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Contracting for Confidential Discovery

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Contracting for Confidential Discovery

Seth Katsuya Endo*

One way that courts have adapted to the age of the internet is to provide nearly instant online access to their dockets. But many important filings remain shielded from public view as courts regularly issue stipulated protective orders at the request of the parties. And, while the costs and benefits of confidential discovery have been extensively discussed in the academic literature, several important contextual developments — including the continuing growth of electronically stored information — prompt a reexamination. Additionally, easily searchable federal dockets now provide a window into what is happening in actual practice.

Taking up this task, Contracting for Confidential Discovery examines how federal trial courts dealt with 100 proposed stipulated protective orders in January 2018. A key finding is that courts are regularly entering orders overly favoring secrecy in a manner that is inconsistent with the governing jurisprudence and consensus theory. The Article proposes several doctrinal and policy interventions to rectify the most problematic common mistakes: (1) an overreliance on boilerplate language and (2) the conflation of the relatively low standard for keeping unfiled discovery confidential with the much higher bar for filing materials under seal.

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INTRODUCTION

In the digital era, it is easy to feel constantly bombarded by information.¹ Even so, what remains hidden can be surprising. Despite our seemingly exhaustive access to court records through online databases, private confidentiality agreements between parties are regularly entered by courts as stipulated protective orders, shielding litigation materials from public view. The common use of stipulated protective orders might be unexpected because, from popular media portrayals to Supreme Court precedent, trials are presumptively open affairs.²

The great majority of civil cases, however, never make it to that stage.³ As one district court judge explained: “[I]t is no secret that the civil jury trial is vanishing.”⁴ In its place, there has been a movement towards settlement and dispositive motions.⁵

¹ See DANIEL J. LEVITIN, *THE ORGANIZED MIND: THINKING STRAIGHT IN THE AGE OF INFORMATION OVERLOAD* 6 (2014) (explaining how, in 2011, each day, Americans were exposed to an amount of information that would fill 175 newspapers); see also John B. Horrigan, *Information Overload*, PEW RESEARCH CTR. (Dec. 7, 2016), <http://www.pewinternet.org/2016/12/07/information-overload/> (finding that 20% of Americans are overwhelmed by the amount information they encounter).

² See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) (“Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.”); Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181, 2186 (2014) (describing public trial scene from Harper Lee’s *To Kill a Mockingbird*).

³ See Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938-2006*, 78 U. COLO. L. REV. 817, 818 (2007); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 928 (2000).

⁴ *Walker v. Yamaha Motor Co.*, No. 6:13-CV-1546-Orl-37GJK, 2016 WL 7325518, at *1 (M.D. Fla. Feb. 16, 2016) (discussing empirical studies showing “an ongoing escalation in the percentage of civil actions resolved without a jury trial”); see also John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012); Xavier Rodriguez, *The Decline of Civil Jury Trials: A Positive Development, Myth, or the End of Justice As We Now Know It?*, 45 ST. MARY’S L.J. 333, 335-36 (2014).

⁵ See, e.g., Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 354 (2018) (describing why defendants might value confidential settlements); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2842-50 (2015) (discussing the court and judges encouraging

The common thread connecting these different means of resolving civil cases is that trials, settlement, and dispositive motions all turn on information exchanged during discovery.⁶ But, in discovery — an early stage of litigation — the presumption of *public* transparency is relatively weak compared with when the case moves towards trial.⁷ Adding to the opacity, civil litigants regularly agree to prohibit the public disclosure of any information obtained in discovery through stipulated protective orders.⁸

Stipulated protective orders have long been an important part of civil litigation and are used in a wide range of cases.⁹ From this, a rich academic literature and case law has developed around confidential discovery, exploring the costs and benefits of letting parties obtain court orders to keep sensitive material exchanged in litigation secret from the public.¹⁰ One side of the long-standing debate champions the reduction

parties to settle). See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1083 (1984) (“The allure of settlement in large part derives from the fact that it avoids the need for a trial.”).

⁶ See Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1512-13 (2016) (“Part and parcel of the vanishing trial is a focus on pretrial practice.”); Michael Moffitt, *Three Things to Be Against: (“Settlement” Not Included)*, 78 FORDHAM L. REV. 1203, 1221 (2009) (stating that “[m]uch of the action in modern litigation takes place in discovery”); Andrew S. Pollis, *Busting Up the Pretrial Industry*, 85 FORDHAM L. REV. 2097, 2097 (2017) (“What has supplanted the trial culture is not settlement alone but rather a culture of pretrial practice.”).

⁷ See Laurie K. Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 285 (1999); see also *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”). See generally *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8-10 (1986) (explaining that historical openness and importance of the role of public are key factors for determination).

⁸ See Benham, *supra* note 2, at 2187.

⁹ See *infra* Part I.A (describing the history of confidential discovery and protective orders); see, e.g., *Stipulated Protective Order, A.M. v. Physicians’ Med. Ctr., P.C.*, No. 3:17-cv-01833, 2018 WL 6305661 (D. Or. Jan. 23, 2018) (entering stipulated protective order in sexual abuse case); [Proposed] *Stipulated Protective Order, Election Sys. & Software, LLC v. Dominion Voting Sys., Inc.*, No. 1:17-cv-01172 (D. Del. filed Jan. 22, 2018) (entering stipulated protective order in patent case).

¹⁰ Compare Benham, *supra* note 2, Doré, *supra* note 7, and Craig Smith et al., *Finding a Balance Between Securing Confidentiality and Preserving Court Transparency: A Re-Visit of Rule 76a and its Application to Unfiled Discovery*, 69 SMU L. REV. 309 (2016), with Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457 (1991) [hereinafter *Discovery Controversy*] and Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991).

of barriers to production.¹¹ When a court issues a protective order preventing the sharing of discovery beyond the parties, a producing party is more likely to both share material and forgo expensive screening. On the other side, confidential discovery effectively limits the public's ability to access what is happening in the courts.¹² And, to this, the hidden information may reduce necessary coordination with outside experts, socially beneficial private enforcement, and oversight over the courts themselves.

Whether stipulated protective orders are viewed as enhancing litigation efficiency by protecting parties' confidential information or as barriers to socially beneficial information-sharing about misconduct, the practical significance is clear. And there is a need for continued examination because the growth of electronically stored information ("ESI"), increased access to electronic dockets, and the #MeToo movement raise new questions about how stipulated protective orders may be used, both now and in the future.¹³

Moreover, despite the sizeable amount of existing scholarship about confidential discovery, scholars have not deeply considered how confidential discovery is implemented in practice. Now, with the rise of electronically searchable dockets, actual entered stipulated protective orders are easy to find.

Taking advantage of that, this Article is the first paper to map the confidential discovery scholarship to both the jurisprudence and practice of stipulated protective orders. As to the former, when looking across jurisdictions, the formal case law is highly consistent with the theory. To the latter, the Article analyzes how federal trial courts dealt with 100 proposed stipulated protective orders in January 2018 (the "Case Set"). The Case Set provides a snapshot of what happens in practice, drawing from forty-four district courts and including twenty-eight types of cases.¹⁴ The survey largely is consistent with the appellate jurisprudence and confirms the conventional understanding from the literature. But it also reveals that courts are regularly entering orders containing provisions which overly favor secrecy in a manner inconsistent with the governing jurisprudence and consensus theory.

To make this more concrete, two major issues appeared in the survey. First, the majority of orders relied on generic language to describe the need for the protective order, obscuring an outside reader's ability to

¹¹ See Marcus, *Discovery Controversy*, *supra* note 10, at 466-67; Miller, *supra* note 10, at 447.

¹² See Marcus, *Discovery Controversy*, *supra* note 10, at 448.

¹³ See *infra* Part I.D.

¹⁴ See *infra* Appendix, Table 1, for a list of all of the cases in the Case Set.

see the particularized need for confidentiality. Second, in fifteen of these cases, the entered stipulated protective orders conflated the standard for filing under seal with the lesser standard for keeping unfiled discovery confidential. This is a major mistake that contravenes both the case law and the interests described in the related scholarship, even by the pro-confidentiality camp.¹⁵ Such errors are problematic — even when any given stipulated order is unlikely to have a formal precedential effect — because common practice may act as persuasive informal authority and provide examples that other courts and litigants might adopt.¹⁶

Moreover, the prevalence of mistakes in stipulated protective orders underscores how profoundly our adversarial system of litigation relies on robust argumentation by the parties to get the law right. Quite commonly, when parties agree about an issue, courts do not carefully examine the legal questions. But where the parties share an interest — here, in secrecy — that may diverge from that of the public, courts should not simply rubber-stamp party-proposed orders.

Part I of the Article first provides background on the confidential discovery controversy. It sketches a short history of the governing rules and jurisprudence. It then summarizes the consensus view of how stipulated protective orders work, along with their costs and benefits. It then identifies several contextual factors that make the issue especially salient at this moment. Part II details the survey's findings. Part III connects the literature to both the case law and practice of stipulated protective orders. Part IV proposes potential interventions to address tradeoffs, including the risk of legal mistake.

I. FOUNDATIONS OF THE CONFIDENTIAL DISCOVERY CONTROVERSY

A. *Short History of Confidential Discovery Rules & Jurisprudence*

1. Significant Procedural Rules Development

Prior to the adoption of the Federal Rules of Civil Procedure (the “Rules”), custom held there was no public right of access to the limited

¹⁵ See, e.g., *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 307 (6th Cir. 2016) (“In sealing all these documents and exhibits, the parties and the district court plainly conflated the standards for entering a protective order under Rule 26 with the vastly more demanding standards for sealing off judicial records from public view.”).

¹⁶ See Elizabeth Y. McCuskey, *Horizontal Procedure* 29-38 (2017) (unpublished manuscript) (on file with author).

discovery available.¹⁷ Courts used their equitable powers to enforce this.¹⁸ And this ability to prevent discovery's abuse by limiting access to the produced materials was not lost when the Rules created a new, broader right of discovery.¹⁹

The most direct mechanism to prevent discovery abuse is the protective order. When originally adopted in 1938, Rule 30(b) authorized courts to issue protective orders that covered only depositions.²⁰ Ten years later, this was expanded to cover written interrogatories and requests for admission.²¹ In 1970, the protective order provisions were moved to Rule 26(c) and made applicable to all forms of discovery.²² At the same time, the description of materials that deserved protection was modified to reflect existing law, going from "secret processes, developments, or research" to "a trade secret or other confidential research, development, or commercial information"²³ The amended rule explicitly allows a court to affirmatively order the discovery sought if it denies a proposed protective order.²⁴

The Rules, however, have not only created tools to limit public access to discovery. For example, Rule 5(d) originally required parties to file interrogatory answers, responses to requests for admission, and deposition transcripts with the court.²⁵ But, in 1980, Rule 5(d) explicitly empowered courts to excuse the filing of discovery.²⁶ Still, some courts and commentators viewed Rule 5 as having a strong negative

¹⁷ See Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 789 (1990).

¹⁸ See *id.* (describing a 1912 case in which a Massachusetts court "barred the press and other members of the public from attending a deposition on the grounds that the deposition was not part of the formal trial").

¹⁹ See generally Richard L. Marcus, *A Modest Proposal: Recognizing (at Last) That the Federal Rules Do Not Declare That Discovery Is Presumptively Public*, 81 CHI.-KENT L. REV. 331, 345 (2006) [hereinafter *A Modest Proposal*] (describing the concerns of framers of the Federal Rules of Civil Procedure).

²⁰ See Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules — and the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 199 n.58 and accompanying text (2007).

²¹ See 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2169 (3d ed. 2002).

²² See FED. R. CIV. P. 26(c) advisory committee's note to 1970 amendment.

²³ *Id.*

²⁴ See *id.*

²⁵ See Campbell, *supra* note 17, at 789; Moskowitz, *supra* note 3, at 833-35 (describing the history of Rule 5).

²⁶ See FED. R. CIV. P. 5 advisory committee's note to 1980 amendment; Campbell, *supra* note 17, at 789; Marcus, *A Modest Proposal*, *supra* note 19, at 350. See generally Moskowitz, *supra* note 3, at 838-48 (describing the history of 1980 amendment).

implication favoring public access to discovery.²⁷ Then, in 2000, Rule 5(d) was modified again, excluding the filing of initial disclosures and most discovery responses unless used in the action or the court orders filing.²⁸ This undercut arguments that the rule created a general right of the public to access discovery.²⁹

In 2007, Rule 5.2 was adopted.³⁰ This rule requires the redaction of several categories of sensitive information, such as social security numbers, names of minors, and financial account numbers.³¹ It also permits courts to order the redaction of additional information and to limit nonparty's remote electronic access.³² While, in practical effect, Rule 5.2 is another mechanism by which aspects of materials exchanged in discovery are kept private, it grew out of a broader push by Congress to ensure that digital records did not threaten individuals' privacy interests and was not obviously directed at curbing discovery abuses.³³

2. Confidential Discovery, the Constitution, and Common Law

By the late 1970s, courts and scholars had begun to consider whether the First Amendment's protections for free speech limited courts' ability to issue protective orders.³⁴ For example, in 1979, the U.S. Circuit Court for the District of Columbia determined that a protective order "constitute[d] direct governmental action limiting speech."³⁵ The circuit court thus applied strict scrutiny to find the district court's order "indisputably deficient."³⁶ But, just five years later, the Supreme Court rejected this view.³⁷ Writing for a unanimous court in *Seattle Times v. Rhinehart*, Justice Powell held that protective orders do not require

²⁷ See Moskowitz, *supra* note 3, at 861-64; see, e.g., *Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978) ("As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings.").

²⁸ See FED. R. CIV. P. 5 advisory committee's notes to 2000 amendment; Marcus, *A Modest Proposal*, *supra* note 19, at 351. See generally Moskowitz, *supra* note 3, at 848-52 (describing the history of 2000 amendment).

²⁹ See Marcus, *A Modest Proposal*, *supra* note 19, at 350.

³⁰ See FED. R. CIV. P. 5.2 advisory committee's note to 2007 amendment.

³¹ See FED. R. CIV. P. 5.2(a).

³² See FED. R. CIV. P. 5.2(e).

³³ See FED. R. CIV. P. 5.2 advisory committee's note to 2007 amendment. See also *Doe ex rel. Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 625 F.3d 1182, 1187 (9th Cir. 2010) (Reinhardt, J., dissenting) (denial of rehearing en banc).

³⁴ See Benham, *supra* note 2, at 2193-94.

³⁵ *In re Halkin*, 598 F.2d 176, 183 (D.C. Cir. 1979).

³⁶ *Id.* at 197.

³⁷ See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 28-29 (1984).

heightened scrutiny where litigants relied on the court's discovery process to gain the information whose dissemination was restricted.³⁸

The question of whether there is a common law right of access to discovery, though, was not discussed in *The Seattle Times*. And, in an earlier decision, the Supreme Court had stated:

It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. In contrast to the English practice, . . . American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit.³⁹

The Supreme Court also provided illustrations of this general right in practice, noting that it required access in cases involving "citizen's desire to keep a watchful eye on the workings of public agencies" and "in a newspaper publisher's intention to publish information concerning the operation of government."⁴⁰

Accordingly, an open doctrinal question governing access to discovery is the definition of a "judicial document."⁴¹ Some jurisprudential lines focus simply on whether the document is filed with the court.⁴² Others examine whether the document plays a role in the adjudication process, frequently using the stage of litigation as a proxy for that determination.⁴³

B. Consensus View of How Stipulated Protective Orders Work

To further anchor the Article's discussion, this Section describes how stipulated protective orders are understood to function, drawing on the

³⁸ See *id.* at 32-34.

³⁹ *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 59 (1978) (citation omitted).

⁴⁰ *Id.* at 597-98.

⁴¹ *Id.* See generally *id.* at 597 ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.").

⁴² See, e.g., *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3rd Cir. 1994) ("If [the document] is not [filed], it is not a 'judicial record.'"); see also *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161-62 (3d Cir. 1993) (listing cases in which "other courts have also recognized the principle that the filing of a document gives rise to a presumptive right of public access"); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344-45 (3rd Cir. 1986) ("Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records.").

⁴³ See, e.g., *United States v. Amodio*, 44 F.3d 141, 145 (2d Cir. 1995); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986).

academic literature and case law to present a picture of general practices.

When a civil action is filed in a federal district court, Rule 26(b)(1) permits the parties to engage in discovery, a process wherein parties use the court's subpoena power to demand information from each other.⁴⁴ As the Supreme Court has observed, the rules governing these processes are "accorded a broad and liberal treatment."⁴⁵ Following from the text of Rule 26(b) and this interpretative principle, a longstanding formulation has been that parties are presumptively entitled to any non-privileged information relevant to a claim or defense in the case.⁴⁶ And parties are generally free to publicly disclose the information they receive in discovery.⁴⁷ Still, this broad right of access to information is not completely untempered by limitations on the scope of discovery and its use.⁴⁸

The key procedural mechanisms for limiting the use of discovery and protecting against its abuse are protective orders, which are commonly entered into by stipulation rather than by contested motion.⁴⁹ Rule 26(c) empowers a court to issue such an order when it finds "good cause" calling for the protection of a party or person from "annoyance, embarrassment, oppression, or undue burden or expense."⁵⁰ The orders

⁴⁴ See *Gonzalez v. Feinerman*, No. 3:11-cv-170-DGW, 2015 WL 12670381, at *2 (S.D. Ill. Sept. 23, 2015).

