NO. _____

(District Case Nos. 1:12-cv-00560-BLW and 1:13-cv-00116-BLW)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re the IDAHO STATESMAN PUBLISHING, LLC (*The Idaho Statesman*); *THE ASSOCIATED PRESS*; the IDAHO PRESS CLUB, INC.; the *Idaho-Press Tribune* (Nampa) owned by IDAHO PRESS-TRIBUNE LLC; and *The Times-News* (Twin Falls) owned by LEE PUBLICATIONS, INC.,

Petitioners,

v.

UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF IDAHO

Respondent,

and

Saint Alphonsus Medical Center - Nampa, Inc.;Treasure Valley Hospital Limited Partnership; Saint Alphonsus Health System, Inc.; Saint Alphonsus Regional Medical Center, Inc.; St. Luke's Health System, Ltd; St. Luke's Regional Medical Center, Ltd; Federal Trade Commission; State of Idaho; Saltzer Medical Group, P.A.

Real Parties in Interest/Respondents.

PETITION FOR WRIT OF MANDAMUS

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PROLOGUE

The underlying case involves an anti-trust lawsuit brought by the FTC, the State of Idaho, and private competitors of the defendant hospital, St. Luke's Health System LTD, for the purchase of Saltzer Medical Group P.A., a group of physicians, which had come on the heels of St. Luke's purchase of other similarly independently owned physician groups. The cumulative impact of said purchases would impact the treatment of medical patients in the State of Idaho and in Eastern Oregon. Three (3) working days before trial, the litigants to the action and the District Court entered into a Pretrial Order which effectively removed any members of the public or the press from the courtroom during substantial portions of trial testimony and also sealed trial exhibits, videotaped depositions, and written depositions and trial exhibits to said depositions without even attempting to meet the requirements of the compelling reasons standard as set forth by the Ninth Circuit Court of Appeals.

ISSUES PRESENTED FOR REVIEW

The issue presented to this Court is whether or not said Pretrial Order and its resultant impact on the trial proceedings, and court filings was proper given the applicable Ninth Circuit case law, which sets forth common law and constitutional rights of access to a court proceeding and trial exhibits.

THE RELIEF SOUGHT

The Petitioners herein request access to unredacted trial transcripts, all trial exhibits that were admitted, access to videotaped depositions as presented at trial, and written depositions and accompanying admitted exhibits as presented at trial. In addition, the parties submitted proposed Findings of Fact and Conclusions of Law under seal, Dkts 403, 404, 414, 426, 427, 429, and 430 - *see* Appendix E, as to which access is sought.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this Petition for Writ of Mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651 and Fed. R. App. P. 21.

FACTUAL AND PROCEDURAL BACKGROUND

The two underlying lawsuits were filed (1) by the Federal Trade Commission and the State of Idaho, which was originally filed under seal, against St. Luke's Health System, Ltd.; Saltzer Medical Group, P.A., on March 12, 2013, and (2) by the medical competitors (Saint Alphonsus Medical Center - Nampa, Inc.;Treasure Valley Hospital Limited Partnership; Saint Alphonsus Health System, Inc.; Saint Alphonsus Regional Medical Center, Inc.) on November 11, 2012. The two cases were then consolidated on March 19, 2013 [Dkt 92].

On January 16, 2013, the parties agreed to a protective order [*see* Dkt 64 - Appendix A]. The terms and conditions of the protective order allowed for the attorneys for the various litigants to designate what they felt should be described as "Attorneys' Eyes Only" (hereinafter AEO) documents during the normal course of discovery. The usual discovery proceeded.

But, three (3) business days before the trial commenced on September 17, 2013, a Pretrial Order [*see* Dkt 209 - Appendix B] was filed which transformed the protective order from one dealing primarily with access to discovery documents between the parties to a pretrial order which now made a determination as to how exhibits were going to be handled in regard to live testimony, videotaped testimony, deposition testimony, and trial exhibits all of which were to be presented at trial. The Pretrial Order provided an exclusion of the public from being able to view any portion of said proceedings simply because attorneys for the various litigants (beginning on January 16, 2013) had designated certain documents to be AEO only.

The Pretrial Order was supplemented on September 18, 2013, now just two (2) business days before the commencement of the trial. *See* Dkt 217 - Appendix C.

The trial commenced on September 23, 2013, and as that week of the trial evolved, it became apparent that significant and substantial portions of the live testimony, videotaped testimony, and presentation of depositions were occurring

behind closed doors in the Federal courtroom. *See* redacted trial testimony for the first five (5) days of the trial - Dkts 234, 239, 240/243, 244, and 245. On the third day of the second week of the trial, (Wednesday, October 2, 2013) the Petitioners herein filed their Motion to Intervene [Dkt 250] for immediate access to the remaining trial proceedings, to unredacted trial transcripts and exhibits, and to unredacted videotaped depositions and exhibits as already used at trial.

