

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
NO. 0:14-md-02551 (SRN/JSM)**

In Re:

NATIONAL HOCKEY LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

This Document Relates To:
ALL ACTIONS

**MOTION OF CTV AND DENNIS
LANG TO INTERVENE FOR
LIMITED PURPOSE OF
REQUESTING
DE-DESIGNATION OF
DOCUMENTS, AND
NOTICE OF HEARING**

TO: The parties above-named and counsel of record:

PLEASE TAKE NOTICE that CTV and Dennis Lang ("Proposed Intervenors") will move the Court for an Order allowing them to intervene in this matter for the limited purpose of joining in the pending motion of plaintiffs to compel de-designation of certain documents obtained from defendant NHL in the course of discovery.

The Motion will be heard before Judge Susan Richard Nelson, U.S. District Court for the District of Minnesota, on December 1, 2015, as part of the status conference previously scheduled for that date. The location is the United States Courthouse, 316 North Robert Street, St. Paul, MN 55101.

This Motion is based upon the files, records, and proceedings herein, including the Proposed Intervenors' Memorandum of Law and Affidavit of Mark R. Anfinson..

Dated: November 17, 2015

s/Mark R. Anfinson

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DISTRICT OF MINNESOTA
NO. 0:14-md-02551 (SRN/JSM)**

In Re:
NATIONAL HOCKEY LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

**MEMORANDUM IN SUPPORT OF
MOTION OF CTV AND DENNIS
LANG TO INTERVENE FOR
LIMITED PURPOSE OF
REQUESTING DE-DESIGNATION
OF DOCUMENTS**

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INTRODUCTION

Plaintiffs have moved to compel the de-designation of certain documents produced through discovery, which are currently marked “protected” by defendant NHL under the protective order (Dkt. 70) and amended protective order (Dkt. 140) entered in this action. That motion is currently pending. Pursuant to Federal Rule of Civil Procedure 24(b), CTV and Dennis Lang (“CTV/Lang”) seek to intervene for the limited purpose of joining in the request.

Precedent construing Rule 24(b) suggests that CTV and Lang should be permitted to intervene for this purpose. Their motion is based on established principles holding that under the First Amendment, there is a right to receive information that a “willing speaker” would provide but for an existing legal restriction. That right independently confers standing. Substantively, the motion of CTV/Lang mirrors plaintiffs’ request that the documents identified in plaintiffs’ motion be de-designated where defendant NHL

cannot affirmatively demonstrate good cause to sustain their confidentiality, especially given the public importance of the issues raised by this litigation, and correspondingly, the widespread public interest in them. Movants believe that some of the materials produced by the NHL may shed valuable light on these issues. If that is true, it weighs against finding that there is good cause to maintain the restrictions of the protective order regarding those materials.

CTV is Canada's largest private television network, with stations in all major cities across the country. Affidavit of Mark R. Anfinson, ¶2. Its programming includes W5, one of the most watched and longest-running current affairs programs in North America. *Id.* CTV periodically reports on issues related to professional and amateur hockey, and has provided coverage about the concerns that have emerged relating to concussions in the context of sports. *Id.* Portions of CTV's audience are in the United States. *Id.* Dennis Lang is an independent freelance journalist residing in St. Paul, who has been retained by CTV to assist with its coverage of this litigation. *Id.*, ¶3. The NHL's interpretation and application of the current protective orders inhibits the ability of news organizations and journalists such as CTV and Lang to convey information related to the litigation that may be of considerable public interest and benefit. *Id.*, ¶4.

A. Factual and Procedural Setting.

The Memorandum submitted by plaintiffs in support of their motion to compel de-designation (Dkt. 262) describes the factual and procedural setting from which CTV/Lang's motion arises, the discovery materials at issue, and the specific reasons why plaintiffs believe they should not be treated as protected. Because the operation of the

protective orders prevents CTV/Lang from reviewing those materials and thus limits their ability to specifically address the applicable legal and factual standards, CTV/Lang adopt and incorporate those portions of plaintiffs' Memorandum by reference.

B. CTV and Lang Should be Permitted to Intervene.

A motion brought under Fed. R. Civ. P. 24(b) is recognized as the preferred method for presenting challenges to restrictions on access to litigation records and proceedings advanced by non-parties such as news organizations and journalists.

“Although the Eighth Circuit has not yet issued a decision on this precise issue, the clear majority view allows the use of Rule 24(b) to challenge a confidentiality order.” *In re Baycol Prods. Litig.*, 214 F.R.D. 542, 543 (D. Minn. 2003) (permitting limited purpose intervention by newspaper). “Rule 24(b)(2) should be interpreted broadly to allow news media an effective mechanism to contest the scope or need for a confidentiality order.” *Id.*, 544. See also *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994) (“the procedural device of permissive intervention is appropriately used to enable a litigant who was not an original party to an action to challenge protective or confidentiality orders entered into that action.”).

“The principal consideration for this Court in determining whether permissive intervention should be granted is whether such intervention will unduly delay or prejudice the adjudication of the parties' rights.” *Baycol*, 214 F.R.D. at 544 (citing *South Dakota ex rel. Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 787 (8th Cir. 2003)).

