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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE ABBOTT LABORATORIES NORVIR ANTITRUST LITIGATION	No. C-04-1511 CW **PLAINTIFFS' RESPONSE TO THE DECLARATION OF SAMUEL S. PARK IN SUPPORT OF PLAINTIFFS' ADMINISTRATIVE MOTION TO SEAL** **Date: April 24, 2008** **Time: 2:00 p.m.** **Ctrm: 2, The Honorable Judge Wilken**

INTRODUCTION

In a case that has been keenly followed by both people living with HIV and by the American public at large, defendant Abbott Laboratories ("Abbott") seeks to seal documents central to Plaintiffs' arguments that this case should proceed to trial.[1] In arguing that the public should be denied its fundamental right of access to these Court documents, Abbott asserts, among other things, that this information might be "confusing" to the public, might be used to disparage Abbott and might "harm Abbott's good will, standing, and relationships that is has created with the HIV/AIDS community." *See* Declaration of Samuel S. Park in Support of Plaintiffs' Administrative Motion to Seal ("Park Declaration" or "Park Decl.") (Docket # 470), filed herein on March 26, 2008, at ¶6.[2] While these documents may well shed unfavorable light on Abbott's 400% price increase on a life-saving drug, Abbott's proffered reasons to seal this information fail to satisfy this Circuit's stringent requirements.

ARGUMENT

In *Pintos v. Pac. Creditors Ass'n*, 504 F.3d 792 (9th Cir. 2007), the Ninth Circuit effectively reaffirmed its earlier holding in *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006), that materials filed in connection with dispositive motions may not be sealed unless the party seeking the sealing "overcome[s] a strong presumption of access by showing that 'compelling reasons supported by specific factual findings . . . outweigh the general history of access and the public policies favoring disclosure.'" *Pintos*, 504 F.3d at 802 (citing *Kamakana*, 447 F.3d at 1180).[3] As the party seeking the sealing of documents, Abbott has the burden of

[1] The documents at issue are Exhibits 2-7, 9-13, 15-19, 21-26, 30-37, 39-44, 46, 48 and 52-53 to the Declaration of Michael W. Stocker in Support of Plaintiffs' Opposition to Abbott Laboratories' Motion for Summary Judgment, and Plaintiffs' Cross-Motion for Summary Judgment on Abbott's "Patent Immunity" Defense ("Stocker Declaration") (Docket # 463), filed herein on March 19, 2008. (Abbott now agrees that Exhibits 1, 8, 14, 20, 27-29, 38, 45 and 49-51 to the Stocker Declaration, previously lodged under seal, should now be filed in the public record in their entirety, and it takes no position on Exhibit 47. *See* Park Decl., ¶3.)

[2] The portions that Abbott contends are entitled to permanent sealing are reflected by the redactions in the re-produced copies of the Stocker Declaration exhibits that are attached to the Park Declaration. (*See* Docket #s 470-473.)

[3] As *Pintos* makes clear, "private materials unearthed during discovery" that become part of the judicial record in connection with a dispositive motion are not governed by Fed. R. Civ. P. 26(c) and its standards, under which a trial court may grant a protective order "'which justice requires to

demonstrating that such documents meet this "compelling reasons" standard. *See Pintos*, 504 F.3d at 802; *Kamakana*, 447 F.3d at 1179. Thus, Abbott was required to "articulate the factual basis [justifying the sealing], without relying on hypothesis or conjecture," which is what a district court is obligated to do when considering a request to seal records submitted with a dispositive motion. *See Kamakana*, 447 F.3d at 1179 (citations omitted).

The above principles are also embodied by this Court's Local Rule 79-5(d), under which "the designating party must file with the Court and serve a declaration establishing that the designated information is sealable . . . ." As this Court observed in an order in the related cases issued two days before Abbott filed the Park Declaration:

> Pursuant to Local Rule 79–5, if any party objects to the public filing of any document, that party must file a declaration establishing with particularity the need to file the document or a portion thereof under seal. The statement must explain how the party stands to be harmed by the public filing of the objectionable information. A blanket statement that the party considers a document confidential or has designated the document as subject to a stipulated protective order is not sufficient to demonstrate that the document is sealable.

See Meijer v. Abbott Labs., Case No. C 07-CW-5985, Order Granting In Part Plaintiff's Motion for Leave to File Under Seal (Docket # 51), filed on March 24, 2008 (emphasis added).

