NO. 12-2209

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

COMPANY DOE,
Plaintiff - Appellee,

v.

PUBLIC CITIZEN; **CONSUMER FEDERATION OF AMERICA**; and **CONSUMERS UNION**,
Parties-in-Interest - Appellants,

and

INEZ TENENBAUM, in her official capacity as Chairwoman of the Consumer Product Safety Commission; and **CONSUMER PRODUCT SAFETY COMMISSION**,
Defendants.

On appeal from the U.S. District Court for the District of Maryland
(Hon. Alexander Williams, Jr., U.S. District Judge)

REPLY BRIEF OF APPELLANTS PUBLIC CITIZEN, CONSUMER FEDERATION OF AMERICA, AND CONSUMERS UNION

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INTRODUCTION AND SUMMARY OF ARGUMENT

Company Doe's argument supporting the seal and pseudonym rulings depends on a single premise: that openness would compromise the right Company Doe seeks to enforce, that is, the right to keep a report about its product out of the Consumer Product Safety Commission (CPSC) database. This premise incorrectly conflates the right to keep the report out of the database with a right to keep litigation about that report out of public view. Contrary to the Company's contentions, the Consumer Product Safety Information Act (CPSIA) addresses only the content and procedures of the CPSC database it created, not what is said in federal courthouses. Thus, the CPSIA provides no support for judicial secrecy. By sealing court records and permitting the use of a pseudonym solely to protect the reputation of the plaintiff, the district court's order violated Consumer Groups' First Amendment and common-law rights of access to court records.

Attempting to avoid the merits of the secrecy issues, Company Doe argues that the district court's decision to reverse its prior grant of intervention strips Consumer Groups of the ability to appeal. But the district court's about-face was an abuse of discretion, both because it relied on the legally erroneous view that the dispute over sealing had become moot and because it contravened the consensus among federal courts of appeals that intervention should be granted to permit a challenge to sealing. Moreover, regardless of their intervenor status, Consumer

Groups may appeal as non-parties because they participated substantially in the sealing litigation below and are bound by the district court's decision. Company Doe's only response to this point is to insinuate that Consumer Groups did not participate substantially in the proceedings below — a notion that the record refutes. Finally, Company Doe's argument that Consumer Groups lack standing ignores decades of precedent permitting third-party challenges to judicial secrecy and contravenes the Supreme Court's holding that the denial of information to which a party is legally entitled constitutes injury in fact.

The district court's decision to conduct this litigation in secret and then permanently to bar public access to the summary judgment record, the name of the plaintiff, and portions of the court's own decision, all because of potential embarrassment to one of the parties, should be reversed.

SUPPLEMENTAL STATEMENT OF FACTS

Although Consumer Groups' opening brief was filed in final form on May 13, 2013, it reflects the state of the litigation when the substance of the brief was originally filed in page-proof form on December 13, 2012. Two subsequent developments merit mention.

First, on December 20, 2012, Company Doe moved the district court to reconsider its order granting intervention. JA8 (entry 80). On January 14, 2013, the district court granted the Company's motion and reversed its prior decision.

JA143-46. The court held that intervention was inappropriate on the ground that Consumer Groups' objection to sealing "effectively became moot" when the court ruled for Company Doe on the merits of its underlying claim. JA144. On January 17, Consumer Groups filed an amended notice of appeal incorporating the district court's January 14 ruling, as this Court's public docket reflects.

Second, on March 13, the district court ordered additional papers in the record unsealed. *See* JA147-48; *compare* JA3-9 (docket as of May 8, 2013), *with* JA133-42 (reflecting docket as of October 31, 2012). Illustrating the breadth of the sealing in this case, documents that remain sealed include Consumer Groups' objections to the motion to seal, opposition to Company Doe's motion to reconsider intervention, notice of appeal, and amended notice of appeal — even though Consumer Groups are not privy to any identifying facts about Company Doe or its product.[1]

ARGUMENT

I. SEALING THIS CASE VIOLATED THE FIRST AMENDMENT AND GRANTING PSEUDONYMITY WAS AN ABUSE OF DISCRETION.

As Consumer Groups explained in their opening brief, the First Amendment right of access to judicial proceedings may be overcome by a compelling interest,

[1] The objections and the opposition are docket entries 14 and 81, respectively. *See* JA4, JA8. PACER displays the message "This document is not available" when access is attempted. The notices of appeal do not appear on the docket.

and the common-law right of access may be overcome by a substantial interest. Opening Br. 20-22. Here, the Company's only interest in maintaining the seal and pseudonym is avoiding bad publicity. As this Court and its sister circuits have held, this interest is insufficient to overcome either the First Amendment or the common law right of access. *Id.* at 29-31. Moreover, the district court's pseudonymity ruling is inconsistent with this Court's jurisprudence because Company Doe seeks merely to "avoid the annoyance and criticism that may attend any litigation" rather than to "preserve privacy in a matter of sensitive and highly personal nature." *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); *see* Opening Br. 45-47.