Because CTV/Lang seek to intervene here only to assert their right to receive certain information that under the terms of the existing protective orders cannot be disclosed by

the parties, and because CTV/Lang would not substantively engage in the underlying litigation, their intervention should not cause any material delay or prejudice with respect to the adjudication of the parties' rights.

CTV/Lang's motion does not directly challenge the protective orders entered in this matter, because they already incorporate the "good cause" standard under Rule 24(c) and authorize appropriate challenges to confidentiality designations by the parties. However, CTV/Lang's motion does address the operation and application of those orders and their interpretation by defendant NHL. Because CTV and Lang have independent grounds for standing as described below, their motion falls within the ambit of limited purpose permissive intervention, and they should be allowed to intervene pursuant to Rule 24(b).

C. CTV and Lang have Standing Based on their First Amendment Right to Receive Information.

Standing requires an injury-in-fact capable of being redressed by a favorable decision of the court. *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 128 S.Ct. 2531, 2535, 171 L.Ed.2d 424 (2008). Where a news organization or journalist seeks limited purpose intervention, it is most commonly done to challenge restrictions on access to documents filed with the Court. In such cases, the standing rules are satisfied by the general right of public access to court documents under either the First Amendment or common law. *Baycol*, *supra*.

Here, however, the focus of CTV/Lang's motion is not on restricted access to court records. Instead, their concern relates to constraints imposed on the parties by the

protective orders, which prohibit disclosure of discovery materials marked as protected, regardless of whether submitted to the Court.

CTV/Lang recognize that there is no direct right of public access to such materials, under either the First Amendment or the common law. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). It is well established, however, that the First Amendment does support a right to receive information in certain circumstances. The right depends on the existence of a “willing speaker,” someone who would provide such information but for the existence of a legal restriction that prevents it. “Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Thus when one person has a right to speak, others hold a “reciprocal right to receive” the speech. *Id.*, at 757, 96 S.Ct. 1817.

This right and the standing it confers have been widely accepted, so long as the predicate condition of a willing speaker is satisfied. “Every circuit to have considered the question of standing in the context of a right-to-receive claim has reached the same conclusion: [I]n order to maintain a ‘right to listen’ claim, a plaintiff must clearly establish the existence of a ‘willing speaker.’ In the absence of a willing speaker, an Article III court must dismiss the action for lack of standing.” *Bond v. Utreras*, 585 F.3d 1061, 1077-78 (7th Cir. 2009) (brackets in original, internal quotation marks omitted), citing *Pa. Family Inst., Inc. v. Black*, 489 F.3d 156, 166 (3d Cir. 2007); *Stephens v. County of Albemarle, Va.*, 524 F.3d 485, 490–93 (4th Cir. 2008); *Competitive Enter. Inst.*

v. U.S. Dep't of Transp., 856 F.2d 1563 (D.C.Cir. 1988); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1211–12 (5th Cir. 1982).

In *Bond*, the Court addressed an independent journalist's motion to intervene for the limited purpose of seeking access to unfiled discovery materials. But because the journalist did not establish that there was a willing speaker, the Court denied the motion, stating that “an intervenor must do more than simply assert that a protective order interferes with his inchoate, derivative right to receive discovery information.” *Bond, id.*, at 1078. “Where, as here, the litigants have voluntarily bound themselves to keep certain discovery confidential and do not themselves seek relief from the requirements of the protective order, there is no willing speaker on which to premise a First Amendment right-to-receive claim.” *Id.* “In short, [the proposed intervenor] has no injury to a legally protected interest and therefore no standing to support intervention.” *Id.*

Correspondingly, in cases where the existence of a willing speaker was established, injury to a legally protected interest has been identified and courts have found standing. See, e.g., *United States v. Wecht*, 484 F.3d 194, 203 (3d Cir. 2007) (media outlets had standing to challenge the constitutionality of a local court rule that limited what attorneys could say publicly about ongoing criminal cases, where “it was undisputed” that the defendant's attorneys were willing to speak publicly about the case); *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 838–39 (3d Cir. 1996) (holding that plaintiffs with an interest in a lawsuit had standing to challenge gag order constraining the speech of parties to a widely publicized adoption case because one party to the case had spoken publicly before the gag order, supporting the inference that it

would be willing to do so again).

In the present action, the existence of a willing speaker is clear. The Memorandum submitted by plaintiffs in support of their motion to de-designate states, for example, that “[i]ndeed, the public has a right to see the documents at issue in this Motion.” Pltfs.’ Mem., 5. The “public and class members have a right to view documents “ and “[a]ll the documents at issue in this motion should be de-designated.” *Id.*, at 12. News organizations such as CTV are major conduits of information to those portions of the general public particularly interested in hockey and hockey-related concussion concerns, and CTV and Lang are potential recipients of the materials that plaintiffs seek to de-designate and want the public to see. Thus there is a willing speaker, and CTV/Lang therefore have standing.¹

