 1289, 1294 (9th Cir. 1986)). The same is true for the pending motion to vacate summary judgment, which "is more than tangentially related to the underlying cause of action" and "requires the court to address the merits." *Ctr. for Auto Safety*, 809 F.3d at 1099.

A party seeking to seal dispositive motions "bears the burden of overcoming this strong presumption" by showing "compelling reasons supported by specific factual findings" that "outweigh the general history of access and the public policies favoring disclosure." *Kamakana,* 447 F.3d at 1178-79. Defendants may not rely on "hypothesis or conjecture." *Id.* at 1179. Though "good cause" might justify sealing non-dispositive motions, it does not provide the "compelling reasons" necessary "to rebut the presumption of access to dispositive pleadings and attachments." *Id.* at 1180. While some "information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action … [t]he same cannot be said for materials attached to a summary judgment motion because summary judgment adjudicates substantive rights and serves as a substitute for trial." *Foltz*, 331 F.3d at 1135 (citation and internal quotation marks omitted). "The rationale underlying the 'good cause' standard for nondispositive orders" accordingly "does not apply to this case." *Oliner v. Kontrabecki*, 745 F.3d 1024, 1026 (9th Cir. 2014).

Regardless of whether they were confidential during discovery, "the *dispositive* documents in any litigation enter the public record notwithstanding any earlier agreement," unless the Court finds the demanding standard for sealing has been met. *Baxter Int'l, Inc. v. Abbott Laboratories*, 297 F.3d 544, 546 (7th Cir. 2002) (emphasis in original). Therefore, any good cause underlying confidentiality during discovery does not furnish compelling reasons to justify sealing documents filed in support of a dispositive motion "even if the dispositive motion, or its attachments, were previously filed under seal or protective order."[8] *Kamakana*, 447

[8] As with "many pretrial protective orders, the [magistrate] judge signed off on the order without the benefit of making an individualized determination as to specific documents." *Kamakana*, 447 F.3d at 1183. A party that obtains a "blanket protective order without making a particularized showing of good cause with respect to any individual document" cannot "reasonably rely on the order to hold these records under seal forever." *Foltz*, 331 F.3d at 1138. In any event, the order

F.3d at 1179; *see also Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665, 679 (9th Cir. 2010) (any "determination ... that good cause exists for sealing … documents does not establish that there are 'compelling reasons' to do so").

CPMG has not met the demanding standards of either the First Amendment or the common law right of access.[9] It has submitted no evidence of any compelling reason to place the Sealed Documents under seal. Instead of demonstrating "articulable facts," it offers only "hypothesis and conjecture," which are insufficient to deprive the public of its right to inspect documents or briefs supporting dispositive motions. *Hagestad*, 49 F.3d at 1434.

CPMG has submitted little more than conclusory assertions of counsel to support any claim that there are "compelling public policy reasons for allowing [the Sealed Documents] to be filed under seal." (ECF 397 at 4:3-4.) For example, Elizabeth Harris has filed a declaration noting that the "documents and deposition testimony" that CPMG seeks to seal in its May 5th motion "constitute, contain, or reflect confidential sensitive information which should not be made public record." Harris Decl., ECF 397-1 at ¶3. Such assertions, taken at face value, are purely conclusory and insufficient to justify sealing documents or briefs in support of dispositive motions. *FTC v. Standard Financial Mgmt. Corp.*, 830 F.2d 404, 412 (1st Cir. 1987) (motion to seal "must be based on a particular factual demonstration

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directed, "No document shall be filed under seal unless counsel secures a court order allowing the filing of a document, or portion thereof, under seal. An application to file a document under seal shall be served on opposing counsel … If opposing counsel … wishes to oppose the application, he/she must contact the chambers of the judge who will rule on the application." ECF No. 36. Therefore, CPMG "should have been on notice that confidential categorization of discovery documents under the protective order was not a guarantee of confidentiality, especially in the event of a court filing." *Kamakana*, 447 F.3d at 1183.