Company's Doe various responses are unavailing.

A. The Right To Avoid Publication in the CPSC Database Does Not Include the Right To Litigate in Secret or Under a Pseudonym.

Company Doe's principal argument against openness is not grounded in this Court's access-to-court-records jurisprudence. It is, rather, the bare assertion that requiring public litigation and disclosing the Company's name would compromise the right Company Doe sues to enforce. *E.g.*, Resp. Br. 1, 2, 19, 20, 24, 26, 37. But the right Company Doe vindicated in this litigation is well-defined and narrow: a "right … to prevent a materially inaccurate report from *appearing on the database*." JA94-95 (emphasis added). The Company's claimed right to seal presumptively public court records concerning litigation about the report is much broader. The Company never justifies its leap from the former to the latter, nor

does it succeed in locating the alleged right-to-be-free-from-embarrassing-court-proceedings in the CPSIA itself. The CPSIA addresses only what may appear in the database, not what may appear in public court records. Company Doe's remedy should extend no further than its right.

Typical of the Company's argument is its claim that "[i]t is not ordinary reputational harm that Company Doe seeks to avoid but the very type of harm — maligning manufacturers with false and misleading incident reports — that Congress sought to preclude by creating this unique statutory scheme." Resp. Br. 30. The Company never explains how this "unique statutory scheme" applies to court proceedings. The Company characterizes its claim as "based … on the carefully reticulated Congressional construct that invites only reliable information to inform the public of dangerous products." *Id.* But the Company glosses over the identity of the particular forum into which Congress has "invite[d]" reliable information. The text of the CPSIA makes clear that the forum whose content it regulates is the CPSC database it created, not a federal courthouse. *See* 15 U.S.C. § 2055a. Company Doe never justifies its logical leap from regulation of the database to regulation of court records. And the Company does not even attempt to square the broad regulation of court records it proposes with the public's longstanding First Amendment and common law rights of access to judicial proceedings.

Referring to the traditional First Amendment concept of a "marketplace of ideas," Company Doe claims that "Congress decided that 'marketplace' should not contain false and misleading reports injurious to a manufacturer's reputation and economic well-being." *Id.* at 44. Again, defining the particular "marketplace" that the CPSIA addresses is crucial. The Company's unstated premise is that the CPSIA, in setting guidelines for the content of the new database it created, also reached out to scrub judicial dockets of "reports injurious to a manufacturer's reputation and economic well-being." Congress is unlikely to have taken such a step sub silentio, particularly since it would contravene the tradition of public access to judicial proceedings, Opening Br. 22-23, the appellate consensus that reputational concerns do not justify the denial of public access, *id.* at 29-31, and the time-honored First Amendment precept that the remedy for "falsehoods and fallacies" in public discourse is "more speech, not enforced silence," *id.* at 33 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

Even the Company's own amici recognize a meaningful difference between an allegation reported in a government database and one made elsewhere: "The public expects more than an unmonitored free-for-all on a government sponsored database, particularly one maintained by a federal agency that issues product recalls that may involve significant harm or death." Amicus Curiae Br. of Nat'l

Ass'n of Mfrs. et al. 19. By contrast, civil litigation, unlike a government-sponsored website, is a historically public forum where discussion of embarrassing or even false allegations is presumptively open to the public. *See, e.g.*, *Cent. Nat'l Bank of Mattoon v. U.S. Dep't of Treasury*, 912 F.2d 897, 900 (7th Cir. 1990) ("[T]he bank's interest in keeping the bad news about its management secret is meager in relation to the claims of a free press for access to governmental proceedings."); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983) (explaining that a litigant's desire to shield information from the public "cannot be accommodated by courts without seriously undermining the tradition of an open judicial system"); *see generally* Opening Br. 29-31. Otherwise, one could imagine all manner of litigants insisting on secret litigation: a criminal defendant accused of murder, a public official sued for embezzlement, a supervisor sued for sexual harassment. The pages of the Federal Reporter would be littered with black boxes covering facts, details, and even legal arguments that litigants thought too sensitive for public consumption. Such a system would be quite different from ours, which is founded on the free flow of information and strong protections for public access to court proceedings.