⁴⁵ See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (discussing this in the context of depositions).

⁴⁶ See *Miller*, *supra* note 10, at 447.

⁴⁷ See *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002); *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 683-84 (5th Cir. 1985).

⁴⁸ See *Miller*, *supra* note 10, at 487.

⁴⁹ See Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 2 (1983).

⁵⁰ FED. R. CIV. P. 26(c). While not exclusive, Rule 26(c) describes the following eight types of discovery protections: (a) forbidding the disclosure or discovery; (b) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; (c) prescribing a discovery method other than the one selected by the party seeking discovery; (d) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; (e) designating the persons who may be present while the discovery is conducted; (f) requiring that a deposition be sealed and opened only on court order; (g) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and (h) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs. *Id.* For a discussion on the jurisprudence defining good cause, see *infra* Part III.A.

typically function by limiting the audience for material that a party designates as confidential.⁵¹

Just as the term implies, stipulated protective orders are proposed by the parties.⁵² This usually occurs at the start of a case, before discovery has begun or early in that process, because parties wish to avoid the costs associated with intensive screening of documents prior to production and motion practice over whether particular documents are entitled to confidential treatment.⁵³

After parties propose a stipulated protective order, the court must determine if there is good cause to issue the order.⁵⁴ Illustrating the routine nature of the approval process when the parties are in agreement, one district court noted:

We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties and approved by the court.⁵⁵

This, however, is not to imply that courts always grant the stipulated protective orders proposed by parties. On occasion, courts deny joint motions for stipulated protective orders when the proposed orders fail to articulate why the requested protection is warranted in contravention of local rules or binding case law.⁵⁶ Courts also may, at their discretion, modify proposed orders to manage the pretrial process and account for the specific factual circumstances.⁵⁷ One important example of when

⁵¹ See Doré, *supra* note 7, at 334.

⁵² See Bond v. Utreras, 585 F.3d 1061, 1067 (7th Cir. 2009) (“Protective orders are often entered by stipulation when discovery commences.”); Doré, *supra* note 7, at 332-33.

⁵³ See Doré, *supra* note 7, at 332.

⁵⁴ See FED. R. CIV. P. 26(c); Benham, *supra* note 2, at 2191-92.

⁵⁵ Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 889 (E.D. Pa. 1981); see also Father M. v. Various Tort Claimants (*In re* Roman Catholic Archbishop), 661 F.3d 417, 424 (9th Cir. 2011) (“While courts generally make a finding of good cause before issuing a protective order, a court need not do so where . . . the parties stipulate to such an order. When the protective order ‘was a stipulated order and no party ha[s] made a ‘good cause’ showing,’ then ‘the burden of proof . . . remain[s] with the party seeking protection.’”) (quoting Phillips v. Gen. Motors Corp., 307 F.3d 1206, 1211 n.1 (9th Cir. 2002)).

⁵⁶ See, e.g., Guardian Life Ins. Co. of Am. v. Am. Guardian Life Assurance Co., No. CIV. A. 95-CV-3997, 1995 WL 653977, at *2 (E.D. Pa. Nov. 14, 1995); Horgan v. Independence Blue Cross, No. 93-CV-2528, 1994 U.S. Dist. LEXIS 1145, at *6-7 (E.D. Pa. Jan. 24, 1994).

⁵⁷ See, e.g., Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984) (“The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.”); Poliquin v. Garden Way, Inc., 989 F.2d 527, 534 (1st

courts intervene is when proposed stipulated protective orders contain provisions implicating the rights of absent third parties.⁵⁸

Given courts' broad discretion to craft protective orders and their tendency to defer to parties' agreements, the specific terms of any given stipulated protective order can vary widely.⁵⁹ Still, stipulated protective orders commonly include provisions that permit parties to designate certain types of discovery materials as confidential.⁶⁰ These are known as "umbrella" stipulated protective orders because they do not require document-by-document designations.⁶¹ Access to the materials designated as confidential is then frequently limited to the court, parties, attorneys, and witnesses.⁶² When third parties, including witnesses, may be shown the material, the orders typically require them to review the stipulated protective order and agree to its terms.⁶³ Occasionally, stipulated protective orders go further, restricting access to all or some subset of the material to only the attorneys, experts, or specifically named individuals.⁶⁴

The initial process for protecting information under a stipulated protective order usually permits a party to unilaterally classify material as confidential without any consultation with the requesting party.⁶⁵ But the orders generally also include a process for the requesting party

Cir. 1993) ("[T]he design of the order is in any event largely within the trial court's discretion."); *Generosity.org v. Generosity Beverages, Inc.*, No. 2:17-cv-06054-ODW-KS, 2018 WL 836610 (C.D. Cal. Feb. 12, 2018) (modifying an order to correct clerical errors and to conform with judge's individual practices); *Pierson v. Indianapolis Power & Light Co.*, 205 F.R.D. 646, 647 (S.D. Ind. 2002) (stating that the order must explicitly allow that "any party and any interested member of the public [can] challenge the sealing of particular documents").

⁵⁸ See generally *In re Baycol Prods. Litig.*, 214 F.R.D. 542 (D. Minn. 2003) (permitting intervention of third party seeking modification of a stipulated protective order).

⁵⁹ See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.432 (Stanley Marcus et al. eds., 2004) [hereinafter MANUAL]; see also Benham, *supra* note 2, at 2210; Doré, *supra* note 7, at 334.

⁶⁰ See MANUAL, *supra* note 59, § 11.432; see also Benham, *supra* note 2, at 2189-92; Doré, *supra* note 7, at 332-33.

⁶¹ See MANUAL, *supra* note 59, § 11.432. Sometimes, though, the term "umbrella protective orders" means that neither the parties or the courts review the material before designating it as confidential. See *Gillard v. Boulder Valley Sch. Dist. Re-2*, 196 F.R.D. 382, 386 (D. Colo. 2000). In those cases, courts tend to use the term "blanket protective orders" to mean those where there is no document-by-document assessment. See *id.*

⁶² See Benham, *supra* note 2, at 2190-91; Doré, *supra* note 7, at 334-35.

⁶³ See Doré, *supra* note 7, at 334-35.

⁶⁴ See Benham, *supra* note 2, at 2191; Doré, *supra* note 7, at 334.

⁶⁵ See Benham, *supra* note 2, at 2192-93; Doré, *supra* note 7, at 333.

to challenge the designation.⁶⁶ And to reduce the risk of error, some orders state that produced material that is inadvertently not designated confidential does not forever lose all protection.⁶⁷

Additionally, to ensure the continued protection of confidential material, some stipulated protective orders require the material to be filed under seal if submitted to the court.⁶⁸ Serving this same end, clauses that call for the return or destruction of the produced material at the end of the litigation are common.⁶⁹

Despite the latitude allowing for significant variation in the terms of individual stipulated protective orders, a number of jurisdictions have model orders that provide a template for litigants.⁷⁰ Even in districts that do not provide a model order or otherwise discuss the substance of stipulated protective orders in their local rules, individual judges may have their own model orders.⁷¹ The Manual of Complex Litigation provides a sample stipulated protective order too.⁷²

C. Costs and Benefits of Stipulated Protective Orders

Scholarly and judicial positions on the relative merits of confidential discovery⁷³ tend to follow from broader conceptions about the principal role of courts.⁷⁴ For some, courts “exist to resolve disputes that are brought to them by litigants, a bedrock principle that finds expression in the case or controversy requirement of Article III of the

⁶⁶ See Benham, *supra* note 2, at 2242; Doré, *supra* note 7, at 333-34.

⁶⁷ See, e.g., Anita Hotchkiss & Diane M. Fleming, *Protecting and Enforcing Protective Orders: Easier Said Than Done*, 71 DEF. COUNS. J. 161, 167-68 (2004) (including such a provision in the sample order).

⁶⁸ See Benham, *supra* note 2, at 664; Doré, *supra* note 7, at 335. These provisions often present a potential mistake of law as is discussed in greater detail later. See Part III.B.

⁶⁹ See Benham, *supra* note 2, at 2189; Doré, *supra* note 7, at 337.

⁷⁰ See Benham, *supra* note 2, at 2193. A quick survey of district courts' websites found twenty-nine districts with model orders.

⁷¹ See, e.g., Model Protective Order, Jed S. Rakoff, U.S. District Judge for the Southern District of New York, http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=737 [https://perma.cc/4FAF-3THS] (last visited Sep. 24, 2019).

⁷² MANUAL, *supra* note 59, at § 40.27.

⁷³ Because stipulated protective orders are a common form of party-customized procedure for keeping discovery confidential, the costs and benefits of stipulated protective orders are well explained by the literature and case law addressing confidential discovery. See Benham, *supra* note 2, at 2182.

⁷⁴ See Doré, *supra* note 7, at 289-90.

Constitution.”⁷⁵ If one views the resolution of the parties’ disputes as the primary function of courts, then party-agreed secrecy is likely viewed as beneficial because it should protect legitimately private information while also promoting the efficient exchange of information and an expanded bargaining range for settlement.⁷⁶ On the other hand, if one sees the judiciary as having a significant role in protecting a broader public interest then confidential discovery may be cause for concern because it can hamper public oversight of courts and the ability of third parties to use information uncovered by the litigation.⁷⁷ While this Article does not stake out a position about the ultimate merits of these arguments, it recognizes the practical importance of confidential discovery and the underlying interests at stake.

1. Privacy

Litigation-related materials can implicate privacy rights that are entitled to protection such as might be effectuated through a stipulated protective order. These privacy rights can be held by a party or even a non-party.⁷⁸ Illustrating the former, in a personal injury suit, a plaintiff might be asked intrusive questions about his or her private life.⁷⁹ And the Federal Rules implicitly acknowledge the importance of these privacy interests, as seen in Rule 5.2’s requirement that certain personal information in court filings be redacted.⁸⁰ It is generally beyond peradventure that the interrelated privacy and property interests in trade secrets also merit protection.⁸¹

2. Efficient Exchange of Information

Another benefit of confidential discovery is that it facilitates the efficient exchange of information. As one scholar put it, “a protective

⁷⁵ Marcus, *Discovery Controversy*, *supra* note 10, at 468; *see also* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236 (1979).

⁷⁶ *See* Doré, *supra* note 7, at 286; Marcus, *Discovery Controversy*, *supra* note 10, at 482 (describing privacy interests); Miller, *supra* note 10, at 476 (describing privacy benefits).

⁷⁷ *See* Doré, *supra* note 7, at 289; Fiss, *supra* note 5, at 1085 (“Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates.”). *But see* Marcus, *Discovery Controversy*, *supra* note 10, at 481-84 (critiquing the over-privileging of the public’s interest in confidential discovery discussion).

⁷⁸ *See* Marcus, *Discovery Controversy*, *supra* note 10, at 464.

⁷⁹ *See id.* at 482-83.

⁸⁰ *See* FED. R. CIV. P. 5.2.

⁸¹ *See* Marcus, *Discovery Controversy*, *supra* note 10, at 469-70.

order addressing discovery confidentiality lubricates the wheels of discovery.”⁸² When parties agree to keep designated discovery confidential, the responding party is more likely to produce material for which it otherwise might assert a privilege or relevance objection.⁸³ This reduces the costs of litigating discovery disputes. Additionally, the intensive screening of voluminous material by lawyers to protect against inadvertent production of non-material sensitive information contributes significantly to the cost of discovery.⁸⁴

However, concerns about efficient exchange of information do not necessarily solely favor confidential discovery. Discovery sharing can enhance the efficiency of the litigation system as a whole by reducing redundant efforts by plaintiffs bringing separate suits against the same defendant.⁸⁵

3. Promotion of Settlement

Current public policy promotes settlement.⁸⁶ In the Federal Rules, Rule 16 and Rule 26(f) both identify settlement as objectives.⁸⁷ And a similar push is reflected in statutes like the Civil Justice Reform Act and numerous Supreme Court decisions.⁸⁸

⁸² Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357, 359 (2006).

⁸³ *See id.*

⁸⁴ *See* NICHOLAS M. PACE & LAURA ZAKARAS, *WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY* 42 (2012).

⁸⁵ *See* Benham, *supra* note 2, at 2199; Doré, *supra* note 7, at 305; Marcus, *Discovery Controversy*, *supra* note 10, at 496 (“More generally, however, it seems that the courts continue to recognize that access for other plaintiffs should be allowed whether or not it is necessary to facilitate the preparation of the case before them because such sharing saves the courts and the litigants time and money.”).

⁸⁶ *See* Doré, *supra* note 7, at 290; Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1474 (1994) [hereinafter *Whose Judgment?*] (“On the one hand, on almost every occasion, judges and lawyers extol the virtues of settlement and the desirability of enabling private accommodations among litigants to end disputes without state-authored adjudication.” (emphasis omitted)).

⁸⁷ *See* FED. R. CIV. P. 16(a)(5) (“In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as: . . . facilitating settlement.”); FED. R. CIV. P. 26(f)(2) (“In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case”); Doré, *supra* note 7, at 290-91.

⁸⁸ *See* Doré, *supra* note 7, at 291; *see, e.g.,* *Marek v. Chesny*, 473 U.S. 1, 5 (1985).

When courts are willing to enter orders that approve parties' agreements to keep discovery confidential, this consensual secrecy becomes another bargaining chip that may expand the parties' bargaining range.⁸⁹ As noted above, trade secrets can be valuable and producing parties might have a low risk tolerance regarding their disclosure.⁹⁰ Additionally, if a company is concerned about future liability in similar cases, it might place a premium on keeping discovery confidential in an existing case.⁹¹ Confidential discovery may also expand the bargaining range of the parties by preventing unwarranted reputational damage.⁹² Allegations based on information exchanged in discovery are untested by a judicial fact-finder but still might carry an imprimatur of authority.⁹³

Confidential discovery also permits parties to communicate more freely about their interests given the economic interests described above.⁹⁴ Moreover, even if there were no economic interest that could increase the bargaining range, shielding sensitive material from public disclosure should still encourage greater candor and, ultimately, promote settlement.

4. Public Accountability of Courts

Opponents of confidential discovery frequently argue that public oversight of courts requires access to the materials upon which judicial decisions are based.⁹⁵ This view treats courts as agents of the public, not just of the parties seeking a resolution to their dispute.⁹⁶ It further posits that public processes improve the accuracy of court determinations,

⁸⁹ See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 510-11 (1994).

⁹⁰ See Miller, *supra* note 10, at 469-70 (describing the value of Coca-Cola's secret formula).

⁹¹ See *id.* at 436 (noting that "lawyers might seek disclosure to identify potential plaintiffs for future suits").

⁹² See *id.* at 491-92; Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 967-68 (2018) (describing reputational costs even when an organization wins the litigation).

⁹³ See Miller, *supra* note 10, at 470 ("In some instances, products have had their reputations severely damaged by the premature release of untested information, even when the courts or further studies later showed that the information was false.").

⁹⁴ See *id.* at 484-86.

⁹⁵ See Doré, *supra* note 7, at 296; see also Marcus, *A Modest Proposal*, *supra* note 19, at 337.

⁹⁶ See Resnik, *Whose Judgment?*, *supra* note 86, at 1527.

educate the public about the law, and model democratic values.⁹⁷ The transparency argument is also linked with press access to discovery or other pretrial information because publication by news outlets is the main mechanism by which the public stays informed of the judiciary's actions.⁹⁸

In response, proponents of confidential discovery question whether unlimited public access to discovery might ultimately disrupt the courts' operations.⁹⁹ If the parties and courts have to continually field public requests, they may have to divert resources from arguing or deciding the substantive legal issue.¹⁰⁰

5. Enforcement of Substantive Laws

Another concern with confidential discovery is that protective orders may be used to hide information — such as defects in a popular product — that would otherwise reveal a public hazard.¹⁰¹ This concern was particularly relevant when product liability cases featured prominently in litigation, as in the 1980s.¹⁰² One example is the Ford/Firestone litigation, which stemmed from the death of hundreds of people due to poor tire quality and vehicle design. Despite numerous lawsuits, information about the defects took almost a decade to come to light.¹⁰³

⁹⁷ See Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1835-36 (2014) (“In addition to Bentham’s focus on publicity as enhancing accuracy, education, and discipline, today’s courts serve another function — as a site of democratic practices.”); see also Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1683 (2016) (“At least some measure of transparency is a social good, necessary not only for individual well-being but also for the successful functioning of a democratic society. Litigation can bring to light vital information that would otherwise remain hidden through the process of civil discovery. Litigation can reveal and draw attention to social or regulatory problems that might otherwise go unnoticed. It can help citizens police the government by forcing governmental entities to release information that would otherwise be kept secret and, in so doing, promotes individual liberty by placing an additional check on authority.” (emphasis omitted)).

⁹⁸ See Miller, *supra* note 10, at 435-36.

⁹⁹ See Marcus, *Discovery Controversy*, *supra* note 10, at 484-87; Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 23-27 (1983) [hereinafter *Myth and Reality*].

¹⁰⁰ See Marcus, *Myth and Reality*, *supra* note 99, at 27.

¹⁰¹ See Marcus, *Discovery Controversy*, *supra* note 10, at 458.