REASONS WHY WRIT SHOULD ISSUE

I. Discussion of Standard of Review

The District Court clearly failed to apply the compelling reasons standard prior to the entry of the protective order [Dkt 64] and the Pretrial Order [Dkt 209] and, thus, this would bring into play the abuse of discretion standard of review. *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F. 2d 470 (1992). Thereafter, the motion to not only intervene but to have access to that portion of the trial which had already occurred was ruled upon by the District Court, but at that juncture in time the District Court still did not apply the compelling reasons standard to the testimony, nor the exhibits, already presented at trial. After the filing of the Motion to Intervene [Dkt 250] and at oral argument, the District Court allowed affidavits to be filed by the litigants and nonlitigants, which continued after termination of evidence and even after closing argument, but the lower court's Memorandum Decision and Order [*see* Dkt 357 -

Appendix D] again clearly fails to apply the compelling reasons standard to testimony and sealing of exhibits and depositions so as to be compliant with Ninth Circuit case law as to the remaining trial. All of the above is an abuse of discretion by the District Court.

II. Discussion of Timeliness Issue

Suffice it to say, the District Court's Memorandum Decision and Order [*see* Dkt 357 - Appendix D] is highly critical of the public and, thus, the press for the timeliness of its Motion to Intervene when even prior to the entry of its Pretrial Order, pleadings and exhibits were being sealed without even a token attempt to meet with requirements as set forth by this Court, the Ninth Circuit, seven (7) years earlier in *Kamakana v. City & County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006) and ten (10) years earlier in *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir.2003).

Nothing was done by the litigants nor the District Court prior to the entry of the Pretrial Order to insure compliance with applicable Ninth Circuit case law.

The first paragraph of the Pretrial Order specifically states:

> The Court held a pretrial conference with all counsel on September 13, 2013. At that conference there was agreement on some issues, while other issues were left to the Court to resolve. This Pretrial Order sets forth the agreements, and the resolution of some of the disputes.

See Dkt 209, p. 1 - Appendix B.

It can only be surmised that the District Court is criticizing the press and, thus, the public for not participating in this conference to which the press and the public were not invited, and the irony of the situation is that it also appears that the Pretrial Order was based, at least in part, upon sealed documents such as Nos. 202, 196, 195, 191, 190, 189, 188, 187, 186, 183, 182, 181, 180, 176, 175, 174, and 173. *See* Docket Sheet - Appendix E. Of course, this Court nor the Petitioners know what occurred at the September 12, 2013, pretrial conference because the transcript of that proceeding has also been sealed. *See* Dkt 210 on the Docket Sheet - Appendix E:

> This transcript is not available to the general public and as such is sealed.

Emphasis added.

As to timeliness, it should be noted that neither the District Court nor any of the nine (9) litigants or the six (6) nonlitigants involved in the underlying litigation even made a token effort to be compliant with well-established Ninth Circuit case law prior to the sweeping Pretrial Order entered just three (3) business days before the commencement of the trial, even though discovery was a continuing process from January 2013 onward. But, after the Motion to Intervene was made, litigants and nonlitigants filed approximately thirty-four (34) affidavits with twelve (12) affidavits being filed from the last day of trial up to November 11, 2013, a full twenty-one (21)

days after trial. See Appendix G. All of the affidavits are trying to justify the exclusion of the public during the trial, during testimony of the witnesses, and the sealing of exhibits during the trial. *See* Appendix E - Docket Sheet, and Appendix G, which is Petitioners' matrix summarizing the dates and docket numbers of filing the various affidavits.

Appendix H hereto is a matrix prepared by Petitioners in an attempt to summarize the various filings and the timing of events as reflected by the Docket Sheet - Appendix E, and reflects the Minute Entries for the trial dates denoting the times of closure of the courtroom and also the many sealed and redacted depositions presented during trial.

The first seven (7) days of trial resulted in 20 hours and 56 minutes of closure; thus, more than half the trial time of 36 hours and 28 minutes of the first seven (7) days of trial was closed. *See* Appendix H.

Petitioners had their Motion to Intervene filed and briefed by the 8th day of the trial protesting the repeated closure of the trial proceedings and sealing of documents, and requesting that the remainder of the trial proceedings conform to established Ninth Circuit case law.

In addition, it should be noted that the District Court heard oral argument on the Motion to Intervene on October 8, 2013, and represents on the record that it will

"try to have something issued by tomorrow morning that will set forth this in a little more detail." *See* Appendix F, p. 41, LL. 7-8. Regardless of said representation, the District Court's Memorandum Decision and Order [*see* Dkt 357 - Appendix D] was issued on Friday, October 18, 2013, eight (8) business days after the District Court heard oral argument and one (1) day before the end of the trial, which occurred on October 21, 2013.

