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11 **UNITED STATES DISTRICT COURT**  
12 **DISTRICT OF NEVADA**

12 DENNIS MONTGOMERY, *et al.*

13 Plaintiffs,

14 v.

15 ETREPPID TECHNOLOGIES, L.L.C., *et al.*,

16 Defendants.

) Case No: 3:06-cv-00056-MMD-CSD  
) and  
) No. 3:06-cv-145-MMD-VPC  
)

) UNITED STATES' MEMORANDUM IN  
) OPPOSITION TO MOTION TO  
) INTERVENE AND TO LIFT  
) PROTECTIVE ORDER  
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**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

INTRODUCTION ..... 1

BACKGROUND ..... 1

I. This Litigation and the State Secrets Protective Order ..... 1

II. Lindell’s Intervention and D.C. Defamation Litigation..... 3

ARGUMENT ..... 4

I. THE COURT SHOULD DENY THE MOTION BECAUSE LINDELL LACKS  
STANDING TO INTERVENE. .... 5

II. THE COURT SHOULD DENY THE MOTION TO INTERVENE FOR  
FAILURE TO MEET THE REQUIREMENTS FOR PERMISSIVE  
INTERVENTION OR INTERVENTION OF RIGHT..... 7

A. Lindell Fails to Establish a Basis for Permissive Intervention. .... 7

B. Lindell Cannot Intervene of Right. .... 9

III. IF THE COURT PERMITS INTERVENTION, IT SHOULD DENY LINDELL’S  
MOTION TO LIFT THE PROTECTIVE ORDER. .... 10

A. Lindell Has Not Established The Relevance of Information Subject to the  
Protective Order. .... 10

B. No Good Cause Exists to Lift or Modify the Protective Order. .... 12

CONCLUSION..... 13

**TABLE OF AUTHORITIES**

**Cases**

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

*Aptheker v. Sec’y of State*,  
378 U.S. 500 (1964)..... 12

*Beckman Indus. Inc., v. Int’l. Ins. Co.*,  
966 F.2d 470 (9th Cir. 1992) ..... 8, 10

*Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*,  
712 F.3d 1349 (9th Cir. 2013) ..... 7, 8, 10

*Bond v. Utreras*,  
585 F.3d 1061 (7th Cir. 2009) ..... 6

*Diamond v. Charles*,  
476 U.S. 54 (1986)..... 5

*Foltz v. State Farm Mutual Auto. Ins. Co.*,  
331 F.3d 1122 (9th Cir. 2003) ..... 11, 12, 13

*Haig v. Agee*,  
453 U.S. 280 (1981)..... 12

*In re Alexander Grant & Co. Litig.*,  
820 F.2d 352 (11th Cir. 1987) ..... 10

*In re Midland Nat. Life Ins. Co. Annuity Sales Pracs. Litig.*,  
686 F.3d 1115 (9th Cir. 2012) ..... 10

*Kalbers v. U.S. Dep’t of Justice*,  
22 F.4th 816 (9th Cir. 2021) ..... 9, 10

*Lujan v. Defs. of Wildlife*,  
504 U.S. 555 (1992)..... 5

*Mohamed v. Jeppesen Dataplan, Inc.*,  
614 F.3d 1070 (9th Cir. 2010) ..... 13

*Perry v. Schwarzenegger*,  
630 F.3d 898 (9th Cir. 2011) ..... 5

*Roman v. Mayorkas*,  
No. EDCV2000768TJHPVC, 2021 WL 6103180 (C.D. Cal. Oct. 15, 2021) ..... 8

*San Jose Mercury News, Inc. v. U.S. Dist. Ct.-N. Dist. (San Jose)*,  
187 F.3d 1096 (9th Cir. 1999) ..... 10

1 *Spokeo, Inc. v. Robins*,  
2 578 U.S. 330 (2016)..... 5

3 *Steel Co., v. Citizens for a Better Env't.*,  
4 523 U.S. 83 (1998)..... 5

5 *Town of Chester, N.Y. v. Laroe Estates, Inc.*,  
6 137 S. Ct. 1645 (2017)..... 5

7 *United States v. Reynolds*,  
8 345 U.S. 1 (1953)..... 12, 13

9 *United States v. Zubaydah*,  
10 142 S. Ct. 959 (2022)..... 13

11

12

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## INTRODUCTION

Proposed-intervenor Michael Lindell has been sued in the District of Columbia for alleged defamation based on statements he made about the administration of the 2020 presidential election and his contentions that various forms of fraud and other malfeasance were perpetrated using the voting machines of a company called Dominion. Lindell has determined that it is necessary to intervene in this long-dismissed litigation in Nevada as part of his defense against the defamation claims he faces in D.C. in order to obtain relief from a protective order entered in this case pursuant to the state secrets privilege. *See* Mot. to Intervene and to Lift Protective Order, ECF No. 1216.

