
Case No. 23-16027

**In the United States Court of Appeals
for the Ninth Circuit**

JESSE HERNANDEZ, et. al.,

Plaintiffs-Appellees,

and

MONTEREY COUNTY WEEKLY, et. al,

Intervenors-Appellees

v.

COUNTY OF MONTEREY, et. al.,

Defendants-Appellants,

On Appeal from the United States District Court for the
Northern District of California, San Jose Division
Hon. Beth Labson Freeman
No. 5:13-cv-02354

**PROPOSED INTERVENORS' OPPOSITION TO APPELLANTS' EMERGENCY
MOTION FOR STAY OF THE DISTRICT COURT'S ORDERS RE MOTIONS TO
SEAL**

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INTRODUCTION

At issue in this case are documents that may demonstrate whether and how Defendant-Appellant County of Monterey and its correctional healthcare contractor, Wellpath, have for almost eight years provided systemically inadequate care to the people whose wellbeing it is entrusted to safeguard, despite promising to remediate this failing via a class action settlement. *See* Dist. Ct. Dkt. 788 at 5. Intervenors Monterey County Weekly, the First Amendment Coalition, and family members of two people who died while incarcerated at the jail (collectively, “Proposed Intervenors”) seek to assert the public’s First Amendment and common law right of access to these court records, which are of significant public interest. As the district court already found, Wellpath has failed to demonstrate that there exist compelling reasons for continued secrecy. Dist. Ct. Dkt. 802. In a well-reasoned and thorough decision, the district court has also found that a discretionary stay is unwarranted in this case, partially because Wellpath failed to demonstrate that it is likely to succeed in overturning the district court’s conclusion that there are no compelling reasons to keep the records under seal. Dist. Ct. Dkt. 819. This Court should also find that Wellpath has not met its burden of proving the circumstances of this case warrant a discretionary grant of a stay. The records must be unsealed without further delay.

PROCEDURAL HISTORY

Under the terms of the underlying settlement agreement in this case, five neutral monitors were appointed by the Court to oversee Defendants-Appellants’ compliance with various settlement implementation plans. Dist. Ct. Dkt. 494 at 13-23. The monitors were ordered to write reports documenting their findings and recommendations. *See id.* at 23. However, until earlier this year, these reports were not publicly docketed. *Id.* On April 26, 2023, Plaintiffs filed an

administrative motion pursuant to Northern District of California’s Local Rule 79-5(f) asking the district court to consider whether the neutral monitor reports should be filed under seal. Dist. Ct. Dkt. 776. Plaintiffs argued the documents were not confidential and that there were no compelling reasons to seal the records in their entirety. *Id.* at 5. The neutral monitor reports were conditionally filed under seal pending a ruling on the sealing issue. Wellpath did not file an opposition to Plaintiffs’ motion.

On July 20, 2023, Proposed Intervenors moved to intervene and unseal court records, including the neutral monitor reports. Docs. 800, 808. The next day, the court denied Plaintiffs’ motion to seal the monitor reports in their entirety and ordered that the reports be filed on the public docket with limited redactions. Dist. Ct. Dkt. 802 at 5. Recognizing that this order may have mooted Proposed Intervenors’ motions, the court also ordered Proposed Intervenors to file a clarification of their intervenor status within seven days of the monitor reports being publicly docketed. Dist. Ct. Dkt. 803. On July 26, 2023—after Wellpath filed a notice of appeal and moved for an emergency stay—Proposed Intervenors submitted a response to the court affirming their request for intervenor status for the limited purposes of 1) moving to unseal additional information subject to Proposed Intervenors’ review of the publicly docketed monitor reports; 2) opposing Wellpath’s request for an emergency stay; 3) protecting public access to upcoming proceedings, and 4) defending an appeal. Dist. Ct. Dkt. 811. On July 27, 2023, the court clarified that it would issue a ruling on Proposed Intervenors’ motion to intervene upon the filing of an opposition or the

expiration of the deadline for opposition. Dist. Ct. Dkt. 814. Wellpath did not file an opposition¹ and has proceeded under the assumption that Proposed Intervenors are parties in this case.²

Proposed Intervenors' motion to intervene remains pending before the district court.

