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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 THE SHERWIN-WILLIAMS
12 COMPANY,

13 Plaintiff,

14 v.

15 JB COLLISION SERVICES, INC. d/b/a
16 J & M AUTOBODY d/b/a EL DORADO
COLLISION *et al.*,

17 Defendants.
18

19 AND RELATED COUNTERCLAIMS.
20

Case No.: 13-CV-1946-LAB(WVG)

**ORDER ON THIRD PARTY
INTERVENOR Z-BEST BODY AND
PAINT SHOPS, INC.'S MOTION
FOR ORDER TO INTERVENE TO
MODIFY JUNE 20, 2014
PROTECTIVE ORDER**

[ECF No. 354.]

21 Z-Best Body and Paint Shops, Inc. (“Z-Best”) is the plaintiff in a lawsuit currently
22 pending in the Central District of California against The Sherwin-Williams Company. (*Z-*
23 *Best Body and Paint Shops, Inc. v. The Sherwin-Williams Company, et al.*, C.D. Cal. No.
24 16-CV-2398.) Z-Best now seeks to intervene in the instant case to request that this Court
25 modify the Protective Order that remains in effect in this case. (ECF No. 354.) Sherwin-
26 Williams opposes the motion. (ECF No. 356.) Having considered the matter on the papers,
27 Z-Best’s Motion to intervene to modify the Protective Order is GRANTED.
28

1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. The Instant Case**

3 In the underlying litigation, Plaintiff Sherwin-Williams and Defendant JB Collision
4 entered into a supply agreement in September 2008 whereby JB Collision agreed to buy
5 all of its paints and coatings from Sherwin-Williams until the amount of its purchases
6 equaled \$1,300,000. (Sherwin-Williams Compl. ¶¶ 6-7, ECF No. 1.) In return, Sherwin-
7 Williams agreed to sell its products to JB Collision at a discount with a \$275,000 advance.
8 (*Id.* at ¶ 8.)

9 In early 2013, JB Collision stopped buying all of its paints and coatings from
10 Sherwin-Williams. (*Id.* at ¶¶ 10-11.) As a result, Sherwin-Williams brought suit against
11 JB Collision for breach of contract on August 20, 2013. (*Id.*) JB Collision counterclaimed
12 contract and tort causes of action that in essence alleged Sherwin-Williams’ products were
13 subpar. (*See* JB Collision Countercl., ECF No. 7.)

14 During the discovery process, the parties jointly requested and this Court enter a
15 general protective order (“Protective Order”) which provides “no document . . . produced
16 pursuant to FRCP 26, in response to FRCP 33 Interrogatories, FRCP 34 Requests for
17 Production, or any non-party in response to a party subpoena, which is designated as
18 ‘Confidential,’ shall be disclosed” (ECF No. 35 at 2.) Accordingly, neither Sherwin-
19 Williams nor JB Collision could disclose covered documents without observing the terms
20 of the Protective Order. Z-Best was not a party to the Protective Order.

21 During a four-day trial in November 2015, a number of protected documents were
22 marked as trial exhibits. (Notice of Subpoena 2, ECF No. 350.) Following the trial, the
23 Court ordered the return of the exhibits and ordered that the parties continue to comply
24 with the Protective Order. On August 8, 2016, judgment was entered in favor of Sherwin-
25 Williams for \$373,448.70, and in favor of JB Collision for \$3,250,000. (ECF No. 282.)

26 **B. The Case in the Central District of California**

27 Z-Best, which is also a body shop that entered into a supply agreement with
28 Sherwin-Williams, claims to have relied on Sherwin-Williams’ misrepresentations

1 regarding the quality of its paint and was damaged as a result. (ECF No. 354-1 at 6.) On
2 November 21, 2016, Z-Best sued Sherwin-Williams in the Central District of California
3 for breach of a supply agreement. (Walker Decl. Ex. 1, at 2, ECF No. 354-3.) Many of the
4 pleadings filed by Z-Best are virtually identical to those filed by JB Collision in the instant
5 case. (Opp'n at 2.)

6 On August 2, 2017, Z-Best served a subpoena on counsel for JB Collision seeking
7 “any and all records and documents produced by [Sherwin-Williams] in related Case No.
8 13-CV-1946-LAB(WVG) and received by [JB Collision] during discovery, including but
9 not limited to, all sets of [Sherwin-Williams’] documents produced.” (ECF No. 350-1 at
10 6.) JB Collision gave notice to this Court of the subpoena and requested instruction on
11 how to proceed. (ECF No. 350 at 1.) This Court affirmed the continued application of the
12 Protective Order and declined to issue an advisory opinion or otherwise intervene in
13 proceedings in another District or interfere with a subpoena issued by a sister court. (ECF
14 No. 352 at 1-2.)