Understandably reluctant to embrace the full implications of its argument, the Company adds this qualification: "it is not Company Doe's position that the district court's injunction bars all discussion of the underlying incident, but merely

that the report … should not be published or disseminated through court documents." *Id.* at 44-45. But the Company never explains why the same interest it asserts in preventing the report's "disseminat[ion] through court documents" would not equally entitle it to an injunction "bar[ring] all discussion" of the incident. Surely widespread discussion of the report on the internet would implicate Company Doe's reputational interest just as much as disclosure of the report in public court papers; indeed, the Company asserted in its original motion to seal that "the injury that Plaintiff seeks to avoid is *public dissemination* of the incident report." JA12 (emphasis added). Thus, Company Doe's interest in keeping this case sealed is the same interest it would have in a full-fledged prior restraint against all public discussion of the incident report. But of course the law is well-established that a prior restraint, strongly disfavored in any circumstances, would not be permissible to protect a company's reputation. *See Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) (striking down injunction against leaflets criticizing a business).

In sum, the key assumption on which the district court's sealing and pseudonymity orders — and Company Doe's defense of those orders — rests, is unmoored from the CPSIA and untenable under the First Amendment. In winning its APA lawsuit, Company Doe secured the right to keep the report about its product out of the database — and no more.

B. Company Doe's Remaining Arguments for Secrecy Lack Merit.

1. The First Amendment's applicability depends on the types of proceedings at issue, not their subject matter.

Company Doe does not dispute the First Amendment's application to summary judgment proceedings or to any of the other proceedings and documents that Consumer Groups have asserted fall within the protection of the First Amendment — judicial decisions, complaints, non-dispositive motions, docket sheets, and materials regarding sealing. *See* Opening Br. 23-29. Instead, the Company contends that the First Amendment right of access does not apply here because the subject matter of the case (the CPSC database) is novel. Resp. Br. 19, 32-34. The relevant question, however, is not whether the particular subject matter of the litigation implicates a tradition of openness but whether the particular proceeding does.

At issue here is civil litigation culminating in summary judgment, a type of proceeding to which this Court has long applied the First Amendment right of access because it is analogous to a trial. *See Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252-53 (4th Cir. 1988); *accord Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 576, 578 (4th Cir. 2004) (hereinafter "*VDSP*"). This Court's access-to-court-records jurisprudence does not suggest that the applicability of the First Amendment depends on the underlying subject matter of the lawsuit; on the contrary, when this Court considers whether the First

Amendment applies to a particular context, it regularly relies on its prior holdings regarding *the same type of proceeding* at issue. *See, e.g.*, *VDSP*, 386 F.3d at 576-80 (summary judgment proceedings); *In re State-Record Co.*, 917 F.2d 124, 127 (4th Cir. 1990) (criminal proceedings).[2] Subject matter might be relevant to determining whether a compelling interest overcomes the First Amendment right of access in specific circumstances, but there is no doubt that the First Amendment applies.

2. Company Doe's right to access the courts is not implicated.

Company Doe's complaint that forcing it to litigate this case in public would interfere with its own First Amendment right to petition the courts, Resp. Br. 27, rests on the faulty assumption that the right to petition the courts entails a right to petition the courts in secret. If the right of access to the courts meant that a party could demand access to courts on whatever terms it desires, then any aspect of judicial practice that a party found inconvenient would be subject to challenge. For instance, a party who found service of process challenging could claim that Rule 5

[2] The generalized "experience and logic" test, cited by the Company, Resp. Br. 31-32, is sometimes used to consider the extension of First Amendment rights to *new* types of proceedings. *See In re Application for an Order Pursuant to 18 U.S.C. Section 2703(d)* (*Appelbaum*), 707 F.3d 283, 291 (4th Cir. 2013) (deciding whether the First Amendment right of access applies to proceedings regarding an order for records under the Stored Communications Act). But, as in *VDSP* and *State-Record*, this Court has generally looked to its more specific holdings when the proceeding at issue is the same as or closely analogous to a proceeding to which this Court has already applied the First Amendment right of access.

denied her "access to the courts." A party who had difficulty meeting court-imposed filing deadlines could claim that a court's refusal to accept his late filings denied him "access to the courts." And a party who found public litigation embarrassing could claim (as the Company does here) that the First Amendment and common-law rights to open judicial proceedings denied the party "access to the courts." That cannot be the law.

Nor has a party been denied access to the courts whenever it fails to obtain what it considers "an effective remedy." *Id.* Even a party that loses its case entirely has not ipso facto been denied "access to the courts." Under Company Doe's theory, unsealing this case would deny it "access" to a court that not only heard its case but decided the case in the Company's favor. Company Doe's authorities, *see id.*, prove only the *existence* of a right to petition the courts, not the broader proposition that the right of access entails a right to litigate on unusual terms preferred by a particular party or to obtain a particular result.