But, even after Petitioners' Motion to Intervene, the District Court did not apply the standards as set forth by the Ninth Circuit Court as to exhibits and the closure of the courtroom as the trial continued.

Closing arguments occurred on November 7, 2013.

On November 1 and 2, 2013, the parties submitted proposed Findings of Fact and Conclusions of Law and these proposed documents were filed **under seal**. *See* Dkts 403, 404, 414, 426, 427, 429, and 430 - Appendix E. Again, the public is being excluded from the proceedings.

As noted above, the affidavits attempting to justify closure of the courtroom and the sealing of filings and exhibits continue on from the end of the trial (October 21) to November 11, 2013, four days after closing arguments.

The court in *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096 (9th Cir. 1999) addressed the issue of timeliness and the right to seek a writ of mandamus.

The newspaper in *San Jose Mercury News, Inc.* waited six (6) months to intervene, and the newspaper sought relief via a writ of mandamus. The Ninth Circuit court recognized therein that mandamus relief was appropriate, "[t]o the extent this is true, the decay of newsworthiness would constitute an injury better addressed by a writ of mandamus than by a direct appeal." *Id.* at 1100.

The Petitioners herein acted quickly and promptly after it became apparent that the first week of trial was resulting in a judicial proceeding occurring not only behind closed doors, but was proceeding in such a manner that it simply was not compliant with United States Supreme Court rulings and, particularly, rulings of the Ninth Circuit which are very clear and declarative.

III. Discussion of (1) Common Law Right of Access, (2) Constitutional Right of Access and (3) Standards Set Forth by Case Law

There are approximately 926 exhibits and 575 exhibits have been considered to be AEO, and, thus, filed under seal. *See* Appendix G and J. (It should be noted that the exhibits themselves generally consist of more than a single page.) Thirty-eight (38) sealed depositions have been submitted as trial testimony. *See* Appendix I and also Appendix E.

It is incumbent upon the District Court and the litigants appearing before the District Court to be compliant with Ninth Circuit case law which is directly on point.

Prior to the filing under seal of any type of dispositive motion and/or documents associated therewith, the litigants must make a showing of compelling reasons why such pleading and exhibits must be filed under seal, and the court must then make a factual finding on the record in such a manner to make it discernable to all why the court's ruling justifies the sealing of such pleading and/or exhibit. But, this is especially true as to trial proceedings in open court.

None of that occurred in this matter whatsoever. Prior to the entry of the Pretrial Order [Dkt 209] there was not an on the record showing of why any exhibits should be sealed nor why the public should be escorted from the courtroom during the testimony of certain witnesses when they testified.

After Petitioners herein filed their Motion to Intervene [Dkt 250], then the affidavits came flowing in from the litigants and from nonlitigants in a belated attempt to justify the Pretrial Order after the fact.

But, said affidavits are more damaging than helpful to the litigants. It appears in the underlying case at bar that the determination of what constitutes a "compelling reason" for nondisclosure has been left to the discretion of counsel for the various parties or to the nonlitigants themselves. Each party has its own agenda and desires as to what it wants to protect from public scrutiny. The Protective Order Governing

the Production and Exchange of Confidential Information [*see* Dkt 64 - Appendix A] states:

> All or any portion of any Protected Material may be designated as Confidential or For Attorneys' Eyes Only, provided that such designation is made in good faith and provided further that any Party may apply to the Court to challenge any such designation. Once designated in good faith as Confidential or For Attorneys' Eyes Only, such material shall be treated as Confidential or For Attorneys' Eyes Only, as appropriate, under the terms of this Stipulated Protective Order until such designation is withdrawn by the producing Party or Third Party or by further order of this Court.

See ¶ 4, p. 3 - Appendix A (emphasis added).

This designation of Attorneys' Eyes Only (AEO) then evolved into the closure of significant portions of the litigation process from the actual trial to the handling of pleadings and trial exhibits, as well as videotaped depositions. The District Court in its Pretrial Order [*see* Dkt 209 - Appendix B] entered the week before trial states:

> Thus, when a witness is testifying in large part about sensitive business information – designated as Attorneys Eyes Only (AEO), a label discussed further below – the only realistic alternative is to close the courtroom for the entirety of their testimony. On the other hand, if the witness is to testify largely about innocuous matters – and any confidential testimony would be brief and separable – the courtroom could remain open until the discrete portion of confidential testimony began.
>
> Cross-examination, however, does not present such neat boundaries. While direct testimony is to some degree scripted, cross-examination is not, and the courtroom may need to be closed during an

> entire cross-examination because it will be impossible to predict when trade secrets may be disclosed.

See p. 4 - Appendix B (emphasis added).

Thus, instead of requiring "compelling reasons" the material need only be "sensitive", and that determination is made by nonlitigants as well as litigants.

