IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc Inc., *et al.*, Litigation Trust,	§	
	§	CIVIL ACTION NO.
Plaintiff,	§	
	§	3:10-CV-1842-G
vs.	§	
	§	ECF
VERIZON COMMUNICATIONS INC., VERIZON FINANCIAL SERVICES, LLC, GTE CORPORATION and JOHN W. DIERCKSEN,	§	
Defendants.	§	

DEFENDANTS' RESPONSE TO MOTION TO
INTERVENE FOR LIMITED PURPOSE AND BRIEF IN SUPPORT

The Association of Belltel Retirees Inc. ("Belltel"), Phillip A. Murphy, Jr., Sandra R. Noe, and Claire M. Palmer (the "Class Plaintiffs," and together with Belltel, the "Proposed Intervenors") have moved to intervene (the "Motion to Intervene") [Dkt. No. 416] in this action pursuant to Rule 24(b)(1) of the Federal Rules of Civil Procedure for the stated purpose of filing a motion to unseal the parties' motions for summary judgment and the related documents. The Court should exercise its discretion and deny the Proposed Intervenors' Motion to Intervene.

I. INTRODUCTION

The Proposed Intervenors seek leave to intervene in this case to challenge the sealed status of the summary judgment briefing and the confidentiality designations made by the parties and the dozens of non-parties that produced confidential documents and gave depositions in this case. The Proposed Intervenors have not met their burden to establish that permissive intervention, granted only at the discretion of the Court, is appropriate or necessary here. The parties have already provided counsel for the Proposed Intervenors with redacted versions of the

sealed filings that remove only those portions of the briefs that disclose the contents of confidential information or jointly privileged communications. Indeed, Proposed Intervenors' counsel initially indicated that such redacted filings would satisfy their concerns; however, they have now reversed course and apparently are in favor of requiring the Court to consider challenges to the confidentiality designations (made by the parties to this case and the dozens of non-parties that produced confidential documents and gave confidential deposition testimony subject to the Agreed Confidentiality Order [Dkt. No. 51]) on a document-by-document, deposition-by-deposition basis. This pointless exercise will unduly delay these proceedings, burden the Court, and prejudice the parties to this Action by forcing them to take time out from the two to three months remaining before the trial setting in this case to address the confidentiality and joint-privilege designations. It will also require numerous non-parties to this action to appear and defend their confidential documents and deposition testimony from public disclosure.

Even setting aside the question of burden, the Motion to Intervene should be denied because Proposed Intervenors have not shown any real need for the confidential and privileged information to which they seek access. Although the Proposed Intervenors include named plaintiffs in another case pending in this Court against Verizon,[1] the motion would not help in that lawsuit—discovery in that case has closed, and the issues in the two lawsuits are different.

Finally, Proposed Intervenors have already ignored the Agreed Confidentiality Order entered in this case, as evidenced by the fact that a version of the amended complaint, which Plaintiff inappropriately filed in the public record before it was quickly sealed by the Court, remains available online on Belltel's website and sealed portions were improperly quoted

[1] Proposed Intervenors include the named plaintiffs of another case pending before this Court—*Murphy v. Verizon, et al.*, Case No. 3:09-cv-2262-G.

verbatim in a newsletter sent to members of Belltel.[2] For all these reasons, the Court should exercise its discretion and deny the Motion to Intervene.

II. BACKGROUND

This action arises out of Plaintiff's claim that the Spin-Off of Idearc Inc. by Verizon Communications Inc. ("Verizon") was a fraudulent transfer, among other things. Early in the case, the parties recognized that confidential information as well as information protected by a joint attorney-client privilege was going to be produced in discovery, and entered into the Agreed Confidentiality Order. (*See* Agreed Confidentiality Order [Dkt. No. 51].) The Agreed Confidentiality Order permits the parties to designate as Confidential any information that qualifies for protection under Rule 26(c) of the Federal Rules of Civil Procedure. (Agreed Confidentiality Order ¶¶ 7-8.) The Court has also clarified that the Agreed Confidentiality Order applies to all jointly-privileged communications produced in this case. While the privilege is shared between Verizon and Idearc, and production of such documents among the parties does not effectuate a waiver, such jointly privileged documents are protected from disclosure to third parties. (Order dated Dec. 12, 2011 [Dkt. No. 176] at 2-3.)

