CIVIL RIGHTS AND PROTECTIVE ORDERS

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"Open courts" are a bedrock principal of our judicial system, and court secrecy, including concealment of pretrial proceedings, poses a serious threat to public safety.[1] Overbroad protective orders have concealed facts uncovered during litigation regarding some of the most important public harms, keeping them secret when the public needs protection.[2] Protective orders routinely include provisions that allow parties to designate discovery material as "confidential" without further judicial review. These orders are often abused and result in unnecessary costs to litigants, the courts, and the public's confidence in the court system. In many cases, a defendant seeking protection under the order drafts the order with little or no input from the plaintiff and no meaningful judicial review before entry. Because the plaintiff is eager for the defendant to produce its documents without delay, and the defendant often makes document production contingent on the entry of a protective order, plaintiff's counsel accepts what is offered without question.[3]

This is always a mistake because it harms the discovery process as a whole, including the ability to compare discovery responses in similar matters, and the integrity of the court system. And because civil rights litigation involves evidence of pattern and practices of police misconduct, overbroad protective orders bury the evidence in each new case. In contrast, a protective order with a sharing provision allows future litigants to discover the patterns of misconduct in a particular department.

In seeking discovery of documents and information that may or may not be subject to protection, a plaintiff need not wait for a defendant to refuse disclosure and propose an unreasonable

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[1] Dustin B. Benham, *Foundational and Contemporary Court Confidentiality, in* POUND CIVIL JUSTICE INST., DANGEROUS SECRETS: CONFRONTING CONFIDENTIALITY IN OUR PUBLIC COURTS 7-40, 16 (2020), https://www.poundinstitute.org/wp-content/uploads/2020/12/Pound-Report-2020_web.pdf.

[2] *Id.* at 21.

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

protective order. Instead, the best practice is for a party seeking discovery to move at the soonest instance for entry of an order that matches the legal standards for presumptive open court proceedings and sharing provisions.[4] Sharing provisions allow disclosure of "confidential" documents to like-situated plaintiffs and their lawyers under the court's strict supervision. Courts have recognized that sharing provisions reduce discovery costs and prevent discovery gamesmanship. It is especially important to enter a narrow order with a limited sharing provision before documents have been produced in lawsuits involving Section 1983 claims, where plaintiffs must prove a pattern or practice of civil rights violations.

The Protective Order

A Rule 26(c) protective order allows courts to limit the persons to whom discovery information may be disclosed. A protective order must show "good cause" and a "specific need for protection."[5] "Good cause" may be established by "a finding that further discovery will impose undue burden or expense without aiding the resolution of dispositive motions."[6] To meet the good cause requirement, parties seeking protection often assert concerns related to economic injury flowing from dissemination of discovery information to competitors.[7] Additionally, some seek protection due to alleged fears of reputational harm.[8]

Notwithstanding the "good cause" requirements, protective orders are often issued in the beginning of the litigation before any documents are produced.[9] Thus, documents are concealed before the receiving party, or the court, has even seen the documents. And in some cases, parties may designate confidential entire document productions and deposition transcripts.[10] This

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[4] FRANCIS H. HARE JR., ET. AL., FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES (ATLA Press 1995).

[5] Landry v. Air Line Pilots Ass'n, 901 F.2d 404, 435 (5th Cir. 1990).

[6] Fujita v. United States, 416 F. App'x 400, 402 (5th Cir. 2011); *see e.g.,* Kilmon v. Saulsbury Indus., No. MO:17-cv-99, 2018 U.S. Dist. LEXIS 237653 at *12 (W.D. Tex. Feb. 13, 2018) (noting that the defendant "cast[ed] its largest net" with its protective order and "fail[ed] to establish good cause and a specific need for protection").

[7] Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181, 2227 (2014).

[8] Sergio J. Campos, *Confidentiality in the Courts: Privacy Protection or Prior Restraint?, in* POUND CIVIL JUSTICE INST., DANGEROUS SECRETS: CONFRONTING CONFIDENTIALITY IN OUR PUBLIC COURTS 71-92, 80 (2020), https://www.poundinstitute.org/wp-content/uploads/2020/12/Pound-Report-2020_web.pdf.