The closure of the courtroom extended to include over 1/3 of the trial testimony. *See* the 19 Minute Entries [Dkts 226, 228, 232, 235, 237/352, 241, 246, 251, 273, 305, 314, 317, 326, 347, 351, 353, 358, and 374] which are reflected on Appendix J and show how often the courtroom has been closed in this matter. But, these minute entries do not reflect the use of the videotaped depositions when they are accessible only by the Court and counsel during the presentation when the public was not escorted from the courtroom. The public was shielded from seeing or hearing certain presentation of evidence. Regardless, the resultant effect was that the public could not see nor hear various testimony of certain witnesses despite the courtroom doors being left ostensibly open. The following excerpt from the transcript reveals how the courtroom remained open, but the proceedings were not revealed to the public. The transcript is replete with examples of going on and off the record, and opening and closing the courtroom, but some examples follow:

PROCEEDINGS

September 25, 2013

******COURTROOM OPEN TO THE PUBLIC******

. . . .

THE COURT: As a housekeeping matter, when we play the deposition, we need to publish that as part of the record. . . .

. . . .

MS. DUKE: Correct. We'll have the original, and then we'll also have a transcript that has all the excerpts so that you can directly go to those, as well.

. . . .

THE COURT: I think we'll just go ahead and proceed with the playing. As I understand, this is open to the public; however, there may be portions of depositions played today where we will need to turn off the sound and the projector; correct?

MS. DUKE: Correct.

. . . .

(Video deposition of Scott Clement resumed.)

MS. DUKE: Your Honor, this is an AEO document, so maybe we can just flip to your screen.

(Video deposition of Scott Clement resumed.)

MS. DUKE: Your Honor, we can flip back on to the main screen now.

. . . .

(Video deposition of Scott Clement resumed.)

. . . .

MR. WILSON: At this point the plaintiffs call Linda Duer, who is a live witness.

THE COURT: Ms. Duer, if you'll summon her.

MR. WILSON: Your Honor, Ms. Duer represents a payor, IPN, and she is in exactly the same situation as Mr. Crouch was, and so we would respectfully request that this portion of the trial be handled the exact same way as Mr. Crouch's testimony was.

. . . .

THE COURT: All right. Then I will have to clear the courtroom. We will direct anyone who has not been identified that they are allowed to stay in the courtroom, but will need to leave during Ms. Duer's testimony.

******COURTROOM CLOSED TO THE PUBLIC******

See Reporter's Tr. of Proceedings, Vol. 3, Dkt 243, p. 453, LL. 1-3, 9-11, 18-20; p. 454, LL. 6-11; p. 457, LL. 3-4, 9-10, 21-23; p. 458, LL. 1, 9-16, 19-23 (emphasis added).

The above excerpt is also revealing as to how the mere mention of a document as being AEO shuts down an entire Federal Judicial proceeding from public viewing.

The District Court's answer to the closure issue is deemed to be somehow resolved by including in its Pretrial Order [*see* Dkt 209 - Appendix B] a requirement

that a transcript be made of the day's proceedings but then cedes the discretionary responsibility for what is or is not redacted to counsel for the interested parties:

> Each day when the public transcript is prepared, counsel shall go through it and provide to the public a redacted version that removes the material designated as AEO.

See p. 5 - Appendix B. In regard to the witnesses testifying as to AEO documents, the Court states in its Order:

> The parties have reached an agreement – approved by the Court – as to three categories of information that would be properly designated as "Attorney Eyes Only" (AEO).

Id. (emphasis added).

The District Court falls into line with this way of thinking in its Pretrial Order [*see* Dkt 209 - Appendix B], wherein the Court allows closure simply because some of the information might be deemed "sensitive business information" by attorneys or nonlitigants.

As noted, perhaps one of the more surprising aspects of this case is that not only did the District Court not apply the compelling reasons standard and, of course, even the attorneys for the litigants did not apply the compelling reasons standard, but when it came to making the designation of what documents were going to be AEO only, it was often left to the nonlitigants. For example, Dkt 328 is a declaration filed by Micron, a nonlitigant, which stated:

> I also explained why Micron designated certain information as Attorneys' Eyes Only and why it deserved protection from public disclosure.

Id., p. 2, ¶ 2. Mr. Otte, Vice President of Human Resources for Micron, declared:

> Consistent with those orders, Micron carefully reviewed the information requested by the parties and designated certain information and documents as Attorneys' Eyes Only.

See Dkt 304-1, p. 2, ¶ 4.

Thus, the determination of what meets the compelling reasons standard for AEO designation and, therefore, for sealing is now being made by the Vice President of Human Resources for a nonlitigant.

Other similar assertions were made by other nonlitigant parties as follows:

In the affidavit of Dr. David Peterman, he makes reference to an exhibit which is sealed and then declares that it was properly sealed at least from his point of view.

> I also believe that the materials designated as Attorneys' Eyes Only satisfy one of the following three categories of information, which the Court has previously recognized merit . . . ."