¹⁰² See *id.*

¹⁰³ See Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1785-86 (2014).

On the other hand, the number of cases in which confidential discovery implicates such interests may be very small.¹⁰⁴ Additionally, government agencies already regulate product safety.¹⁰⁵

Nonetheless, while the heyday of mass tort actions asserting product liability claims might have passed, present-day examples of the danger of confidential discovery remain. For example, over the past decade, a certain make of Goodyear tires was implicated in dozens of injuries and deaths, but there was virtually no public discussion about the product because the evidence was shielded from disclosure by protective orders.¹⁰⁶ Such protective orders often shield the information forever because as cases settle, their dockets are closed and the orders are never revisited.¹⁰⁷ Additionally, protective orders are increasingly sought to protect company data about the diversity of employees as a trade secret, which might interfere with the enforcement of civil rights laws if it allows companies to hide identity group disparities in its practices.¹⁰⁸

D. Changing Contextual Factors for Confidential Discovery

While the merits of confidential discovery have been debated for many years, several new contextual changes suggest a need for continued examination of how courts balance its costs and benefits. Specifically, the growth of ESI, the increasing public access to electronic dockets, and the #MeToo movement each raise new questions about the value of confidential discovery.

¹⁰⁴ See Marcus, *Discovery Controversy*, *supra* note 10, at 478-84.

¹⁰⁵ See *id.* at 1481-82.

¹⁰⁶ See Ryan Felton, *How Goodyear Hid Evidence of 'The Worst Tire Made in History' Linked to at Least 9 Deaths*, JALOPNIK (Jan. 29, 2018, 11:22 AM), <https://jalopnik.com/how-goodyear-hid-evidence-of-the-worst-tire-made-in-his-1822200424> [https://perma.cc/XKLS-ZG83].

¹⁰⁷ See Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 478 (2006); see also Burt Neuborne, *Limiting the Right to Buy Silence: A Hearer-Centered Approach*, 90 U. COLO. L. REV. 411, 423 (2019) ("The truth is that every single day money changes hands in an American courthouse in the form of settlement agreements purchasing silence about activities that might expose a powerful payor to civil liability or public obloquy." (emphasis omitted)).

¹⁰⁸ See Jamillah Bowman Williams, *Diversity As A Trade Secret*, 107 GEO. L.J. 1685, 1689-90 (2019).

1. Growth of Electronically Stored Information

It is well understood that many rule-based reforms are aimed at reducing the error or screening costs associated with voluminous ESI.¹⁰⁹ The 2015 amendments to Rule 26(b)(1), which directly embedded a proportionality requirement into the definition of the scope of discovery, speak to this concern about economic efficiency.¹¹⁰ One example of a procedural reform designed to address the costs of producing material was the adoption of Federal Rule of Evidence 502, which permits the claw-back of privileged material that was inadvertently produced.¹¹¹

The sheer quantity of ESI represents a potentially significant challenge to standard discovery practice, including the use of stipulated protective orders.¹¹² The proliferation of laptops and smart phones means people are continually producing tremendous amounts of digital data.¹¹³ As one judge put it: “The amount of digital information that is created every day is staggering, and many companies preserve almost everything.”¹¹⁴

Looking forward, it is estimated that the world will have produced forty-four zettabytes of data within the next five years.¹¹⁵ Forty-four

¹⁰⁹ See Seth Katsuya Endo, *Discovery Hydraulics*, 52 UC DAVIS L. REV. 1317, 1338-39 (2019) [hereinafter *Discovery Hydraulics*] (discussing concerns about the costs of ESI as a driver of discovery reforms).

¹¹⁰ See Seth Katsuya Endo, *Technological Opacity & Procedural Injustice*, 59 B.C. L. REV. 821, 828 (2018); see also Henry H. Perritt, Jr., *The Electronic Agency and the Traditional Paradigms of Administrative Law*, 44 ADMIN. L. REV. 79, 89 (1992). This, however, is not the only possible definition and there are compelling arguments that, as a normative matter, social costs and non-monetizable considerations should also play a role. See Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1797-1800 (2015). Moreover, there is significant debate about whether ESI is presently putting significant logistical pressure on litigants or the courts. See Endo, *Discovery Hydraulics*, *supra* note 109, at 1339.

¹¹¹ See Liesa L. Richter, *Making Horses Drink: Conceptual Change Theory and Federal Rule of Evidence 502*, 81 FORDHAM L. REV. 1669, 1672 (2013). Note also that, as was discussed above, the substance of Rule 502 is frequently integrated into stipulated protective orders. See *id.* at 1687.

¹¹² See Marcus, *A Modest Proposal*, *supra* note 19, at 343.

¹¹³ Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 174 (2006); see also Betsy Barry et al., *The Big ESI: Going from Big to Better in E-Discovery*, 10 I/S: J.L. & POL'Y INFO. SOC'Y 721, 723 (2015) (“Simply put, the information artifacts of our personal and professional lives are now mostly digital . . .”).

¹¹⁴ Judge Andrew Jay Peck, *A Survey of Emerging Issues in Electronic Discovery: Foreword*, 26 REGENT U. L. REV. 1, 3 (2014).

¹¹⁵ *The Digital Universe of Opportunities: Rich Data and the Increasing Value of the Internet of Things*, Executive Summary, IDC (Apr. 2014), <http://www.emc.com/>

zettabytes is equivalent to one trillion gigabytes, and each gigabyte of data may correspond to tens of thousands of printed pages.¹¹⁶

This volume, in turn, may carry significant monetary costs. A 2012 study found that production costs on a per gigabyte basis averaged around \$18,000.¹¹⁷ Review costs comprised more than two-thirds of the total discovery expenses in more than half of the studied cases.¹¹⁸

However, when the risk of public disclosure is removed, producing parties are less likely to fight the disclosure of information whose relevance might be debatable. For example, in one case, two parties agreed to a stipulated protective order to resolve a dispute over whether deposition transcripts had to be produced.¹¹⁹ The producing party explicitly noted that it was not conceding the legal point about producing the deposition transcript, but, instead, stated that it merely wished to avoid costly litigation.¹²⁰

With respect to massive troves of emails containing both responsive information and non-material sensitive information that might be of gratuitous interest to the general public, and which are easily spread via traditional and social media, ESI also raises an issue of *kind* in addition to the issue of *volume*. Email is now an omnipresent form of workplace communication, leading to relaxed standards in which people commonly make statements they would not otherwise share in more formal settings.¹²¹ And, notwithstanding any corporate training, individuals frequently mix personal and work emails, creating an

leadership/digital-universe/2014iview/executive-summary.htm [https://perma.cc/TGA7-RK9R].

¹¹⁶ See Joshua M. Hummel, *What's in the Future for E-Discovery? New Federal Rules and Big Data Will Require Consideration in the Face of Continued Uncertainty*, LAW PRAC., Mar./Apr. 2015, at 52, 56.

¹¹⁷ See NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY, at xiv, 20 (2012), http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf [https://perma.cc/47B7-5A5R] (finding that 73% of e-discovery costs consists of attorneys' fees for reviewing for relevance, responsiveness, and privilege).

¹¹⁸ See *id.* at xv.

¹¹⁹ See Stipulated Protective Order at 1-2, *Calise v. Brady Sullivan Harris Mill, LLC*, No. 1:18-cv-00099-WES-PAS (D.R.I. Apr. 30, 2018), ECF No. 21.

¹²⁰ See *id.* at 2.

¹²¹ See Marcus, *A Modest Proposal*, *supra* note 19, at 343-44; James H.A. Pooley & David M. Shaw, *Finding Out What's There: Technical and Legal Aspects of Discovery*, 4 TEX. INTEL. PROP. L.J. 57, 63 (1995) ("Employees say things in e-mail messages that would never be stated directly to a person or consciously memorialized in a writing.").

additional risk of intrusion.¹²² One can easily imagine an email chain in which a relevant document is forwarded along with a non-relevant, sensitive conversation.¹²³ This creates an extra risk that the non-relevant conversation — which might involve personal details or commentary on other business associations — will be used strategically against the producing party in the public sphere beyond the contours of the particular case.¹²⁴

2. Easy Public Access to Dockets

The introduction of web-accessible electronic dockets in the early 2000s began a trend, which implicates privacy rights that are part of the equation for assessing stipulated protective orders.¹²⁵ Virtually all federal district courts have adopted the Case Management/Electronic Case Files (“CM/ECF”) system, which provides electronic access to case dockets through the Public Access to Court Electronic Records (“PACER”) interface.¹²⁶ Many courts now require parties to use the electronic filing system,¹²⁷ which fundamentally changes the public’s practical access to court documents by reducing the transaction costs of

¹²² See Marcus, *A Modest Proposal*, *supra* note 19, at 343-44; Mark Huleatt-James & Richard Lewis, *Managing Electronic Disclosure: Part Two*, *CROSS BORDER Q.*, Jan.–Mar. 2007, at 47-48.

¹²³ See CRAIG BALL, *RE-BURN OF THE NATIVE* (2007), *reprinted in* NERDY THINGS LAWYERS SHOULD KNOW ABOUT ELECTRONIC EVIDENCE (2012) (“Like their counterparts on e-mail servers, local container files weave together the user’s responsive and non-responsive items with privileged and personal messages; consequently, they’re more like self-contained communications databases than paper correspondence folders.”).

¹²⁴ See Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, 2000 *FED. CTS. L. REV.* 2, II.B.4-C.1 (2000).

¹²⁵ See Marcus, *A Modest Proposal*, *supra* note 19, at 338; Peter W. Martin, *Online Access to Court Records — From Documents to Data, Particulars to Patterns*, 53 *VILL. L. REV.* 855, 863 (2008).

¹²⁶ See *Local Court CM/ECF Information Links*, PACER, <https://www.pacer.gov/cmecf/ecfinfo.html> (last visited Dec. 31, 2019) [<https://perma.cc/CCR5-BDQ5>] (only the District of the Northern Mariana Islands and District of the Virgin Islands have not yet adopted this).

¹²⁷ See, e.g., Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 *WASH. L. REV.* 307, 318 (2004) (“In Section 205 of the E-Government Act of 2002, Congress directed the federal court system to implement public access to the Internet by 2004”); *About CM/ECF*, TENTH CIR. CT. APPEALS, <https://www.ca10.uscourts.gov/clerk/cmecf> (last visited Dec. 31, 2019) [<https://perma.cc/L4YB-K9BJ>] (“ECF became mandatory for all attorney filers on June 1, 2009.”).

procuring them.¹²⁸ Moreover, services like Bloomberg Law make targeted searching in PACER even easier.¹²⁹

The Supreme Court has recognized that remote access to digital public records may implicate a different privacy interest than in-person access to the same information found in a hard copy.¹³⁰ The hard-copy record is “practically obscure” because the transaction costs of physically visiting a courthouse to examine the records is likely high.¹³¹ And, thus, as the Supreme Court stated:

Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.¹³²

Non-parties have used this relatively cheap access for their own ends. For example, credit rating agencies have been heavy users of PACER, using the information to confirm bankruptcy filings and determine whether individuals are either involved in other monetary lawsuits or

¹²⁸ See Marcus, *A Modest Proposal*, *supra* note 19, at 337; Nancy S. Marder, *From “Practical Obscurity” to Web Disclosure: A New Understanding of Public Information*, 59 SYRACUSE L. REV. 441, 444 (2009); Nancy S. Marder, *Introduction to Secrecy in Litigation*, 81 CHI.-KENT L. REV. 305, 317 (2006) [hereinafter *Introduction to Secrecy*]. Not everybody agrees, though, that ECF/PACER has resulted in true public access because of the fees it imposes. See, e.g., Stephen J. Schultze, *The Price of Ignorance: The Constitutional Cost of Fees for Access to Electronic Public Court Records*, 106 GEO. L.J. 1197, 1223 (2018).

¹²⁹ See *The Future of Legal Tech is Here*, BLOOMBERG LAW, <https://pro.bloomberglaw.com/ai-analytics/> (last visited Nov. 12, 2019) [<https://perma.cc/H5LK-3DS2>].

¹³⁰ Cf. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (Blackmun, J., dissenting) (“The substantial character of that interest is affected by the fact that in today’s society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains age 80 . . .”).

¹³¹ Marder, *Introduction to Secrecy*, *supra* note 128, at 317; see Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772, 789 (2012) (describing steps in getting records from the New Jersey Supreme Court); Marcus, *A Modest Proposal*, *supra* note 19, at 337; Martin, *supra* note 125, at 865-66 (“Historically, courthouse access to paper records had been free in only the most literal sense.”); Winn, *supra* note 127, at 316 (“Only those with a relatively strong interest in the information would take time out of their day, wait in line at the clerk’s office, fill out the necessary forms, and pay the necessary copy charges.”).

¹³² *Reporters Comm. for Freedom of the Press*, 489 U.S. at 764.

have judgments pending against them.¹³³ This illustrates how the system shares important information whose value “flows not from the light it casts on the performance of the judicial system or on legal issues but rather from what court records reveal about individuals and entities engaged in litigation.”¹³⁴

Defining these stakes, court records frequently contain sensitive personal information, regardless of whether they were deemed “confidential” and shielded from the public by protective order.¹³⁵ For example, a study of about fifteen years of cases from the North Carolina Supreme Court found that case files “contained an average of 113 appearances of sensitive information per document.”¹³⁶ And electronic court records contribute to the aggregation problem wherein even seemingly innocuous data can ultimately reveal private or sensitive information when linked together.¹³⁷

3. The #MeToo Movement

Most of the conversation about whether stipulated protective orders harm third parties revolves around product liability suits where there is a large potential pool of people with effectively the same claim.¹³⁸ In such cases, the shielded information would likely be of direct use to other claimants in future litigation, reducing the need for duplicative discovery efforts.¹³⁹ But this misses the potential psychic and instrumental benefits of public dispute resolution processes, which may include boosting the morale of victims and protecting them from being singled out for retaliation. The practical significance of these benefits has come to the fore with the #MeToo movement, a social media

¹³³ See Martin, *supra* note 125, at 867-68.

¹³⁴ *Id.* at 866-67. Moreover, the public cares about keeping sensitive information private, even if it is in an otherwise public document, when its use does not serve the public interest. See Kirsten Martin & Helen Nissenbaum, *Privacy Interests in Public Records: An Empirical Investigation*, 31 HARV. J.L. & TECH. 111, 141 (2017).

¹³⁵ See David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807, 1890-91 (2015).

¹³⁶ *Id.* at 1857.

¹³⁷ See David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1395-96 (2017); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1185 (2002) (“Viewed in isolation, each piece of our day-to-day information is not all that telling; viewed in combination, it begins to paint a portrait about our personalities.”).

¹³⁸ See Benham, *supra* note 2, at 2200.

¹³⁹ See *id.* at 2199-2200.

phenomenon in which women shared their experiences of sexual harassment and abuse.¹⁴⁰

Confidentiality agreements and secret settlements kept hidden information about many repeat sexual harassers and abusers. As a result, the secret dispute resolution processes have probably led to third parties ending up in harm's way.¹⁴¹ And the silenced plaintiffs might also have missed out on the benefits of evidence of repeat behavior.¹⁴² But, beyond this, many individuals described feeling inspired to share their stories and bring their claims by the collective outcry and public support.¹⁴³ For example, after several major publications featured stories in which women alleged they were sexually abused by Harvey Weinstein, a former influential Hollywood executive, "an increased number of victims [were] willing to put their names 'on the record' (whether in the press or on social media), crack[ing] open a floodgate of allegations against powerful men across industries, including hospitality, journalism, tech, and law."¹⁴⁴ This is a significant example of individuals becoming more aware of the critical importance of procedure through public dialogue about substantive issues.

Moreover, this public movement has led to several policy shifts. For example, several members of Congress introduced an act that would void compulsory arbitration clauses in employment contracts when applied to sexual harassment and sex discrimination claims.¹⁴⁵ Additionally, a recent federal statute eliminated an employer's tax deduction for settlement payments and attorneys' fees where the settlement agreement is related to a claim of sexual harassment or abuse

¹⁴⁰ See Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979> [<https://perma.cc/HH45-GQKL>].

¹⁴¹ See Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 613 (2018) ("The outpouring of [#MeToo] stories shows that secrecy has its costs, both for third parties who might not have been in harm's way and for those directly involved.").

¹⁴² See *id.*

¹⁴³ See Rhitu Chatterjee, *A New Survey Find Eighty Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018, 7:43 PM), <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment> [<https://perma.cc/VJK2-ND5D>].

¹⁴⁴ Ann Fromholz & Jeanette Laba, *#metoo Challenges Confidentiality and Nondisclosure Agreements*, L.A. LAW., May 2018, at 12.