[9] Although Plaintiffs acquiesced in sealing documents, at least conditionally, CPMG is the only party arguing to keep them sealed. Regardless of any acquiescence by Plaintiffs, the public has an independent right to judicial records.

of potential harm, not on conclusory statements," and court may not "accept conclusory assertions as a surrogate for hard facts").

CPMG asserts no facts demonstrating what exactly is "sensitive" about the Sealed Documents, or what harm would be done should they be made publicly available. Indeed, CPMG has itself made many of these documents publicly available, filing them without seal in *Nishimoto v. County of San Diego. See* ECF 337 at 1. CPMG thus appears to have only a newfound conviction that release of at least this subset of the Sealed Documents would be harmful. And because the deposition excerpts, too, were initially publicly posted (ECF No. 385), any potential harm the release could do is likely to have already been done. Once "information that is supposed to be confidential … is [made] public, it necessarily remains public. … Once the cat is out of the bag, the ball game is over." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 n.11 (2d Cir. 2004) (citations and internal quotation marks omitted).

In any event, regardless of whether any of the Sealed Documents are otherwise available, the record does not establish compelling reasons to conceal them from the public. Rather than provide concrete facts establishing that unsealing the Sealed Documents would create any harm, CPMG relies on an extended discussion of the peer review privilege, seeking to establish that there are "important policy considerations which overcome the presumption in favor of public access to the records at issue." (ECF 397 at 3:13-16.) CPMG is forced to rely on a discussion of the privilege rather than the privilege itself because, as it acknowledges, "[t]he Court has declined to recognize a federal peer review privilege in this case." *Id*. at 8:23-25; *see also Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir. 2005) (declining to find or create a federal peer review privilege, noting that "[n]o case in this circuit has recognized the [medical peer review] privilege" and that "Congress has twice had occasion and opportunity to consider the privilege and not granted it either explicitly or by implication") (original

brackets); *Love v. Permanente Med. Grp.*, No. C-12-05679 DMR, 2013 WL 4428806, at *2 (N.D. Cal. Aug. 15, 2013) ("Peer review privilege is not recognized under federal law.").

Conceding that it cannot rely on any federal peer review privilege, CPMG instead relies on the asserted policy behind the state law peer review privilege, Cal. Evid. Code § 1157, suggesting that the logic of the privilege provides a compelling reason to seal. (ECF No. 397 at 4-5.) This suggestion is misplaced because it is not mere happenstance that, as CPMG claims, "the Ninth Circuit has so far declined to recognize a federal peer review privilege." *Id*. at 5:11-13. Instead, the Ninth Circuit explicitly rejected the privilege in the context of documents "bearing on the death of a prisoner." *Agster*, 422 F.3d at 839.

The *Agster* court allowed that part of its determination might be different "in the ordinary hospital [where] it may be that the first object of all involved in patient care is the welfare of the patient." *Id*. However, "in the prison context the safety and efficiency of the prison may operate as goals affecting the care offered. In these circumstances, it is peculiarly important that the public have access to the assessment by peers of the care provided." *Id*. Privilege is not needed to ensure that that peer review will be conducted in the prison context "[g]iven the demands for public accountability, which seem likely to guarantee that such reviews take place whether they are privileged or not." *Id*.

Even outside of the context of prison or jail deaths, "[s]everal federal courts have specifically declined to create a federal common law privilege analogous to Section 1157 because it would be inconsistent with the liberal policy of discovery under federal law." *Love*, 2013 WL 4428806 at *2 (citing cases); *see also Leon v. County of San Diego*, 202 F.R.D. 631, 636 (S.D. Cal. 2001) ("[T]his Court finds that because this is a civil rights action, special concerns about the protection of federal substantive law also weigh in favor of rejecting the state privilege claim. The claims made here are federal constitutional claims against a non-federal

government agency. It thus appears particularly inappropriate to allow the use of state evidentiary privileges."); *Taylor v. Los Angeles Police Dept.*, 1999 WL 33101661, at *3 n.1 (C.D. Cal. Nov. 10, 1999) ("[T]he so-called privileges raised by defendants under various provisions of the California Evidence and Penal Codes are not federal evidentiary privileges and do not warrant discussion.").