See Dkt 330, p. 3, ¶ 7 (emphasis added) filed by Alliance Medical Group, LLC.

> 2. . . . Numerous confidential documents were provided to the parties in response to the subpoena under the protection of a protection order.
>
> . . . .

> 6. Attached as Exhibit A [emphasis theirs] to this Affidavit is a list of the deposition testimony of Ms. Butterbaugh that we consider confidential and for "attorneys eyes only," the content of which is incorporated herein.
>
> 7. Attached as Exhibit B [emphasis theirs] to this Affidavit is a list of the trial exhibits that we either produced or which relate to Imagine Health that we have indicated to be confidential and for "attorneys eyes only," the content of which is incorporated herein.

Dkt 339-1, p. 1 filed by Imagine Health Inc. (emphasis added).

> I do not believe that the public interest would be served by granting the media's motion, at least as it relates to Primary Health. I took great care when reviewing the transcript of my trial testimony. I redacted only the portion of my testimony that I believe is highly sensitive and proprietary.

See Dkt 297-1, p. 4, ¶ 12 (emphasis added) filed by Alliance Medical Group, LLC.

Surprisingly, not only was it the nonlitigants who made the determination as to what was or was not to be designated as AEO, it appears that many of the nonlitigants even made the discretionary decision as to what was going to be redacted from the live testimony that was presented. Therefore, these conclusory statements of the nonlitigants were used as the reason to shutdown the court proceedings and deny access to videotaped depositions and exhibits, and deny access to anything except the redacted transcripts of the proceedings.

The affidavits filed by nonlitigants revealed repeatedly that the determination of what was to be designated as AEO was at their discretion.

The Ninth Circuit Court has been clear and declarative as to what it expects prior to closure of a trial or the sealing of exhibits at a trial, or even dispositive motions and their attachments:

> Historically, courts have recognized a "general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 & n. 7, 98 S. Ct. 1306, 55 L.Ed.2d 570 (1978). This right is justified by the interest of citizens in "keep[ing] a watchful eye on the workings of public agencies." Id. at 598, 98 S. Ct. 1306. Such vigilance is aided by the efforts of newspapers to "publish information concerning the operation of government." *Id.*
>
> . . . .
>
> Unless a particular court record is one "traditionally kept secret," a "strong presumption in favor of access" is the starting point. *Foltz*, 331 F.3d at 1135 (citing *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir.1995)). A party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the "compelling reasons" standard. *Foltz*, 331 F.3d at 1135. That is, the party must "articulate[ ] compelling reasons supported by specific factual findings," id. (citing *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1102-03 (9th Cir.1999)), that outweigh the general history of access and the public policies favoring disclosure, such as the " 'public interest in understanding the judicial process.' " *Hagestad*, 49 F.3d at 1434 (quoting *EEOC v. Erection Co.*, 900 F.2d 168, 170 (9th Cir.1990)). In turn, the court must "conscientiously balance[ ] the competing interests" of the public and the party who seeks to keep certain judicial records secret. *Foltz*, 331 F.3d at 1135. After considering these interests, if the court decides to seal certain judicial records, it must "base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Hagestad*, 49 F.3d at 1434 (citing *Valley Broadcasting Co. v. U.S. Dist. Ct.*, 798 F.2d 1289, 1295 (9th Cir. 1986)).

> In general, "compelling reasons" sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such "court files might have become a vehicle for improper purposes," such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets. *Nixon*, 435 U.S. at 598, 98 S. Ct. 1306; accord *Valley Broadcasting Co.*, 798 F.2d at 1294. The 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. *Foltz*, 331 F.3d at 1136.
>
> We acknowledged explicitly in *San Jose Mercury News*, 187 F.3d at 1102, and later confirmed in *Foltz*, 331 F.3d at 1136, that the strong presumption of access to judicial records applies fully to dispositive pleadings, including motions for summary judgment and related attachments. We adopted this principle of disclosure 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." *Valley Broadcasting*, 798 F.2d at 1294; accord *Foltz*, 331 F.3d at 1135-36 (noting that " 'summary judgment adjudicates substantive rights and serves as a substitute for trial' ") (quoting *Rushford v. The New Yorker Magazine*, 846 F.2d 249, 252 (4th Cir.1988)). . . .

Kamakana v. City & County of Honolulu, 447 F.3d 1172, 1178-1180 (9th Cir. 2006).

This Court, again, recently addressed this issue in *Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665 (2009) as amended in May, 2010, in affirming the *Kamakana* case. This Court gives guidance in regard to the "compelling reasons" standard:

> Under the "compelling reasons" standard, a district court must weigh "relevant factors," base its decision "on a compelling reason," and "articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir.1995). A proper analysis is reviewed for abuse of discretion. *Foltz*,

> 331 F.3d at 1135. An order that fails to articulate its reasoning must be vacated and remanded because "meaningful appellate review is impossible" when the appellate panel has no way of knowing "whether relevant factors were considered and given appropriate weight." *Hagestad*, 49 F.3d at 1434-35 (internal quotation marks omitted).