[9] Dustin B. Benham, *Tangled Incentives: Proportionality and the Market for Reputational Harm*, 90 TEMP. L. REV. 427, 442-43 (2018).

[10] Benham, *supra* note 1, at 11.

practice has enabled parties to engage in other blanket designation practices.[11] Most surprisingly, the receiving party routinely stipulates to confidentiality to increase the efficiency of the discovery process.[12] But parties should not sacrifice transparency in exchange for quicker document production.

Secrecy in Mass Tort Litigation

Mass tort litigation best illustrates the dangers of broad protective orders. Beginning in the 1970s, hundreds, if not thousands, of plaintiffs were harmed by defective products.[13] As a result, mass tort litigation ensued across the country.[14] The lawsuits uncovered crucial documents that proved the defendants' knowledge of their products' harmful effects, such as the presence of asbestos.[15] Over the course of several decades, defendant corporations strategically began to use protective orders to conceal pertinent information from regulators and the public.[16] As a result, hundreds of thousands of people were killed or seriously injured by harmful products after judges allowed corporations to "file under seal, beyond public view, evidence that could have alerted customers and regulators to the dangers."[17]

In the infamous talc litigation, talc was found to contain asbestos.[18] But like the other asbestos cases, a confidentiality order prevented the dissemination of key information.[19] Thereafter, any time a plaintiff alleged an injury from the talc, the defendant responded by denying any evidence of asbestos in the talc.[20] In fact, a 2019 Reuters investigation revealed that in 115 of the biggest

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[11] Benham, *supra* note 1, at 11.

[12] Marcus, *supra* note 4, at 2.

[13] Robert C. Nissen, *Open Court Records in Products Liability Litigation under Texas Rule 76a*, 72 TEX. L. REV. 931, 932 (1994).

[14] *Id.* at 932.

[15] Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 71 (1992).

[16] Michelle Conlin et. al., *Special Report: Why Big Business Can Count on Courts to Keep its Deadly Secrets*, REUTERS (Dec. 19, 2019), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-lobbyist/.

[17] *Id.*

[18] Christopher Placitella, *Comments by Panelists*, *in* POUND CIVIL JUSTICE INST., DANGEROUS SECRETS: CONFRONTING CONFIDENTIALITY IN OUR PUBLIC COURTS 104-05, 104 (2020), https://www.poundinstitute.org/wp-content/uploads/2020/12/Pound-Report-2020_web.pdf.

[19] *Id*. at 105.

[20] *Id*.

mass torts over the past 20 years, judges sealed public health and safety information in about half of them.[21] Naturally, secrecy makes it significantly harder for individuals, including current and future plaintiffs, to discover pertinent information about defective products.[22] Moreover, it leads to an uninformed public.[23] Indeed, third parties simply "do not know what they do not know about confidential litigation."[24]

Protective Orders and Sealing

Notwithstanding the harm of the instrument itself, courts' application and analyses of protective orders have been equally harmful. Specifically, courts often conflate the standards for protective orders and sealing orders.[25] As a result, entering overly broad protective orders has led to pervasive sealing.[26] Because a protective order, supported by good cause alone, cannot keep discovery confidential once the discovery is filed, protective orders sometimes include provisions that require filing all protected information under seal.[27] Even where sealing is not automatic, some protective orders require parties to first seek a sealing order for the confidential material.[28] And in those cases, courts routinely grant the sealing order.[29] In many instances, no party has challenged the confidentiality designation.[30]

Importantly, there are different standards for handling confidential documents produced in discovery and those that govern sealing or destruction of relevant documents during trial. Indeed, the Fifth Circuit recently criticized the "growing practice of parties . . . presuming that whatever satisfies the lenient protective-order standard will necessarily satisfy the stringent sealing-order standard."[31] Illustrating this point, *In re Terra Int'l Inc.* was recently compared with *Van Waeyenberghe* to specifically acknowledge that the former case involved a protective

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[21] Conlin, *supra*. note 16.