Here, the parties produced hundreds of thousands of pages of documents, some of which were designated as confidential and others as jointly privileged—documents that never would have been produced outside of a conflict involving joint clients and documents which Proposed Intervenors do not seek to obtain. (Mot. to Intervene ¶ 10.) In addition to documents produced by the parties to this action, a large number of non-parties have produced documents pursuant to subpoenas issued by both Plaintiff and Defendants. For example, SuperMedia LLC, McKinsey & Company, attorneys for Verizon and Idearc (Debevoise & Plimpton LLP, Skadden, Arps,

[2] *See* Spring 2012 Belltel Newsletter, (*available at* http://www.belltelretirees.org/images/stories/2012%20spring%20belltel%20%20final.pdf); *see also* Copy of Amended Complaint [Dkt. 161] (*available at* http://www.belltelretirees.org/images/stories/idearc_v_verizon_1.pdf).

Slate, Meagher & Flom LLP, and Fulbright & Jaworski LLP), dozens of banks that loaned money to Idearc and purchased Idearc's unsecured notes, as well as numerous former officers and directors of Verizon and Idearc have all produced documents—and many have given deposition testimony—subject to the protections of the Agreed Confidentiality Order.

During and after the close of fact discovery, the parties submitted motions for summary judgment and associated briefing [Dkt. Nos. 283, 317, 333, 343, 363, 372, 379, 390, 395, 402, 406, 423, 430, 439, 446, and 447]. Because these filings rely extensively on documents and information designated as confidential or jointly privileged, most of the briefing was filed under seal. Approximately one-third of the documents cited in the parties' briefing were designated confidential or jointly privileged, and a similar proportion of the factual background portion of the briefs contains confidential information.[3]

After the summary judgment briefs were filed, counsel for the Proposed Intervenors sent an email (referenced in the Motion to Intervene) complaining that the summary judgment briefing was filed under seal and seeking to confer regarding the proposed intervention and regarding unsealing the summary judgment briefing. Counsel for Verizon responded, explaining various impediments to unsealing the documents in their entirety, including the jointly held privilege recognized by the Court, and the confidentiality expectations of not only the litigants but of numerous non-parties. After discussions with counsel for Proposed Intervenors regarding the information they sought, and in an effort to craft a practical resolution to this dispute, Verizon offered to and did prepare draft redacted versions of both Plaintiff's and Defendants' voluminous summary judgment filings. Defendants undertook this time-consuming task in an attempt to provide information to the Proposed Intervenors while protecting legitimate privilege

[3] A much smaller proportion of the argument section of the briefing contains confidential information.

and confidentiality concerns. With the agreement of Plaintiff, these draft redacted summary judgment briefs were provided to counsel for the Proposed Intervenors. Counsel for the Proposed Intervenors reviewed Verizon's redacted summary judgment briefing, indicated it might suffice to resolve the issues in the Motion to Intervene, and encouraged and requested that Verizon complete the process of redacting all of the summary judgment briefing. Now, however, Proposed Intervenors have reversed course and take the position that the redactions of Plaintiff's summary judgment briefing were not acceptable. Proposed Intervenors position is confounding given that the redacting of Plaintiff's and Defendants' summary judgment briefing was done in the same manner, based on the same set of confidentiality and joint-privilege designations.

III. ARGUMENTS & AUTHORITIES

A. Standard of Review.

Granting permission to intervene is wholly within the Court's discretion, even if the requirements of Rule 24(b) are met. *Newby v. Enron Corp.*, 443 F.3d 416, 424 (5th Cir. 2006); *PDVSA Servs., Inc. v. Transeguro C.A. de Seguros*, Civ. A. No. H-09-364, 2009 WL 2485590, at *3 (S.D. Tex. Aug. 6, 2009). "On timely motion, the court *may* permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1) (emphasis added). "In exercising its discretion, the court *must* consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3) (emphasis added). Here, Proposed Intervenors are not permitted to intervene as of right, and the Court must make a determination that, in its discretion, there is a common question of law or fact *and* that the intervention will not unduly delay or prejudice the rights of the parties to this action. Proposed Intervenors fail to identify for the Court any common questions of law or fact with any specificity, fail to identify any need for the

confidential information apart from an alleged "great public interest," and fail to recognize the delay and prejudice that granting intervention would cause the parties to this action.