Pintos v. Pacific Creditors Ass'n, 605 F.3d at 678, 679.

Generally, access to judicial records is a question of a common-law-right of access, but in this case the District Court allowed its Pretrial Order [*see* Dkt 209 - Appendix B] also impact the closure of the courtroom. Almost as an aside, the District Court's Pretrial Order [Dkt 209] relies upon *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) in order to allow for the closure of the trial in this matter. But, the facts of the *Nixon* case are significantly different and actually support the Petitioners' position in this case. The District Court also relies upon the case of *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417 (9th Cir. 2011) which also does not stand for the proposition of the closing of the courtroom. The constitutional right of access to civil and criminal trials has been championed by the Ninth Circuit court:

> As the Supreme Court explained in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982), public access to court proceedings allows "the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government."

Perry v. City & Cnty. of San Francisco, 10-16696, 2011 WL 2419868, *19 (9th Cir. April 27, 2011) (emphasis added).

> Indeed, every lower court opinion of which we are aware that has addressed the issue of First Amendment access to *civil* trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal trials. (*Publicker Industries, Inc. v. Cohen* (3d Cir.1984) 733 F.2d 1059 (*Publicker*)

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 1208, 980 P.2d 337, 358 (1999) (emphasis added).

IV. Discussion of Compelling Reasons Standard

In the underlying case, the Federal court system is being used as a device to resolve differences, but in doing so skirts the guidelines and dictates of the Ninth Circuit Court of Appeals that have been clearly spelled out for years.

The tremendous volume of sealed documents, exhibits, videotaped testimony, and videotaped and written depositions is absolutely staggering, all of which was done without even making a blinking reference to the specific standards as set forth by this Court.

The irony of this situation is that what this Court has required is that the interests of the public be taken into account in determining what are "compelling reasons," and in this situation the public's interest cannot come at a more critical time in our Country's history. The timing of the trial occurred at a time when the Federal

government was grinding to a halt because of political conflict over medical care and coverage in the United States.

The hospitals in the underlying lawsuit are essentially making complaint that St. Luke's Health System has purchased Saltzer Medical Group (along with many others) wherein they go in and buy up the independent practices of the medical practitioners, have the practitioners then come to work for the hospitals as employees, and in paying the doctors for their practices, this results in the Doctors steering their patients to St. Luke's specialists and hospitals thus cornering the market and charging whatever it desires.

The public's right of access and the public's right as impacted by the above-entitled lawsuit have been brushed aside in this matter. The plaintiff's Amended Complaint [Dkt 63] specifically alleges:

> St. Luke's actions threaten to monopolize a broad series of markets in Idaho, further increase health care costs and reduce health care quality.

Id., ¶ 1, p. 2. Thus, such a focal allegation of the Amended Complaint certainly puts at issue the public's right of access and the right to know how it is impacted by St. Luke's acquisition of "more than 20 physician practices, 5 hospitals and 4 outpatient surgery centers in the last several years, gaining a dominant position in a series of health care markets." *Id.*, ¶ 2, p. 2.

The Amended Complaint also states:

> b. St. Luke's will possess an irreplaceable network of hospitals and physicians, that will allow it to raise prices beyond competitive levels.

Id. Again, when prices are raised beyond competitive levels, the public suffers and is directly impacted by such actions.

As specifically stated by the FTC and the State of Idaho in their complaint:

> 4. St. Luke's recognizes that a dominant market share in Adult PCP Services is critical to both increasing volume and extracting the highest possible payments for other components of its health system, including services provided by other physician specialties, surgeries, and ancillary services such as X-rays and laboratory tests. PCPs generally determine what additional care and services their patients need, and refer them to other physicians, labs, or testing facilities accordingly. As St. Luke's own documents show, St. Luke's reaps the benefits of its physician acquisitions in part by relying on those physicians to shift patients to its own facilities. Those facilities almost invariably charge substantially higher fees (often more than double those of independent facilities), even when the patient is receiving the *same* service in the *same* location she did before her PCP was acquired by St. Luke's. Health plans have had limited success resisting these price increases in the past, and in light of St. Luke's newly expanded market power, they believe their ability to do so will further diminish if the Acquisition is allowed to stand.
>
> . . . .
>
> 7. Idahoans and Idaho employers will pay for that "better profit"– directly or indirectly – through higher premiums, co-pays, and other out-of-pocket costs, as commercial health plans will be forced to accede to St. Luke's rate demands. As healthcare costs increase, employers reduce or eliminate benefits or pass along those higher costs to their employees. Faced with higher costs, some employees will drop

> their health insurance coverage, while others will delay or forgo healthcare services that they can no longer afford.