3. The fact that the public can glean some information from the unsealed materials does not justify sealing the rest of the materials.

The Company posits that if the public can glean *enough* information from what *does* appear in the public record, this Court should not concern itself with the material that has been suppressed. *Id.* at 42. But the right to access judicial records is not the right to the gist of judicial records, but to the records themselves.

Moreover, in this case, although the redacted opinion discloses the general rule applied, understanding the scope of that rule depends on the factual context. For instance, if the report of harm alleged that a lawnmower had caused a heart attack because an elderly consumer happened to have had one the moment someone started the lawnmower, the district court's decision would be limited in scope, because the causal connection would be so weak on its face that few consumers would even link the two, much less report the incident to the CPSC. But if the underlying report alleged that a paint product used in the basement of a multi-story home exacerbated the asthma of a child whose bedroom was upstairs, the decision would be broader in scope, because it would have rejected a causal connection that at least seems possible and thereby imposed a more demanding standard of causation. Here, the CPSC's future decisions whether to include or exclude reports from the database will likely be affected by the proceedings and decision in this case, yet because of the seal, only the agency and Company Doe will understand how the CPSC's decisionmaking process has been affected.

In addition to promoting public understanding of court decisions, the First Amendment right of access to judicial proceedings exists to enable public *oversight* of the judicial branch. *E.g.*, *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 203 F.3d 291, 303 (4th Cir. 2000). But "[i]t is hardly possible to come to a reasonable conclusion" about a judicial opinion "without knowing the facts of the

case." *Id.* For instance, if the case involved the hypothetical lawnmower-heart attack injury, most readers would probably think the causal connection was weak and applaud the district court's judgment. The paint-asthma example, however, would be more controversial. By redacting its application of law to fact, the district court has disabled the public from evaluating its work.

Additionally, without seeing the summary judgment motion papers, Consumer Groups and the public generally cannot evaluate the *manner* in which the district court performed its role. Did the court consider all the parties' arguments, or ignore strong points made on one side? Did the decision follow from the claims and arguments made by the parties, or did the court stretch beyond those arguments to reach its result? Absent a compelling interest supporting secrecy, the public is entitled to answer these questions for itself with full access to the court's opinion and the record on which it was based. Thus, the availability of a redacted opinion does not obviate the First Amendment problem here.

4. Cases involving attorney-client privilege, trade secrets, FOIA exemptions, or libel are inapposite.

Company Doe's claim that courts regularly seal cases of this type and grant pseudonymity to corporations is undermined by key distinctions between this case and the authorities on which the Company relies.

The Company's discussion of *Under Seal v. Under Seal*, 17 F.3d 1435, 1994 WL 52197 (4th Cir. Feb. 23, 1994) ("*Under Seal I*"), is typical of the Company's

reliance on inapposite cases. *Under Seal I* is a one-page affirmance of the district court's decision to seal *X Corp. v. Doe*, 805 F. Supp. 1298 (E.D. Va. 1992), a case arising out of an attempt by a company's former in-house counsel to use, in support of a qui tam action, confidential material obtained during his representation of the company. *See id.* at 1301. The district court granted the seal and pseudonym not because of the risk of embarrassment to the company but because of the risk of disclosure of information that was legally *confidential* by virtue of the attorney-client relationship. *Id.* at 1300 n.1; *see also Doe v. A Corp.*, 709 F.2d 1043, 1044 n.1 (5th Cir. 1983) (same).

The material at issue here, by contrast, discusses and analyzes a third-party's report of injury and the CPSC's handling of that report — the sort of information that any person could talk about or blog about online. This is not information made confidential by canons of ethics to maintain the integrity of the legal system, *see X Corp.*, 805 F. Supp. at 1307-08; it is just a set of allegations that Company Doe would rather the public not hear. As Consumer Groups have demonstrated, a corporate reputational interest does not justify either sealing or pseudonymity. Opening Br. 29-31, 45-47. At a separate stage of the *Under Seal* case on which Company Doe relies, this Court recognized this very principle and affirmed the district court's decision *not* to order a permanent seal. *See Under Seal v. Under Seal*, 27 F.3d 564, 1994 WL 283977, at *3 (4th Cir. June 27, 1994) ("*Under Seal*

II"). Company Doe dismisses the statement in this second opinion as dicta, but it was in fact one of two bases for the Court's ruling. *See id.* (explaining that "[s]imply showing that the sealed information would harm a company's reputation is not sufficient" to override the public interest in access, and also noting that given what was already public, the release of additional information would not harm the company (citation, internal quotation marks, and source's alteration marks omitted)). Consideration of the *Under Seal* case as a whole — both the affirmance of the initial seal in *Under Seal I* and the affirmance of the *denial* of a seal in *Under Seal II* — reveals that sealing may be appropriate to protect information that is legally confidential (such as confidential attorney-client communications) but not information that would merely cause embarrassment.