[22] Rustad, *supra* note 15, at 78.

[23] *Id.*

[24] Benham, *supra* note 1, at 10.

[25] In re Terra Int'l, 134 F.3d 302, 306 (5th Cir. 1998); *see e.g.*, Gillard v. Boulder Valley Sch. Dist. Re.-2, 196 F.R.D. 382, 388 (D. Colo. 2000).

[26] Benham, *supra* note 1, at 12.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Binh Hoa Le v. Exeter Fin. Corp., No. 20-10377, 2021 U.S. App. LEXIS 6663 at *11 (5th Cir. Mar. 5, 2021).

order "for documents exchanged in discovery," while the latter case involved "sealing documents filed with the court."[32] Due to this growing and dangerous practice, federal courts across the country have directed litigants to the distinction between protecting confidentiality during discovery, as opposed to the sealing of court records.[33]

Automatic sealing, by default, is even less justified in pattern and practice litigation. The Fifth Circuit recently addressed a sealing request in a case involving a police-involved death.[34] Last year, a press organization sought to unseal the settlement agreement between a decedent's family and the police department.[35] Agreeing with the organization, the Fifth Circuit explained that the allegations that law enforcement shot the decedent and then covered it up were "matters of local and national concern."[36] Underscoring the national relevance of the death, the court noted, "Public access . . . will shed light on the resolution of a case that is of local and national interest and related to the criminal prosecutions of the [city's] sheriff and sheriff's deputies for allegedly violating the laws in ways similar to those that were alleged in this case—prosecutions that are also of local and national interest."[37] Indeed, "[t]he public's interest is particularly legitimate and important where at least one of the parties to the action is a public entity or official."[38] Therefore, the public policy behind the promotion of judicial economy and an open and fair discovery process supports narrow protective orders.[39]

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[32] United States v. Fisch, No. H-18-1419, 2018 U.S. Dist. LEXIS 81141 at *2-3 (S.D. Tex. May 15, 2018).

[33] *See* In re Avandia Mktg., Sales Practices & Prods. Liab. Litig., 924 F.3d 662, 672 (3d Cir. 2019) ("[a]nalytically distinct from the District Court's ability to protect discovery materials under Rule 26(c), the common law presumes that the public has a right of access to judicial materials."); *see also Fisch*, 2018 U.S. Dist. LEXIS 81141 at *2 ("A more stringent showing is needed to seal filed documents than to limit access to documents exchanged in discovery."); Midwest Ath. & Sports All. LLC v. Rico, No. 2:19-cv-00514-JDW, 2021 U.S. Dist. LEXIS 44658 at *7 (E.D.P.A. Mar. 10, 2021) (rejecting a movant's motion to seal one of its documents because the movant "conflate[d] the lesser standard applicable to issuance of protective orders that apply to discovery material with the more demanding common law right of access standard.").

[34] *See* Bradley v. Ackal, 954 F.3d 216 (5th Cir. 2020).

[35] *Id*.

[36] *Id*. at 232.

[37] *Id*.

[38] *Id*. at 233; *see also* Macias v. Aaron Rents, Inc., 288 F. App'x 913, 915 (5th Cir. 2008) (rejecting the litigant's argument that his motion to seal should be granted because of "the lack of importance to the public").

[39] *See Binh Hoa Le*, 2021 U.S. App. LEXIS 6663 at *10 ("Americans cannot keep a watchful eye, either in capitols or in courthouses, if they are wearing blindfolds.").

Narrowing the Protective Order

Instead of agreeing to the designating party's protective order, the receiving party should propose a narrow protective order with two key components: (1) a sharing provision to enable similarly situated litigants to share confidential documents; and (2) a provision that places the burden of resolving discovery disputes on the party seeking protection.