Lindell seeks this relief despite the fact that: he is not subject to the protective order entered in this case and that protective order does not apply to any litigation but the above-captioned cases in which it was entered; he has not alleged that the protective order has actually prevented him from obtaining any information he needs; no party or prior party to this litigation is a party to the defamation lawsuit; and neither this litigation nor the United States' motion for protective order have anything at all to do with voting, elections administration, or Dominion. On this last point, a simple look at the calendar shows that Lindell's motion is meritless: the United States sought the challenged protective order over 16 years ago and this lawsuit has been dismissed for over a decade, long predating the events in 2020 giving rise to the defamation litigation that ostensibly provides a basis for Lindell's intervention. For numerous reasons—jurisdictional, procedural, and substantive—the Court should deny Lindell's motion, as he has failed to establish any right to intervene or to obtain relief lifting the protective order entered at ECF No. 253.

## BACKGROUND

### **I. This Litigation and the State Secrets Protective Order**

This litigation is comprised of two related actions, Civil Action No. 06-00056 (hereinafter referred to as the “Federal Case”) and Civil Action No. 06-00145 (hereinafter referred to as the “Removed Case”), both filed in 2006.<sup>1</sup> In a complaint originally filed in state court, eTrepid

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<sup>1</sup> Each citation to the “Federal Case” or “Removed Case” are to the docket of Civil Action No. 06-00056 or No. 06-00145 respectively. Citations to the docket that do not specifically reference one of these two identifiers are to the docket of the Federal Case.

1 Technologies, Inc., asserted claims to protect and recover trade secrets from Dennis Montgomery.  
2 Removed Case 3d Am. Complaint ¶ 63 *et seq.*, ECF No. 93. Montgomery, a former employee,  
3 officer, and director of eTreppid, filed a counter-complaint as well as a federal court action,  
4 alleging that eTreppid had infringed his copyright interests. Montgomery claimed that he is an  
5 inventor and software developer who developed certain software for which he was granted  
6 copyrights that he contributed in establishing eTreppid. Removed Case Counter-complaint ¶¶ 8–  
7 10, ECF No. 1-2; Federal Case 1st Am. Complaint ¶¶ 8–10, ECF No. 7. The dispute between  
8 Montgomery and eTreppid largely stemmed from the issue of the extent to which Montgomery  
9 retained the sole interest in derivative works based on the copyrighted technology. *See generally*  
10 Removed Case Counter-complaint ¶¶ 11–14; Federal Case 1st Am. Compl. ¶¶ 8–20.

11 Montgomery also asserted a claim in these lawsuits against the U.S. Department of Defense  
12 (“DoD”). *See* Removed Case Counter-complaint ¶¶ 22–27; Federal Case 1st Am. Compl. ¶¶ 68–  
13 74. This claim arose from a Classified Information Nondisclosure Agreement that Montgomery  
14 executed with the Defense Security Service, an agency within DoD, on September 16, 2003. *See*  
15 Montgomery Nondisclosure Agreement, Ex. 2, United States’ Mot. for Protective Order, ECF No.  
16 83-3. Specifically, Montgomery alleged that he was prevented from disclosing information  
17 necessary to his claims and defenses as to eTreppid because of the Nondisclosure Agreement.  
18 Removed Case Counter-complaint ¶¶ 22–27; Federal Case 1st Am. Compl. ¶¶ 68–74.  
19 Montgomery therefore sought a declaration from the Court that disclosure of information he  
20 wished to use in the litigation would not violate his Nondisclosure Agreement with the United  
21 States. *Id.*

22 DoD filed motions to dismiss as to Montgomery’s claims against the agency for lack of  
23 subject matter jurisdiction.<sup>2</sup> While those motions were pending, on September 25, 2006, the  
24 United States moved for the entry of a protective order based on an assertion of the state secrets  
25 privilege by Director of National Intelligence John Negroponte. ECF No. 83-1, 83-2. The DNI’s  
26 declaration established that disclosure of certain information at issue in the litigation reasonably

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<sup>2</sup> DoD’s motions to dismiss were later granted. ECF No. 177.