This same distinction — between information that is confidential by law, and information whose disclosure would be merely embarrassing — also distinguishes the trade secrets and FOIA cases on which the Company relies. Resp. Br. 28, 34-35. As one of the Company's own authorities explains, "trade secrets partake of the nature of property, the value of which is completely destroyed by disclosure." *Level 3 Communications, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572, 582 (E.D. Va. 2009) (citation and internal quotation marks omitted). And FOIA delineates what categories of documents the government must disclose

and what categories are shielded by law. See 5 U.S.C. § 552(b) (specific exemptions).

The Company's comparison to libel is likewise inapt, because publication of libelous statements is subject to legal sanction. Company Doe has not claimed, much less shown, that mere repetition of the allegations in the report of harm at issue would be libelous — nor could it likely make such a showing, given the high bar it would presumably have to meet. *See generally N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (public figure must demonstrate "actual malice").[3]

Other than cases from these distinguishable contexts, the Company's authorities for its claim that "[c]ourts have often allowed companies to proceed under a pseudonym," Resp. Br. 39 n.11, all permitted pseudonymity without analysis. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 148 n.1 (1989); *John Doe Corp. v. United States*, 714 F.2d 604 (6th Cir. 1983) (per curiam); *John Doe Corp. v. Miller*, 499 F. Supp. 378 (E.D.N.Y. 1980).[4] The relevant question is not whether corporations ever proceed under a pseudonym but whether they are

[3] In any event, it would be rather late in the day for Company Doe to argue for the first time on appeal that the report of harm must be sealed to prevent a libel, as Company Doe has failed to raise this argument in its original motion to seal the case, JA12-15, or even in its briefing before this Court.

[4] Additionally, the Sixth Circuit's *John Doe Corp.* case, 714 F.2d 604, involved grand jury secrecy, which is a well-recognized exception to the right of access to judicial records. *See Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 8-9 (1986).

permitted to do so *in order to protect corporate reputation*. As Consumer Groups have demonstrated, the answer to that question is no. Opening Br. 45-47.

Because Company Doe has no generalized legal right to prevent disclosure of the information sealed in this case, only the right to prevent its inclusion in the government database saferproducts.gov, *see supra* Part I.A, the rationales for court secrecy and pseudonymity in cases involving attorney-client privilege, trade secrets, FOIA-exempt material, and libel, do not apply here.

II. CONSUMER GROUPS ARE PROPER APPELLANTS.

Company Doe's attempt to avoid this appeal on procedural grounds fares no better than its substantive defense of the secrecy orders on the merits. The courts of appeals are in broad agreement that permissive intervention is appropriate where a third party seeks to obtain access to judicial records. *See* Opening Br. 17-18. The district court did not dispute this consensus, but instead based its revocation of intervention on two errors of law and thereby abused its discretion. First, its decision did not comport with the standard for reconsideration. Second, the court relied on the legally erroneous view that the secrecy issues were moot. In addition, regardless of their intervention status, Consumer Groups are proper appellants under *Kenny v. Quigg*, 820 F.2d 665 (4th Cir. 1987), because they participated substantially in the sealing litigation and are bound by the adverse result.

A. The District Court Abused Its Discretion in Revoking Intervention.

1. The order revoking intervention did not satisfy the standard for reconsideration under Rule 60(b).

Company Doe's characterization of the district court as having simply "denied" intervention, Resp. Br. 3, 6, is inaccurate. In fact, the court first *granted* intervention shortly after the filing of this appeal. JA27. It is the district court's *reconsideration* of its intervention order that is at issue here. The disposition of a motion to reconsider is reviewed for abuse of discretion. *Aikens v. Ingram*, 652 F.3d 496, 501 (4th Cir. 2011) (en banc).

Rule 60(b) permits reconsideration for specific reasons, including mistake, new evidence, fraud, voidness of judgment, and satisfaction of judgment, or for "any other reason that justifies relief." Fed. R. Civ. P. 60(b). Below, neither the court nor the Company suggested that one of the five enumerated circumstances applied, so relief could be granted (if at all) only under the final, catch-all clause. That provision "may be invoked in only 'extraordinary circumstances.'" *Aikens*, 652 F.3d at 500. Strict application of Rule 60 "is essential if the finality of judgments is to be preserved." *Id.* at 501 (citation omitted). Here, the district court failed to find, implicitly or explicitly, any extraordinary circumstance justifying reconsideration. *See* JA143-46. Its reconsideration ruling should be reversed on this basis alone.

