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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

HAROLD J. PHILLIPS and GEORG-ANNE PHILLIPS,	)	CASE NO: 02 CV 1642 B (NLS)
Plaintiffs,	)	<b>ORDER DENYING DEFENDANT’S OBJECTIONS TO MAGISTRATE JUDGE’S ORDER DENYING AS MOOT INTERVENORS’ MOTION TO MODIFY PROTECTIVE ORDER; AND, IN THE ALTERNATIVE ONLY, DENYING DEFENDANT’S OBJECTIONS TO MAGISTRATE JUDGE’S ORDER GRANTING INTERVENORS’ MOTION TO MODIFY PROTECTIVE ORDER TO REMOVE CONFIDENTIALITY COVERAGE AS TO CERTAIN TESTIMONY BY KIM COX</b>
and	)	
LEROY HAEGER, KORI D. HALEY, et al.,	)	
Intervening Plaintiffs,	)	
v.	)	
THE GOODYEAR TIRE & RUBBER COMPANY, an Ohio Corporation,	)	
Defendant.	)	[Docket Nos. 27-2, 65, & 78]

In October 2007, the Court permitted Intervening Plaintiffs in collateral litigation to intervene in this closed case for the purpose of seeking a modification of the June 2003 Protective Order pertaining to a deposition of an employee of Defendant Goodyear Tire & Rubber Company.<sup>1</sup> On January 28, 2008, the Magistrate

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<sup>1</sup>The moving parties include Leroy Haeger (D. Arizona), Kori Haley (Arizona state court), Margaret Bogaert (Arizona state court), Billy Woods (Alabama state court), Joseph Anton (S.D. Texas), and John Schalmo (Florida state court). Hereinafter “Intervening Plaintiffs.”

1 Judge denied as moot the motion to modify the Protective Order (Sealed Doc. No. 65).  
2 Goodyear filed timely objections to the Magistrate Judge's findings and conclusions  
3 that the June 2003 deposition was not covered by the Protective Order and that no  
4 good cause existed for its continued protection. Intervening Plaintiffs filed a response  
5 and Defendant Goodyear filed a reply brief.

#### 6 Standard of Review

7 When a party objects to a magistrate judge's non-dispositive order, the district  
8 court may set aside or modify any portion of that is "clearly erroneous or contrary to  
9 law." Fed. R. Civ. P. 72(a); *Maisonville v. F2 Am., Inc.*, 902 F.2d 746, 747 (9th Cir.  
10 1990).

#### 11 Burden of Proof

12 When an intervening party challenges the contention that discovery documents  
13 belong under seal, "the collateral litigant must demonstrate the relevance of the  
14 protected discovery to the collateral proceedings and its general discoverability  
15 therein." *Foltz v. State Farm Mutual Auto. Ins. Co.*, 331 F.3d 1122, 1132 (9th Cir.  
16 2003).

17 Once relevance has been shown, "the district court must require [the opposing  
18 party] to make an actual showing of good cause for their continuing protection under  
19 Federal Rule of Civil Procedure 26(c)." *Foltz*, 331 F.3d at 1131; *Beckman Indus., Inc.*  
20 *v. Int'l Ins. Co.*, 966 F.2d 470, 475-76 (9th Cir. 1992) (adopting Rule 26(c) approach  
21 that places burden on the party *opposing* modification to show "good cause" for  
22 continued protection).

23 In addition, the court "must weigh the countervailing reliance interest of the  
24 party opposing modification against the policy of avoiding duplicative discovery."  
25 *Foltz*, 331 F.3d at 1133.

#### 26 Factual Background

27 In 2002, Plaintiffs Harold and Georg-Anne Phillips filed this tort action against  
28 Defendant Goodyear. They alleged personal injuries and property damages resulting

1 from an accident when the Goodyear “G159” Unisteel tire’s tread separated, causing a  
2 loss of control of their motor home. Plaintiffs alleged the tire was defective and that  
3 Goodyear knew this model tire was not safe for motor homes.

4 On June 19, 2003, Plaintiffs commenced a deposition of a Goodyear employee,  
5 Kim Cox. During that deposition, Cox allegedly testified that the G159 tire was  
6 defective for use on a motor home or some similar statement or opinion. At that point,  
7 the deposition was interrupted and the parties discussed settlement. The court reporter  
8 had her stenographer’s notes of the incomplete deposition, but never made a transcript.

9 A few days before the Cox deposition commenced, the parties stipulated to a  
10 Protective Order to govern the production of “documents and information that  
11 Goodyear believes to be proprietary and confidential.” Protective Order at p. 1, lines  
12 19-20 (filed June 16, 2003). By the terms of the Protective Order, the attorney for the  
13 Plaintiffs, Guy Ricciardulli, Esq., was prohibited from communicating in any manner  
14 information contained in “designated documents” because the information was solely  
15 for use in this case. *Id.* p.3, § II, ¶ 1, lines 10-11. Deposition testimony was included.  
16 *Id.* p. 4, § II, ¶ 3. The Protective Order further provided that Goodyear could destroy  
17 confidential documents sixty days after the case concluded. *Id.* p. 8, § II, ¶ 11.