ARGUMENT

There is no basis for granting Defendant-Appellant Wellpath's motion for a stay. A stay pending appeal is "an exercise of judicial discretion," not a "matter of right." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginia Ry. Co.*, 272 U.S. 658, 672 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34. "[E]ven certainty of irreparable harm has never entitled one to a stay." *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011).

When deciding whether to grant a stay pending an appeal, a court must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Wellpath has not demonstrated that any of these factors are present here.

I. WELLPATH IS NOT LIKELY TO SUCCEED ON THE MERITS

First, Wellpath has not made an adequate showing—let alone "a strong showing"—that it is likely to succeed on the merits, which is one of the "most critical" factors in determining whether a stay is proper. *Id.* In its motion requesting a stay, Wellpath characterizes the issue that will be

¹ Defendant-Appellant County of Monterey opposed both Proposed Intervenors' motion to intervene and motion to unseal. Docs. 822, 823.

² Wellpath listed Proposed Intervenors as appellees in this appeal. Dist. Ct. Dkt. 805. As noted in their Emergency Motion for Stay, counsel for Wellpath notified Proposed Intervenors of its intention to file the stay and asked whether Proposed Intervenors would oppose. Dkt. 9 at 3.

presented on appeal as an issue of first impression. Dkt. 9 at 12. Specifically, Wellpath states that the Court will “consider whether the trial court abused its discretion in unsealing documents that were expected to remain confidential between the actual parties to the case, and that had remained under seal for years³ of pending litigation.” This is not a novel issue. This Court has made clear that expectations of privacy alone are not “compelling reasons” to seal court records. *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1183 (9th Cir. 2006) (“a non-party’s reliance on a blanket protective order is unreasonable and is not a ‘compelling reason’ that rebuts the presumption of access”); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1138 (9th Cir. 2003) (“Because [the defendant] obtained the blanket protective order without making a particularized showing of good cause with respect to any individual document, it could not reasonably rely on the order to hold these records under seal forever.”) These cases make clear that Wellpath is unlikely to succeed on the merits of its claim that the district court abused its discretion when finding that Wellpath had not proved compelling reasons for sealing. As the district court explained in its order to unseal the monitor reports, based on the evidence before it (including multiple declarations from the monitors who authored many of the reports), granting public access to the monitor reports would not “impair the free flow of information necessary for the neutral monitors to fulfill their responsibilities.” Dist. Ct. Dkt. 802 at 5. As the district court explained in its order denying Wellpath’s motion to stay, in which Wellpath improperly raised new arguments and presented new evidence, the fact that public disclosure of the reports may “create mistrust” between healthcare providers and patients or impair Wellpath’s ability to hire

³ The assertion that the records “remained under seal for years” is inaccurate. The documents at issue were not submitted to the district court until April 26, 2023.

and retain competent staff are not compelling reasons for sealing. Dist. Ct. Dkt. 819 at 5. Wellpath has provided no legal authority to support its position because no such authority exists.

Wellpath also argues the district court abused its discretion when it “summarily order[ed] the Reports unsealed, without providing the parties to the case a meaningful opportunity to respond to or otherwise oppose the motion [to unseal].” This is a gross mischaracterization of the record. Plaintiffs first presented the issue of the monitor reports’ confidentiality via administrative motion pursuant to Local Rule 79-5(f), which entitles a party to submit a response. Wellpath chose not to respond. Any argument that Wellpath was precluded from being heard on the issue of the confidentiality of the monitor reports is without merit.