¹⁴⁵ Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. § 402(a) (2017); Ending Forced Arbitration of Sexual Harassment Act, H.R. 4570, 115th Cong. § 402(a) (2017); David S. Fortney et al., *Impact of #metoo on Mandatory Arbitration, Nondisclosure Agreements*, 15 No. 6 FED. EMP. L. INSIDER 1, 1 (2018).

and contains a confidentiality or nondisclosure provision.¹⁴⁶ Private employers have responded to this pressure too. As of December 2017, Microsoft announced that it would void mandatory arbitration clauses in its employment contracts.¹⁴⁷

4. Implications of the Changing Context

As early as 2006, Professor Richard Marcus presciently described both how the growth of ESI and the increased access to electronic dockets could tilt the balance of the confidential discovery dispute even further towards protecting privacy.¹⁴⁸ And courts have taken notice of these arguments, integrating such concerns into their evaluations when deciding whether to issue protective orders.¹⁴⁹ While the #MeToo movement has not yet been referenced in a discovery order, it seems only a matter of time. Still, on balance, the first two factors are likely to predominate and suggest that an uptick in stipulated protective orders might be seen over time as parties and courts address the increased volume of ESI and easily accessible dockets. And, in fact, the number of docket mentions of stipulated protective orders goes from 2,142 in 2000 to 4,115 in 2017, with a high of 7,127 in 2013.¹⁵⁰ While the number of civil cases also has grown over this period, these figures still represent a jump from mentions in 0.8% of cases in 2000 to mentions in 2.3% at the high point in 2013.¹⁵¹

¹⁴⁶ See Practical Law The Journal, *GC Agenda: March 2018 (Practical Law Article W-013-3500)*, THOMSON REUTERS PRAC. L. (Mar. 1, 2018), [https://1.next.westlaw.com/w-013-3500?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0&__lrTS=20191231233541361](https://1.next.westlaw.com/w-013-3500?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0&__lrTS=20191231233541361).

¹⁴⁷ See Fortney et al., *supra* note 145, at 1.

¹⁴⁸ See Marcus, *A Modest Proposal*, *supra* note 19 at 337-39.

¹⁴⁹ See, e.g., *In re NHC—Nashville Fire Litig.*, 293 S.W.3d 547, 571-72, 571 n.22 (Tenn. Ct. App. 2008) (discussing Richard L. Marcus, *A Modest Proposal: Recognizing (at Last) that the Federal Rules Do Not Declare that Discovery Is Presumptively Public*, 81 CHI.-KENT L. REV. 331 (2006), and finding that public access was not warranted).

¹⁵⁰ The author searched across all federal district court dockets for the term “stipulated protective order,” which gave a rough sense of how much they were being proposed and the relative frequency over time. The author would guess that there are at least two or three mentions per actual order assuming the term shows up in both the docket entry for the proposal and the court disposition of the proposal.

¹⁵¹ The author compared docket mentions with the total number of pending civil cases at the year’s end as provided on the U.S. District Courts website. See *Table C-1. U.S. District Courts — Civil Cases Commenced, Terminated, and Pending During the 12-Month Period Ending December 31, 2006*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/statistics_import_dir/C01Dec06.pdf (last visited Jan. 4, 2020) [<https://perma.cc/UEE8-6GD5>]; *Table C-1. U.S. District Courts — Civil Cases Commenced, Terminated, and Pending During the 12-Month Period Ending December 31,*

The observed increase does not, however, answer whether the contextual developments *should* change how often stipulated protective orders are used. While the jurisprudence governing stipulated protective orders has largely tracked with the concerns identified in both sides of the academic literature, the overarching principle in the case law has been deference to individual courts' weighing of the competing factors.¹⁵² This is most consistent with the scholars who have questioned the general approach of the pro-transparency camp that calls for virtually blanket access to discovery, whether filed or not.¹⁵³ But it also highlights that, once the First Amendment arguments are excluded, the positions of the two camps in the confidential discovery debate are close to each other. The main difference is just in the default posture and in which direction the error costs are placed. On that front, as is discussed later,¹⁵⁴ judges often enter proposed stipulated protective orders without engaging in a robust substantive analysis. Such casualness suggests, at least, some minimal pro-transparency interventions are warranted, particularly as the #MeToo movement highlights the potential harms of secrecy. At the same time, there may also be an increasing need for confidential discovery given the cost and privacy concerns associated with the growth of ESI and easier access to electronic dockets. Maintaining a fair balance will be key.

2007, U.S. COURTS, https://www.uscourts.gov/sites/default/files/statistics_import_dir/C01Dec07.pdf [<https://perma.cc/KQR5-ZZV2>] (last visited Jan. 4, 2020); *Table C-1. U.S. District Courts — Civil Cases Commenced, Terminated, and Pending During the 12-Month Period Ending December 31, 2016*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/stfj_c1_1231.2016.pdf [<https://perma.cc/7QPG-KPUB>] (last visited Jan. 4, 2020); *Table C-1. U.S. District Courts — Civil Cases Commenced, Terminated, and Pending During the 12-Month Period Ending December 31, 2017*, U.S. COURTS, <https://www.uscourts.gov/statistics/table/c-1/statistical-tables-federal-judiciary/2017/12/31> [<https://perma.cc/5ULX-XLAQ>] (last visited Jan. 4, 2020). There were 274,639 pending cases at the end of 2007 and 338,013 pending cases at the end of 2017, which corresponds to a 2.1% compound annual growth rate in total pending cases over the ten-year period.

¹⁵² See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (“To be sure, Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.”).

¹⁵³ See, e.g., Marcus, *A Modest Proposal*, *supra* note 19, at 331-32; Miller, *supra* note 10, at 429-42.

¹⁵⁴ See *infra* Part III.

II. CASE SET'S FINDINGS ABOUT HOW STIPULATED PROTECTIVE ORDERS OPERATE IN ACTUAL PRACTICE

Neither the academic literature nor the jurisprudence grapples much with the on-the-ground practice of stipulated protective orders beyond broadly describing how they function and analyzing court opinions. But, as Professor Elizabeth McCuskey noted, when studying legal decisions, one must look at both “orders (available only on dockets) and opinions (available on dockets and mostly on commercial databases) to make holistic observations about outcomes.”¹⁵⁵ And, given that federal dockets are increasingly easy to access and search, it is likely that such orders will start to play a larger role in how society understands legal rules and the work of the judiciary.¹⁵⁶ Moreover, practicing lawyers and litigants care greatly about — and are impacted by — these orders and what they suggest about how the law functions and how it might evolve.¹⁵⁷

This Article provides a window into what courts are doing in their everyday practice by examining a set of 100 orders on proposed stipulated protective orders from January 2018. This period was selected to provide the most up-to-date set of orders while also allowing sufficient time for challenges to arise. This is a cross-sectional snapshot, drawing from forty-four district courts and encompassing twenty-eight different types of cases.¹⁵⁸

The Case Set comes from PACER, found via Bloomberg Law searches for docket entries or documents where the terms “joint” or “stipulated” appeared within four words before the terms “protective” or “confidential,” which appeared within two words of the term “order.”¹⁵⁹

¹⁵⁵ Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 522 (2016).

¹⁵⁶ See David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 730 (2007).

¹⁵⁷ See *id.* at 730-31.

¹⁵⁸ See *infra* Tables 1-3.

¹⁵⁹ PACER was not designed — and is not optimized — for research. See Michael Kagan et al., *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 689 (2018) (describing how PACER is a different tool than Lexis or Westlaw and that “[e]ven the case information that is theoretically available is difficult to access”). But Bloomberg Law provides an easier way to search through PACER, particularly at a national level. See Mary Sheridan Newman et al., *Here a Docket, There a Docket: Part II*, LEGAL INFO. ALERT, vol. 52, no. 5, 2010, at 3-4 (describing how Bloomberg Law provides more effective access to PACER). Of course, even Bloomberg Law’s PACER records are not always completely accurate. See Mark Giangrande, *What’s in Your Toolbox for Using PACER for Empirical Research?*, LAW LIBR. BLOG (Aug. 4, 2014), <https://llb2.com/2014/08/04/whats-in-your-toolbox-for-using-pacer-for-empirical-research/> [https://perma.cc/F59R-J3VP] (“Since PACER dockets on Bloomberg are not updated on a real-time

The results were then screened for orders entered between January 1, 2018 and January 31, 2018.

This Article does not use the data to assert any statistically significant finding — that is a project for the future.¹⁶⁰ Still, the Case Set likely captures a large portion of the stipulated protective orders from the time period and does not have any obvious skew.¹⁶¹ For example, of the top six districts by average docket mentions from 2007-2017, four districts were also in the top six of the Case Set, as measured by the percentage of orders the districts account for in the Case Set.¹⁶² The fifth district by average docket mentions finished with the seventh highest percentage of orders in the Case Set.¹⁶³

The cases within the Case Set were mostly of types that are likely to involve sensitive personal information or trade secrets. Twenty-three orders were filed in cases categorized as civil rights claims with eighteen of these dealing with employment issues.¹⁶⁴ Eighteen orders involved copyright, patent, or trademark claims.¹⁶⁵ Seventeen orders were filed in contract cases.¹⁶⁶ A dozen orders were entered in labor cases and another twelve were filed in personal injury ones.¹⁶⁷

The Case Set tends to confirm the understanding of stipulated protective orders described above. For example, all of the orders

basis, the results were significantly incomplete.”). Still, it should be reasonably accurate given that the Case Set is looking back six months.

¹⁶⁰ During his time as a former strategy consultant, the author has engaged in data analyses ranging from, colloquially, “two points defines a line and that is a trend,” to using sophisticated statistical software like SPSS and STATA. In consultation with experts, a sample size of about 375 would permit drawing statistically significant conclusions from the data. While the author did not create a sample that large, the results confirm the anecdotal impressions of numerous litigation experts and stand on their own as discrete observations.

¹⁶¹ There are only about 4,000 mentions of the search terms across all federal dockets per year, which would suggest an average of about 330 mentions per month. Additionally, one would expect the terms to show up more than once in each docket, generally in close proximity, because there should be, at minimum, an entry with its proposal and one for its entry or denial. Thus, while this Article does not purport to draw any statistical inferences from the data, the 100 dispositions should be a good portion of the actual orders from the time period. From discussions with experts, a sample size of about 375 would permit the possibility of statistically significant findings.

¹⁶² The top six districts each had 4% or more of total docket mentions, providing an easy cut-off. The seven top district courts in both the case set and overall docket mentions are laid out *infra* Table 4 in the Appendix.

¹⁶³ See *infra* Appendix, Table 4.

¹⁶⁴ See *infra* Appendix, Table 3.

¹⁶⁵ See *infra* Appendix, Table 3.

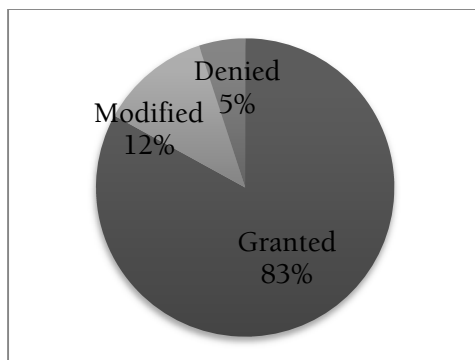
¹⁶⁶ See *infra* Appendix, Table 3.

¹⁶⁷ See *infra* Appendix, Table 3.

provide umbrella protections, permitting the parties to designate material “confidential” and shield it from general disclosure. All but one of the entered orders call for the return or destruction of the material at the conclusion of the litigation.¹⁶⁸ And eighty-five of the entered orders explicitly continue after the end of the litigation.

The Case Set also illustrates courts’ tendency to approve proposed stipulated protective orders. Out of the 100 proposed orders, only five were denied.¹⁶⁹ Four were denied because they did not establish good cause.¹⁷⁰ And two of those four denials also noted that the proposed orders conflated the standard for keeping filing under seal with the standard for keeping unfiled discovery confidential.¹⁷¹ Twelve orders modified the proposed stipulations, either correcting a conflation or making the specified dispute resolution processes conform to the judge’s chamber practices.¹⁷² The remaining eighty-three were approved without any changes.¹⁷³

Figure 1. Court Dispositions of Proposed Stipulated Protective Orders



¹⁶⁸ See Stipulated Protective Order at 2, *Idrissu v. Aerotek, Inc.*, No. 2:17-cv-13794 (E.D. Mich. Jan. 14, 2018), ECF No. 10 (entering order). The order was uncommonly short, running just two double-spaced pages. But there was nothing otherwise patently outlying about this case alleging a violation of a Michigan civil rights statute related to the plaintiff’s pregnancy and subsequent non-promotion at the defendant company.

¹⁶⁹ *Infra* Figures 1-2. Note, too, that, after the initial count but before publication, revised stipulated protective orders were approved in all five of these cases after counsel addressed the concerns of the respective courts. This means that, in the set of 100 orders, there was (at least) one or more case(s) involving a movie star/professional wrestler than there were cases in which the parties did not ultimately get to have a confidentiality order.

¹⁷⁰ See *infra* Figure 2.

¹⁷¹ See *infra* Figure 2.

¹⁷² See *infra* Figure 1; *infra* Figure 3.

¹⁷³ See *infra* Figure 1.

Figure 2. Reasons for Denials (by Case)

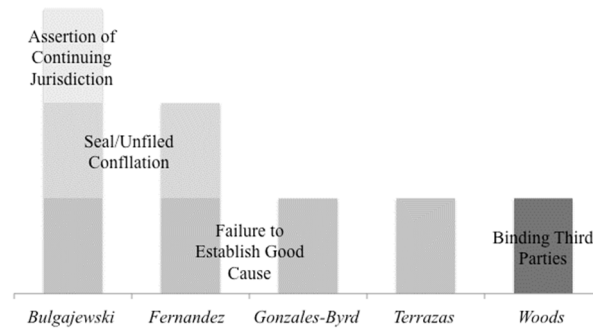
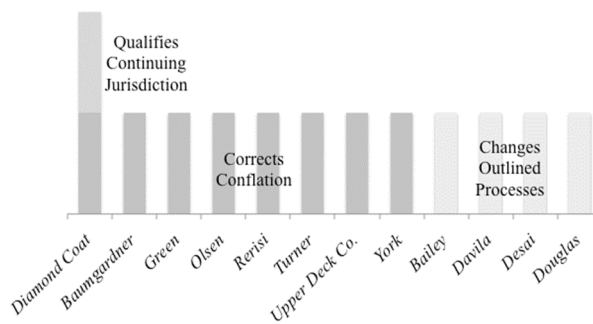


Figure 3. Modifications to Proposed Orders (by Case)



Further conforming to expectations from the literature, the stipulated protective orders were entered relatively early in the cases. The average length of time between the initial filing of the case and the entry of the protective order was 113 days. The quickest was just eleven days.¹⁷⁴ The longest was 434 days.¹⁷⁵

Overall, the Case Set is mostly solicitous of third-party interests. Eighty-six of the entered stipulated protective orders include protections for third parties. But this came at a cost: seventy-six of the entered orders required third parties to acknowledge that they were

¹⁷⁴ See Confidentiality Stipulation and Protective Order at 15, *Solus Alt. Asset Mgmt. LP v. GSO Capital Partners L.P.*, No. 1:18-cv-00232 (S.D.N.Y. Jan. 22, 2018), ECF No. 52 (entering stipulated protective order in securities case filed on January 11, 2018).

¹⁷⁵ See Order Granting Joint Motion for Entry of Stipulated Protective Order at 8, *Declue v. United Consumer Fin. Servs. Co.*, No. 1:18-cv-00425 (S.D. Cal. Jan. 30, 2018), ECF No. 48 (entering stipulated protective order in case filed on Nov. 18, 2016). In this case, the stipulated protective order was proposed after a good deal of case activity, including the filing of motions to dismiss, amended complaints, and motions to stay.

shown, and agree to be bound by, the stipulated protective order before protected materials can be shown to them. On the other hand, one of the proposed orders was denied for including this same provision.¹⁷⁶ Ultimately, in none of the cases did the docket reflect that any entity actually intervened to either assert a confidentiality claim or challenge a confidentiality designation between January and August 2019.

The Case Set did not, however, confirm all of the general practices described above. For example, forty-five of the ninety-five granted orders include “highly confidential” (or similar) protections that restrict access to the attorneys in the case, technical experts, or a very small subset of the parties.¹⁷⁷ That said, it is not clear the designation was actually used in every case where the order contains that type of provision. To this point, in only twenty-one cases did parties file any material under seal at all. And, of these, four of the six patent cases involved sealed filings, which might warrant that sort of more restrictive access.

The Case Set also offers some new insights. For example, it demonstrates that practice can be imperfect.¹⁷⁸ Implicitly acknowledging the fallibility of lawyers, seventy-eight entered orders explicitly state that inadvertent failures to designate material as confidential or inadvertent production of privileged materials would not constitute waivers. Additionally, as will be discussed in further detail later, more than half of the entered orders failed to include a particularized showing of need.¹⁷⁹ And fifteen entered orders themselves contained a mistake of law in which the standard for filing

¹⁷⁶ Order at 1, *Woods v. Progressive Ins. Co.*, No. 1:17-cv-00281 (W.D. Mich. Jan. 4, 2018), ECF No. 38 (denying proposed stipulated protective order in a disability employment case). The subsequently approved version removed the last sentence from the following provision:

(7) Others by Consent. Other persons only by written consent of the producing party or upon order of the Court and on such conditions as may be agreed or ordered. All such persons shall execute the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound.

¹⁷⁷ A few types of cases seemed to include these provisions. All but one (i.e., twenty-two of twenty-three) of the copyright, patent, personal injury-health care/pharmaceutical personal injury/product liability, personal property, other fraud, and trademark cases included this provision. Only one other category of case type (“other statutory actions,” with three of five) had more entered stipulated protective orders that included such a provision than not.

