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12 **SIKORSKY AIRCRAFT CORPORATION**

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 AMERICAN SMALL BUSINESS
17 LEAGUE,

18 Plaintiff,

19 v.

20 DEPARTMENT OF DEFENSE,

21 Defendant.

22 SIKORSKY AIRCRAFT CORPORATION,

23 Proposed Defendant-
24 Intervenor.

Case No. CV 14-2166 WHA

**SIKORSKY AIRCRAFT
CORPORATION'S NOTICE OF
MOTION AND MOTION TO
INTERVENE; MEMORANDUM OF
POINTS AUTHORITIES**

**[DECLARATION OF AMY JOHNSON;
PROPOSED ORDER; AND ANSWER OF
PROPOSED-DEFENDANT
INTERVENOR FILED
CONCURRENTLY]**

Date: June 1, 2017
Time: 8:00 a.m.
Place: Courtroom 8, 19th Floor
Judge: Hon. William H. Alsup

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Sikorsky Aircraft Corporation (“Sikorsky”) is a contractor with the Department of Defense (“DOD”). Under a DOD program with its contractors, Sikorsky was required to provide DOD with a Comprehensive Subcontracting Plan (the “Plan”). Pursuant to the Freedom of Information Act (“FOIA”), Plaintiff American Small Business League (“ASBL”) requested that DOD turn over the Plan to it. ASBL subsequently sued DOD and sought to compel disclosure of the Plan. DOD took the position that the Plan was privileged or confidential information and thus exempt from disclosure under FOIA, but this Court ordered DOD to disclose the Plan on November 23, 2014. Dkt. No. 28 at 7 (“Disclosure Order”). Sikorsky subsequently intervened and, with DOD, prevailed on appeal and obtained reversal of the Disclosure Order. *American Small Business League v. Department of Defense*, No. 15-15120, 2017 U.S. App. LEXIS 284, *2-4 (Jan 6., 2017).

The case is now set for trial in December 2017. To protect its interests in the ongoing litigation, Sikorsky again seeks to intervene. Sikorsky does not know what arguments DOD will make or the evidence it will introduce. Therefore, it cannot assume that DOD will adequately protect Sikorsky’s interests in maintaining the confidentiality of the Plan and preventing its disclosure.

II. STATEMENT OF FACTS

On or about August 9, 2013, Plaintiff filed a FOIA request with DOD seeking “the most recent master comprehensive subcontracting plan submitted by Sikorsky Aircraft Corporation for participation in the Comprehensive Subcontracting Plain Test Program for the Department of Defense.” Complaint at 2:13-14. Sikorsky had submitted the Plan to DOD to satisfy a requirement for participation in the agency’s Comprehensive Subcontracting Plan Test Program. Concurrently filed Declaration of Amy M. Johnson (“Johnson Decl.”) at ¶ 7. When it submitted the Plan to DOD, Sikorsky marked the document as confidential and takes steps to ensure that the information contained in the Plan remains confidential. *Id.* at ¶ 7; Dkt. No. 27 at ¶¶ 6-7 (detailing security measures employed to retain confidentiality of Plan information).

ASBL filed this lawsuit on May 12, 2014 alleging that DOD was wrongfully withholding documents responsive to its FOIA request. Complaint at ¶ 9. As relief, ASBL sought “an order

1 compelling DOD to complete its determination regarding the subject FOIA request and to disclose all
2 responsive documents in their entirety.” *Id.* at 3:25-27.

3 DOD argued that the Plan was exempt from disclosure under a FOIA exemption for
4 confidential or privileged information and that disclosure of the Plan would cause substantial harm to
5 Sikorsky’s competitive position. Dkt. No. 20 at 4:14-22; *see also* Johnson Decl. at ¶ 9. To support that
6 argument, DOD submitted a declaration from a Sikorsky official, Amy Johnson. The declaration stated
7 that the Plan consists of Sikorsky’s operational strategies and methods, including the company’s make-
8 or-buy process; the types of supplies and services subcontracted by Sikorsky; the techniques of
9 identification and development of potential sources; subcontractor proposal evaluation criteria; flow-
10 down of subcontracting requirements; the company’s socio-economic goals used in subcontracting; the
11 methods for developing such goals; selected industry categories targeted for major outreach initiatives;
12 case-study examples; and data regarding administration of the Plan, as well as the associated
13 organizational structure and the roles and responsibilities of specific individuals. Dkt. No. 20 at 4:14-
14 22; Johnson Decl. at ¶ 9.