The declaration Abbott has filed in support of its sealing request, *i.e.*, the Park Declaration, fails to satisfy Abbott's burden under *Pintos*, *Kamakana* and Local Rule 79-5. As a preliminary matter, the declaration is not based on the personal knowledge of Abbott's counsel, Mr. Park. For the most part, the declaration merely asserts Mr. Park's "understanding" of the general subject matter of the redacted portions of the documents Abbott proposes that the Court permanently seal, and presents no actual evidence. *See*, *e.g.*, Park Decl., ¶27 (setting out Mr. Park's "understanding" of the purpose of a document prepared by Abbott).[4] Indeed, nowhere in his Declaration does Mr. Park state that he is prepared to testify as to the truth of any of the statements made in his Declaration. As such, the Park Declaration is incompetent and should be stricken. *See*, *e.g.*, Civ. L.R. 7-5(b) (declarations must comply as much as possible with Fed. R. Civ. P. 56(e), which, in

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protect a party from annoyance, embarrassment, oppression, or undue burden or expense.'" 504 F.3d at 801-02.

[4] Even in this respect, Mr. Park does not come close to fairly describing the extensive material Abbott has redacted.

turn, requires that a declaration be made "on personal knowledge" and that the declarant be "competent to testify on the matters" set forth in the declaration).

Moreover, the Park Declaration offers little in the way of facts; rather, it is replete with unsubstantiated, conclusory statements and hypothetical assertions, as well as argument. *See*, *e.g.*, Park Decl., ¶27 (asserting that the document, prepared by an Abbott executive, reflects a "misunderstanding of the HIV market"). This separately renders the declaration improper. *See* Civ. L.R. 7-5(b) ("An affidavit or declaration may contain only facts . . . and must avoid conclusions and argument."). Abbott has not even attempted to make the sort of particularized showing mandated by the applicable standards. The Ninth Circuit has made it clear that this approach does not pass muster. *See Kamakana*, 447 F.3d at 1182 ("[C]onclusory offerings do not rise to the level of 'compelling reasons' sufficiently specific to bar the public access to the documents.").[5]

The Court has hewn closely to these standards when it initially rejected Abbott's request to file under seal certain of the documents it filed with its opening papers. *Compare* the Declaration of Samuel S. Park in Support of Abbott Laboratories' Administrative Motion (Docket # 439), filed herein on February 13, 2008, at ¶¶7-8 *with* Order Granting in Part Defendant's Motion to Seal (Docket # 450), filed herein on March 6, 2008 (rejecting Abbott's request to file Exhibits G, H and I under seal). The Park Declaration before the Court now is deficient in precisely the same ways in which the Court found Mr. Park's February 13, 2008 Declaration to be deficient.

Abbott also fails to address any of the factors Plaintiffs previously highlighted that affirmatively support an order requiring the Stocker Declaration exhibits to be filed in the public record,[6] *e.g.*, that much of the information in the documents has already been made public, the documents are mostly four to six years old and therefore especially undeserving of being shielded

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[5] Thus, in *Kamakana*, the Ninth Circuit found to be inadequate in that case declarations that "largely make conclusory statements about the content of the documents -- that they are confidential and that, in general, their production would, amongst other things, hinder [the agency's] future operations with other agencies, endanger informants' lives, and cast [the police department] officers in a false light." 447 F.3d at 1182.

[6] *See* Plaintiffs' Motion Pursuant to Civil L.R. 79-5(d) to Lodge Under Seal and Request to Unseal ("Plaintiffs' Request to Unseal") (Docket # 458), filed herein on March 18, 2008.

1 and there is a particularly strong interest here in allowing public access to the materials at issue
2 given that the subject matter of the litigation "involves matters of significant public concern." *See*
3 *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 38
4 (C.D. Cal. 1984).

5 Finally, for at least two reasons, the Court should not afford Abbott another opportunity to
6 attempt to demonstrate that sealing is somehow appropriate. First, Abbott failed to meet and
7 confer about its confidential designations although Plaintiffs requested that it do so. More
8 specifically, soon after the Ninth Circuit issued its decision in *Pintos*, Plaintiffs' counsel invited
9 Abbott's counsel into a dialogue about the impact of *Pintos* on this case as well as on the material
10 that the parties had filed in connection with the earlier summary judgment briefing (much of which
11 has now been re-submitted in this latest summary judgment round). *See* Exhibit A hereto, which is
12 a true and correct copy of a letter Daniel Harris wrote and sent to David Doyle on January 17,
13 2008. Abbott never responded. At a minimum, this process would have eliminated the need for
14 Plaintiffs to lodge under seal several of the documents that Abbott now agrees should be filed in
15 the public record. Perhaps it also would have resulted in a further narrowing of the number of
16 documents the Court must now evaluate to determine the propriety of Abbott's sealing requests.