15 On August 29, 2017, the United States District Court for the Central District of
16 California granted Sherwin-Williams’ motion to quash the subpoena. (Walker Decl. Ex.
17 1, at 6.) Citing *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1129 (9th Cir.
18 2003), the court reasoned that “the court that issued the order is in the best position to
19 make the relevance assessment for it presumably is the only court familiar with the
20 contents of the protected discovery.”¹ (Walker Decl. Ex. 1, at 5.) Similarly, it found that
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22
23 ¹ To clarify, this Court’s relevance assessment is only the limited context of modifying the
24 Protective Order—not generally deciding whether future requested discovery is relevant in
25 the litigation pending in the Central District. That determination is wholly separate and will
26 be made, if necessary, on a case-by-case basis by that court. The case in this District has
27 been closed for nearly two years and is not the proper forum in which to wage battles over
28 the relevancy of *specific* items of discovery in an active case pending in another district.
The narrow issue before this Court is whether the Protective Order should be modified such
that such a battle can even be waged or whether the Protective Order should remain
unmodified and thus serve as a barrier to requests for protected discovery.

1 “because the JB Collision Litigation is still pending . . . it would not require significant
2 additional burden and expense for [Z-Best] to seek modification of the [P]rotective [O]rder
3 before the United States District Court for the Southern District of California.” (*Id.*) The
4 court also suggested that the subpoena was overbroad because “it would necessarily
5 encompass documents relating to [Sherwin-Williams’] business relationship with JB
6 Collision, who is not a party to the instant action.” (*Id.* at 5-6.)

7 Now before the Court is Z-Best’s motion to intervene to modify the June 20, 2014
8 Protective Order.

9 II. DISCUSSION

10 A. Permissive Intervention

11 “On timely motion, the court may permit anyone to intervene who . . . (B) has a
12 claim or defense that shares with the main action a common question of law or fact.” Fed.
13 R. Civ. P. 24(b)(1)(b). Third parties seeking access to a judicial record or modification of
14 a protective order in a civil case may do so by seeking permissive intervention under Rule
15 24(b)(2). *San Jose Mercury News, Inc. v. Dist. Ct.*, 187 F.3d 1096, 1100 (9th Cir. 1999);
16 *Beckman Indus. v. Int’l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992) (approving permissive
17 intervention as a method for challenging protective order under Rule 26(c)).

18 Generally, permissive intervention under Rule 24(b) requires “(1) an independent
19 ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact
20 between the movant’s claim or defense and the main action.” *Beckman*, 966 F.2d at 473.
21 An independent ground for jurisdiction and a common question of law and fact are not
22 required, however, where the intervenor merely seeks to challenge a protective order.
23 *Beckman*, 966 F.2d at 473-74 (reasoning independent jurisdictional grounds and strong
24 nexus of fact or law unnecessary because party seeks to intervene only for the purpose of
25 modifying a protective order and district court retained the power to do so). A motion for
26 permissive intervention is directed to the sound discretion of the district court. *Beckman*,
27 966 F.2d at 472.

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1 The Court finds that the motion was timely filed, and permissive intervention is the
2 appropriate method by which to challenge a protective order. The Court GRANTS Z-
3 Best's motion to intervene.

4 **B. Access to Sealed Documents**

5 The Ninth Circuit strongly favors access to discovery materials to meet the needs
6 of parties engaged in pending collateral litigation. *Beckman*, 966 F.2d at 475. "Allowing
7 the fruits of one litigation to facilitate preparation in other cases advances the interests of
8 judicial economy by avoiding the wasteful duplication of discovery." *Foltz v. State Farm*
9 *Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003); *Beckman*, 966 F.2d at 475; *see*
10 *also United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990);
11 *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980) ("[W]here an appropriate
12 modification of a protective order can place private litigants in a position they would
13 otherwise reach only after repetition of another's discovery, such modification can be
14 denied only where it would tangibly prejudice substantial rights of the party opposing
15 modification."). So long as "reasonable restrictions on collateral disclosure will continue
16 to protect an affected party's legitimate interests in privacy, a collateral litigant's request
17 to the issuing court to modify an otherwise proper protective order so that collateral
18 litigants are not precluded from obtaining relevant material should normally be granted."
19 *Foltz*, 331 F.3d at 1132 (citing *Beckman*, 966 F.2d at 475).

20 That being said, modification of a protective order will not be automatically
21 granted. Collateral litigants will not be allowed access to discovery materials merely as a
22 means to subvert the limitations of the discovery process in the collateral litigation. *Id.*
23 Collateral litigants seeking to modify a protective order must demonstrate the relevance
24 of the protected discovery to the collateral litigation and its general discoverability in that
25 case. *Id.* Once a relevance determination has been made, the court that issued the
26 protective order must weigh the policy of avoiding duplicative discovery against the
27 countervailing reliance interest of the party opposing modification. *Id.* at 1133.