15 Both parties moved for summary judgment. Following briefing and a hearing on the parties’
16 motions, the Court ordered DOD to lodge the Plan for *in camera* review. Dkt. No. 23. On November
17 20, 2014, DOD lodged the Plan. On November 23, 2014, the Court denied DOD’s motion for
18 summary judgment,¹ and ordered DOD to release the Plan by December 3, 2014 “subject only to
19 appeal.” Disclosure Order at 7.

20 On December 11, 2014, Sikorsky moved to intervene, solely for the purpose of appealing the
21 Disclosure Order. Dkt. No. 36. At the time, DOD had not decided if it would appeal. *Id.*; *see also*
22 Dkt. No. 31 (DOD motion to stay the Disclosure Order pending determination by the Solicitor General
23 on whether to authorize DOD to appeal). This Court granted the motion to intervene on January 20,
24 2015. Dkt. No. 48.

25 Sikorsky appealed, as DOD eventually also did. The Ninth Circuit reversed the Disclosure
26 Order, holding that DOD had created a genuine issue of fact as to whether most of its redactions fell
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28 ¹ Plaintiff’s motion for summary judgment was denied as moot. Dkt No. 28.

1 within the scope of FOIA Exemptions 4 or 6. *American Small Business League v. Department of*
2 *Defense*, No. 15-15120, 2017 U.S. App. LEXIS 284, at *2-4 (Jan 6., 2017). Mandate issued on March
3 9, 2017.

4 This Court set a case management conference for April 6, 2017. In the parties' Joint Case
5 Management Conference Statement, Plaintiff requested that the Court set a deadline for Sikorsky to
6 bring a motion to intervene "or be foreclosed from intervening later in the proceeding[.]" which
7 Plaintiff claimed would be prejudicial. Dkt No. 70 at 3. Following the case management conference,
8 this Court set a trial date for December 11, 2017 and directed Sikorsky to move to intervene within 14
9 days. Dkt Nos. 71, 72.

10 **III. SIKORSKY SHOULD BE PERMITTED TO INTERVENE.**

11 Federal Rule of Civil Procedure 24 governs applications for intervention in litigation. Rule
12 24(a) pertains to intervention by right, while Rule 24(b) pertains to permissive intervention. Sikorsky
13 seeks intervention under Rule 24(a) and, in the alternative, under Rule 24(b). It meets the
14 requirements for both intervention of right and permissive intervention.

15 **A. Sikorsky Should be Permitted to Intervene As A Matter of Right**

16 Rule 24(a) authorizes intervention as of right if:

- 17 1. the application is timely;
- 18 2. the applicant for intervention has an interest relating to the property or transaction
19 that is the subject of the action;
- 20 3. without intervention, the protection of that interest may as a practical matter be
21 impaired or impeded by the disposition of the action; and
- 22 4. the interest is not adequately represented by existing parties.

23 Fed. R. Civ. P. 24(a).

24 In the Ninth Circuit, "Rule 24 traditionally has received a liberal construction in favor of
25 applications for intervention." *Sagebrush Rebellion, Inc., v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983)
26 (internal quotation omitted); *accord United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 397 (9th
27 Cir. 2002) (reversing denial of motion to intervene); *Southwest Center for Biological Diversity v. Berg*,
28 268 F.3d 810, 818 (9th Cir. 2001) (same). The Ninth Circuit has explained that its interpretation of

1 Rule 24 “allows[] parties with a practical interest in the outcome of a particular case to intervene,” and
2 thereby serves to “prevent or simplify future litigation involving related issues [and] at the same time. .
3 . allow[s] an additional interested party to express its views before the court.” *U.S. v. City of Los*
4 *Angeles*, 288 F.3d at 398 (citation omitted). In short, “practical and equitable considerations” support a
5 broad reading of Rule 24. *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1148 (9th Cir. 2010).
6 Applying the Rule 24(a) factors in light of these principles, Sikorsky should be permitted to intervene
7 as a matter of right.