18 After proceeding to mediation, the Phillips case was settled and dismissed in  
19 October 2003. [# 24]

20 In the interim, Goodyear’s attorney, John McCormick, Esq., contacted the court  
21 reporter and asked her to send her “original and all copies of [her] notes and  
22 transcription” of the Cox deposition for destruction. McCormick Decl. Ex. B (letter  
23 dated August 19, 2003). Ricciardulli signed that letter as “agreed to per stipulation.”  
24 *Id.* The court reporter complied and sent the notes and exhibits of the deposition to  
25 McCormick. She confirmed that the Cox deposition had not been transcribed.  
26 McCormick destroyed the reporter’s notes. None of the notes or oral testimony from  
27 the deposition was ever designated as confidential information to be included within  
28 the Protective Order. *See* Protective Order p.1, § I, ¶ A, B & p.3-4, § II, ¶ 1, 3.



Analysis

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2       1. Confidential Matters Covered by Protective Order Must Be Designated

3       The Court affirms the primary holding of the Magistrate Court's Order that  
4 interpreted the scope and duties of Goodyear under its Protective Order. *Jeff D. v.*  
5 *Andrus*, 899 F.2d 753, 759 (9th Cir. 1989) (interpretation of terms of stipulation  
6 between parties is subject to de novo review). Because Goodyear drafted the  
7 Protective Order to exempt documents from the public record, the Court construes the  
8 terms narrowly so as to enforce the general presumption of public access. *Olympic*  
9 *Refining Co. v. Carter*, 332 F.2d 260, 264 (9th Cir. 1964) ("In the federal judicial  
10 system trial and pretrial proceedings are ordinarily to be conducted in public.").  
11 While it is true that the deposition was not transcribed to permit the legend in red ink  
12 contemplated by § II, ¶ 3 of the Protective Order, Goodyear has not provided evidence  
13 of any stipulation or certification that the content of the Cox deposition must not be  
14 divulged.<sup>3</sup> As the Magistrate Court observed, Goodyear bears the hardship of its  
15 decision to destroy not only the court reporter's notes but any evidence, if any existed,  
16 that the parties had stipulated that it be designated as "confidential." Ricciardulli  
17 denies any such stipulation was made.

18       2. No Good Cause to Continue Protection of Cox Deposition on Defective Tire

19       The Court affirms the Magistrate Court's alternative ruling that the Protective  
20 Order can be modified to allow the Intervening Plaintiffs access to Cox's alleged  
21 testimony that the G159 tire is defective when used on motor homes. *Olympic*  
22 *Refining*, 332 F.2d at 264 (protective orders are "subject to modification to meet the  
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24       <sup>3</sup>McCormick, counsel for Goodyear, did obtain Ricciardulli's stipulation that the  
25 court reporter return her notes to him for destruction. Ex. to McCormick Decl. In  
26 Goodyear's Opposition to Intervenors' Motion to Modify Protective Order at 3, it states:  
27 "Pursuant to Federal Rule 30(f)(2), the parties to a matter may agree to relieve the court  
28 reporter of his/her responsibility for retaining notes of the deposition transcript. That is  
exactly what occurred here." No suggestion is made by Goodyear in this record that the  
notes were certified as "confidential and proprietary" as described in the Protective Order.

1 reasonable needs of other parties in other litigation”).

2       The Intervening Plaintiffs have met their initial burden to show that Cox’s  
3 testimony is relevant to their collateral lawsuits. *Foltz*, 331 F.3d at 1132. The  
4 pending lawsuits allege that the same Goodyear tire model is defective when used on  
5 motor homes. This information is highly relevant. It is also likely to be discoverable,  
6 either as a possible admission by Goodyear or, if there is contrary testimony at trial, as  
7 impeachment. *Id.* Certainly such discovery would have an effect of reducing  
8 necessary pre-trial discovery in the collateral litigation.

9       The Magistrate Court correctly held that Goodyear had not met its burden to  
10 show good cause why the Cox deposition should be sealed. All of the important  
11 public policies favor transparency. *See generally Foltz*, 331 F.3d at 1131-33 (citing  
12 *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 654 (D. MD. 1987) (sharing discovery  
13 “particularly appropriate” when multiple plaintiffs assert same wrong against national  
14 manufacturer of a consumer product)).

15       First, *if* the Phillips case had been tried to a jury, Cox’s alleged testimony  
16 potentially would have been admissible in open court, either as a possible admission  
17 that the tire is defective for use on motor homes, or if he testified in a contradictory  
18 manner, for impeachment purposes. The availability of that testimony should not be  
19 any different when the attorney has destroyed the written record than if it had been  
20 admitted on the record during a public trial.<sup>4</sup>

21       Second, if the Court were to continue to protect Cox’s alleged opinion, it would  
22 create a potential for subornation of inconsistent testimony by Cox, which could not  
23 be illuminated by potentially impeaching evidence from his June 2003 deposition.