Plaintiffs' counsel, specifically, should incorporate a sharing provision in every protective order. A good protective order will provide limited sharing of discovery with similarly situated plaintiffs and bar further dissemination outside the terms of the order.[40] Importantly, sharing provisions reduce the cost and burden on litigants and courts alike when addressing duplicative, highly relevant discovery.[41] Indeed, permitting access by similarly situated litigants to the discovery materials produced in a case will allow them to focus their discovery requests in those cases and eliminate lengthy motions to compel. In effect, sharing provisions allow litigants to "avoid wastefully reinventing the wheel by repeatedly conducting virtually identical discovery."[42]

Moreover, "[s]haring also increases discovery accountability by allowing parties to compare discovery responses against responses in a similar case."[43] Although a producing party may complain that the receiving party received undue access to information that helped prove her case, it should be noted that "discovery limitations are meant only to balance the search for truth against the cost of that search, not to serve as a shield against liability."[44]

Sharing also facilitates collaboration between attorneys with fewer resources, thus "leveling the playing field with large law firms and national collaboration on the other side of the docket."[45] Indeed, commentators have recognized that in a typical case,

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[40] *See e.g.,* Charter Oak Fire Ins. Co. v. Electrolux Home Products, Inc., 287 F.R.D. 130, 134 (E.D.N.Y. 2012) (reasoning that the defendant would not be prejudiced because "the plaintiff in this action and any related action would be bound by the Protective Order" and "there will not be public dissemination"); *see also* Raymond Handling Concepts Corp. v. Super. Ct., 45 Cal. Rptr. 2d 885, 888 (Cal. Ct. App. 1995).

[41] *See* Garcia v. Peeples, 734 S.W.2d 343, 347 (Tex. 1987) (explaining that "[i]n addition to making discovery more truthful, shared discovery makes the system itself more efficient."); Idar v. Cooper Tire & Rubber Co., No. C-10-217, 2011 U.S. Dist. LEXIS 26013 at *7 (S.D. Tex. Feb. 17, 2011) (concluding that under *Garcia*, "it would be an abuse of discretion for this Court to disallow any sharing among similarly situated litigants.").

[42] Benham, *supra* note 7, at 2199.

[43] *Id*.

[44] Benham, *supra* note 7, at 2231.

[45] Benham, *supra* note 7, at 2199.

> [T]he defendant possesses infinitely superior knowledge and resources, the need for cooperation among Plaintiffs' attorneys is even greater than that of defendants . . . The sharing of information among Plaintiffs' attorneys has four main goals: (1) to minimize the advantage of the defendant and allow the plaintiff to adequately prepare his case, (2) to enhance the speed and efficacy of the discovery process, (3) to provide a mechanism for verifying the accuracy of a manufacturer's response to the Plaintiffs' discovery requests, and (4) to reduce the cost of preparing each case . . . Courts should refrain from granting overly restrictive confidentiality orders that deny the plaintiff access to a cooperative discovery mechanism.[46]

Furthermore, keeping the burden on the party seeking protection is equally important. In most instances, protective orders omit a mechanism for expeditiously resolving abusive over-designations. But because the designating party maintains the burden of proving confidentiality, that party should also maintain the burden to resolve a discovery dispute that may arise. Such a request would only be necessary after the receiving party provided notice of its challenge to the confidentiality of the document and the parties conferred regarding the objection to avoid piecemeal use of the court's limited time and resources. In the event of a disagreement, the protective order should keep the burden on the designating party.[47] Thus, the party making the claim of confidentiality has the burden to prove that the information is entitled to continued protection.[48]

Many federal courts agree with this approach. Consistent with the Fifth Circuit's position, the Eleventh Circuit affirmed a lower court's endorsement of a protective order that "allow[ed] the producing party to designate a document confidential unless the other party objects."[49] The court noted that upon objection, "the party asserting the confidentiality is required to apply within fifteen days to the court for a ruling or concede the objection."[50] To be sure, orders that

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[46] Hare & Gilbert, *Confidentiality Orders in Products Liability Cases*, 13 AM. J. TRIAL ADVOC. 597, 612 (Fall 1989).