II. WELLPATH WILL NOT BE IRREPARABLY HARMED IF THE RECORDS ARE UNSEALED

Wellpath has not shown that they will be irreparably harmed during the pendency of the appeal if the monitor reports are publicly docketed. “[S]imply showing some possibility of irreparable injury’ is insufficient. The minimum threshold showing for a stay pending appeal requires that irreparable injury is likely to occur during the period before the appeal is likely to be decided. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (internal citations omitted). Wellpath attempts to articulate harm in three ways. Each is unavailing. First, Wellpath asserts that unsealing the public records “will discourage Wellpath’s employees from engaging in the quality review process... potentially adversely affecting patient care.” But this Court has already held that public access to similar correctional healthcare quality review reports is of paramount importance. In *Agster v. Maricopa County*, this Court considered the competing policy concerns implicated in disclosing correctional healthcare quality review reports. 422 F.3d 836, 839 (9th Cir. 2005). In rejecting the creation of a federal peer-review privilege, the Court concluded that “it is peculiarly important that the public have access to the assessment by peers of the care provided. Given the

demands for public accountability, which seem likely to guarantee that such reviews take place whether they are privileged or not, we are not convinced by the County's argument that such reviews will cease unless kept confidential by a federal peer review privilege." *Id.* Here, Wellpath has a court-ordered obligation to comply with the settlement agreement and implementation plans, which includes the obligation to meaningfully participate in the monitoring process. Ultimately, the County of Monterey, and by extension, Wellpath, have a constitutional duty to provide adequate healthcare and the public has a right to demand that those duties are met.

Second, Wellpath argues it would suffer irreparable harm because unsealing the monitor reports "would create distrust between Wellpath's staff and their patients. Patients may be discouraged from seeking medical or mental health care, or speaking openly and honestly with their medical providers, if they know that their medical and psychiatric/mental health concerns are subject to disclosure and review by third parties." This assertion is both speculative and misleading. Other than a single conclusory opinion by a Wellpath employee, nothing in the record suggests patients will be discouraged from seeking medical care if the monitor reports are unsealed. *See* Dist. Ct. Dkt. 817-1 at ¶ 3. Furthermore, individual health information will not be disclosed if the reports are unsealed where the district court has already allowed the redaction of certain sensitive information, including protected health information. *See* Dist. Ct. Dkt. 802 at 5-7.

Finally, Wellpath argues that it will experience harm because public access to the monitor reports will adversely affect their recruitment and hiring efforts, which would subsequently impair their ability to comply with the settlement agreement. Dkt. 9 at 16. Again, this alleged harm is speculative and unsupported by record evidence. Furthermore, Wellpath admitted that is already experiencing the harm it alleges it will suffer from unsealing the reports. *Id.* ("The [hiring] process

has already been negatively impacted by the media attention surrounding this litigation.”) As the Northern District of California recently noted in a recent case, “[i]f the reputational injury experienced by movants is already irreparable, it is unclear why a stay would be necessary to avoid irreparable injury pending appeal.” *Sweet v. Cardona*, No. C 19-03674 WHA, 2023 WL 2213610, at *8 (N.D. Cal. Feb. 24, 2023). Absent a stay, the fact that the County and Wellpath are intent on shielding the monitor reports from public scrutiny is itself newsworthy and could just as well impact Wellpath’s hiring efforts. See Rey Mashayekhi, *A Court Battle Over Sealed Reports Detailing Conditions at Monterey County Jail Escalates*, Monterey County Weekly (July 26, 2023), <https://tinyurl.com/yc484kms>. Unsealing the reports would not substantially change the status quo, and there is no evidence that, if the change to the status quo is significant, harm would be suffered while the appeal is pending. See *Sweet*, 2023 WL 2213610, at *12 (noting that “conclusory factual assertions and speculative arguments that are unsupported in the record” do not establish irreparable harm while an appeal is pending) (citing *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020)).