1 could be expected to cause serious, and in some cases exceptionally grave, damage to national  
2 security. Negroponete Decl. ¶ 12. The United States' motion was also supported by a classified  
3 declaration submitted for the Court's *ex parte, in camera* review. *Id.* ¶ 2.

4 The Court entered the requested protective order on August 29, 2007, excluding from  
5 "discovery or disclosure" information relating to two categories of information: (1) "the existence  
6 or non-existence of any actual or proposed relationship" between the parties and any U.S.  
7 intelligence agency and (2) any "actual or proposed intelligence agency interest in, application of  
8 or use of any technology, software or source code owned or claimed by the Parties." Protective  
9 Order ¶¶ 2, 3, ECF No. 253. The Protective Order, however, exempted from its coverage discovery  
10 regarding "[t]he computer source code, software, programs, or technical specifications relating to  
11 any technology owned or claimed by any of the Parties," as well as any "actual or potential  
12 commercial or government applications of" this technology, so long as it did not relate to the  
13 aforementioned categories concerning U.S. intelligence agencies. *Id.* ¶ 4(c), (e). The Protective  
14 Order's prohibitions applied only to "discovery or disclosure . . . during all proceedings in these  
15 actions," *i.e.* the above-captioned consolidated cases. *Id.* ¶ 1. Thus, by its terms, the Protective  
16 Order applied only to the parties to this litigation, only to discovery or disclosure within this  
17 litigation, and only to certain information regarding alleged activities or interests of the United  
18 States Government.

19 The litigation has since been resolved in full. The claims of Montgomery, eTreppid, and  
20 related parties were resolved by settlement and dismissed with prejudice on February 19, 2009.  
21 *See* Order ¶¶ 1, 2, ECF No. 962. The Court retained jurisdiction to resolve motions related to  
22 sanctions by Montgomery's former counsel, to enforce the United States' Protective Order, and to  
23 enforce the Parties' settlement agreement. *See id.* ¶ 3. The motions for sanctions were later  
24 resolved and judgment entered as to them on July 8, 2010. ECF No. 1171.

## 25 **II. Lindell's Intervention and D.C. Defamation Litigation**

26 Michael Lindell, an entrepreneur and salesman of pillows, has now moved to intervene in  
this litigation for the purpose of lifting the United States' Protective Order. Lindell's intervention

1 is based on a defamation lawsuit filed against him in the District of Columbia by Dominion, a  
2 company that “provides local election officials with tools they can use to run elections.” Lindell  
3 Decl. Ex. A ¶ 157, ECF No. 1216-1 (Compl., *US Dominion, Inc. v. My Pillow, Inc.*, No. 1:21-cv-  
4 00445 (D.D.C.) (hereinafter “Defamation Compl.” or “defamation litigation”). Dominion’s claims  
5 are rooted in numerous statements by Lindell in the wake of the 2020 presidential election, in  
6 which Lindell claimed that Dominion voting technology was exploited in various ways to alter  
7 votes and election results to the detriment of former-President Trump. *Id.* ¶¶ 164, 165. According  
8 to Dominion, Lindell’s assertions generally centered on the alleged failure and/or exploitation of  
9 certain “algorithms” in Dominion voting machines. *See id.*

10 Lindell claims that he possesses certain “Data” obtained from Montgomery, which he seeks  
11 to use in defending himself in the defamation litigation. Lindell Decl. ¶ 6. Specifically, Lindell  
12 contends that this “Data compris[es] internet transmissions sent during the 2020 election that were  
13 collected by technology developed and previously licensed by Dennis Montgomery.” *Id.* ¶ 7. But  
14 Lindell asserts that this data may be covered by the Protective Order and, therefore, relief in this  
15 Court is necessary. *Id.* ¶ 9. In order to obtain relief lifting the Protective Order, Lindell seeks to  
16 intervene in this litigation on one of two bases—permissive intervention pursuant to Rule  
17 24(b)(1)(B) and intervention of right pursuant to Rule 24(a)(2). Mot. at 3–8.