B. Proposed Intervenors' Motion Was Premature, Unnecessary, and Will Unduly Delay the Proceedings and Prejudice the Parties.

Proposed Intervenors' attempt to insert themselves into this action is premature and unnecessary, as Verizon has attempted to resolve the Proposed Intervenors' request without the need for court involvement. The Class Plaintiffs can obtain the information they seek by review of the redacted summary judgment briefing, drafts of which have already been provided to counsel for the Proposed Intervenors; therefore, intervention is not necessary. For Verizon, preparing the redacted briefing was an exceedingly time consuming process, involving the redaction of portions of hundreds of pages of summary judgment briefing related to approximately 140 of the 370 exhibits filed in support of the parties' motions for summary judgment. These include sensitive financial data, board minutes (including related to matters other than the transaction underlying this dispute) and presentations (including related to matters other than the transaction underlying this dispute), and proprietary lender memoranda. (*See, e.g.*, Verizon Defs.' App. in Supp. Of Their Consolidated Mot. For Summary J. [Dkt. No. 376] (Exhibits 5, 19, 20, 32-36, 53, 54, 78-84).) Proposed Intervenors already have access to more than two-thirds of the summary judgment briefing and the vast majority of the argument sections. Fighting over the confidential or privileged nature of the remaining portions of the summary judgment briefing so that Proposed Intervenors may "public[ly] disclos[e]… summary judgment motions and related memorandum briefs" will only serve to waste the parties' limited

remaining time before trial and burden the Court with unnecessary discovery battles.[4] (Mot. At ¶ 8.)

Because of the large number of documents referenced or quoted in the summary judgment briefing that were produced by third-parties subject to the Agreed Protective Order, any motion to unseal will necessarily be an arduous process involving a large number of interested parties. Many of the documents cited in the summary judgment briefing are documents produced by lenders, including their internal memoranda regarding whether and why they thought lending to Idearc was appropriate. *See e.g.*, Verizon Defs.' App. in Supp. Of Their Consolidated Mot. For Summ. J. [Dkt. No. 376] at 610-808 (Ex. 19 & 20).) These documents were produced subject to the Agreed Protective Order by non-parties whose business interests could be harmed if their lending decisions were on display to the public and their competitors. Dozens of non-parties, each of whom will presumably seek to defend its confidentiality designations, will be forced to complete briefing on collateral and trivial issues unrelated to the merits of either this case or the Murphy action. This briefing will provide an unnecessary distraction to the Court in a time when it will be focusing on reviewing the parties' summary judgment briefing and other pending motions, as well as resolving pre-trial matters in advance of the trial set to begin as early as October 2, 2012.

C. Proposed Intervenors Have Provided No Common Question of Law and Fact and Have No Need to Access Confidential Information.

To determine whether, in its discretion, to grant permissive intervention, the Court should balance the strength of the common questions of law and fact and need of Proposed Intervenors for the confidential information against the undue delay and prejudice outlined above. Here, there are no common questions of law—the instant action is a fraudulent transfer case while the

[4] Notably, discovery in the Proposed Intervenors' Action has concluded, and they disclaim any desire to reopen discovery or use any information "publicly disclosed" in this case in that Action.

Murphy litigation is an ERISA claim. Similarly, there is no real common question of fact—the only commonality identified by Proposed Intervenors is that the claims in both actions "involve the same corporate spin-off transaction." (Mot. to Intervene ¶ 10.) This action involves whether Idearc was insolvent due to the debt incurred at the time of the Spin-Off, whether Verizon or Diercksen acted as promoters, whether Diercksen breached a fiduciary duty in approving the Spin-Off and other related issues, whereas the *Murphy* action, by contrast, involves the transfer of pension and other retirement costs and benefits to Idearc, an issue that has no bearing on this action at all, and suggests that Proposed Intervenors are engaged in a fishing expedition.