2. The district court relied on the legally erroneous view that the case was moot.

"By definition, a district court abuses its discretion when it makes an error of law." *RZS Holdings AVV v. PDVSA Petroleo S.A.*, 506 F.3d 350, 356 (4th Cir. 2007). The court reversed itself on intervention because it thought that the controversy over sealing became "moot" when Company Doe won its underlying substantive claim. JA144. This view conflates two distinct controversies. Although the controversy between the Company and the CPSC over the contents of the database has been resolved, a controversy still exists between the Company and Consumer Groups over the sealing and pseudonymity rulings.

A controversy is moot when it is no longer "live," meaning that the parties lack a legally cognizable interest in the outcome or there is no relief a court can grant. *E.g.*, *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 161 (4th Cir. 2010). That condition is not met here. Sealing is a distinct issue on which this Court may rule (as it has in the past) without touching the underlying judgment on the merits of the case that was sealed. *See, e.g.*, *VDSP*, 386 F.3d at 570. In fact, *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 178 (4th Cir. 1988), explicitly rejected the notion that a decision on the underlying case moots the question whether the case was properly sealed. There, after the court granted the parties' joint motion to seal and granted summary judgment for the defendant, the plaintiff appealed from the judgment, and the Baltimore Sun intervened to

challenge the seal. *Id.* at 180. This Court affirmed summary judgment but ordered the district court to reconsider the seal. *See id.* at 180 & n.*, 182. The Court explained: "The affirmance of the summary judgment order in this case does not moot the Sun's motion to unseal, because the right of access to judicial records and documents is independent of the disposition of the merits of the case." *Id.* at 180 n.*. Likewise, here, this Court could reverse the sealing and pseudonymity orders, thus enabling public access to the court records, without disturbing the order enjoining the CPSC from publishing the report about Company Doe's product in the database.

Company Doe is incorrect that the government's decision not to appeal the merits renders the sealing controversy moot. This Court can grant Consumer Groups relief by reversing the secrecy orders below, whether or not the government is a party. The Company's theory that the government is specially empowered to defend the First Amendment to the exclusion of other parties, Resp. Br. 51, is unfounded. The case the Company cites, *Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013), in no way suggests that if the government declines to litigate a particular claim, other parties are precluded from doing so. *Stuart* held that third-parties dissatisfied with the government's litigation strategy in defending a state statute need not be permitted to intervene to take a different approach in pursuit of the same result sought by the government. *Id.* at 349, 351-52. The Court explicitly

distinguished the circumstance in which a proposed intervenor does not "share the same ultimate objective as an existing party." *Id.* at 352. Here, Consumer Groups do not share the same objective as an existing party; the only party who shared Consumer Groups' objective of securing public access to court records — the government — is not a party to this appeal at all. Notwithstanding the government's decision not to pursue an appeal, the secrecy issues remain live, and the Court has authority to grant the relief requested in this appeal. The district court's contrary conclusion that the case is moot was legal error; consequently, its revocation of intervention was an abuse of discretion.

3. The Company's defense of the district court's ruling relies on incorrect premises and distinguishable authorities.

Company Doe does not attempt to defend the district court's conclusion that the secrecy issues became moot; instead, it defends the decision on alternate grounds by assailing the broad body of appellate authority approving intervention as the means to challenge judicial secrecy orders. The Company's efforts are unpersuasive.

The Company argues first that the resolution of the underlying dispute between the parties renders untimely a later motion to intervene to challenge a court secrecy order. But courts of appeals have repeatedly allowed intervention in such circumstances. *See, e.g., Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1014-16 (11th Cir. 1992); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d

1424, 1426 (10th Cir. 1990). Indeed, cases in this line have explicitly rejected the Company's untimeliness argument. *See, e.g.*, *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778-80 (3d Cir. 1994); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 784-87 (1st Cir. 1988). These cases permitting post-judgment intervention to challenge sealing orders also refute the Company's argument that prejudice to the original parties results whenever intervention requires "additional litigation," Resp. Br. 47 — a sweeping proposition that, if accepted, would mean intervention is never appropriate when sought for the purpose of appeal.