See Dkt 98, pp. 3-4.

Thus, the entire dynamic of the medical marketplace shifts dramatically and the public is directly impacted. No longer is the public allowed to go to an independent medical practitioner of their choice, but now the public's choice has been eliminated or, at best, limited and the price to be charged by the hospital is at its discretion.

Perhaps the best argument in this regard is supplied by one of the affidavits urging AEO sealing. Ms. Linda Duer, as a representative of IPN (Idaho Physicians Network Inc., [Dkt 402] wherein she states:

> 10. Exhibit No. 2214 is highly confidential because of the competitive nature of insurance companies around reimbursement of physicians, physician groups, and/or facilities, or health systems. If a competing insurer were to find out about an IPN fee schedule or other reimbursement rates it would give them the ability to adjust their pricing/reimbursement for the above mentioned groups putting the competing insurance company at a competitive advantage to match or lower their reimbursement creating the illusion of a better cost savings to the employer and group(s) they are trying to sell/market products to. An example of this would be Blue Cross of Idaho telling an employer by just changing networks alone we can save you over one million dollars over the course of a year based on BCI's discounts versus IPN's discounts. This would be extremely problematic due to the fact that over 50 payors use IPN network discounts.

Id. p. 4 (emphasis added).

Ms. Duer reveals that openness as to pricing makes the market competition more open, vibrant, and honest, and IPN, Blue Cross, and all others would simply have to compete on a transparent manner that would save "over one million dollars over the course of a year." *Id.* Her affidavit provides a conjecture of "creating the illusion of a better cost saving," but the heart of her affidavit provides an argument as to openness. By contrast, the medical consumers' premiums are readily attainable in the open market place.

The public is not the gatekeeper in determining the common law right of access and/or the First Amendment rights in regard to the testimony and exhibits in this case. That is the job of the District Court sitting on the case, but it is also the responsibility of, at last count, 32 attorneys involved with the litigation to be sure that their requests for secrecy and asking the public to exit an open Federal courtroom are absolutely compliant with this Court's case law, the Constitution of the United States, and the common law right of access.

The parties in this lawsuit are using the generic umbrella of sensitive trade secrets, negotiating strategies, bargaining power evaluations, reimbursement policies, pricing, and future plans to avoid revealing what they do not want to be revealed. Then nonlitigants make the determination as to what is or is not AEO. Where does the interest of the medical consumer enter into this equation? Where does the Court's

duties as gatekeeper of the rights of the public come into play? It is the press, and thus the public, who is being excluded from the courtroom.

The closing arguments repeatedly expounded upon and focused upon how the public would be impacted by this litigation.

Testimony at a trial and the use of exhibits, depositions, and the transcripts of such trial activity constitute a "dispositive" court activity or filing as contemplated by this Court.

The voluminous affidavits routinely just set forth that entity's desires and opinions as to what it wants to be removed from public view, but none of them reveal to this Court nor the lower court "compelling reasons" to do so. As noted previously, over 575 exhibits have been sealed, not in part but in their totality.

The public's right to know in the case at bar is absolutely compelling, critical, and important. In response to the Motion to Intervene [Dkt 250], the parties opposing it relied upon *Apple Inc. v. Samsung Electronics Co., Ltd.*, 727 F.3d 1214 (Fed. Cir. 2013) to support their position, but the *Apple* case provides a template as to exactly how the litigation in question should have been handled. Comparing the handling of this case to that in the *Apple* case, supra., reveals the deficiencies as to how this matter was handled below by the District Court and the many attorneys.

The Federal Circuit Court described how Apple and Samsung handled the documents in question in their multibillion dollar lawsuit:

> In these appeals, Apple and Samsung have limited the documents they challenge to a small subset of the documents they originally sought to seal. Even within that small subset, they seek only to redact limited portions that contain what they consider their most confidential financial information. Moreover, because the parties agreed to rely on less-detailed financial information to prove their damages at trial, none of the documents were introduced into evidence. Thus, the financial information at issue was not considered by the jury and is not essential to the public's understanding of the jury's damages award. Nor is there any indication that this information was essential to the district court's rulings on any of the parties' pre-trial motions. In light of all of these considerations, we conclude that the particular financial information at issue in these appeals is not necessary to the public's understanding of the case, and that the public therefore has minimal interest in this information.

Apple Inc. v. Samsung Electronics Co., Ltd., 727 F.3d at 1226 (emphasis added).

Thus, what occurred in *Apple* is that the courtroom doors were open, testimony was had, and only a limited portion of specific financial information was redacted from a very limited number of documents.