While a privilege may not be required to justify sealing court records, CPMG has not identified any compelling harm sufficient to overcome the strong presumption of public access to court records. The same reasons that the Ninth Circuit has advanced for rejecting the peer review privilege apply with equal force when considering a motion to seal court records in this case: there is no need to maintain the confidentiality of peer review in the jail context, especially where doing so would frustrate the public need to access peer assessment of jail medical care. *Agster*, 422 F.3d at 839. The Ninth Circuit's sound rejection of the privilege thus makes clear that there is no compelling reason to seal documents the privilege might otherwise protect in state court.

CPMG cannot evade the reasoning of *Agster* by merely asserting the general interest in confidentiality of peer review. Courts have expressly rejected that interest as a basis for sealing judicial records. *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991) ("[W]e do not think it sufficient merely to allude to the Hospital's general interest in keeping peer review processes out of the public eye. That rationale sweeps far too broadly and would encompass all litigation involving public and private institutions that provide essential services to the public."); *Romero v. County of Santa Clara*, No. 11-CV-04812-WHO, 2014 WL 12641990, at *1 (N.D. Cal. June 17, 2014) (holding "blanket assertion" that peer review protects "confidentiality of ... committees having responsibility of evaluation and improvement of quality of care is insufficient to overcome the presumption against sealing" court records) (citation & quotation marks omitted); *Wood v. Archbold Med. Ctr., Inc.*, No. 7:07-CV-109 HL, 2009 WL 3418162, at *2

(M.D. Ga. Oct. 14, 2009) (holding that "where the Hospital Defendants make essentially the same argument" rejected in *Johnson*, "it is insufficient to justify an order sealing the peer review documents").

CPMG may be motivated by fear of exposure rather than genuine concerns for effective peer review. This would be understandable given the damning critiques of its operations that appear in the Sealed Documents. However, "[t]he 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." *Kamakana*, 447 F.3d at 1179; *see also Oliner*, 745 F.3d at 1026 ("The only reasons provided for sealing the records—to avoid embarrassment or annoyance to Kontrabecki and to prevent an undue burden on his professional endeavors—are not 'compelling,' particularly because the proceedings had been a matter of public record since at least 2004.").

Even if CPMG could show compelling reasons based on specific facts why certain information should be redacted or filed under seal, its blanket request to seal all of the previously undisclosed records and the excerpts of the depositions in their entirety is grossly overbroad. A motion to seal must "analyze in detail, document by document, the propriety of secrecy." *Baxter*, 297 F.3d at 548. CPMG has not demonstrated any "sufficiently compelling reasons for maintaining a seal over particular documents." *Foltz*, 331 F.3d at 1138. "The Court simply cannot deny the public's right of access to information that they are entitled to view on grounds that [CPMG does] not wish to undertake the burden of … identifying with specificity the particular attachment and how it constitutes confidential information" allegedly subject to sealing. *Gray v. Woodford*, No. 05-cv-1475-MMA (CAB), 2010 WL 2231808, at *10 (S.D. Cal. June 2, 2010).

CONCLUSION

For the foregoing reasons, the Court should grant the motion of ACLU-SDIC to intervene for the limited purpose of challenging the orders sealing documents and to oppose CPMG's motions to seal as well as any conditional sealing sought by Plaintiffs in response to CPMG's demands. It should also lift the seal on documents sealed by two Court Orders dated March 4, 2019 (ECF Nos. 375 and 376) and documents withdrawn or filed conditionally under seal on April 22 and 26, 2019 (ECF Nos. 386 and 392).

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Respectfully submitted,

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