## 18 ARGUMENT

19 Lindell’s motion should be denied for at least three reasons. First, the Court lacks  
20 jurisdiction to provide any of the relief Lindell seeks because he lacks standing to pursue it.  
21 Second, Lindell has failed to meet the requirements to intervene on either a permissive basis,  
22 pursuant to Rule 24(b)(1)(B), or of right, pursuant to Rule 24(a)(2). And third, even if there were  
23 jurisdiction and even if intervention were appropriate, Lindell has failed to establish a right to  
24 lifting the protective order entered in this litigation; the information subject to the order is utterly  
25 irrelevant to the defamation litigation and the United States has significant reliance interests in the  
26 order, which was issued on the basis of the state secrets privilege.



1 **I. THE COURT SHOULD DENY THE MOTION BECAUSE LINDELL LACKS**  
2 **STANDING TO INTERVENE.**

3 Lindell’s motion should be denied first and foremost because he lacks standing to pursue  
4 it. Parties invoking federal jurisdiction bear the burden of establishing the three elements that  
5 constitute the “irreducible constitutional minimum of standing,” *Lujan v. Defs. of Wildlife*, 504  
6 U.S. 555, 560 (1992)—namely, that they have “(1) suffered an injury in fact, (2) that is fairly  
7 traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a  
8 favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citation omitted).  
9 Standing is necessary for parties to establish the existence of an Article III case or controversy  
10 and, thus, to invoke the jurisdiction of the federal courts. *See, e.g., Steel Co. v. Citizens for a Better*  
*Env’t*, 523 U.S. 83, 103–04 (1998).

11 The standing requirement separately applies to intervenors in at least two circumstances.  
12 First, during pending litigation, an intervenor that “seeks additional relief beyond that which the  
13 plaintiff requests” must demonstrate standing. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137  
14 S. Ct. 1645, 1651 (2017) (“For all relief sought, there must be a litigant with standing, whether  
15 that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right.”). And second,  
16 an intervenor must also demonstrate standing where it seeks to continue litigation to which no  
17 party has any pending claim. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986) (“[A]n intervenor’s  
18 right to continue a suit in the absence of the party on whose side intervention was permitted is  
19 contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.”); *see also*  
20 *Perry v. Schwarzenegger*, 630 F.3d 898, 906 (9th Cir. 2011) (explaining that although “[i]n  
21 general, an applicant for intervention need not establish Article III standing to intervene,” standing  
22 is required where the intervenor seeks to appeal a judgment entered against a party in that party’s  
23 absence).

24 Consistent with these principles, numerous courts of appeals have held that “an intervenor  
25 must establish standing to challenge a protective order after the case has been dismissed.” *Bond*  
26 *v. Utreras*, 585 F.3d 1061, 1071–72 (7th Cir. 2009) (citing cases from the First, Third, and Fifth  
Circuits). That is the scenario presented by this case. The claims of all Plaintiffs and Defendants

1 were resolved by settlement and dismissed with prejudice on February 19, 2009. *See* Order ¶¶ 1,  
2 2, ECF No. 962. Lindell must accordingly demonstrate standing to pursue this otherwise dormant  
3 litigation.

4 But here, Lindell cannot establish any of the elements of Article III standing. To begin,  
5 Lindell has not articulated any cognizable injury. Lindell claims that his injury arises from his  
6 understanding that the information he obtained from Montgomery “may be covered by the  
7 Protective Order.” Mot. at 2. But the Protective Order does not bind Lindell in any way as he is  
8 not a party to this litigation. Nor does the Protective Order apply to any litigation but the above-  
9 captioned cases. Protective Order ¶ 1 (Order’s prohibitions applied only to “discovery or  
10 disclosure . . . during all proceedings in these actions,” *i.e.* the above-captioned consolidated  
11 cases). The Protective Order is thus doubly irrelevant to any actions Lindell might take in the  
12 defamation litigation. Moreover, it does not appear that Lindell has actually been prevented from  
13 obtaining any information he requires by virtue of the protective order. Instead, Lindell simply  
14 says that he is unable to *use* the information he has already obtained. Lindell Decl. ¶¶ 6, 9, 10  
15 (stating that Lindell has “agreed to acquire ownership from Montgomery” of “Data” for use in his  
16 defense but that he is “concerned that the Protective Order . . . prohibits the use or disclosure of  
17 the Data”). That is wrong; the Protective Order does not bind Lindell.