Company Doe argues that this Court should ignore the appellate consensus because of *Black v. Central Motor Lines, Inc.*, 500 F.2d 407 (4th Cir. 1974). But that case (as Company Doe concedes, Resp. Br. 46 n.15) explicitly distinguished the category of cases, like this one, in which "intervention was permitted so that the intervenor could prosecute an appeal which an existing party had decided not to take." *Id.* at 408. Additionally, *Black*, which concerned twelve employees' attempt to intervene in a case in which another employee had been granted back pay as a remedy for employment discrimination, *see id.*, was far removed from the context of a third party's assertion of constitutional and common-law rights of access to judicial records. And context matters: the courts of appeals have consistently recognized that Rule 24 must be interpreted flexibly in sealing disputes "because

of the need for 'an effective mechanism for third-party claims of access to information generated through judicial proceedings.'" *Nat'l Children's Ctr.*, 146 F.3d at 1045 (quoting *Public Citizen*, 858 F.2d at 783). Finally, *Black* involved attempted intervention almost one year after judgment, by parties apparently brand new to the litigation. *Black*, 500 F.2d at 408. Company Doe's other Fourth Circuit authorities involve similar tardiness problems. *See Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 840 (4th Cir. 1999) (attempted intervention after appeal deadline expired); *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989) (intervention sought "at the last possible moment"). By contrast, here Consumer Groups promptly filed objections to the Company's original motion to seal under the applicable local rule, participated in the sealing litigation to the maximum extent possible consistent with the seal, and promptly moved to intervene when the motion to seal was granted.

Next, the Company argues that "[i]n this unique case, the remedy and decision to seal are inextricably bound." Resp. Br. at 47. This argument reprises Company Doe's central argument on the merits of sealing, which is both irrelevant to intervention and substantively incorrect. *See supra* Part I.A.

Finally, the Company tries to distinguish the leading federal appellate cases on the grounds that they involved either an intervenor with a "particularized interest" in the court records at issue or original parties that had agreed to a seal.

Resp. Br. 49-50. Both distinctions are irrelevant. Company Doe cites no authority holding either that the right of access to judicial proceedings is *limited* to members of the public with a "particularized interest" in court records, or that the public loses that right if none of the original parties opposes restrictions on access.

This Court should reverse the reconsideration order and deem Consumer Groups intervenors as provided in the district court's October 9, 2012 order granting intervention. *See Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 220 F.3d 241, 248 (4th Cir. 2000) (finding abuse of discretion but finding remand unnecessary because record was fully developed); *United States v. Fenner*, 147 F.3d 360, 363 (4th Cir. 1998) (no remand required if exercising discretion in the manner one side requests would be an abuse of discretion).

B. Regardless of Their Intervenor Status, Consumer Groups Are Entitled To Appeal As Non-Parties Who Participated in the Sealing Litigation Below and Are Bound by the Adverse Decision.

This Court has long recognized an exception to the general rule that only named parties may appeal a judgment: such appeals are allowed where a non-party (1) has participated in the proceedings below and (2) has a substantial interest in the outcome of the proceedings. *Kenny v. Quigg*, 820 F.2d 665, 668 (4th Cir. 1987). Other courts of appeals agree. *See, e.g.*, *In re Siler*, 571 F.3d 604, 608 (6th Cir. 2009); *Curtis v. City of Des Moines*, 995 F.2d 125, 128 (8th Cir. 1993); *In re Eastern Sugar Antitrust Litig.*, 697 F.2d 524, 527-28 (3d Cir. 1982); *see also*

Castillo v. Cameron County, 238 F.3d 339, 349 (5th Cir. 2001) (weighing equities in addition to the two factors identified in *Kenny*); *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1504 (9th Cir. 1990) (same).

In *Kenny*, the Secretary of Labor sued an employee stock-ownership plan challenging its sale of stock in the plan. 820 F.2d at 666-68. Kenny, who was a participant in the plan but not a party to the case, objected to the plan's motion to approve the sale; when the district court approved the sale, the Secretary declined to appeal, but Kenny did. *Id.* at 667. This Court allowed the appeal, finding that Kenny had "participated significantly" through her objection to the sale, which the district court had considered and rejected on the merits, and that Kenny's financial stake in the plan gave her a "substantial interest" in the outcome. *Id.* at 668.

Here, Consumer Groups, like the appellant in *Kenny*, participated significantly in the proceedings below by raising objections to the Company's motion for seal and pseudonym — objections that, like those in *Kenny*, the district court considered in its ruling, *see* JA102-07 — and by filing their own motion to unseal. Company Doe's attempts to minimize Consumer Groups' role, *see, e.g.*, Resp. Br. 4, are based on Consumer Groups' non-participation in proceedings that were closed to them by the seal and which they did not even know were occurring. *See, e.g.*, *id.* at 5 ("Consumer Groups filed objections to the motion to seal but did not otherwise participate in the proceedings before the district court prior to the