17 Second, as shown above, Abbott was aware from two different earlier orders in this
18 litigation that the Court would deem declarations like the Park Declaration inadequate. Abbott's
19 decision to proceed with the filing of the Park Declaration notwithstanding the Court's instructions
20 should not be countenanced.

21 In view of the above, the Court may and should strike the Park Declaration and order the
22 material at issue to be filed in the public record. *See* Civ. L.R. 7-5(b) ("An affidavit or declaration
23 not in compliance with this rule may be stricken in whole or in part."); Civ. L.R. 79-5(d) ("If the
24 designating party does not file its responsive declaration as required by this subsection, the
25 document or proposed filing will be made part of the public record.") (emphasis added).

26 **CONCLUSION**

27 For all the reasons set forth herein and in Plaintiffs' Request to Unseal, the Court should
28 order that Exhibits 2-7, 9-13, 15-19, 21-26, 30-37, 39-44, 46-48 and 52-53 to the Stocker

Declaration be filed in the public record. Correspondingly, Plaintiffs respectfully request that the Court order that the portions of the parties' briefs that were lodged under seal in view of Abbott's confidential designations of the information embraced by these same exhibits also need now be filed in the public record.

Dated: April 2, 2008

Respectfully submitted,

BERMAN DEVALERIO PEASE TABACCO BURT & PUCILLO

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EXHIBIT A

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January 17, 2008

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Re: *In re Abbott Labs Norvir Antitrust Litigation*

Dear Dave:

We wish to bring to your attention *Pintos v. Pacific Creditors Association*, 504 F.3d 792 (9th Cir. 2007), in which the Ninth Circuit recently held that materials filed in connection with summary judgment motions are not entitled to be sealed unless the party seeking the sealing "overcome[s] a strong presumption of access by showing that 'compelling reasons supported by specific factual findings . . . outweigh the general history of access and the public policies favoring disclosure.'" *Id.* at 802 (*citing Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). As *Pintos* makes clear, "private materials unearthed during discovery" that become part of the judicial record in connection with a dispositive motion are ***not*** governed by Fed. R. Civ. P. 26(c) and its standards, under which a trial court may grant a protective order "which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense." *Id.* at 801 (citation omitted).

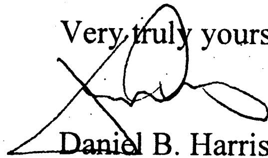
Pintos has potential bearing on the instant litigation in at least two respects. *First*, we believe it calls into question the propriety of continued sealing of the materials filed under seal in the case in connection with Abbott's previous summary judgment motions. Put another way, while some of them may be independently protected by other laws, we believe that most of the materials that were filed in support of and opposition to Abbott's earlier summary judgment motions are no longer entitled to be sealed in view of *Pintos* and therefore are no longer confidential "private materials unearthed during discovery." For this reason, we are evaluating whether to file a motion or motions under paragraph 6.3 of the Stipulated Protective Order (providing for a party to challenge a confidentiality designation), paragraph 12.1 of the Stipulated Protective Order (which allows any party to seek modification of the Order) and/or on another basis.

Consistent with Abbott's obligations under paragraph 6.2 of the Stipulated Protective Order, and to aid our determination of whether (and the extent to which) such a motion or motions would be appropriate, please advise us of Abbott's position on the application of *Pintos* to this case and the materials previously filed under seal in connection with your client's summary judgment motions. In this respect, please explain to us whether you believe any such materials meet the "compelling reasons" standard described in *Pintos*, specifically "articulat[ing] the factual basis [therefor] . . . without relying on hypothesis or conjecture," which is what a district court is obligated to do when considering a motion to seal records submitted with a dispositive motion. *See id.* at 802 (citation omitted).

Second, you and Abbott should be cognizant of *Pintos* and plaintiffs' position on its application to this case when and if Abbott chooses to file any further dispositive motions. You should not assume that plaintiffs will agree to the filing under seal of any documents or information that do not meet the *Pintos* "compelling reasons" standard, even if, as "private materials unearthed during discovery," they heretofore have been properly embraced by the Stipulated Protective Order.

We look forward to your prompt response to the above.

Very truly yours,



Daniel B. Harris

cc: Christopher T. Heffelfinger, Esq.
Hollis Salzman, Esq.
Richard Wiebe, Esq.
Michael Stocker, Esq.