Further, Belltel is not party to any litigation involving the Spin-Off, and is allegedly an interested observer only due to ownership in Verizon stock and as a "conduit of information to its membership." (Mot. to Intervene ¶ 2.) However, other than ownership in Verizon stock (a trait shared by many others who are not attempting to intervene), Belltel has no basis for its desire to unseal these documents for general public consumption.

In addition, Proposed Intervenors already have access to much of the summary judgment briefing, but seek only the non-privileged portion to which they have not been provided access. They have made no argument that the confidential information is in any way related to their case; for example, they have set forth no rationale why documents produced by Idearc's lenders and the purchasers of its unsecured notes would be in any way relevant to the claims in the *Murphy* action. (*See* generally Mot. To Intervene) The absence of need is further highlighted by Proposed Intervenors' apparent position that the redacted versions of Defendants' briefing were acceptable while the redacted versions of Plaintiff's briefs were not, even though those briefs were prepared using the same methodology.

Moreover, and as recognized by the Proposed Intervenors, certain of the information in the summary judgment briefing and appendices is protected by a joint attorney-client privilege. (Mot. To Intervene ¶ 10.) There is no dispute that any such information would have to be redacted before being shared beyond the holders of the privilege, even if the Court were to conclude that some of the parties' and non-parties' confidential information should be unsealed. (*See* Order dated Dec. 22, 2011 at 3.) There is no dispute that Proposed Intervenors are not entitled to fully unredacted copies of the filings or that fully unredacted copies should be made publicly available.

Also critical to the Court's balancing of access to confidential information versus prejudice here is the Proposed Intervenors' history of treatment of confidential information. On November 30, 2011, Plaintiff filed its Amended Complaint, which attached and cited a jointly privileged document, without filing it under seal. (Am. Compl. [Dkt. No. 161].) Immediately thereafter, the Court sealed the Complaint and entered an order that the Amended Complaint filed as docket entry 161 would stay under seal until substituted with an amended complaint that did not contain jointly privileged information. (*See* Electronic Order Sealing Amended Complaint [Dkt. No. 165]; Order dated Dec. 22, 2011 at 3.)

Between the filing and initial sealing of the Amended Complaint, Belltel or its counsel apparently obtained a copy of the Amended Complaint. Notwithstanding that the Amended Complaint was promptly sealed by the Court, Belltel proceeded to post the Amended Complaint on its website.[5] Belltel also included privileged details from the Amended Complaint in its Spring 2012 newsletter,[6] both of which remain accessible to the public to this date. Belltel

[5] Copy of Amended Complaint [Dkt. 161] (*available at* http://www.belltelretirees.org/images/stories/idearc_v_verizon_1.pdf).

[6] Spring 2012 Belltel Newsletter, (*available at* http://www.belltelretirees.org/images/stories/2012%20spring%20belltel%20%20final.pdf).

clearly knew that there were sealed portions of the Amended Complaint because it also has a link to the expurgated version of the Amended Complaint on its website.[7] Such improper behavior should not be rewarded by access to additional confidential material.

Finally, if the Court determines that the Motion to Intervene should be granted, unsealing the relevant documents as the Proposed Intervenors suggest is not the appropriate solution. Rather, the Proposed Intervenors could sign the Agreed Confidentiality Agreement and receive the confidential (but not privileged) documents. *See, e.g.*, *Newby v. Enron Corp.*, 443 F.3d 416, 424 (5th Cir. 2006) ("the Board itself must adhere to the order requiring the confidentiality of deposition transcripts and exhibits"). This would provide additional relief to the Proposed Intervenors (access to the confidential documents) while still protecting those documents from disclosure to the public.

IV. CONCLUSION

For all of the above reasons, the Motion to Intervene should be denied.

[7] Plaintiff's Amended Complaint and Jury Demand (Expurgated) (*available at* http://www.belltelretirees.org/images/stories/2-17-12_murphy_v_verizon.pdf).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing document via the Court's CM/ECF system pursuant to the Court's Local Rules this 27th day of July 2012. Counsel for the Proposed Intervenors will be served by US Mail as follows:

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