entry of final judgment."). The notion that Consumer Groups should have attempted to participate in the process of redacting sealed materials for public consumption, *see id.* at 41 n.12, is nonsensical, because Consumer Groups were not privy to the sealed materials. By contrast, with respect to the specific issues here on appeal — sealing and pseudonymity — Consumer Groups' participation was as substantial as possible given that the case was sealed. And contrary to the Company's conclusory claim that Consumer Groups have failed to "establish[] that they are sufficiently bound by the sealing order," *id.* at 54, the seal deprives Consumer Groups of access to meaningful parts of the district court opinion and record in violation of their constitutional and common-law rights. *See, e.g.*, *VDSP*, 386 F.3d at 575; *Rushford*, 846 F.2d at 253. Company Doe does not suggest what more might be required for them to be "bound" by the sealing order.

The *Kenny* rule is not predicated, as Company Doe argues, on "a unique legal relationship" between the non-party and a principal party. Resp. Br. 54. *Kenny* itself says nothing about such a requirement, and courts permit non-party appeals where no such relationship exists. *See, e.g.*, *United States v. Kravetz*, 706 F.3d 47, 51-52 (1st Cir. 2013) (deciding journalist's appeal regarding access to judicial records in a criminal case in which he had no stake and in which intervention motion remained pending in district court); *Siler*, 571 F.3d at 608 (allowing crime victims to appeal the denial of motions seeking to unseal

documents in a criminal case so victims could use the documents in their own separate civil action). In support of its argument that a "unique relationship" is required, the Company cites two unpublished Fourth Circuit opinions applying *Kenny* in contexts where such a relationship arguably existed. *See* Resp. Br. 54. But neither case suggested that the non-party's relationship to a party influenced the Court's decision to apply *Kenny*.

Company Doe denigrates Local Rule 105(11) as a mere "public notice provision," *id.* at 55, but the rule not only requires notice but also "permit[s] the filing of objections by interested parties." D. Md. Loc. R. 105(11). Appellate review therefore must be available to effectuate the rule's purpose of facilitating public scrutiny of judicial proceedings. *Cf. Kaplan v. Rand*, 192 F.3d 60, 66-67 (2d Cir. 1999) ("It would make little sense to invite a shareholder to file objections in the manner provided by [Federal Rule of Civil Procedure] 23.1 and then deny him the right to challenge the district court's ruling on his objection."). Applying *Kenny*, this Court should hold that Consumer Groups are entitled to appeal the district court's rulings regarding secrecy regardless of their intervenor status.

III. CONSUMER GROUPS HAVE STANDING TO CHALLENGE THE SECRECY ORDERS.

The Company's argument that Consumer Groups lack standing to challenge the sealing and pseudonym rulings misapprehends the nature of the injury

Consumer Groups have sustained and ignores decades' worth of precedent regarding challenges to secrecy in judicial proceedings.

The Supreme Court has held that a concrete injury can constitute an "injury in fact" sufficient to confer standing even where the injury is widely shared. *FEC v. Akins*, 524 U.S. 11, 24 (1998). The Court has also held that the denial of information to which a party is legally entitled can constitute an injury in fact. *Id.* at 21. These holdings apply directly to this context, in which courts have permitted challenges to judicial secrecy orders without any greater showing than intent to access the sealed materials. The types of parties that have successfully challenged sealing orders have included not just media parties, *see* Resp. Br. 23, but also litigants in cases other than the one under seal who seek sealed material to assist them in separate litigation, *see Brown*, 960 F.2d at 1014; and (as here) public interest groups who advocate on issues to which the sealed material relates, *see Public Citizen*, 858 F.2d at 776.

The right of access to judicial proceedings is the right to oversee and observe the workings of government. This interest is broadly shared among the public at large, so anyone who has sought to access judicial records and been denied access has been injured. The Company attempts to distinguish this Court's prior cases as involving special rights belonging to the press alone, but "the First Amendment does not guarantee the press a constitutional right of special access to information

not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

Here, Consumer Groups have sought and been denied access and continue to be denied access to the judicial records in this case — thereby sustaining injury. They therefore have standing. Were it otherwise, this Court's procedural protections regarding judicial sealing would be of little value. "[P]ublic notice of a request to seal and a reasonable opportunity to challenge it," *Stone*, 855 F.2d at 181, would mean nothing if the challenger were kicked out of court on standing grounds the moment she arrived.

CONCLUSION

The district court's secrecy rulings should be reversed.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of 32(a)(7)(B) because this brief contains 6,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 14-point type.

/s/ Scott Michelman

CERTIFICATION OF SERVICE

I certify that on May 20, 2013, I served this brief by ECF on all registered counsel for appellees.

/s/ Scott Michelman