III. ISSUING A STAY WILL SUBSTANTIALLY INJURE PROPOSED INTERVENORS AND THE PUBLIC AND IS CONTRARY TO THE PUBLIC INTEREST

Despite correctly noting that the Court should consider whether issuing the stay will substantially injure other parties, and despite acknowledging the public’s demonstrated interest in this case, Wellpath utterly fails to acknowledge that issuing a stay will substantially injure Proposed Intervenors and the public. See Dkt. 9 at 16-17. As explained in Proposed Intervenors’ Motions to Unseal, the public has unquestionable First Amendment and common law rights of access to the records Wellpath insists must remain entirely secret. Dist. Ct. Dkt. 800 at 5-7. These records likely expose whether Wellpath has provided and continues to provide systemically inadequate care to people incarcerated at the Jail and may help explain why the death and suicide

rates at the Jail remain alarmingly high. The district court already determined that the public has a right to access these records, and that access must be “immediate and contemporaneous.” *See Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994), superseded by rule on other grounds in *Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009). As such, each passing day without access to these records constitutes separate, cognizable, and irreparable harm to Proposed Intervenors and the public. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006) (holding that a court’s delay in ruling on a motion to intervene and unseal records was “effectively a denial of any right to contemporaneous access—where each passing day may constitute a separate and cognizable infringement of the First Amendment” (internal alternations and citations omitted)).

Proposed Intervenors will also suffer irreparable harm if the monitor reports are not unsealed before the upcoming August 24, 2023, hearing on Plaintiffs’ motion to enforce the settlement. Wellpath appears to indicate that this hearing should be conducted behind closed doors. Proposed Intervenors have a presumed right of access to this hearing and any enforcement proceedings. *See Courthouse News Serv. v. Planet*, 947 F.3d 581, 590 (9th Cir. 2020) (noting that “federal courts of appeals widely agree” that the First Amendment right of access to information applies to civil judicial proceedings); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999) (“[I]t is clear today that substantive courtroom proceedings in ordinary civil cases are ‘presumptively open’”); *Newman v. Graddick*, 696 F.2d 796, 801–03 (11th Cir. 1983) (recognizing a constitutional right of access to settlement enforcement proceedings in a prison conditions case); *see also Visit a Federal Court*, U.S. Courts, <https://tinyurl.com/22fpsvvn> (“Our Constitution and court tradition give citizens right of access to court proceedings. Citizens gain confidence in the courts by seeing judicial work in action, and learn first-hand how the judicial

system works.”). Evidence on the record shows that at least one intervenor plans to attend and produce news coverage of the upcoming hearing. Their interests will be irreparably harmed if they are not allowed to meaningfully observe the proceedings.

Finally, the Court should reject Wellpath’s argument that the public interest lies with granting a stay. To the contrary, courts have “consistently recognized the significant public interest in upholding First Amendment principles.” *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 838 (9th Cir. 2020) (citations omitted). Here, Proposed Intervenors and the public have a First Amendment right to inspect court records in a case that alleges serious and ongoing constitutional violations. Both the information contained in those records and the fact that the government and Wellpath do not want these records to be publicly accessible are of significant public interest. *See* Mashayekhi, <https://tinyurl.com/yc484kms>. When balancing the harms the parties may suffer from the granting or denial of a stay, the speculative harm Wellpath may suffer is not outweighed by the harm Proposed Intervenors (especially Intervenor Monterey County Weekly) will suffer if they cannot access court records and proceedings so that they may continue to “provide a vitally important service to the public.” *Index Newspapers LLC*, 977 F.3d at 838.

Because Wellpath cannot meet the burden of showing why the circumstances in this case justify issuing a discretionary stay, Proposed Intervenors ask that the Court deny the motion to stay.

CONCLUSION

For all of the foregoing reasons, the Court should deny Wellpath’s motion for stay.

Dated: August 8, 2023

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CERTIFICATE OF SERVICE

I certify that on August 8, 2023, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

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