18 Nor has Lindell shown that the Protective Order governs the kind of information that  
19 Lindell says he needs for his defense in the defamation litigation such that any injury would be  
20 traceable to the Order. The Protective Order specifically exempts from its coverage information  
21 regarding “[t]he computer source code, software, programs, or technical specifications relating to  
22 any technology owned or claimed by any of the Parties,” as well as any “actual or potential  
23 commercial or government applications of” this technology. Protective Order ¶ 4(c), (e). But that  
24 is the only kind of information that Lindell has specifically indicated he needs. Lindell contends  
25 that he wishes to rely on “internet transmissions sent during the 2020 election that were collected  
26 by technology developed . . . by Dennis Montgomery.” Lindell Decl. ¶ 7. The express terms of  
the Protective Order present no barrier to the use of such information.

1 The Protective Order also does not injure Lindell on the basis of its effect on Montgomery.  
2 Although Montgomery is subject to the Protective Order as a prior party to this litigation, that  
3 makes no difference here because, again, the Order only governs the conduct of the above-  
4 captioned proceedings, not unrelated litigation involving none of the same parties. To be clear,  
5 the Government does not mean to disclaim that Montgomery could be under some other  
6 nondisclosure obligation, such as a nondisclosure agreement with the United States. *See, e.g.*,  
7 Montgomery Nondisclosure Agreement, ECF No. 83-3. Nor does the Government concede that  
8 discovery directed to the United States in relation to the defamation litigation would be appropriate  
9 or that the United States would not be entitled to seek protection against discovery or disclosure  
10 in that litigation. The point is simply that the Protective Order entered in *this* case from which  
11 Lindell seeks relief has no relevant effect on the defamation litigation or his ability to obtain or  
12 use any information he needs therein. The motion should therefore be denied for lack of standing.

13 **II. THE COURT SHOULD DENY THE MOTION TO INTERVENE FOR FAILURE**  
14 **TO MEET THE REQUIREMENTS FOR PERMISSIVE INTERVENTION OR**  
15 **INTERVENTION OF RIGHT.**

16 **A. Lindell Fails to Establish a Basis for Permissive Intervention.**

17 Permissive intervention under rule 24(b) generally requires “(1) an independent ground for  
18 jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant’s  
19 claim or defense and the main action.” *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712  
20 F.3d 1349, 1353 (9th Cir. 2013). At minimum, Lindell has failed to satisfy the third prong of this  
21 test, a common question of law and fact.

22 To be sure, a permissive intervenor seeking to lift or modify a protective order based on  
23 collateral litigation does not face a high burden in establishing a “common question of law and  
24 fact between the movant’s claim or defense and the main action.” *See Beckman Indus., Inc. v. Int’l*  
25 *Ins. Co.*, 966 F.2d 470, 473–74 (9th Cir. 1992). This is because they are not attempting to litigate  
26 any claim on the merits in the proceeding to which they intervene. *See id.* Nonetheless, the  
absence of a high burden is not the absence of any burden at all. For example, in *Beckman*, the  
Ninth Circuit affirmed the granting of permissive intervention in a case seeking modification of a

1 protective order on the basis of collateral litigation. *Id.* at 471–72. The collateral litigation  
2 involved the same defendant insurance company as the dormant case in which intervention was  
3 sought and it concerned interpretation of an insurance policy issued by that defendant. *Id.* The  
4 Ninth Circuit affirmed the district court’s conclusion that the “importance of access to documents  
5 prepared for similar litigation involving the same parties satisfied the commonality requirement.”  
6 *Id.* at 474 (emphasis added) (further explaining that the “issue of interpretation of the policy  
7 supplies a sufficiently strong nexus between the district court action and the state actions”). Thus,  
8 the lesson of the Ninth Circuit’s *Beckman* decision is that a court evaluating a motion for limited  
9 intervention to modify a protective order based on collateral litigation should evaluate the  
10 relationship between the two litigations in assessing the “common question of law and fact.” *See*  
11 *also Roman v. Mayorkas*, No. EDCV2000768TJHPVC, 2021 WL 6103180, at \*2 (C.D. Cal. Oct.  
12 15, 2021) (“The common question of law and fact requirement is satisfied where the proposed  
13 intervenor is engaged in similar litigation involving the same parties, and, there is ‘a sufficiently  
14 strong nexus between the action in which the prospective intervenor seeks to intervene and the  
15 parallel action.’” (quoting *Beckman*, 966 F.2d at 474)).