¹⁷⁸ While this itself might not be a terribly new insight, the particular instantiations of lawyer imperfection have not been widely discussed before.

¹⁷⁹ See *infra* Figure 4 and Part III.B.

material under seal was conflated with the lower standard for keeping unfiled discovery confidential.¹⁸⁰

The Case Set suggests that stipulated protective orders typically are bilateral. Only eleven orders used definitions that explicitly restrict confidentiality designations to only one party. In these instances, the definitions related to clear party-specific concerns. For example, one case involved the sexual abuse of a minor and her personal information was shielded by the stipulated protective order.¹⁸¹ Another case involved personnel records of absent third parties who were employees of a company being sued for work-related discrimination.¹⁸²

¹⁸⁰ See Stipulated Protective Order, FotoNation Ltd. v. Samsung Elecs. Co., Ltd., No. 2:17-cv-00669 (E.D. Tex. Jan. 31, 2018), ECF No. 45; Stipulated Protective Order, Harrison v. MetLife Grp., Inc., No. 4:17-cv-00412 (S.D. Iowa Jan. 29, 2018), ECF No.16; Order on Motion for Protective Order, RPG Receivables Purchase Grp., Inc. v. WKW Erbsloeh N. Am., LLC, No. 4:17-cv-01916 (N.D. Ala. Jan. 23, 2018), ECF No. 16; Proposed Stipulated Protective Order, First Solar, Inc. v. Absolute Process Instruments, Inc., No. 1:17-cv-08518 (S.D.N.Y. Jan. 23, 2018), ECF No. 26; Confidentiality Order, Caprate Events, LLC v. Knobloch, No. 1:17-cv-05907 (E.D.N.Y. Jan. 22, 2018), ECF No. 18; Stipulated Protective Order, Desai v. Lowe's, No. 4:17-cv-02485 (N.D. Ohio Jan. 22, 2018), ECF No. 9; Stipulated Protective Order, Richland State Bank v Agspring Miss. Region, LLC, No. 3:17-cv-01007 (W.D. La. Jan. 22, 2018), ECF No. 14; Protective Order, Depositors Ins. Co. v. Broan-Nutone, LLC, No. 4:17-cv-02597 (E.D. Mo. Jan. 18, 2018), ECF No. 22; Stipulated Protective Order, Idrissu v. Aerotek, Inc., No. 2:17-cv-13794 (E.D. Mich. Jan. 14, 2018), ECF No. 10; Stipulated Protective Order, Ruiz v. FCA US LLC, No. 2:17-cv-00326 (S.D. Tex. Jan. 11, 2018), ECF No. 20; Confidentiality and Protective Order, Thompson v. McCullen, No. 3:17-cv-00255 (S.D. Tex. Jan. 9, 2018), ECF No. 13; Protective Order, Alarm.com Inc. v. ipDatatel, LLC, No. 4:18-cv-02108 (E.D. Tex. Jan. 8, 2018), ECF No. 37; Stipulated Protective Order, Myatt v. Smith & Nephew, Inc., No. 3:17-cv-03102 (W.D. Ark. Jan. 5, 2018), ECF No. 12; Protective Order, Forum US, Inc. v. Southern Roller LLC, No. 4:17-cv-03764 (S.D. Tex. Jan. 3, 2018), ECF No. 7.

¹⁸¹ See Stipulated Protective Order at 2, A. M. v. Yates, No. 3:17-cv-01833 (Jan. 23, 2018), ECF No. 11 (entering order).

¹⁸² See Protective Order on Stipulation at 2, Cottone v. Does, No. 1:17-cv-01006 (N.D.N.Y. Jan. 8, 2018), ECF No. 13 (entering order protecting records of city employees who were not parties to the suit).

III. MAPPING THE CONFIDENTIAL DISCOVERY THEORY TO THE
JURISPRUDENCE & PRACTICE OF STIPULATED PROTECTIVE ORDERS

A. *Confidential Discovery Theory & Stipulated Protective Order
Jurisprudence*

The case law governing stipulated protective orders primarily relies on interpretations of Rule 26(c)'s good cause requirement.¹⁸³ As discussed above, constitutional and common law principles do not play a direct significant role in the analysis.¹⁸⁴ Instead, a court is given broad discretion in its assessment as to whether a proposed stipulated protective order meets the good cause standard required by Rule 26(c).¹⁸⁵ However, this discretion is bounded by a jurisprudence that calls for balancing several factors, which are largely consistent with the competing interests described in the confidential discovery literature.¹⁸⁶ The U.S. Court of Appeals for the Third Circuit articulated these interests in *Glenmede Trust Co. v. Thompson* as follows:

- 1) whether disclosure will violate any privacy interests;
- 2) whether the information is being sought for a legitimate purpose or for an improper purpose;
- 3) whether disclosure of the information will cause a party embarrassment;
- 4) whether confidentiality is being sought over information important to public health and safety;

¹⁸³ This analysis is generally understood to function similar to statutory interpretation. See Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 21 (2014); see also David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 929 (2011). But see Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2168 (2017); Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 125 (2015).

¹⁸⁴ See *supra* Part I.A.2.

¹⁸⁵ See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

¹⁸⁶ There appears to be a robust exchange between the judiciary and the academy. The scholarship, as it must, discusses the important case law. But the judiciary also has taken note of the scholarly debates. For example, a leading case from the Third Circuit extensively quoted Professor Miller's article in its discussion of the relevant factors to consider. See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994) (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991)).

- 5) whether the sharing of information among litigants will promote fairness and efficiency;
- 6) whether a party benefitting from the order of confidentiality is a public entity or official; and
- 7) whether the case involves issues important to the public.¹⁸⁷

Here, the parties' privacy and autonomy interests are prominently featured.¹⁸⁸ Additionally, courts may account for how a stipulated protective order promotes settlement as part of its efficiency analysis.¹⁸⁹

At the same time, the interests of third parties and the public are also present in the above-listed *Glenmede* factors. To this, the general case law holds that party agreement alone is not sufficient to demonstrate good cause.¹⁹⁰ This corresponds to the line of thought in the academic literature that assigns some public function to the judiciary and a concern about the enforcement of substantive laws.¹⁹¹

Even prominent voices in favor of confidential discovery acknowledge that there are instances in which the public's interests are sufficiently weighty to counsel against the issuance of a stipulated protective order, whether it is to ensure the accountability of courts or to promote the private enforcement of important substantive laws.¹⁹² Consonantly, the jurisprudence requires that the parties explain, with some degree of specificity, how keeping the designated materials confidential will shield a party from harm.¹⁹³ This harm usually takes the form of a legitimate privacy interest such as the protection of trade secrets or shielding an entity from undue, non-monetizable

¹⁸⁷ *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995).

¹⁸⁸ *See id.*

¹⁸⁹ *See Pansy*, 23 F.3d at 785-89 (cautioning against general consideration of how confidentiality promotes settlement but permitting specific showing).

¹⁹⁰ *See Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858-60 (7th Cir. 1994) (holding that stipulated protective order was improperly issued). Even where the parties stipulate, the court must independently determine whether the requirements of Rule 26(c) are satisfied, but there is no indication the magistrate judge did so. *See, e.g., In re Violation of Rule 28(D)*, 635 F.3d 1352, 1357-58 (Fed. Cir. 2011); *San Jose Mercury News, Inc. v. U.S. Dist. Court-N. Dist. (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999).

¹⁹¹ *See Benham*, *supra* note 2, at 2188-98.

¹⁹² *See, e.g., Miller*, *supra* note 10, at 498-99.

¹⁹³ *Compare Makar-Wellbon v. Sony Elec., Inc.*, 187 F.R.D. 576 (E.D. Wis. 1999) (holding that the terms were too general), *with Bayer AG & Miles, Inc. v. Barr Lab., Inc.*, 162 F.R.D. 456, 458 (S.D.N.Y. 1995) (denying motion to modify existing order).

embarrassment.¹⁹⁴ It can also be the need to prevent commercial exploitation of the information in ways unrelated to the litigation.¹⁹⁵

The good cause analysis also integrates the common law's presumption of a right of access to public documents¹⁹⁶ by how much weight is given to the public's interest based on the stage of litigation.¹⁹⁷ With stipulated protective orders, clauses that only protect unfiled confidential discovery require a lesser showing of need than those that call for filing material under seal.¹⁹⁸ And, with filed discovery, the standard to shield information becomes more difficult to meet as one goes from materials used to support non-dispositive motions to dispositive motions and further to trial.¹⁹⁹ Still, even the most permissive standard requires that parties show a particularized need for the protective order.²⁰⁰

Towards the more demanding end of the spectrum of good cause, as with a motion to seal materials connected to a dispositive motion, the parties must demonstrate a compelling need that overcomes a strong presumption of public access.²⁰¹ And “[e]ven if designated as confidential under a protective order, discovery materials . . . lose confidential status (absent a showing of ‘most compelling’ reasons) if introduced at trial or filed in connection with a motion for summary judgment.”²⁰²

¹⁹⁴ See *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 484 (3d Cir. 1995); *Pansy*, 23 F.3d at 787; *Shelley v. Cty of San Joaquin*, No. 2:13-CV-0266 MCE DAD, 2015 WL 2082370, at *4-5 (E.D. Cal. May 4, 2015).

¹⁹⁵ See, e.g., *Damiano v. Sony Music Entm't, Inc.*, 168 F.R.D. 485 (D.N.J. 1996).

¹⁹⁶ See *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-99 (1978).

¹⁹⁷ See *Shane Grp., Inc., v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 307 (6th Cir. 2016). Compare *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001) (dispositive vs. non-dispositive), with *Constand v. Cosby*, 112 F. Supp. 3d 308 (E.D. Pa. 2015), vacated, 833 F.3d 405 (3d Cir. 2016).

¹⁹⁸ See *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945-46 (7th Cir. 1999).

¹⁹⁹ See *Level 3 Commc'ns, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572, 579, 583 (E.D. Va. 2009).

²⁰⁰ See, e.g., *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157 (3d Cir. 1993).

²⁰¹ See, e.g., *id.*

²⁰² MANUAL FOR COMPLEX LITIGATION § 11.432 (2019), annotated for DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION (4th ed. 2019) (listing cases from four circuits in support). This, however, is quite muddled in practice. See *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141, 144 (2007) (noting that both the reported case law and the comments received by the Sedona Conference Working Group “demonstrates that litigants frequently move to seal docket entries, court filings, or whole proceedings, citing standards applicable only in the discovery or non-dispositive context. Likewise,

Another element of the jurisprudence that speaks both to the public's interest in overseeing the courts' decision-making processes and the rights of third parties is its treatment of third-party intervention. While the general requirement that third-party intervention in a lawsuit be timely is a feature of the case law dealing with stipulated protective orders, the definition of "timely" is expansive, permitting third parties to challenge such orders even after the lawsuit has concluded.²⁰³ Most commonly, media entities seek to intervene in mass tort cases, contributing to the promotion of public health and safety by publicizing information that leads to additional regulation or private suits to enforce the substantive law.²⁰⁴

Although it is rare, as part of their good cause evaluation, some courts also decline to enter stipulated protective orders that purport to bind third parties or limit their rights.²⁰⁵ For example, a district court rejected a proposed stipulated protective order that included a provision limiting the grounds that non-parties could rely on to challenge the parties' designations.²⁰⁶ The same court also advised the parties that their agreement could not limit any potential waiver, as to third parties,

judges across the country are routinely presented with stipulated discovery protective orders that the parties claim govern filings on the merits. Under the pressure of court workloads, some judges may be tempted to improperly forgo the individual determinations necessary to seal court documents, and instead issue orders in accordance with the parties' stipulations.").

²⁰³ See, e.g., *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1353 (9th Cir. 2013) ("However, motions to intervene for the purpose of seeking modification of a protective order in long-concluded litigation are not untimely."); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778-79 (3d Cir. 1994); *Leucadia*, 998 F.2d at 161 n.5 ("[A] district court may properly consider a motion to intervene permissively for the limited purpose of modifying a protective order even after the underlying dispute between the parties has long been settled."); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) ("We find nothing improper in allowing intervention to challenge a protective order still in effect, regardless of the status of the underlying suit."); *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 786 (1st Cir. 1988) ("Because Public Citizen sought to litigate only the issue of the protective order, and not to reopen the merits, we find that its delayed intervention caused little prejudice to the existing parties in this case.").

²⁰⁴ See, e.g., *Ford v. City of Huntsville*, 242 F.3d 235 (5th Cir. 2001); *Pierson v. Indianapolis Power & Light Co.*, 205 F.R.D. 646, 647 (S.D. Ind. 2002) ("[T]he protective order explicitly allows any party and any interested member of the public to challenge the sealing of particular documents."); *Van Etten v. Bridgestone/Firestone, Inc.*, 117 F. Supp. 2d 1375 (S.D. Ga. 2000), *vacated on other grounds*, 263 F.3d 1304 (11th Cir. 2001).

²⁰⁵ See, e.g., *Hartford Fire Ins. Co. v. Guide Corp.*, 206 F.R.D. 249, 250-51 (S.D. Ind. 2001); *Nestor v. Posner-Gerstenhaber*, 857 So. 2d 953, 955 (Fla. Dist. Ct. App. Oct. 22, 2003).

²⁰⁶ See *Hartford Fire Ins.*, 206 F.R.D. at 250-51.

resulting in inadvertent disclosures.²⁰⁷ Likewise, courts have noted that stipulated protective orders cannot prevent parties in other cases from pursuing those materials covered by such orders.²⁰⁸

An exhaustive search found no instances in which a court rejected a proposed stipulated protective order for being too one-sided.²⁰⁹ Nevertheless, this additional theoretical limitation can be gleaned both from courts' dicta and from the broader (non-stipulated) protective order jurisprudence. Courts frequently caution parties that they cannot shift the burden to the party challenging a confidentiality designation.²¹⁰ Courts even differ as to whether parties can agree to provisions that require the party challenging a confidentiality designation to file a motion with the court or whether the designating party must affirmatively file a motion to protect the specific material once the designation has been questioned.²¹¹ Further illustrating the concern with one-sided agreements, in a recent federal case, a party proposed a modification to the protective order that would only permit its executives to access the opposing party's "Highly Confidential" material without providing reciprocal access.²¹² The district court rejected the proposed modification because there was no reason that the provision should only favor one party.²¹³

²⁰⁷ See *id.*

²⁰⁸ See, e.g., *Nestor*, 857 So. 2d at 955.

²⁰⁹ While there were no instances in which a court rejected a proposed stipulated protective order for being too one-sided, there are several instances in which courts rejected arbitration agreements for creating discovery processes that were too unfair to one side. See Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 ARIZ. ST. L.J. 471, 513-14 (2013) (discussing concepts and citing case examples).

²¹⁰ See, e.g., *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986). *But see*, e.g., *Cranmer v. Colo. Cas. Ins. Co.*, No. 2:14-CV-645-MMD-VCF, 2014 WL 6611313, at *3-4 (D. Nev. Nov. 20, 2014).

²¹¹ Compare Stipulated Protective Order at 6, *In re Chase Bank USA, N.A. "Check Loan" Contract Litig.*, No. 3:09-md-02032-MMC (N.D. Cal. Aug. 21, 2009), ECF No. 48 (entering proposed stipulated protective order with provision requiring challenging party to file), and *Trusz v. UBS Realty Inv'rs LLC*, No. 3:09 CV 268(JBA), 2010 WL 3583064, at *8-9 (D. Conn. Sept. 7, 2010) (discussing challenge when producing party designated 1.8 million documents "confidential"), *on reconsideration in part*, No. 3:09 CV 268(DJS), 2011 WL 121651 (D. Conn. Jan. 13, 2011), and *opinion vacated in part on reconsideration*, No. 3:09 CV 268(DJS), 2011 WL 124504 (D. Conn. Jan. 13, 2011), with Order Re: Joint Statement of Discovery Dispute at 2, *Ramirez, v. Trans Union, LLC*, No. 3:12-cv-00632 (N.D. Cal. July 25, 2012), ECF No. 28 (rejecting proposed stipulated protective order with provision requiring challenging party to file).

²¹² See *Oracle USA, Inc. v. Rimini St., Inc.*, No. 2:10-CV-00106-LRH-PAL, 2015 WL 3721687, at *2 (D. Nev. June 12, 2015).

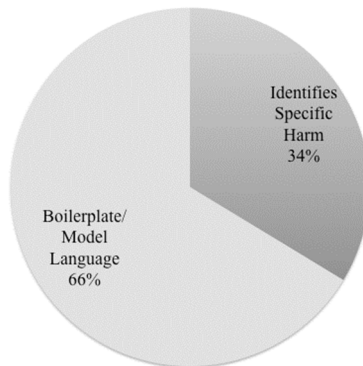
²¹³ See *id.*

B. *Confidential Discovery Theory & Stipulated Protective Order Practice*

As shown above, the case law governing stipulated protective orders broadly tracks the scholarship on confidential discovery. But actual court practices in entering stipulated protective orders present a more complicated picture.