[47] *See In re Terra Int'l*, 134 F.3d at 306; *e.g.,* Gillard v. Boulder Valley Sch. Dist. Re.-2, 196 F.R.D. 382, 388 (D. Colo. 2000) ("If the parties cannot resolve the objection within ten (10) business days after the time the notice is received, it shall be the obligation of the party designating the information as CONFIDENTIAL to file an appropriate motion requesting that the Court determine whether the disputed information should be subject to the terms of this Protective Order.").

[48] *In re Terra Int'l*, 134 F.3d at 306 (citing United States v. Garrett, 571 F.2d 1323, 1326, n.3 (5th Cir. 1978)); United States ex rel. Donald v. Lockheed Martin Corp., No. 1:99-cv-285, 2014 U.S. Dist. LEXIS 773 (S.D. Ohio Jan. 22, 2014) ("If the parties are unable to reach an agreement about a contested designation, the designating party can file an application to the Court . . . The party making the designation shall have the burden of proving that the material should be treated as designated.").

[49] McCarthy v. Barnett Bank of Polk County, 876 F.2d 89, 90 (11th Cir. 1989).

[50] *Id*.

flip the burden of proving a lack of confidentiality, including by shifting the burden of requesting court intervention away from the party claiming privilege, are contrary to well-established law. By extension, "[k]eeping the responsibility for filing the motion with the party that has the ultimate burden makes sense where . . . the principal issue is whether that party can meet its burden to show confidentiality."[51]

Pattern and Practice Litigation

In cases where the court mandates the entry of a protective order, the receiving party should ensure that the order is narrow. A limited protective order is particularly important to future plaintiffs in Section 1983 litigation. In more detail, a municipality may be liable under Section 1983 where a governmental custom violates an individual's constitutional rights.[52] The custom need not receive formal approval through the body's official decision-making channels.[53] Indeed, the existence of an official custom may be found in "persistent and widespread discriminatory practices of state officials."[54] Thus, in a Section 1983 case involving allegations of police misconduct, the plaintiff often must prove an institutional policy authorizing police misconduct or the custom of police misconduct.[55]

For these reasons, broad protective orders drafted by municipal defendants pose a significant barrier to future similarly situated plaintiffs' ability to litigate their cases. In a Section 1983 lawsuit, a plaintiff's access to police misconduct records, for example, is especially important because many of these suits typically involve officers who engaged in or have histories of misconduct.[56] Indeed, an officer's record of misconduct might be the "smoking gun" that reveals an improper pattern and practice within the municipality. If one plaintiff discovers the "smoking gun," but the "smoking gun" is subsequently concealed by a protective order, future similarly situated plaintiffs will be required to reinvent the wheel in an attempt to discover it.

A recent study analyzed proposed and granted protective orders in federal cases against New York police officers.[57] According to the study, "each order specifically protected certain information" and "nearly all of it focused on [New York Police Department] records and

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[51] ATLC, Ltd. v. Eastman Kodak Co., No. 6:11-cv-855-Orl-31GJK, 2012 U.S. Dist. LEXIS 206252, at *15-16 (M.D. Fla. Jan. 19, 2012).

[52] Monell v. City of Dep't of Social Servs., 436 U.S. 658 (1978).

[53] *Id*.

[54] *Id*.

[55] Haley v. City of Boston, 657 F.3d 39, 52 (1st Cir. 2011).

[56] Chelsea Hanlock, *Settling for Silence: How Police Exploit Protective Orders*, 109 CALIF. L. REV. 1507, 1522 (2021).