16 Here, Lindell has failed to show *any* relationship between the defamation litigation and this  
17 case. None of the current or former parties to this litigation are party to the defamation litigation.  
18 The claims concern various statements about election administration made in and around the year  
19 2020, not anything to do with legal rights or responsibilities of Montgomery or his former business  
20 partner during the mid-2000s. *See generally* Defamation Compl. There is simply nothing in the  
21 motion to intervene that would show any relationship at all between this litigation and the  
22 defamation litigation adequate to show the existence of a “common question of law and fact.”

23 Lindell hardly argues otherwise. His sole support for the existence of this element is that  
24 “there is a common question of law and fact between the grounds that considerations that justified  
25 the entry of the Protective Order originally, and whether those grounds still justify any restrictions  
26 of the Protective Order upon the Data.” Mot. at 5. It appears that Lindell is arguing that there is  
a common question of law and fact between the Government’s original motion for a protective

1 order and his current motion to lift that protective order. That is beside the point. Under *Beckman*,  
2 Lindell must show some kind of relationship between the defamation litigation and this litigation  
3 to be permitted to intervene. He has not done so.

4 **B. Lindell Cannot Intervene of Right.**

5 The Court should also deny Lindell’s request for intervention of right. The Ninth Circuit’s  
6 test for intervention of right

7 requires a prospective intervenor to show that: (1) its motion is timely; (2) it has a  
8 significantly protectable interest relating to . . . the subject of the action; (3) it is so  
9 situated that the disposition of the action may as a practical matter impair or impede  
its ability to protect that interest; and (4) its interest is inadequately represented by  
the parties to the action.

10 *Kalbers v. U.S. Dep’t of Justice*, 22 F.4th 816, 822 (9th Cir. 2021).

11 Lindell fails to meet, at minimum, the second and third elements of this test. Lindell has  
12 not shown *any* interest at all in the subject of this litigation, let alone a “significantly protectable  
13 interest.” Put simply, Lindell has nothing to do with the business and copyright dispute among  
14 these parties that arose and was resolved well over a decade ago.

15 Lindell contends that his interest in litigating the protective order entered in this case allows  
16 him to largely sidestep the requirement to show a significantly protectable interest, asserting that  
17 this is met where a non-party “intervene[s] in an action for the purpose of litigating the substance  
18 of a protective order.” Mot. at 7. This is an erroneously expansive articulation of even the  
19 permissive intervention standard as discussed above. And in any event, it has nothing to do with  
20 the standard for intervention of right, which requires a relationship between the movant’s interests  
21 and the claims in the lawsuit to which intervention is sought. *See Kalbers*, 22 F.4th at 827  
22 (explaining that “a proposed intervenor has a significant protectable interest in an action if (1) it  
23 asserts an interest that is protected under some law, and (2) there is a relationship between its  
24 legally protected interest and the plaintiff’s claims” (citation omitted)). Indeed, the cases Lindell  
25 cites for his erroneously expansive standard either involved permissive intervention, *see In re*  
26 *Alexander Grant & Co. Litig.*, 820 F.2d 352 (11th Cir. 1987), or did not involve any appeal of a  
motion to intervene at all, *In re Midland Nat. Life Ins. Co. Annuity Sales Practs. Litig.*, 686 F.3d

1 1115 (9th Cir. 2012) (noting motion to intervene was granted but not that any party appealed that  
2 decision). Lindell must show a significantly protectable interest in *this* litigation and he has failed  
3 to do so.

4 Nor would disposition of this action “impair or impede” Lindell’s ability to protect his  
5 interests. To begin, this lawsuit has long since been resolved on the merits. And even if Lindell  
6 could show that the protective order provides a hook appropriate to this prong of the intervention  
7 inquiry, Lindell is not bound by the protective order for multiple reasons. *See supra* Argument  
8 Part I.