8 **1. Sikorsky’s Application Is Timely**

9 In determining whether a motion to intervene is timely, courts consider three factors: “(1) the
10 stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and
11 (3) the reasons for and length of the delay.” *County of Orange v. Air California*, 799 F.2d 535, 537
12 (9th Cir. 1986). Applying these factors, Sikorsky’s intervention motion is timely.

13 First, Sikorsky initially intervened after this Court’s order directing that DOD disclose a
14 Sikorsky document (the Plan) pursuant to Plaintiff’s FOIA request and now seeks to continue
15 participating in this action having prevailed on appeal. At similar stages in other FOIA cases, courts
16 have allowed intervention by the subject of a FOIA request after the federal government agency that
17 received the request had been compelled to disclose documents the plaintiff sought. *Fisher v.*
18 *Renegotiation Bd*, 355 F. Supp 1171, 1173 (D.D.C. 1973) (request to intervene was granted after
19 district court ruled on motion for summary judgment, and after appellate court ordered *in camera*
20 disclosure of documents subject to the Plaintiff’s FOIA request); *LaRouche v. Fed. Bureau of*
21 *Investigation*, 677 F.2d 256, 257 (2d Cir. 1982) (granting intervention in a FOIA case “almost two
22 years after” a court order requiring the disclosure of documents). Thus, there is nothing remarkable
23 about Sikorsky’s intervention at this stage of this FOIA case.

24 Second, intervention by Sikorsky at this point would cause no prejudice to the Plaintiff. The
25 Ninth Circuit reversed the Disclosure Order after summary judgment and only a case management
26 conference has taken place since mandate issued. Trial is set for December 2017, and intervention by
27 Sikorsky would not require any change in that schedule. Sikorsky’s intervention thus would not delay
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1 proceedings and it is difficult to identify any prejudice to Plaintiff that would arise by permitting
2 Sikorsky to participate in the remaining pretrial proceedings and trial.

3 In fact, setting aside the time that this case was pending on appeal, very little has occurred in
4 this case. Plaintiff filed its Complaint in May 2014 and the first case management conference occurred
5 in August 2014. Dkt Nos. 1, 15. Summary judgment motions were decided in November 2014, with
6 the appeal noticed in January 2015. Dkt No. 28, 49. Other than those few months and the month since
7 the Ninth Circuit issued its mandate, proceedings in this Court have been stayed. Courts have granted
8 applications to intervene in cases with much longer track records, finding no prejudice to the party on
9 the other side of the intervenor. E.g., *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250-51 (10th
10 Cir. 2001).

11 By contrast, if Sikorsky is not permitted to intervene, it will suffer prejudice as the result of
12 being denied the opportunity to protect its confidential material. Johnson Decl. at ¶¶ 10-12.

13 Third, Sikorsky did not seek to become officially involved in the case as a party before now
14 because, up to the appeal, DOD has provided a vigorous defense of Sikorsky's interests. Before the
15 appeal, working in tandem with Sikorsky, DOD resisted disclosure of the Plan and mounted a strong
16 argument, based on a declaration from a Sikorsky official, that the Plan is exempt from disclosure
17 because it contains confidential or privileged information. Johnson Decl., at ¶¶ 7-9. On appeal,
18 however, Sikorsky concluded that it needed to protect its own interests by intervening. *Id.* at ¶ 10.
19 Now, post-appeal litigation presents new uncertainties – whether specific witnesses will be called, how
20 will evidence be presented, what specific arguments will be made, etc. – and it is unclear how DOD
21 will continue the fight. *Id.* at ¶ 11. In light of this uncertainty, Sikorsky has no choice but to seek to
22 intervene to protect its interests itself.

23 **2. Sikorsky Has An Interest In Ensuring That Its Confidential Information**
24 **Remains Protected From Disclosure, And Disposition Of This Case May**
Substantially Impair Or Impede Sikorsky's Interests

25 To intervene as a matter of right, “[i]t is generally enough that the interest [asserted] is
26 protectable under some law, and that there is a relationship between the legally protected interest and
27 the claims at issue.” *Sierra Club v. U.S. E.P.A.*, 995 F.2d 1478, 1484 (9th Cir. 1993), *abrogated on*
28 *other grounds as stated in Wilderness Soc. v. U.S. Forest Svc.*, 630 F.3d 1173 (9th Cir. 2011); *United*

1 *States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *see also Donnelly v. Glickman*, 159
2 F.3d 405, 410 (9th Cir. 1998) (“relationship” requirement is satisfied if the resolution of plaintiffs’
3 claims will affect the applicant). Sikorsky easily satisfies this standard.