[57] *Id.* at 1532-33.

information pertaining to officers."[58] The study revealed that some of the orders specifically protected officer's personnel and disciplinary records, performance evaluations, New York Police Department (NYPD) training materials, and NYPD-issued cameras.[59] Some orders included a provision that openly and explicitly protected "any other NYPD documents produced as part of *Monell* discovery."[60] But litigants should not be allowed to engage in blanket designation practices in order to avoid liability. Indeed, the purpose of limiting discovery is only to "balance the search for truth against the cost of that search, not to serve as a shield against liability."[61] Recognizing the harm of broad protective orders, at least one court has rejected a defendant city's proposed protective order on the ground that "[c]urrent case law suggests the privacy interests police officers have in their records do not outweigh a plaintiff's interests in civil rights cases."[62] Indeed, where "the case involves pattern and practice litigation against the same police department, "this balancing approach should be 'moderately pre-weighted in favor of disclosure.'"[63] Thus, plaintiffs' counsel should be weary of agreeing to the defense counsel's proposed protective order in pattern and practice litigation.

In contrast, plaintiffs' counsel should propose a narrow protective order with a limited sharing provision in every proposed protective order. A sharing provision in pattern and practice litigation prevents abuse of the order. The inclusion of a sharing clause is critical where similar litigation has already initiated over the same pattern and practices.[64] For example, due to the numerous cases against police officers, sharing provisions are especially important. Indeed, because police misconduct is often litigated, municipalities are often repeat defendants.[65] In order to protect the public from the dangers of court secrecy, especially in pattern and practice litigation, plaintiffs should fight for narrow protective orders.

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[58] Hanlock, *supra* note 56, at 1542.

[59] Hanlock, *supra* note 56, at 1543-44.

[60] Hanlock, *supra* note 56, at 1544.

[61] Benham, *supra* note 7, at 2231.

[62] Estrada v. City & County of San Francisco, No. 16-cv-00722-MEJ, 2016 U.S. Dist. LEXIS 173740 at *7 (N.D. Cal. Dec. 14, 2016).

[63] *Id.* (citing Soto v. City of Concord, 162 F.R.D. 603, 615 (N.D. Cal. 1995)).

[64] *See* Marcus, *supra* note 4, at 1 ("By far the most important justification for granting nonparties access to discovery information is their need to use the information in other litigation.").

[65] *See* Khansari v. City of Houston, No. H-13-2722, 2015 U.S. Dist. LEXIS 145969 at *11 (S.D. Tex. Oct. 28, 2015) (the plaintiff alleged that several Houston police officers infringed on his "right to be free from excessive force" and "proximately caused [him] to suffer severe injury"); Garcia v. Harris Cty., No. H-16-2134, 2018 U.S. Dist. LEXIS 192012 at *3 (S.D. Tex. Nov. 9, 2018) (concluding that the Harris County District Attorney's "single constitutional action [was] enough to establish a municipal policy or custom" under *Monell*); Brendle v. City of Houston, 177 F. Supp. 2d 553, 560 (N.D. Miss. 2001) (denying a Houston police officer's motion to dismiss as to the plaintiff's excessive force claim).

Moreover, a sharing provision is particularly appropriate in cases where there are no concerns about financial harm. Unlike commercial litigants who may advance concerns about financial harm if required to produce company documents, municipalities will not face any competitive disadvantage if plaintiffs are allowed to share documents with similarly situated plaintiffs.[66] Indeed, public police departments do not have competitors. And legitimately confidential information will remain confidential even if it is shared under the strict terms of the order. A sharing provision only permits sharing relevant documents with other similarly situated litigants if they agree to be bound by the same protective order. Therefore, the designating party is not endangered by a sharing provision because only like-situated persons that submit to the court's confidentiality order fall under this limited exception. There is simply no legitimate purpose in encouraging discovery gamesmanship by assertion of confidentiality to avoid production of relevant materials to those that are not competitors.

Conclusion

Protective orders have allowed litigants to litigate the most important cases in private. Where a court mandates the entry of a protective order, litigants should ensure that the order is narrow. A narrow protective order will provide a mechanism for challenging confidentiality designations. More importantly, the protective order will place the burden on the party seeking protection to seek relief from the court. It will require the designating party to make tailored, and not wholesale designation, of protected information, including necessary provisions for electronically stored information (ESI). Most importantly, it will incorporate a sharing provision to reduce the cost and burden on litigants and courts alike when addressing duplicative, highly relevant discovery. Section 1983 litigation has the power to motivate police departments into changing their harmful policies and practices.[67] Thus, ensuring that these cases are not wholly litigated in secret is imperative.