Despite the rationales identified in the scholarship and the case law requiring a true independent examination by the courts as to whether the parties would suffer a specific harm from public disclosure,²¹⁴ the reality of what courts are doing suggests that party agreement itself may be sufficient for many courts to enter proposed stipulated protective orders. In the Case Set, just four orders were denied because the parties failed to establish good cause by articulating a particularized need for protection.²¹⁵ But the ninety-five approved orders do not suggest that parties were truly diligent in showing the specific harm that is the crux of a good cause finding. Rather, in the approved group, only thirty-two orders described specific types of information to be protected or harms that would follow from public disclosure.²¹⁶ Almost twice as many entered orders only included generic language, such as a recitation of the list of confidential information from Rule 26(c)(1)(g) or definitions drawn from model orders.²¹⁷

Figure 4. Good Cause Language in Entered Orders



This general deference to the parties' agreements, even in the absence of a particularized showing of harm, also represents a break with

²¹⁴ See *Suell v. United States*, 32 F. Supp. 3d 1190, 1191-92 (S.D. Ala. 2014).

²¹⁵ See *supra* Figure 2.

²¹⁶ See *infra* Figure 4.

²¹⁷ See *infra* Figure 4.

confidential discovery theory's concern for third parties whose legal rights might be affected.²¹⁸ When courts enter stipulated protective orders that lack such language, they are effectively disregarding the interest of third parties — whether individual entities or the broader public — in open dispute resolution processes by ignoring the good cause requirement of Rule 26(c).²¹⁹

Still, the Case Set demonstrates that the stipulated protective order practice does not totally ignore third-party interests. Illustrating this, as previously noted, eighty-six out of ninety-five approved stipulated protective orders included provisions that granted rights to third parties. The most common provisions explicitly permitted third parties to challenge confidentiality designations or to protect their own information. Additionally, when the case was likely to implicate the privacy rights of specific third parties as might be seen when the personnel information of a defendant-corporation would be material, a few orders directly referenced them. One court initially denied a proposed stipulated protective order because it required third parties to sign a form acknowledging their willingness to be bound by the order.²²⁰ With that said, third-party information generally is not well protected by parties to the litigation.²²¹

²¹⁸ See generally Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between*, 30 HOFSTRA L. REV. 783, 808 (2002).

²¹⁹ See, e.g., *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994); *Welle v. Provident Life & Accident Ins. Co.*, No. 3:12-cv-3016 EMC (KAW), 2013 WL 6055369, at *2 (N.D. Cal. Nov. 14, 2013) (“Now, although Provident identifies the information at issue as proprietary and confidential, it does not provide reasons beyond the boilerplate references to competitive disadvantage if the information were publicly available.”); *BCI Commc’n Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154, 160 (N.D. Ala. 1986) (“Moreover, the particular facts alleged by defendants in their present motion as constituting good cause for the broad protective order sought do not impress the Court as being anything more than ordinary garden variety or boilerplate ‘good cause’ facts which will exist in most civil litigation.”). This, however, seems more honored in the breach when it comes to unfiled discovery or discovery filed in support of a non-dispositive motion. See *Erichson*, *supra* note 82, at 359, *passim* (explaining why a light showing of need should be sufficient to support a finding of good cause when a protective order is uncontested). See generally Reid K. Weisbord & David Horton, *Boilerplate and Default Rules in Wills Law: An Empirical Analysis*, 103 IOWA L. REV. 663 (2018) (discussing benefits and problems with boilerplate).

²²⁰ See Order at 1, *Woods v. Progressive Ins. Co.*, No. 1:17-cv-00281 (W.D. Mich. Jan. 4, 2018), ECF No. 38 (denying proposed stipulated protective order in a disability employment case).

²²¹ See *Conley et al.*, *supra* note 131, at 781 (“Each and every form filled out by the parties, their lawyers, or by related third parties (witnesses, jurors, etc.) potentially contains vast amounts of personal data including home or school addresses, places of

The Case Set did not include any denials for one-sidedness or unequal bargaining power between the parties. Still, this concern may, perhaps, be inferred from the bilateral nature of the approved orders.²²² All ninety-five of the approved orders presented frameworks that were facially neutral between the parties, even in the rare instances in which the statement of good cause described only one party's information.

Confidential discovery theory's concern for the enforcement of substantive laws is complicated in practice, perhaps reflecting the divide in the scholarship.²²³ All ninety-five approved orders included a general prohibition on third-party use of the information, which reduces parties' ability to share information with other potential litigants. On the other hand, four orders — all of which involved regulated entities — explicitly permitted information sharing with regulators. And several included provisions which acknowledged that other courts or government entities could command the production of material designated confidential.

Probably the most notable finding from the Case Set is a common mistake of law in the entered stipulated protective orders wherein the standard for filing materials under seal is conflated with that for keeping unfiled discovery confidential. Two orders were denied on this basis. Seven of the thirteen orders that were modified by the courts were done to correct that mistake. These findings are promising and consistent with the private procedural ordering theory's basic premise regarding the hierarchy of law that should constrain judicial discretion and trump party agreement. But fifteen of the ninety-five approved orders contained this mistake. In other words, more than one in seven approved stipulated protective orders contained a significant error of law that was ultimately imported into the court's practice by party agreement.

With that said, the conflation error might not be entirely driven by the parties.²²⁴ Drawing from the findings discussed above, there were

employment, birthdates, and, in many cases, Social Security numbers."); *see also* Martin, *supra* note 125, at 884.

²²² *See generally* Ramirez-Baker v. Beazer Homes, Inc., 636 F. Supp. 2d 1008, 1020 (E.D. Cal. 2008) (rejecting an argument that an arbitration agreement with discovery-limiting provisions was one-sided because the provisions were bilateral).

²²³ *Compare* Benham, *supra* note 2, at 2182, with Marcus, *supra* note 10, at 496-97.

²²⁴ *See generally* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1933-34 (2011); Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 666 (2015); Diego A. Zambrano, *Judicial Mistakes in Discovery*, 112 NW. U. L. REV. ONLINE 217 (2018), for excellent discussions of legal mistakes. As to this particular context, it probably rests with the parties. *See, e.g.*, United States v. Carell, No. 3:09-00445, 2011

twenty-five total proposed stipulated protective orders with the conflation — a full quarter of the Case Set. But nine of the orders entered with the mistake came from jurisdictions with a non-compliant model order, making it difficult to fault the parties. Nevertheless, even after subtracting those instances, the courts only correctly addressed the parties' conflation — through modification or denial of the proposed stipulated protective order — about 63% of the time overall (ten of sixteen cases). In more than a third of the instances, the courts simply entered the flawed stipulated protective order.

C. Implications of Comparisons

1. The Limits of Trans-Substantive Procedure

Throughout this Article, the conflation of the standard to file materials under seal with that for keeping unfiled discovery materials confidential has been defined as a mistake of law.²²⁵ This is consistent with the jurisprudence as it is articulated by the appellate courts and in the more formal opinions of district courts that are issued to resolve disputes.²²⁶ But it is possible that, in part, the on-the-ground practice of stipulated protective orders is one place where the courts are carving out a special exception for certain types of claims.²²⁷ Of the fifteen stipulated protective orders that were entered with the conflation, three were patent cases. And courts have recognized how certain types of cases, such as those involving patent claims, might present a differential need for protective orders, stipulated or not.²²⁸ While this Article does

WL 1114242, at *3 (M.D. Tenn. Mar. 24, 2011) (“The parties in cases often draft proposed joint Protective Orders that violate the requirements of *Procter & Gamble* and *Brown & Williamson*, and it appears that many attorneys are unfamiliar with the principles set forth in these two cases.”).

²²⁵ See *supra* Part III.

²²⁶ See *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 307 (6th Cir. 2016).

²²⁷ See generally Margaret B. Kwoka, *Judicial Rejection of Transsubstantivity: The FOIA Example*, 15 NEV. L.J. 1493, 1495 (2015) (describing how contemporary civil procedure is marked by the “departure from the transsubstantive design of the Federal Rules by judicial decisions that create substance-specific procedure operating in their shadow”); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371 (2010) (providing a history of trans-substantive procedure and the implications of its theoretical underpinnings).

²²⁸ See, e.g., *E3 Biofuels, LLC v. Biothane Corp.*, No. 1:12-mc-76, 2013 WL 3778804, at *3 (S.D. Ohio July 18, 2013) (“[P]articular cases, such as patent lawsuits, routinely require protective orders . . . to protect the interests of the litigants.”); *Method Elecs., Inc. v. Delphi Auto. Sys. LLC*, No. 09-13078, 2009 WL 3875980, at *2 (E.D. Mich. Nov.

not make any claims about the general value of trans-substantive procedure, it is easy to see how stipulated protective orders might be a procedural mechanism that is ripe for substance-specific adaptation.²²⁹ As noted above, two-thirds of the patent cases in the Case Set involved sealed filings — a rate that is more than three times the remainder of the cases.

2. Judicial Practice Trends Too Much Towards Secrecy

A second implication of the prevalence of the common legal errors in the Case Set — that is, the standards conflation and the lack of specific good cause language — is that courts probably are erring on the permissive side when it comes to entering stipulated protective orders. Both of those mistakes speak to a casualness about the public's interest in transparency — a vital component of the jurisprudence. As such, while judicial discretion is an effective tool for dealing with fact-specific questions, here, it is possible that courts are erring too much in favor of confidential discovery. The one saving grace is that, as mentioned above, only about one in five of the suits in the Case Set actually involved the filing of sealed materials. And, as of August 2019, only eighteen of the cases are still pending at the trial level (and five of this subset have already had material filed under seal), which suggests that there will not be a giant uptick. And, given those realities, it is possible that courts are simply kicking the can down the road to when they are faced with an actual sealed filing. To this, in the Case Set, two courts subsequently denied motions to file sealed material and one court ordered material unsealed.

3. Considering the Relative Bargaining Power of the Parties

One final implication of the regular presence of the conflation mistake is the concern that it could migrate from contexts in which the parties are likely to be sophisticated actors (as with, for example, patent cases) who deliberately — and mutually — selected the non-conforming standard for filing materials under seal to suits in which it only benefits

17, 2009) (“Patent litigation often requires parties to disclose confidential information to one another . . . [T]here is danger that one party may use such information to the competitive disadvantage of the other. The typical means to mitigate this risk is through a protective order . . .”).

²²⁹ See generally Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1637 (2017) (arguing that “[t]he time has come for civil procedure to move beyond rigid formalism and instead begin focusing on substantive equality.”) (emphasis omitted).

a sophisticated producing party to the detriment of an unsophisticated requesting party.²³⁰ While a mutual misstatement of the law is bad enough, the second situation presents problematic fairness concerns.²³¹ An unsophisticated requesting party who agrees to a stipulated protective order without understanding the importance of publicity might lose a key negotiating element or the benefits of public investigation that might accompany public disclosure of the uncovered information.²³² Such a circumstance might come about because it is hard to educate individuals about the importance of procedure, and sophisticated parties may use “cognitive biases and information asymmetries to manipulate [individual] perceptions about procedural terms.”²³³ Weaker parties might also be more vulnerable to short-term incentives.²³⁴ Illustrating this concern, the *Elliott-McGowan Productions v. Republic Productions, Inc.*²³⁵ decision is open to criticism because the contractual provisions — limiting the inspection of a film distributor’s financial records — may have been the product of unequal bargaining power between a smaller production company and a larger film distributor.²³⁶

The Case Set findings are somewhat suggestive in this regard. Although it is difficult to assess the relative bargaining power of the parties, there appeared to be a general preference amongst companies for more secrecy. There were thirty-two entered stipulated protective orders in which the parties were both either individuals or companies. In the sole case in which both parties were individuals, the entered stipulated protective order did not include the standards conflation. Of the thirty-one entered orders involving companies on both sides, eight

²³⁰ See Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L.J. 1277, 1279-80 (2019) (describing how contract terms and court interpretations can migrate from sophisticated-actor contexts to consumer contexts). See generally Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97 (1974).

²³¹ See Resnik, *Whose Judgment?*, *supra* note 86, at 1487 (describing the normative problems with letting a sophisticated repeat actor strategically maneuver to the detriment of a one-shot player in the context of vacatur).

²³² See Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 732-33 (2011).

²³³ *Id.* at 762.

²³⁴ See *id.* at 764.

²³⁵ 145 F. Supp. 48 (S.D.N.Y. 1956).

²³⁶ See, e.g., *Federal District Court Upholds Contractual Limitation upon Discovery*, 5 UTAH L. REV. 409, 412 (1957); see also Henry S. Noyes, *If You (Re)build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration’s Image*, 30 HARV. J.L. & PUB. POL’Y 579, 608 n.127 (2007).

of the orders had the conflation. For the sixty-three entered orders in which the parties were mixed, only seven had the conflation error.

IV. ADDRESSING THE PROBLEMATIC PRACTICES

This Part explores several solutions to address the risk of legal mistakes commonly found in court-entered stipulated protective orders. It divides proposals into those that may be implemented locally by courts, those that require doctrinal interventions, and legislative responses.

A. Local Rules & Tools

Given that the formal doctrine already addresses common mistakes, courts might consider adopting local rules or tools that would help in the actual practice of confidential discovery.²³⁷

To this, an early hypothesis was that, if a jurisdiction had a model or sample order, it would dictate whether the proposed stipulated protective order included the standards conflation.²³⁸ Anecdotally, it appears likely that the existence of a compliant model order (i.e., one that uses the correct legal standard) helps prevent the conflation. Three of the granted orders with the standards conflation came from jurisdictions with a compliant model.²³⁹ Nine of the entered non-complying orders came from jurisdictions whose model orders also contained the mistake.²⁴⁰

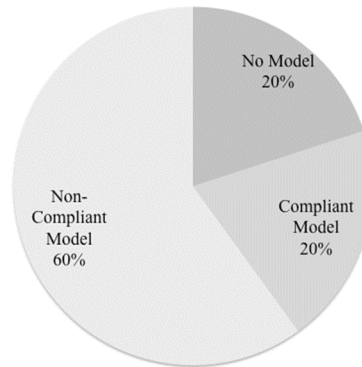
²³⁷ Furthermore, a recent Supreme Court decision does not add to any confidence of a top-down doctrinal shift that is going to reduce the emphasis placed on parties' agreements. See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (holding that "where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4 [of the FOIA scheme]").

²³⁸ See *Maxchief Invs. Ltd. v. Plastic Dev. Grp., LLC*, No. 3:16-CV-63, 2017 WL 710956, at *2 (E.D. Tenn. Feb. 22, 2017) (noting that "courts in other circuits have adopted pre-approved protective orders that parties in patent-infringement suits may enter into").

²³⁹ See *infra* Figure 5.

²⁴⁰ See *infra* Figure 5.

Figure 5. Model Orders and Entered Orders' Conflation



Although not featured in the figure above, the two proposed orders denied, in part, for the standards conflation both came from jurisdictions with compliant models. This suggests that district courts might be able to prevent mistakes by providing a compliant model order.²⁴¹ This solution, though, might exacerbate the problem of parties using overly generic language to describe the need for confidentiality.

Federal courts also can adopt local rules that promote transparency, even if they do not directly address either the conflation or boilerplate issues. For example, the District of South Carolina adopted a rule that created a strong presumption against secret settlements.²⁴² And while such rules might have unintended downsides,²⁴³ they should prevent parties from conflating the standard for filing under seal with a lesser standard for keeping unfiled discovery confidential.

Courts also might be able to encourage parties to craft better, more compliant proposed orders (or, perhaps, reduce the need for them

²⁴¹ This, however, might have no helpful effect on the good cause error. Merely parroting model order language is unlikely to capture the need for confidentiality specific to the parties. See *Stroup v. United Airlines, Inc.*, No. 15-CV-01389-WYD-CBS, 2016 WL 7176717, at *4 (D. Colo. Sept. 16, 2016) (“A ‘standard’ or ‘model’ protective order has no talismanic value and should not substitute for counsels’ own thoughtful analysis. Counsel should tailor a stipulated protective order to the specific needs and circumstances of the case at hand, rather than reflexively recycling hackneyed forms.”).

²⁴² See Local Civ. Rule 5.03(E) (D.S.C.).

²⁴³ See Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1459 (2006) (explaining how “restrictions on secret settlements not only may be ineffective, but in fact may be counterproductive” because they might “encourage parties to settle before the claimant files suit or to choose arbitration instead of litigation,” reducing the overall amount of public information).

altogether) through more active management.²⁴⁴ When courts provide parties with informal guidance and closely supervise discovery, it can encourage significantly greater cooperation.²⁴⁵

B. Doctrinal Interventions

1. Require More Explanation in Orders

Another potential solution would be to require more explanation in the entered stipulated protective orders.²⁴⁶ Courts are generally expected to justify their decisions with reasoning.²⁴⁷ But, with stipulated protective orders, one rarely sees anything more than a general invocation of Rule 26's standard.²⁴⁸

Having to give reasons promotes deliberation and reinforces the legitimacy of courts' orders. As Professor Martin Shapiro explained, "A decisionmaker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision than will a decisionmaker able to proceed by simple fiat."²⁴⁹ This deliberative process is a clear antidote to the problem of generic expressions of need that commonly appeared in the entered stipulated protective orders. Moreover, a skepticism of rote recitals speaks to the Rules Committee's concerns that led to the 2015 amendment to Rule 34, which prevents the use of boilerplate objections to discovery requests.²⁵⁰

Additionally, in taking this time to explain its reasoning, courts should be less likely to make the conflation mistake. To put it another way, when courts have to explain what they are doing, they are more likely to avoid accuracy mistakes — an essential component of their

²⁴⁴ See, e.g., Endo, *Discovery Hydraulics*, *supra* note 109, at 1358.