28

1 **1. Relevance Analysis**

2 The court that issued the protective order should confirm that the protected
3 discovery is sufficiently relevant to the collateral litigation such that “a substantial amount
4 of duplicative discovery will be avoided by modifying the protective order.” *Id.* at 1132.
5 Such a determination depends on the “degree of overlap in the facts, parties, and issues
6 between the suit covered by the protective order and the collateral proceedings.” *Id.* This
7 is to be a rough estimate; the issuing court is not to embroil itself in the specific discovery
8 disputes applicable only to the collateral suit by deciding whether the collateral litigants
9 will actually obtain the materials. *Id.* at 1133-34 (citing *United Nuclear*, 905 F.2d at 1428).

10 Here, Z-Best is engaged in litigation against Sherwin-Williams with allegations
11 substantially similar to those involved in the instant case. (Motion at 1.) Z-Best accuses
12 Sherwin-Williams of fraudulently inducing it to continue purchasing Sherwin-Williams’
13 defective products beyond the term of the supply agreement during a period of time
14 overlapping that involved in the instant case’s fraud and misrepresentation claims. (Opp’n
15 Ex. B, ECF No. 356-2 at 5.) Both involve claims by body shops against Sherwin-Williams
16 alleging misrepresentations made by Sherwin-Williams regarding the quality of its
17 automotive paint products. Z-Best moved to modify the Protective Order to permit access
18 to the instant case’s discovery materials for use in the collateral litigation, arguing that
19 much of the discovery necessary in the Z-Best case has already been produced in the
20 instant action. (P&A at 6.) Sherwin-Williams opposes modification on four grounds.

21 First, Sherwin-Williams contends that Z-Best’s request should be denied because
22 the motion failed to specify concrete changes to the Protective Order. (Opp’n at 4.)
23 However, Z-Best was not required to specify concrete changes to the Protective Order. As
24 the issuer of the Protective Order, this Court makes only a rough estimate of relevance in
25 order to determine whether the order will bar the collateral litigant from gaining access to
26 the discovery already conducted. *Foltz*, 331 F.3d at 1132-33. Any disputes over the
27 ultimate discoverability of specific materials covered by the Protective Order are to be
28 resolved by the court handling the Z-Best case. *Id.* at 1133.

1 Second, Sherwin-Williams argues that because the Central District Court concluded
2 that Z-Best’s Subpoena was overbroad, Z-Best is trying to “do indirectly that which it
3 cannot do directly” and “deprive Sherwin-Williams of the discovery protections set forth
4 in Rule 26.” (Opp’n at 5-6.) However, as Sherwin-Williams itself pointed out, this Court
5 “does not decide whether the collateral litigants [here, the parties before the Central
6 District] will ultimately obtain the discovery materials—a decision that is to be made by
7 the collateral courts [here, the Central District of California].” (*Id.* at 5 (citing *In re*
8 *Dynamic Random Access Memory (DRAM) Antitrust* Litigation, 2008 WL 4191780 at *1)
9 (internal quotations omitted).) This Court decides whether the modifying order will
10 eliminate the potential for duplicative discovery and, if the order is modified, the Central
11 District Court may freely control the discovery process without running up against the
12 Protective Order. *See Foltz*, 331 F.2d at 1133. Sherwin-Williams will not be deprived of
13 its discovery protections.

14 Third, Sherwin-Williams contends that any modification of the Protective Order,
15 absent the specific consent of the Central District, would be an abuse of discretion. (Opp’n
16 at 6.) However, as the Central District Court pointed out in its order granting Sherwin-
17 Williams’ motion to quash Z-Best’s Subpoena, the court that issued the Protective Order
18 is in the best position to make the relevance assessment in order to modify the Protective
19 Order because it is familiar with the contents of the Protective Order. (Walker Decl. Ex.
20 1, at 5.) Indeed, the court acknowledged that modification of the Protective Order was
21 properly administered by this Court, stating that “because the JB Collision Litigation is
22 still pending . . . it would not require significant additional burden and expense for [Z-
23 Best] to seek modification of the [P]rotective [O]rder before the United States District
24 Court for the Southern District of California.” (*Id.*) Modification is appropriate so long as
25 a rough estimate of relevance is found and the policy of avoiding duplicative discovery is
26 adequately weighed against the countervailing reliance interest of the party opposing
27 modification.