9 Ultimately, Lindell’s attempt to invoke intervention of right is an ill fit for a party seeking  
10 a limited purpose intervention to litigate the scope of a protective order. The Ninth Circuit  
11 accordingly holds that *permissive* intervention is the appropriate vehicle for “[n]onparties seeking  
12 access to a judicial record in a civil case.” *San Jose Mercury News, Inc. v. U.S. Dist. Ct.--N. Dist.*  
13 *(San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999). Indeed, the leading Ninth Circuit cases on limited  
14 purpose intervention to litigate a protective order involved permissive intervention, not  
15 intervention of right. *Beckman*, 966 F.2d at 471; *Blum*, 712 F.3d at 1353. The motion to intervene  
16 of right should be denied.

17 **III. IF THE COURT PERMITS INTERVENTION, IT SHOULD DENY LINDELL’S**  
18 **MOTION TO LIFT THE PROTECTIVE ORDER.**

19 **A. Lindell Has Not Established The Relevance of Information Subject to the**  
20 **Protective Order.**

21 A collateral litigant seeking to obtain information properly subject to a protective order  
22 “must demonstrate the relevance of the protected discovery to the collateral proceedings and its  
23 general discoverability therein.” *Foltz v. State Farm Mutual Auto. Ins. Co.*, 331 F.3d 1122, 1132  
24 (9th Cir. 2003). A court asked to modify a protective order “should satisfy itself that the protected  
25 discovery is sufficiently relevant to the collateral litigation that a substantial amount of duplicative  
26 discovery will be avoided by modifying the protective order.” *Id.* This relevance determination  
“hinges on the degree of overlap in facts, parties, and issues between the suit covered by the  
protective order and the collateral proceedings.” *Id.* (citation omitted).

1 Lindell contends that he must use information subject to the Protective Order to “defend  
2 the reasonability and veracity of his statements regarding the 2020 election at issue in the D.C.  
3 Litigation.” Mot. at 9. Lindell appears to be referencing the Complaint’s allegations of defamation  
4 with respect to numerous statements by Lindell, all of which allege election and/or voter fraud in  
5 the 2020 presidential election through Dominion’s voting machines. *See* Defamation Compl. ¶  
6 165. Lindell asserts that these “statements were based on information received from  
7 Montgomery.” Mot. at 9.

8 Lindell’s assertions fail to meet the Ninth Circuit’s test for relevance for at least three  
9 reasons. First, the Protective Order in this litigation was entered over 15 years ago, pursuant to an  
10 assertion of the state secrets privilege over 16 years ago. Just simply looking at a calendar shows  
11 that the Order had nothing to do with the 2020 election or alleged fraud therein. Second, neither  
12 the Protective Order nor the supporting materials submitted by the United States in seeking it had  
13 anything to do with voting, elections administration, or voting machines, whether manufactured  
14 by Dominion or any other entity.<sup>3</sup> And third, Lindell has not explained what the two categories of  
15 information that *are* subject to the Protective Order have to do with the defamation litigation. The  
16 closest Lindell comes on this score are statements that Montgomery has information related to  
17 purported “illegal US government surveillance programs” using Montgomery’s technology that  
18 involved the surveillance of, among many others, voting machines manufactured by Dominion.  
19 Mot. at 3; Montgomery Decl. ¶ 38, ECF No. 1216-2. But even on its own terms, this baseless  
20 claim provides no support to Lindell. That is because Lindell has not explained what these  
21 farfetched allegations of surveillance have to do with his contentions that votes in the 2020 election  
22 were manipulated by anyone, let alone the United States Government.

23 In any event, Lindell certainly has not explained how “a substantial amount of duplicative  
24 discovery” in the defamation litigation “will be avoided by modifying the protective order” in this  
25 case. *See Foltz*, 331 F.3d at 1132. To the contrary, Lindell asserts that he already has the

26 <sup>3</sup> The Government is willing to make the previously submitted Classified Declaration available for  
the Court’s review *ex parte* and *in camera*, should the Court believe it necessary to review the  
declaration to conclude that the information here is irrelevant to the defamation litigation.

1 information he seeks. *See* Lindell Decl. ¶¶ 6, 9, 10. He only asks for relief from the Court because  
2 of his erroneous understanding that the protective order binds his conduct in the defamation  
3 litigation.