²⁴⁵ See *id.* at 1350-55.

²⁴⁶ See Portia Pedro, *Stays*, 106 CALIF. L. REV. 869, 915-19 (2018) (explaining benefits of reason-giving with procedural questions).

²⁴⁷ See *id.* at 915; see also Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633-34 (1995) ("The conventional picture of legal decisionmaking, with the appellate opinion as its archetype and 'reasoned elaboration' as its credo, is one in which giving reasons is both the norm and the ideal. Results unaccompanied by reasons are typically castigated as deficient on precisely those grounds. In law, and often elsewhere, giving reasons is seen as a necessary condition of rationality. To characterize a conclusion as an *ipse dixit* — a bare assertion unsupported by reasons — is no compliment.").

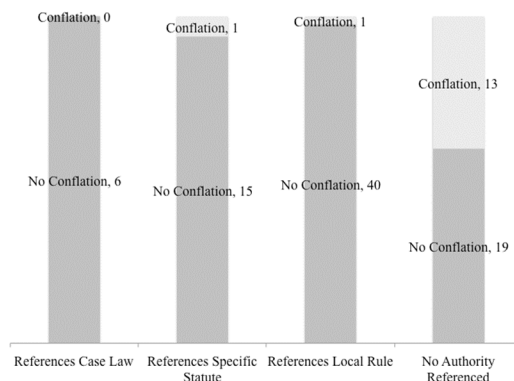
²⁴⁸ See *supra* Figure 5.

²⁴⁹ Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 180 (1992).

²⁵⁰ See FED. R. CIV. P. 34 advisory committee's note to 2015 amendment; see also Endo, *Discovery Hydraulics*, *supra* note 109, at 1355-56.

legitimacy.²⁵¹ Illustrating this, in the Case Set, thirty-two of the entered orders did not reference any legal authority other than generic references to Federal Rule of Civil Procedure 26 or Federal Rule of Evidence 502.²⁵² This subset had thirteen orders with the conflation. In the remaining sixty-three entered orders, there were only two orders with the conflation.²⁵³

Figure 6. References to Legal Authorities in Entered Orders



One possible objection to this proposal is that asking courts to explain their reasoning would unduly burden them.²⁵⁴ But the simple act of writing should not create a significant opportunity cost for the courts given that they already are charged to do this analysis.²⁵⁵

Another potential objection is that trial courts have broad discretion to grant or deny proposed stipulated protective orders.²⁵⁶ And it follows

²⁵¹ See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1084 (9th Cir. 2010) (noting that “conducting a more detailed analysis will tend to improve the accuracy, transparency and legitimacy of the proceedings”). See generally Michael T. Morley, Note, *Avoiding Adversarial Adjudication*, 41 FLA. ST. U. L. REV. 291, 330 (2014) (“People reasonably may question the efficacy or legitimacy of courts if they are perceived as being indifferent to achieving accuracy and substantive justice . . .”).

²⁵² See *infra* Figure 6.

²⁵³ See *infra* Figure 6.

²⁵⁴ See Marcus, *supra* note 10, at 501.

²⁵⁵ See Pedro, *supra* note 246, at 917 (“If a court is already deciding according to the standard, the additional time it takes to explain verbally that thought process should be reasonably short and, at least, should not be the dispositive factor for a court determining whether to write.”). Additionally, there are other structural ways of addressing the court-capacity costs of requiring courts to spend more time providing reasons to litigants for their decisions. See generally F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 752–53 (2018).

²⁵⁶ See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

that any appellate review will be highly deferential to the trial court's decision, reducing the structural demand for explicit discussion of its logic.²⁵⁷ Even so, this discretion is not unlimited. Thus, reason-giving should help effectuate meaningful appellate review.²⁵⁸ Additionally, the case law sets forth the factors that trial courts should consider, providing clear instructions and enhancing uniformity of legal principle, while still allowing for case-by-case determinations.²⁵⁹

Finally, legal decisions impact the rights — and lives — of parties.²⁶⁰ Giving reasons lets parties know that their arguments have been heard and understood — a key component of the participation norm.²⁶¹ And, even in a circumstance in which the court is granting the parties' requested relief, such transparency lets outsider observers understand the rationale for the decision, adding to the accountability of courts.²⁶²

2. Permit Partial Redactions

Instead of using stipulated protective orders to reduce the screening costs and privacy concerns of the producing parties, an alternative tactic frequently employed in practice is the redaction of non-relevant or sensitive information from responsive documents.²⁶³ But Rule 34 does

²⁵⁷ See Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 704-05 (2014); Pedro, *supra* note 246, at 927.

²⁵⁸ See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 662 (1994).

²⁵⁹ See Effron, *supra* note 257, at 716 (explaining that procedural rules should lay out the purposes of the mechanisms and how courts should consider the relevant factors).

²⁶⁰ See Pedro, *supra* note 246, at 915.

²⁶¹ See generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW 125-27, 149-63, 175-78 (1990); Susan A. Fitzgibbon, *The Judicial Itch*, 34 ST. LOUIS U. L.J. 485, 506 (1990) ("The arbitral opinion contributes to the therapeutic effect [of] the process and the continuing relationship of the parties by explaining the reasoning behind the award, demonstrating that the arbitrator heard and considered the arguments of each side."); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978) ("Without [reasoned] opinions the parties have to take it on faith that their participation in the decision has been real, that the arbiter has in fact understood and taken into account their proofs and arguments.").

²⁶² See Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 510-11 (2015).

²⁶³ See *York Grp. v. Pontone*, No. 2:10-CV-1078-JFC, 2011 WL 13136290, at *3 (W.D. Pa. Dec. 15, 2011) ("Despite the absence of any provision in Rule 34 authorizing the redaction of non-responsive information from documents produced in response to a request for production, it is not uncommon for such redactions to be made . . ."); JAY E. GRENIG & JEFFREY S. KINSLER, HANDBOOK OF FEDERAL CIVIL DISCOVERY AND DISCLOSURE E-DISCOVERY AND RECORDS § 7:43 (4th ed. 2019); see also Vernon M. Winters, *Secrets Revealed: Side Effects of High-Stakes Litigation*, FED. LAW., July 2001, at 30, 35

not explicitly contemplate such redactions.²⁶⁴ And, while courts are split on whether it is permissible,²⁶⁵ the prevailing view is that it is “generally improper for parties to unilaterally make redactions within responsive documents on the grounds that the redacted portions are not relevant.”²⁶⁶ Courts have identified strong reasons for the dominant trend in the case law, including the possibility of abuse, the importance of seeing relevant information in its context, and the risk that even proper redactions might engender distrust between the parties.²⁶⁷

While courts have (for good reasons) generally disfavored the redaction of non-relevant, sensitive information in responsive documents, it is possible that the growth of email will force a new look.²⁶⁸ And Rule 5.2 already articulates a concern for keeping certain types of information exchanged in discovery presumptively private through redactions.²⁶⁹ While the United States has not gone that far, Canada’s legal system permits redactions along such lines.²⁷⁰

(describing the practical costs and benefits of redacting vigorously). Speaking to the interchangeability of the tactics, one court, in part, denied a party’s request for permission to redact non-relevant information from responsive documents because of the existence of a stipulated protective order. See *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 8:10 ML 02151 JVS, 2012 WL 9337626, at *1 (C.D. Cal. Jan. 13, 2012). In a mirroring circumstance, another court granted a party’s request to redact non-relevant information from responsive documents, in part, because sensitive information had been exposed to the public in violation of an existing protective order. See *In re Takata Airbag Prods. Liab. Litig.*, No. 15-2599-MD-MORENO, 2016 WL 1460143, at *2 (S.D. Fla. Feb. 24, 2016).

²⁶⁴ See FED. R. CIV. P. 34; see also *York Grp.*, 2011 WL 13136290, at *3.

²⁶⁵ See, e.g., *In re Toyota Motor Corp.*, No. 8:10 ML 02151 JVS, 2012 WL 9337626, at *1 (“While the Special Masters recognize there is a split of authority regarding “relevance” redactions within responsive documents, we feel that the better policy is not to allow unilateral redactions based on relevance by the producing party.”).

²⁶⁶ Steven Gensler, *Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes*, in 1 FED. RULES CIV. PROC., RULES & COMMENT. RULE 34 (Feb. 2019) (citing *Christine Asia Co., Ltd. v. Alibaba Grp. Holding Ltd.*, 327 F.R.D. 52, 54 (S.D.N.Y. 2018)); see also, e.g., *Jewels v. Casner*, No. 12-cv-1895, 2016 WL 2962203, at *4 (E.D.N.Y. May 20, 2016); *Bartholomew v. Avalon Capital Grp.*, 278 F.R.D. 441, 451-52 (D. Minn. 2011); *David v. Alphin*, No. 3:07cv11, 2010 WL 1404722, at *7-8 (W.D.N.C. Mar. 30, 2010); Steven J. Purcell, *Document Production in Federal Litigation: Can You Redact for Nonresponsiveness?*, FED. LAW., Dec. 2012, at 22.

²⁶⁷ See, e.g., *Burris v. Versa Prods., Inc.*, Civil No. 07-3938, 2013 WL 608742, at *3 (D. Minn. Feb. 19, 2013).

²⁶⁸ See *supra* notes 123 and 124 and accompanying text.

²⁶⁹ See *supra* notes 30 and 33 and accompanying text.

²⁷⁰ See, e.g., *Mfrs. Life Ins. Co. v. Dofasco Inc.*, [1989] O.J. No. 1456 (Can. Ont. H.C.J.) (QL).

C. Legislative Solutions

One way of addressing the conflation and boilerplate mistakes is to simply take them off the table by legislative command. One example of this arose in the early 1990s, when state legislatures began adopting “open records” or “sunshine in litigation” rules.²⁷¹ Texas was the first state to enact a sunshine rule that creates a presumption that court records are open to the general public.²⁷² This rule permits the sealing of court records — including unfiled discovery that deals with public health or safety unless it is a case dealing with trade secrets or other intangible property rights — only when a court finds that there is a “specific, serious and substantial interest which clearly outweighs: (1) this presumption of openness [and] (2) any probable adverse effect that sealing will have upon the general public health or safety.”²⁷³ A few other states followed suit but most of those reforms have a more limited scope and the trend was effectively over before the end of the decade.²⁷⁴

For more than two decades, similar federal legislation has been proposed.²⁷⁵ For example, in 2017, a bill was introduced that would amend Chapter 111 of Title 28 of the United States Code, prohibiting courts from entering a protective order to prevent the disclosure of information relevant to the protection of public health or safety without making an independent finding that the benefits of disclosure is “outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and [] the requested order is no broader than necessary to protect the confidentiality interest asserted.”²⁷⁶ This bill, however, did not pass.²⁷⁷

The legislature could entertain more extreme changes too. The United States is an outlier with the liberal amount of discovery that is part of the litigation system.²⁷⁸ But Congress could reset that balance to one that more closely resembles other industrially-advanced countries’

²⁷¹ David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2651-52 (1995) (describing the history of “open records” and “sunshine in litigation” rules).

²⁷² See TEX. R. CIV. P. 76(a).

²⁷³ *Id.*

²⁷⁴ See Benham, *supra* note 2, at 2197; Doré, *supra* note 7, at 314.

²⁷⁵ The Sunshine in Litigation Act was first introduced by Senator Herb Kohl in 1994. S. 1404, 103d Cong. (1994).

²⁷⁶ Sunshine in Litigation Act of 2017, H.R. 1053, 115th Cong. (2017).

²⁷⁷ See *id.*

²⁷⁸ See Erichson, *supra* note 82, at 364 (“Even in other common law countries, such as the United Kingdom and Canada, U.S.-style discovery is largely unknown . . .”).

approaches to discovery.²⁷⁹ Additionally, some systems — like Canada’s — treat unfiled discovery as presumptively confidential and prohibit its use beyond the confines of the instant case.²⁸⁰ Such changes, though, would involve a radical reconception of discovery’s role in American litigation.

CONCLUSION

Confidential discovery continues to be an important issue in procedure. And changing contextual changes warrant continued reexamination of the balance between efficiency and participation. Moreover, the case law governing the primary mechanism for effectuating confidential discovery — that is, actual orders of proposed stipulated protective orders — nicely integrates the concerns laid out in the academic theory. But the on-the-ground working of stipulated protective orders shows how courts regularly over-privilege secrecy in contravention of both the consensus academic theory and general jurisprudence. Still, the most common mistakes — the use of boilerplate language to define the particularized need for secrecy and an overly permissive standard for filing under seal — may be solved by any number of interventions, from model orders to doctrinal evolutions and legislative action.

²⁷⁹ See *id.* at 364-65.

²⁸⁰ See D. Martin Low & Lisa Parliament, *Protecting Protective Orders: Misuse of U.S. Discovery in Canadian Antitrust Litigation*, 26 *ANTITRUST* 38, 39 (2012) (“Under Canadian common law, parties are under an implied undertaking to keep all documents and information confidential, and to use them exclusively for the purposes of the litigation in which discovery was obtained.”).

APPENDIX

Table 1. List of All Cases in Case Set with Case Type and Disposition

Case Name	Case Type	Disposition
Fernandez v. Bank of Am., N.A., No. 2:17-cv-06104 (C.D. Cal. Aug. 9, 2019)	Labor - Other Litigation [790]	Granted
Terrazas v. Wells Fargo Bank NA, No. 2:17-cv-04275 (D. Ariz. Dec. 18, 2018)	Civil Rights - Employment [442]	Granted
Gonzales-Byrd v. Cotiviti Holdings, Inc., No. 2:17-cv-05275 (E.D. Pa. May 3, 2018)	Civil Rights - Employment [442]	Denied
Bulgajewski v. R.T.G. Furniture Corp., No. 8:17-cv-02166 (M.D. Fla Mar. 2, 2018)	Consumer Credit [480]	Modified
Woods v. Progressive Ins. Co., No. 1:17-cv-00281 (W.D. Mich. Oct. 22, 2018)	Civil Rights - Disabilities - Employment [445]	Denied
Williams v. United Parcel Serv., Inc., No. 2:17-cv-06773 (C.D. Cal. Sept. 14, 2018)	Civil Rights - Employment [442]	Granted
Torres v. Lane Bryant, Inc., No. 2:17-cv-06933 (C.D. Cal. Apr. 25, 2018)	Civil Rights - Employment [442]	Granted
Vigueras v. Red Robin Int'l, Inc., No. 8:17-cv-01422 (C.D. Cal. Aug. 20, 2019)	Labor - Other Litigation [790]	Granted
A Plus Fabric Inc. v. Pac. Sunwear of Cal., LLC, No. 8:17-cv-01556 (C.D. Cal. Aug. 3, 2018)	Property Rights - Copyrights [820]	Granted
Lang Van, Inc. v. Asia Entm't, Inc., No. 8:17-cv-01481 (C.D. Cal. Nov. 20, 2018)	Property Rights - Copyrights [820]	Granted
In-N-Out Burgers v. Smashburger IP Holder LLC, No. 8:17-cv-01474 (C.D. Cal. June 19, 2019)	Property Rights - Trademark [840]	Granted
Microsoft Corp. v. Genesis Comput. Sys., Inc., No. 8:17-cv-01416 (C.D. Cal. July 29, 2019)	Property Rights - Trademark [840]	Granted

Case Name	Case Type	Disposition
NexGen HBM, Inc. v. ListReports, Inc., No. 2:17-cv-06522 (C.D. Cal. Aug. 21, 2019)	Property Rights - Trademark [840]	Granted
Honest Co., Inc. v. Jakks Pac., Inc., No. 2:17-cv-08072 (C.D. Cal. May 8, 2018)	Property Rights - Trademark [840]	Granted
Epic Brewing Co., LLC v. Eddyline Brewing LLC, No. 1:17-cv-02637 (D. Colo. July 2, 2018)	Property Rights - Trademark [840]	Granted
Election Sys. & Software, LLC v. Dominion Voting Sys., Inc., No. 1:17-cv-01172 (D. Del. July 5, 2018)	Property Rights - Patent [830]	Granted
Percept Techs., Inc. v. Fove, Inc., No. 1:17-cv-01119 (D. Del. Mar. 15, 2018)	Property Rights - Patent [830]	Granted
<i>In re</i> Epipen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., No. 2:17-md-02785 (D. Kan. Sept. 20, 2019)	Personal Injury - Product Liability [365]	Granted
Martins v. Vt. Mut. Ins. Grp., No. 1:17-cv-12360 (D. Mass. Aug. 14, 2019)	Contract - Insurance [110]	Granted
Conley v. Nissan Motor Acceptance Corp., Inc. No. 2:17-cv-02785 (D. Nev. Aug. 21, 2018)	Consumer Credit [480]	Granted
Sutton v. PlusFour, Inc., No. 2:17-cv-02926 (D. Nev. July 11, 2018)	Consumer Credit [480]	Granted
A. M. v. Physicians' Med. Ctr., P.C., No. 3:17-cv-01833 (D. Or. Mar. 21, 2018)	Personal Injury - Medical Malpractice [362]	Granted
Evangelista v. Univ. of Phx., No. 2:17-mc-01184 (D. Utah Mar. 30, 2018)	Other Statutory Actions [890]	Granted
Hulstrunk v. Ultracell Insulation, LLC, No. 2:17-cv-00232 (D. Vt. Aug. 16, 2018)	Contract - Other [190]	Granted