As the Federal Court noted: "In most instances, rather than asking to seal documents in their entirety, Apple sought only to redact certain information." *Id.* at 1218. Even in regard to the limited amount of information that Apple sought to redact, it supplied declarations: "The declarations individually addressed each document Apple sought to seal, explaining the measures Apple takes to maintain each

document's confidentiality and describing the competitive harm Apple would suffer from disclosure." *Id.*

It has already been noted herein, prior to the Motion to Intervene [Dkt 250], the trial did not attempt to meet the compelling reasons standard as set forth by this Court as to live testimony, videotaped depositions, written depositions, or any of the accompanying exhibits. After the Motion to Intervene, the District Court required the parties and nonlitigants to file various affidavits, but in reality the trial simply continued on as it had previously, unabated. The affidavits which were filed, with many after the trial concluded [Dkts 386, 399, and 401] and once even filed after the closing arguments [Dkt 438], make various conclusory allegations in regard to documents. Because the testimony and particularly no part of the exhibits are of public record, it is not possible to tell the context, and the litigants and nonlitigants continue to reference the exhibits in clumps and clusters. Again, no context can be given to make a determination on the open record as to what does or does not meet the compelling reasons standard. When a comparison is made to the approach used, even after the fact, by the litigants and nonlitigants versus that as used in the *Apple*, supra, case, it becomes apparent that this Court's requirement that, "under the 'compelling reasons' standard, a district court must weigh 'relevant factors,' base its decision 'on compelling reasons,' and 'articulate the factual basis for its ruling,

without relying upon hypothesis or conjuncture.' " Such has not occurred and cannot occur in the case at bar.

The District Court is faced with the attempt to close the doors of the barn, after the cows have escaped, and struggles with that in its comments on the open record:

> THE COURT: I do want -- you know, I am a believer in open access to the courts. It's one of the reasons that I encourage counsel to agree to live blogging. It's a way of bringing the public into the courtroom in this electronic age. The challenge, of course, is that became kind of an empty offer when so much of the evidence, at least during the first two weeks, was closed.
>
> So far this week, not so much, and so it may change the dynamic. But we at least have, I think, a game plan going forward. And I am not suggesting that I think our original approach was wrong. It's just that it may have been, almost of necessity, as I said earlier, more of a broad sword, and we need something a little more subtle than that, more specific. And we'll take care of that in the manner I have described.
>
> We'll be in recess. (Proceedings concluded.)

See Dkt 376, p. 48, LL. 17-25, Tr. of Proceedings, Motions to Intervene - Appendix F.

CONCLUSION

The duties to protect the public's right of access and to be compliant with the well-established case law of this Court, of course, falls on the shoulders of the District Court below. But, the multiple litigants and the multiple nonlitigants were all well represented and all knew and understood that by their own affidavits they

were revealing what they felt was sensitive material, and all of them failed in even attempting to be compliant with the case law from this Court. Having this information revealed to open review is not going to cause their corporate houses to come tumbling down.

Drawing the curtain back for all to see is healthy and necessary. The medical consumer is certainly being impacted in their daily lives. Is it not best that they at least have a better understanding of the medical market as it exists around them?

The District Court, the litigants, and the well-represented nonlitigants are simply hoping that by filing generalized, alarmist affidavits after the fact that the Ninth Circuit Court will blink and sidestep the declarative and clear standards this Court has set forth for many years.

DATED on this 12th day of November, 2013.

/s/ Charles A. Brown
Charles A. Brown
Attorney for Petitioners.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

THE ASSOCIATED PRESS, the IDAHO PRESS CLUB, INC., the *Idaho-Press Tribune* (Nampa) owned by IDAHO PRESS-TRIBUNE LLC, and *The Times-News* (Twin Falls) owned by LEE PUBLICATIONS, INC., all state that they have no parent corporation and no publicly held corporation which own 10% or more of its stock.

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DATED on this 12th day of November, 2013.

/s/ Charles A. Brown
Charles A. Brown
Attorney for Petitioners.

STATEMENT OF RELATED CASES

There are no related cases by this Court at this time.

DATED on this 12th day of November, 2013.

/s/ Charles A. Brown
Charles A. Brown
Attorney for Petitioners.

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

I certify pursuant to Red. R. App. P. 32(a)(7)(C) that the attached petition is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this petition complies with Fed. R. App. P. 21 and Fed. R. App. P. 32(a)(1)-(7) and is a principle petition of no more than 30 pages.

DATED on this 12th day of November, 2013.

/s/ Charles A. Brown
Charles A. Brown
Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify that I served the Petition for Writ of Mandamus on the following persons on November 12, 2013:

1. The U.S. District Court for the District of Idaho, by Federal Express overnight delivery to:

Honorable B. Lynn Winmill
U.S. District Judge
US Courts - District of Idaho
550 W Fort St. Rm 400
Boise, ID 83724

2. It is the petitioners' understanding that the real parties in interest will be served with a copy of this Petition via the Court's CM/ECF system, but in case that understanding is incorrect, the Petitioners have emailed a copy of the Petition on this date to the real parties in interest as follows:

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