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25       <sup>4</sup>Moreover, though the parties did not clearly establish such documents would be  
26 made available to the public, the federal statutes and regulations on transportation safety  
27 require manufacturers to report defective tires to the Secretary of Transportation. 49  
28 U.S.C. § 30118(c)(1); 49 C.F.R. § 576. The Court discerns no reason why a failure to  
comply with that statute should be grounds to conceal the report of a defect in later  
litigation.

1 That possibility of mischief is not in the interest of justice in a court of law and does  
2 not commend protecting the information.

3 Third, Goodyear has not identified any public policy that supports the  
4 perpetuation of secrecy of a Goodyear employee's testimony concerning a possibly  
5 defective tire in certain usages. Nothing commends the concealment from a trier of  
6 fact of evidence bearing on the issue of defect in suits for personal injury to other  
7 members of the public. It would be repugnant to the public policy of protecting the  
8 health and safety of the public.

9 Finally, "the collateral courts may freely control the discovery processes" as to  
10 whether the material requires protection in those proceedings. *Foltz*, 331 F.3d at  
11 1132-33; *Olympic Refining Co. v. Carter*, 332 F.2d 260, 265-66 (9th Cir. 1964)  
12 (district court can control the right of access, but is not authorized "to protect trade  
13 secret and sensitive competitive information *from such disclosure as is relevant to the*  
14 *subject matter involved in a pending litigation*" because other litigants in similar cases  
15 are "entitled to know" what the same defendant said about the same matter) (emphasis  
16 added). For example, to the extent that Cox's testimony dealt with any proprietary or  
17 trade secret information regarding claims handling, the issue of admissibility might be  
18 a closer question, but this Order is limited to testimony, if any, given by Cox regarding  
19 possible defect in the design or manufacture of the "G159" Unisteel tire when used  
20 with certain motor homes. *Beckman*, 966 F.2d at 475-76. Here, the Order does not  
21 concern technical, patent, or financial information but only the alleged defect of the  
22 tire under certain usage conditions.

### 23 3. Miscellaneous Matters

24 The Court rejects Goodyear's remaining objections. 28 U.S.C. § 636 (b)(3) (a  
25 magistrate judge may be assigned additional duties).

#### 26 (a) Dismissal of Intervening Plaintiff Anton

27 In December 2007, Intervening Plaintiff Anton electronically filed a document  
28 entitled "notice of settlement and stipulation to dismiss the action between settled

1 parties.” That document states that Anton and Goodyear agreed to a form of dismissal  
2 order “which accompanies this Stipulation.” However, there was no such attachment.  
3 Although court staff contacted Anton’s counsel on four occasions to request a  
4 proposed order for the Court to sign, Anton has not submitted a proposed order.  
5 Accordingly, on or before March 28, 2008, Anton shall submit a proposed order of  
6 dismissal to the undersigned’s official email address,<sup>5</sup> preferably in Word Perfect  
7 format, in compliance with this Court’s Electronic Case Filing Administrative Policies  
8 and Procedures § 2(h).

9 (b) Sealed Documents

10 As a final housekeeping matter, the Magistrate Judge had permitted the parties  
11 to file certain motions, declarations, and exhibits under seal during the proceedings on  
12 the merits of the motions. [# 29] Because Goodyear stated that it would file  
13 objections, the Magistrate Judge ordered the relevant documents to remain sealed  
14 pending review by this Court. [# 67] The Magistrate Judge also sealed the transcript  
15 of the argument on the motions and her Orders. [# 69] The Court maintained the seal  
16 on the underlying documents pending its review. [# 75]

17 As the Court has completed its review, these documents need not be sealed any  
18 longer. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006).  
19 The documents contain the arguments of counsel, declarations by attorneys concerning  
20 their memory as to the scope of the protective order, and factual recitations of  
21 conversations regarding allegations of the topics on which Cox may or may not have  
22 testified at his May 2003 deposition, but they do not contain confidential information.  
23 Accordingly, the Court unseals those motions, exhibits, declarations, transcript, and  
24 orders.

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Conclusion


1. The Court denies Defendant's objections to the Magistrate Judge's Order Denying as Moot Intervenor's Motion to Modify the Protective Order. [# 27-2, 65 & 78]

2. The Court removes the seal from Docket Numbers 27, 37, 45, 48, 51, 53, 65, 68 and the transcript of the January 11, 2008 hearing.

3. Intervening Plaintiff Anton shall submit a proposed order of dismissal by March 28, 2008.

IT IS SO ORDERED.

DATED: March 18, 2008

  
Hon. Rudi M. Brewster  
United States Senior District Judge

cc: all counsel  
Magistrate Judge Stormes