4 **B. No Good Cause Exists to Lift or Modify the Protective Order.**

5 Even where relevance is established, the Court “must weigh the countervailing reliance  
6 interest of the party opposing modification” of a protective order. *Foltz*, 331 F.3d at 1133. Those  
7 reliance interests are at their zenith in the context of the state secrets privilege, which exists to  
8 exclude from litigation information where “there is a reasonable danger that compulsion of the  
9 evidence will expose . . . matters which, in the interest of national security, should not be divulged.”  
10 *United States v. Reynolds*, 345 U.S. 1, 6–7, 10 (1953) (describing this privilege as “well established  
11 in the law of evidence”). “It is ‘obvious and unarguable’ that no governmental interest is more  
12 compelling than the security of the Nation.” *Haig v. Agee*, 453 U.S. 280, 307–09 (1981) (quoting  
13 *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)). And the state secrets privilege is absolute  
14 in its effect, requiring exclusion of evidence against even the most compelling showing of need by  
15 a litigant. *United States v. Zubaydah*, 142 S. Ct. 959, 967 (2022) (“[I]n all events, ‘even the most  
16 compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that  
17 military secrets are at stake.” (quoting *Reynolds*, 345 U.S. at 11)).

18 The reliance interests of the United States in the Protective Order foreclose Lindell’s  
19 request to lift the Order. Indeed, this is demonstrated by the effect of the Court’s decision to uphold  
20 the state secrets privilege assertion here. Unlike an ordinary protective order limiting the persons  
21 to whom protected information may be disclosed, a protective order entered pursuant to the state  
22 secrets privilege causes “the evidence [to be] completely removed from the case.” *Mohamed v.*  
23 *Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1082 (9th Cir. 2010) (citation omitted); *see also id.* at  
24 1079 (“A successful assertion of privilege under *Reynolds* will remove the privileged evidence  
25 from the litigation.”). Thus, this is far from a case where the Court is only being asked to permit  
26 an additional party to view and use evidence already available to the other parties to the case.  
*Compare Foltz*, 331 F.3d at 1133 (approvingly quoting statement that a “legitimate interest” in



1 “continued secrecy as against the public at large can be accommodated by placing the collateral  
2 litigants under the same restrictions on use and disclosure contained in the original protective  
3 order” (citation omitted)), *with Mohamed*, 614 F.3d at 1082 (successful invocation of state secrets  
4 privilege “completely remove[s]” the information from the case).

5 Lindell contests the United States’ reliance interests on two grounds: that the protective  
6 order is “stale” and that it conceals constitutional violations. Mot. at 9–10. Neither assertion has  
7 merit. As to the age of the protective order, Lindell cites no authority for the proposition that a  
8 state secrets protective order necessarily becomes obsolete with the passage of time. At minimum,  
9 the United States is entitled to the protection of its reliance interests in a state secrets protective  
10 order against the claims of parties that have demonstrated no necessity in having them lifted and  
11 no relationship to the litigation in which they were entered. And Lindell’s contention that the  
12 Protective Order in this case was entered to conceal violations of constitutional rights is baseless.  
13 The un rebutted evidence before the Court is that the Protective Order was sought (and granted) to  
14 protect “intelligence sources and methods,” the disclosure of which could cause harm to national  
15 security. Negroponte Decl. ¶ 12. Lindell’s speculations to the contrary are inadequate to support  
16 his claim for relief.<sup>4</sup>

### 17 CONCLUSION

18 For the foregoing reasons, the motion to intervene and to lift the protective order should be  
19 denied.

20 Respectfully submitted this 6th day of October, 2022.

21 BRIAN M. BOYNTON  
22 Principal Deputy Assistant Attorney General

23 ANTHONY J. COPPOLINO  
24 Deputy Director

25 /s/ James R. Powers

26 <sup>4</sup> The Court should reject Lindell’s motion for the many reasons set forth above. If the Court nonetheless concludes that Lindell is entitled to some relief on the current record, the Court should permit the United States an additional 60 days in which to consider additional steps to protect its interests.

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**CERTIFICATE OF SERVICE**

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 1100 L Street, NW, Washington, DC 20005. I am not a party to the above-entitled action. On the date set forth below, I caused service of the foregoing document through the Court’s electronic filing and notice system (CM/ECF), and by sending a copy of same via ECF notice upon:

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11 I declare under penalty of perjury that the foregoing is true and correct.

12 Dated this 6th day of October, 2022.

13 /s/James Powers

14 James R. Powers  
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