Case Name	Case Type	Disposition
Carter v. Bridenstine, No. 1:17-cv-01752 (D.D.C. June 21, 2019)	Civil Rights - Employment [442]	Granted
T. H. v. District of Columbia, No. 1:17-cv-00196 (D.D.C. Oct. 11, 2018)	Civil Rights - Other [440]	Granted
TLE Mktg. Corp. v. WBM, LLC, No. 3:17-cv-11752 (D.N.J. July 18, 2019)	Contract - Other [190]	Granted
110 Sunport, LLC v. Holiday Hosp. Franchising, LLC, No. 1:17-cv-01097 (D.N.M. Dec. 26, 2018)	Contract - Franchise [196]	Granted
Yeboah v. Cty. of Placer, No. 2:17-cv-02449 (E.D. Cal. Sept. 17, 2018)	Civil Rights - Other [440]	Granted
Bergkamp v. WBM LLC, No. 2:17-cv-02533 (E.D. Cal. Apr. 6, 2018)	Other Statutory Actions [890]	Granted
Tryan v. Ulthera, Inc., No. 2:17-cv-02036 (E.D. Cal. June 19, 2019)	Personal Property - Other Fraud [370]	Granted
Kovacs v. Assocs. in Neurology, P.C., No. 2:17-cv-13577 (E.D. Mich. Dec. 19, 2018)	Civil Rights - Disabilities - Employment [445]	Granted
Idrissu v. Aerotek Inc., No. 2:17-cv-13794 (E.D. Mich. Sept. 19, 2018)	Civil Rights - Other [440]	Granted
Ford Motor Co. v. Cena, No. 2:17-cv-13876 (E.D. Mich. June 20, 2018)	Contract - Other [190]	Granted
Young v. Walmart Stores E., L.P., No. 2:17-cv-13744 (E.D. Mich. Nov. 19, 2018)	Personal Injury - Other [360]	Granted
Depositors Ins. Co. v. Broan-Nutone, LLC, No. 4:17-cv-02597 (E.D. Mo. Nov. 6, 2018)	Personal Property - Product Liability [385]	Granted
Steffenson v. Wal-Mart Stores E., L.P., No. 1:17-cv-00306 (E.D. Tenn. Sept. 28, 2018)	Personal Injury - Other [360]	Granted

Case Name	Case Type	Disposition
Martin v. Mgmt. & Training Corp., No. 2:17-cv-00588 (E.D. Tex. May 22, 2018)	Labor - Fair Labor Standards Act [710]	Granted
Martin v. Mgmt. & Training Corp., No. 6:17-cv-00563 (E.D. Tex. May 11, 2018)	Labor - Family and Medical Leave Act [751]	Granted
FotoNation Ltd. v. Samsung Elecs. Co., Ltd., No. 2:17-cv-00669 (E.D. Tex. Dec. 18, 11, 2018)	Property Rights - Patent [830]	Granted
Attiyah v. Jones Lang Lasalle Ams. Inc., No. 1:17-cv-01261 (E.D. Va. May 14, 2018)	Civil Rights - Employment [442]	Granted
Gradillas Court Reporters, Inc. v. Cherry Bekaert, LLP, No. 2:17-cv-00597 (E.D. Va. Dec. 17, 2018)	Contract - Other [190]	Granted
Martin v. Navient Sols., LLC, No. 1:17-cv-05507 (E.D.N.Y. May 21, 2019)	Consumer Credit [480]	Granted
Lucian v. Crosstex Int'l, Inc., No. 2:17-cv-05286 (E.D.N.Y. Feb. 12, 2018)	Labor - Fair Labor Standards Act [710]	Granted
Caprate Events, LLC v. Knobloch, No. 1:17-cv-05907 (E.D.N.Y. Jan. 9, 2019)	Other Statutory Actions [890]	Granted
Kaplan v. Regions Bank, No. 8:17-cv-02701 (M.D. Fla. Mar. 19, 2019)	Personal Injury - Other [360]	Granted
Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf, No. 1:17-cv-02041 (M.D. Pa. May 17, 2018)	Constitutionality - State Statutes [950]	Granted
RPG Receivables Purchase Grp., Inc. v. WKW Erbsloeh N. Am., LLC, No. 4:17-cv-01916 (N.D. Ala. June 24, 2019)	Contract - Other [190]	Granted
Foresee Results, Inc. v. Auryc, Inc., No. 3:17-cv-06973 (N.D. Cal. Oct. 23, 2018)	Property Rights - Copyrights [820]	Granted
Vasilopoulos v. United Airlines, Inc., No. 4:17-cv-05983 (N.D. Cal. Aug. 8, 2018)	Civil Rights - Employment [442]	Granted

Case Name	Case Type	Disposition
Briggs v. Matson, No. 3:17-cv-04973 (N.D. Cal. May 22, 2018)	Civil Rights - Other [440]	Granted
Shaikh v. Experian Info. Sols., Inc., No. 3:17-cv-06486 (N.D. Cal. Mar. 6, 2018)	Consumer Credit [480]	Granted
Roy v. MI Grp., Inc., No. 3:17-cv-05800 (N.D. Cal. Nov. 27, 2018)	Labor - Fair Labor Standards Act [710]	Granted
Vikram v. First Student Mgmt., LLC, No. 4:17-cv-04656 (N.D. Cal. Aug. 27, 2019)	Labor - Fair Labor Standards Act [710]	Granted
Contour IP Holding, LLC v. GoPro, Inc., No. 3:17-cv-04738 (N.D. Cal. Aug. 5, 2019)	Property Rights - Patent [830]	Granted
Taylor v. Cont'l Cas. Co., No. 1:17-cv-04506 (N.D. Ga. Mar. 5, 2019)	Contract - Insurance [110]	Granted
Cathedral Art Metal Co., Inc. v. Divinity Boutique, LLC, No. 1:18-cv-00141 (N.D. Ga. Jan. 11, 2019)	Property Rights - Trademark [840]	Granted
Falasco v. Gucci Am., Inc., No. 1:17-cv-07081 (N.D. Ill. Mar. 9, 2018)	Civil Rights - Employment [442]	Granted
Associated Materials, LLC v CDC LaRue Indus., Inc., No. 5:17-cv-02355 (N.D. Ohio Sept. 5, 2018)	Contract - Other [190]	Granted
Declue v. United Consumer Fin. Servs. Co., No. 1:18-cv-00425 (N.D. Ohio June 8, 2018)	Other Statutory Actions [890]	Granted
Cottone v. McCracken, No. 1:17-cv-01006 (N.D.N.Y. Oct. 15, 2018)	Civil Rights - Other [440]	Granted
Lorie v. Spirit Airlines, Inc., No. 0:17-cv-62151 (S.D. Fla. July 26, 2018)	Civil Rights - Disabilities - Employment [445]	Granted
MSP Recovery Claims, Series LLC v. Indem. Ins. Co. of N. Am., No. 1:17-cv-23752 (S.D. Fla. Feb. 27, 2018)	Contract - Medicare Act [151]	Granted

Case Name	Case Type	Disposition
JEG & Sons, Inc. v. Commc'ns Test Design, Inc., No. 1:17-cv-23096 (S.D. Fla. Aug. 8, 2018)	Contract - Other [190]	Granted
Sarah S. v. Aetna Health Mgmt., LLC, No. 1:17-cv-23513 (S.D. Fla. Apr. 11, 2018)	Labor - Employee Retirement Income Security Act [791]	Granted
Sargeant, III v. Maroil Trading Inc., No. 9:17-cv-81070 (S.D. Fla. June 4, 2018)	Personal Property - Other Fraud [370]	Granted
Audi AG v. USP Motorsports, Inc., No. 0:17-cv-62121 (S.D. Fla. June 29, 2018)	Property Rights - Trademark [840]	Granted
Seneff v. Ind. Univ. Health, Inc., No. 1:17-cv-04126 (S.D. Ind. May 3, 2019)	Civil Rights - Employment [442]	Granted
Harrison v. MetLife Grp., Inc., No. 4:17-cv-00412 (S.D. Iowa Apr. 3, 2018)	Labor - Other Litigation [790]	Granted
Martin v. Davis, No. 2:17-cv-00789 (S.D. Ohio Apr. 20, 2018)	Civil Rights - Employment [442]	Granted
Norris v. Glassdoor, Inc., No. 2:17-cv-00791 (S.D. Ohio July 13, 2018)	Civil Rights - Employment [442]	Granted
Hart v. EM SNS LLC, No. 1:17-cv-00567 (S.D. Ohio Oct. 4, 2018)	Labor - Fair Labor Standards Act [710]	Granted
Crawford v. ABM Indus. Grp., LLC, No. 4:17-cv-02510 (S.D. Tex. Oct. 10, 2018)	Civil Rights - Employment [442]	Granted
Marshall v. Acad. Ltd., No. 4:17-cv-03495 (S.D. Tex. Nov. 8, 2018)	Civil Rights - Employment [442]	Granted
Thompson v. McCullen, No. 3:17-cv-00255 (S.D. Tex. Aug. 31, 2018)	Labor - Fair Labor Standards Act [710]	Granted

Case Name	Case Type	Disposition
Ruiz v. FCA US LLC, No. 2:17-cv-00326 (S.D. Tex. June 18, 2018)	Personal Injury - Motor Vehicle Product Liab. [355]	Granted
Alarm.com Inc. v. ipDatatel, LLC, No. 4:18-cv-02108 (S.D. Tex. July 12, 2019)	Property Rights - Patent [830]	Granted
Forum US, Inc. v. S. Roller, LLC, No. 4:17-cv-03764 (S.D. Tex. Apr. 13, 2018)	Property Rights - Patent [830]	Granted
U.S. Bank Nat'l Ass'n v. Manhattan Jeep Chrysler Dodge, Inc., No. 1:17-cv-06415 (S.D.N.Y. Aug. 5, 2019)	Contract - Other [190]	Granted
First Solar, Inc. v. Absolute Process Instruments, Inc., No. 1:17-cv-08518 (S.D.N.Y. Apr. 11, 2018)	Contract - Product Liability [195]	Granted
Lucky Horse Press LLC v. Earthbound Trading Co., L.P., No. 1:17-cv-06295 (S.D.N.Y. Mar. 13, 2018)	Property Rights - Copyrights [820]	Granted
Solus Alt. Asset Mgmt. LP v. GSO Capital Partners L.P., No. 1:18-cv-00232 (S.D.N.Y. May 31, 2018)	Securities/ Commodities/ Exchanges [850]	Granted
Myatt v. Smith & Nephew, Inc., No. 3:17-cv-03102 (W.D. Ark. Mar. 21, 2019)	Personal Injury - Product Liability [365]	Granted
Richland State Bank v. Agspring Miss. Region LLC, No. 3:17-cv-01007 (W.D. La. Apr. 18, 2018)	Personal Property - Other Property Damage [380]	Granted
Woods v. Progressive Ins. Co., No. 1:17-cv-00281 (W.D. Mich. Oct. 22, 2018)	Civil Rights - Disabilities - Employment [445]	Granted
Kula v. Blackstone, No. 2:18-cv-00471 (W.D. Wash. July 3, 2018)	Contract - Other [190]	Granted

Case Name	Case Type	Disposition
Verasonics, Inc. v. SuperSonic Imagine, S.A., No. 2:17-cv-01764 (W.D. Wash. May 31, 2019)	Property Rights - Patent [830]	Granted
Dengler v. Int'l Bhd. of Teamsters, Local 118, No. 6:17-cv-06582 (W.D.N.Y. July 31, 2019)	Civil Rights - Employment [442]	Granted
Olsen v. Otis Elevator Co., No. 5:17-cv-01792 (C.D. Cal. Oct. 18, 2018)	Real Property - Tort Product Liability [245]	Modified
Diamond Coat Epoxy LLC v. B.D. Classic Enterprizes, Inc., No. 1:17-cv-02624 (D. Colo. Sept. 17, 2018)	Contract - Other [190]	Granted
Baumgardner v. Cannon, No. 1:17-cv-02727 (D. Colo. Feb. 20, 2019)	Labor - Employee Retirement Income Security Act [791]	Granted
Davila v. Vt. Mut. Grp., No. 1:17-cv-12266 (D. Mass. Jan. 3, 2018)	Contract - Insurance [110]	Modified
Green v. Bristol-Myers Squibb Co., No. 5:18-cv-00131 (E.D. Ky. July 30, 2019)	Personal Injury - Health Care/ Pharmaceutical Personal Injury/Product Liability [367]	Granted
Turner v. Bristol-Myers Squibb Co., No. 5:18-cv-00078 (E.D. Ky. Feb. 13, 2018)	Personal Injury - Health Care/ Pharmaceutical Personal Injury/Product Liability [367]	Granted
York v. Bristol-Myers Squibb Co., No. 5:18-cv-00079 (E.D. Ky. July 30, 2019)	Personal Injury - Health Care/ Pharmaceutical Personal Injury/Product Liability [367]	Granted
Rerisi v. Gov't Emps. Ins. Co., No. 8:17-cv-02230 (M.D. Fla. May 3, 2018)	Consumer Credit [480]	Modified

Case Name	Case Type	Disposition
Douglas v. DHI Grp., Inc., No. 5:17-cv-04887 (N.D. Cal. Mar. 19, 2018)	Other Statutory Actions [890]	Modified
Bailey v. Home Depot U.S.A., Inc., No. 4:17-cv-05844 (N.D. Cal. Aug. 6, 2018)	Personal Injury - Other [360]	Modified
Desai v. Lowe's, No. 4:17-cv-02485 (N.D. Ohio May 25, 2018)	Personal Injury - Other [360]	Granted
Upper Deck Co. v. Leaf Trading Cards, LLC, No. 3:17-cv-02364 (S.D. Cal. Feb. 27, 2018)	Contract - Other [190]	Granted

Table 2. District Court Distribution of the Case Set

District	Orders		District	Orders
C.D. Cal.	11		D. Ariz.	1
N.D. Cal.	8		D. Kan.	1
S.D. Fla.	6		D. Or.	1
S.D. Tex.	6		D. Utah	1
E.D. Mich.	4		D. Vt.	1
S.D.N.Y.	4		D.N.J.	1
D. Colo.	3		D.N.M.	1
E.D. Cal.	3		E.D. Mo.	1
E.D. Ky.	3		E.D. Pa.	1
E.D. Tex.	3		E.D. Tenn.	1
E.D.N.Y.	3		M.D. Fla	1
N.D. Ohio	3		M.D. Pa.	1
S.D. Ohio	3		N.D. Ala.	1
D. Del.	2		N.D. Cal.	1
D. Mass.	2		N.D. Ill.	1
D. Nev.	2		N.D.N.Y.	1
D.D.C.	2		S.D. Cal.	1
E.D. Va.	2		S.D. Ind.	1
M.D. Fla.	2		S.D. Iowa	1
N.D. Ga.	2		W.D. Ark.	1
W.D. Mich.	2		W.D. La.	1
W.D. Wash.	2		W.D.N.Y.	1

Table 3. Case Set — Case Type

Case Type	Number of Cases
Civil Rights - Employment [442]	14
Contract - Other [190]	11
Property Rights - Patent [830]	7
Property Rights - Trademark [840]	7
Consumer Credit [480]	6
Labor - Fair Labor Standards Act [710]	6
Civil Rights - Other [440]	5
Other Statutory Actions [890]	5
Personal Injury - Other [360]	5
Civil Rights - Disabilities - Employment [445]	4
Property Rights - Copyrights [820]	4
Contract - Insurance [110]	3
Labor - Other Litigation [790]	3
Personal Injury - Health Care/Pharmaceutical Personal Injury/Product Liability [367]	3
Labor - Employee Retirement Income Security Act [791]	2
Personal Injury - Product Liability [365]	2
Personal Property - Other Fraud [370]	2
Constitutionality of State Statutes [950]	1
Contract - Franchise [196]	1
Contract - Medicare Act [151]	1
Contract - Product Liability [195]	1
Labor - Family and Medical Leave Act [751]	1
Personal Injury - Medical Malpractice [362]	1
Personal Injury - Motor Vehicle Product Liab. [355]	1
Personal Property - Other Property Damage [380]	1
Personal Property - Product Liability [385]	1
Real Property - Tort Product Liability [245]	1
Securities/Commodities/Exchanges [850]	1

Table 4. Comparison of Top Seven District Courts by Federal Docket Mentions from 2007-2018 and Top Seven District Court Appearances in Case Set

District	Percentage of Total Federal District Court Docket Mentions		District	Percentage of Orders in Case Set
N.D. Cal.	8%		C.D. Cal.	11%
C.D. Cal.	7%		N.D. Cal.	8%
S.D.N.Y.	6%		S.D. Fla.	6%
E.D. Mich.	5%		S.D. Tex.	6%
D. Colo.	4%		E.D. Mich.	4%
D. Or.	4%		S.D.N.Y.	4%
S.D. W.Va.	4%		D. Colo.	3%