1 Finally, Sherwin-Williams argues that the protected discovery materials are not
2 sufficiently relevant because Z-Best’s claims have been narrowed to those that occurred
3 after their agreement ended in September 2014—eighteen months after JB Collision
4 stopped buying from Sherwin-Williams. (Opp’n at 7.) Relevance is assessed according to
5 the “degree of overlap in the facts, parties, and issues between the suit covered by the
6 protective order and the collateral proceedings.” *Foltz*, 331 F.2d at 1132. A lack of overlap
7 in time does not necessarily amount to a lack of overlap in facts, parties, or issues. As
8 Sherwin-Williams points out, “[m]any of the pleadings filed by Z-Best in the Central
9 District Case . . . copy the pleadings that were filed by [JB Collision] in this matter.”
10 (Opp’n at 2.) Z-Best lists numerous documents that are properly protected discovery in
11 the instant case and relevant in the collateral suit: “misrepresentations made by Sherwin-
12 Williams to JB Collision regarding the AWX product line; all claims and complaints made
13 by JB Collision regarding the AWX product line; all Product Quality Reports prepared by
14 Sherwin-Williams regarding JB Collision’s claims and complaints regarding the AWX
15 product line; the formulation of the AWX product line; and developmental testing of the
16 AWX product line.” (Reply 4-5, ECF No. 357.) These documents appear to be relevant as
17 to Sherwin-Williams’ knowledge of the defective paint, as to its misrepresentations
18 regarding the quality of the paint, and that other body shops were having analogous
19 problems with the paint.

20 Z-Best has offered sufficient basis for this Court to find a rough estimate of
21 relevance such that duplicative discovery may be avoided. The court overseeing the
22 collateral litigation can settle any disputes as to whether particular documents are
23 discoverable or admissible in that litigation.

24 **2. Reliance Interest**

25 Once a relevance determination has been made, the court that issued the protective
26 order must weigh the policy of avoiding duplicative discovery against the countervailing
27 reliance interest of the party opposing modification. *Foltz*, 331 F.2d at 1133. “[R]eliance
28 will be less with a blanket [protective] order, because it is by nature overinclusive.”

1 *Beckman*, 966 F.2d at 476. This is because a party seeking protection of the court by means
2 of a blanket protective order typically does not make the required Rule 26(c) “good cause”
3 showing for any particular documents. *Id.* In such a case, “[a]ny legitimate interest . . . in
4 continued secrecy as against the public at large can be accommodated by placing [the
5 collateral litigants] under the same restrictions on use and disclosure contained in the
6 original protective order.” *United Nuclear*, 905 F.2d at 1428; *see also Beckman*, 966 F.2d
7 at 476.

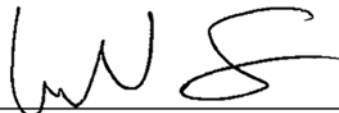
8 In a footnote, Sherwin-Williams argues that its “rights (1) to assert discovery
9 challenges available under Rule 26 to Z-Best’s discovery requests in the Central District
10 case, and (2) under the [P]rotective [O]rder entered in this case are placed at risk by this
11 Motion.” (Opp’n at 5 n.3.) As noted above, if the Protective Order is modified, the Central
12 District of California will decide whether Z-Best ultimately obtains the discovery
13 materials without running up against the Protective Order in this case. *See Foltz*, 331 F.2d
14 at 1133. Z-Best’s right to assert Rule 26 discovery challenges is not in peril.

15 Sherwin-Williams did not make a particularized showing of good cause with respect
16 to any individual document produced under the blanket Protective Order, therefore any
17 argument of reliance on the Protective Order is an insufficient reason not to modify it.
18 Particularly with regards to those records marked as trial exhibits in open court and which
19 were the primary focus of argument to the jury, as the Ninth Circuit strongly favors access
20 to such court records. *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)
21 (recognizing strong presumption in context of civil trial). Any information Sherwin-
22 Williams wants protected can be protected by placing Z-Best under the same use and
23 disclosure restrictions contained in the Protective Order. As it appears that a protective
24 order will be instituted in the collateral litigation, any documents subject to this Court’s
25 Protective Order can also be protected by the protective order in that litigation. (Opp’n at
26 4.) The Court finds the policy of avoiding duplicative discovery outweighs any
27 countervailing reliance interest of Sherwin-Williams.

1 **III. CONCLUSION**

2 For the foregoing reasons, Z-Best’s motion to intervene for modification of the
3 Protective Order is GRANTED. The June 20, 2014 Protective Order (ECF No. 35) is
4 hereby modified to allow access solely to the parties to *Z-Best Body and Paint Shops, Inc.*
5 *v. The Sherwin-Williams Company, et al.* pending in the United States District Court for
6 the Central District of California for the purposes of litigating that action. This Order is
7 conditioned on the filing of a protective order in the collateral case and in no way limits
8 the collateral court’s ability to decide whether the litigants before it should ultimately
9 obtain the specific discovery materials.

10 DATED: December 5, 2017

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12 _____
13 Hon. William V. Gallo
14 United States Magistrate Judge