D. THE STRONG AND LEGITIMATE PUBLIC INTEREST IN ISSUES RELATED TO THIS LITIGATION FAVORS DE-DESIGNATION.

The Court is familiar with the standards governing protective orders, the requirement of “good cause” for maintaining the confidentiality of discovery materials under Rule 26(c), and the balancing of factors used in determining whether good cause exists. The governing law is also detailed in plaintiffs’ Memorandum in support of their motion to de-designate, accompanied by an analysis of the balancing factors with respect to the particular documents that are at issue in plaintiffs’ motion. CTV/Lang incorporate

¹ Movants recognize that because CTV is a Canadian-based enterprise, there could be an issue related to whether, by itself, CTV is permitted to claim rights guaranteed by the First Amendment, even though portions of its audience are in the United States. However, because Dennis Lang is a U.S. resident and citizen, and is an independent co-movant, that issue is obviated here.

plaintiffs' summary of the governing law, but since they have not seen the documents at issue, they cannot meaningfully offer specific arguments as to how the balancing factors should be applied here. CTV/Lang concur with plaintiffs' analysis of the NHL's claims of confidentiality, in which plaintiffs describe in detail why it appears unlikely under the governing standards that the requisite demonstration of good cause can be made.

CTV and Lang do, however, want to emphasize one important facet of the balancing analysis, which is the public interest in disclosure. When conducting the balancing called for under Rule 24(c) to determine if discovery materials should be protected, courts have consistently emphasized factors such as whether the information is being sought for a legitimate purpose, whether the information is important to public health and safety, and whether the case involves issues that are important to the public. See, e.g., *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-87 (3d Cir. 1994), widely recognized as a leading precedent in this context. "Overall, in determining good cause, a court must weigh the injuries that disclosure may cause against the other party's or the public's interest in the information." *Constand v. Cosby*, __ F.Supp.3d __, 2015 WL 4071586 (E.D. Pa. July 6, 2015), citing *Pansy*, *id.* at 787-91.²

The instant litigation (whatever its eventual disposition) clearly demonstrates the public importance of issues related to concussions suffered by athletes in general, and by hockey players in particular. In recent years, these issues have been the subject of

²In a Minnesota case involving analogous considerations, the Court noted that "[t]he very nature of this motion highlights that the public has a strong interest in access to these materials because the health and safety of the public is at issue." *Healy v. I-Flow, LLC*, 282 F.R.D. 211, 214 (D.Minn. 2012).

innumerable news reports across the United States and Canada, clearly signaling the public appetite for more information about the risk of concussions related to athletic competition. That is not surprising, considering the number of people who participate in athletics where a concussion risk exists. For example, there are hundreds of thousands of active hockey players just in the United States, a large percentage of them under the age of 18.³ Thus CTV/Lang's interest (and that of the public) in obtaining certain discovery materials produced by the NHL is legitimate.

According to plaintiffs' Memorandum, the "documents at issue in this motion concern the NHL's knowledge, attitude and response regarding player-safety issues." Pltfs.' Mem., 18. Given the scale and sophistication of the NHL's operations, the information collected by the League about such matters may be much more broadly applicable, and may provide insights about sports concussions and the ways in which they can be avoided and treated, insights that would not otherwise be available to organizations and individuals lacking the resources of the NHL. This kind of information would clearly be important to public health and safety, and for that reason, it has broad general consequence as well. Furthermore, access to the information is sought not for any incremental private or commercial gain, but to help illuminate the issue of sports

³According to USA Hockey, the leading hockey organization in the country; see <http://unitedstatesofhockey.com/2014/06/17/u-s-hockey-participation-numbers-for-2013-14/>.

concussions, their consequences, and options for preventing them, matters in which CTV/Lang—and by extension the public—clearly have a significant, legitimate interest.⁴

Pansy and its progeny also suggest that in deciding whether good cause exists to withhold discovery materials, private interests may be diminished when a party "is a public person subject to legitimate public scrutiny." *Pansy*, 23 F.3d at 787. In the present case, given the scope and visibility of the NHL's operations—not just as a commercial enterprise but also in terms of its emotional impact as an exemplar of adult behavior on thousands of potentially impressionable young people playing hockey—this consideration plainly favors disclosure. CTV/Lang therefore submit that the public interest in gaining access to the discovery materials described in plaintiffs' Memorandum weighs heavily in favor of disclosure.

CONCLUSION

For the foregoing reasons, CTV and Dennis Lang respectfully request that their motion to intervene in this action be granted, and that the Court require disclosure of the documents identified in plaintiffs' motion except to the extent that defendant NHL can empirically demonstrate the necessity of continued confidentiality.

⁴ An appreciation for the public health issues related to sports concussions is clearly growing. Just recently, the United States Soccer Federation announced a new policy aimed at addressing head injuries in the sport, which sets strict limits on youth players heading the ball. See http://www.nytimes.com/2015/11/10/sports/soccer/us-soccer-resolving-lawsuit-will-limit-headers-for-youth-players.html?_r=0. The broader issues with concussions and young players are described in Robert Cantu, M.D. and Mark Hyman, *Concussions and Our Kids: America's Leading Expert on How to Protect Young Athletes and Keep Sports Safe* (2012).

DATED: November 17, 2015

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