4 Sikorsky has a manifest interest in ensuring that its confidential commercial and financial
5 information remains protected from disclosure. That interest enjoys legal recognition and protection
6 under the FOIA exemptions. 5 U.S.C. § 552(b)(4) & (b)(6). The relief Plaintiff seeks in this action --
7 disclosure of Sikorsky’s proprietary and confidential information -- directly threatens the
8 confidentiality of Sikorsky’s information and will cause Sikorsky competitive harm. Johnson Decl.,
9 at ¶ 9. All told, the question at the very heart of this case is whether Sikorsky’s legally-recognized
10 interest in maintaining the confidentiality of its commercial and financial information will be
11 compromised. Therefore, Sikorsky satisfies the second and third prongs of the test for intervention as
12 of right under Rule 24(a). *See, e.g., Yorkshire v. U.S. Internal Revenue Serv.*, 26 F.3d 942, 944-45 (9th
13 Cir. 1994) (district court properly granted intervention as of right to entity that submitted confidential
14 information to IRS that was the subject of a FOIA request); *LaRouche*, 677 F.2d at 258 (where a court
15 is ordering the public disclosure under FOIA in litigation to which the interested person is not a party,
16 “[its] effective remedy, perhaps [its] only one, is by way of intervention”).

17 **3. Sikorsky’s Interests Are Inadequately Represented By The Existing Parties**

18 Courts examine three factors when determining whether existing parties adequately represent a
19 prospective intervenor’s interests: (1) the similarity of legal arguments; (2) the capability and
20 willingness of the parties to make such arguments; and (3) whether an intervenor would add some
21 necessary element to the proceedings. *Blake v. Pallan*, 554 F.2d 947, 954-55 (9th Cir. 1977);
22 *Southwest Center for Biological Diversity*, 268 F.3d at 822-23. The burden of showing inadequate
23 representation is “minimal.” *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)
24 (citation omitted). It “is satisfied if the applicant shows that representation of his interest may be
25 inadequate.” *Id.* Sikorsky meets that standard.

26 While the legal arguments that Sikorsky would make to prevent disclosure of the Plan under
27 FOIA might be the same arguments that DOD would make, they may not be and they may not employ
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1 the same evidence that Sikorsky would use at trial. Thus, at this stage, it cannot be said that DOD is
2 capable of and willing to represent Sikorsky's interests.

3 Additionally, while government agencies have an interest in ensuring that contractors from
4 whom they seek confidential information will not be chilled by the specter of FOIA requests, Sikorsky
5 would add an important element to the proceedings because it is Sikorsky's information that is the
6 subject of the litigation and thus it is Sikorsky that can best explain how disclosure of the Plan would
7 harm its competitive position.

8 **B. Sikorsky's Permissive Intervention Under Rule 24(b) Is Appropriate.**

9 Rule 24(b) provides:

10 On timely motion, the court may permit anyone to intervene who:
11 (A) is given a conditional right to intervene by a federal statute; or
12 (B) has a claim or defense that shares with the main action a common question
of law or fact.

13 Fed. R. Civ. P. 24(b). An applicant seeking permissive intervention must establish "(1) independent
14 grounds for jurisdiction; (2) the motion is timely and (3) the applicant's claim or defense, and the main
15 action, have a question of law or a question of fact in common." *Northwest Forest Res. Council v.*
16 *Glickman*, 82 F.3d 825, 839 (9th Cir. 1996). Sikorsky meets each of these requirements.

17 First, Sikorsky satisfies the jurisdictional requirement because it does not seek to add additional
18 claims to this federal question case. As the Ninth Circuit has noted, "[w]here the proposed intervenor
19 in a federal-question case brings no new claims, the jurisdictional concern drops away." *Freedom from*
20 *Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011). Second, for the reasons discussed
21 above, Sikorsky's motion is timely. And third, Sikorsky's defense has questions of law and fact in
22 common with the main case -- namely, whether the Plan is exempt from disclosure under FOIA on the
23 ground that it contains confidential or privileged information.

1 **IV. CONCLUSION**

2 For the foregoing reasons, this Court should grant Sikorsky's motion to intervene.

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4 Dated: April 20, 2017

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