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[66] Compare Johnson v. City & Cty. Of San Francisco, No. C-09-5503, 2011 U.S. Dist. LEXIS 172187, at *7 (N.D. Cal. Feb. 9, 2011) (denying the City and County of San Francisco's "request for the Court to impose the extremely restrictive type of protective order usually employed in patent and trade secret cases") *with* Edco Plastics, Inc. v. Allynce, Inc., No. SACV12-1168, 2012 U.S. Dist. LEXIS 181430 at *2 (C.D. Cal., Dec. 20, 2012) (justifying confidentiality designations "[b]ecause of the parties' status as former and/or present competitors").

[67] Hanlock, *supra* note 56, at 1521.

Appendix 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN NICHOLAS, et.al. Consolidated with CLIFFORD TUTTLE, et. al. Plaintiffs, v. CITY OF HOUSTON; ART ACEVEDO, et. al. Defendants.	Case No. 4:21-cv-00270 (JURY DEMANDED)

PLAINTIFFS' JOINT MOTION FOR PROTECTIVE ORDER

Summary of the Argument

Last month, the Fifth Circuit explicitly cautioned district courts against the practice of routinely adopting abusive protective orders that violate the common law presumption of public access to judicial records. *See Binh Hoa Le v. Exeter Fin. Corp*., No. 20-10377, 2021 U.S. App. LEXIS 6663 (5th Cir. Mar. 5, 2021). The Circuit reiterated that "excessive secrecy—particularly displacing the high bar for sealing orders with the low bar for protective orders—undercuts the public's right of access and thus undermines the public's faith in our justice system. Legal arguments, and the documents underlying them, belong in the public domain." *Id*. at *17.

Plaintiffs John Nicholas; Jo Ann Nicholas; Clifford F. Tuttle; Robert Tuttle, and Ryan Tuttle (together, "the Harding Street families" or "Plaintiffs") request entry of a protective order (the "Order") that safeguards legitimate confidentiality interests, but also removes undue burdens on the Court, the discovery process, and the public interests in public information. The Order is tailored to unique requirements of a 42 U.S.C. §1983 "pattern and practice" case against a repeat Defendant, City of Houston ("the City") and those police officers alleged to have committed related violations of federal law ("pattern and practice litigation"). The Order therefore differs from the City's "standard" order in pattern and practice litigation, as well as this Court's Agreed Stipulated Protective Order, in the following aspects mandated by the applicable rules and constitutional interests:

1) The Order requires a party to make tailored, and not wholesale designation, of Protected Information, and includes necessary provisions for Electronically Stored Information (ESI);

2) The Order incorporates a mechanism for resolving disputes about designations that requires a party alleging privilege to actually support such claims, with a minimum of Court intervention necessary (but consistent with this Court's Rule 4 "Discovery Disputes" provisions when Court intervention is required);

3) The Order incorporates a "sharing" provision for pattern and practice litigation against the same Defendants, to reduce the cost and burden on litigants and courts alike when addressing duplicative, highly relevant discovery;

4) The Order preserves our "open courts", especially in :pattern and practice litigation where the public interest in the public's own information is too easily abused by abusive orders sealing continuing misconduct from public scrutiny; and

5) The Order removes automatic permanent sealing of public records without the necessary scrutiny required by law, both generally and especially in pattern and practice litigation.

The Order follows the law strictly, and heeds the Circuit's recognition that protective orders intended to protect legitimate interests are too often abused, with real costs to litigants, the Courts, and the public's confidence in the court system. The Order insists that a party claiming "confidentiality" bear the burden through resolution of the assertion to prove that information is entitled to protection. *In re Terra Int'l*, 134 F.3d 302, 306 (5th Cir. 1998). And more directly, it recognizes the presumption of public access to judicial records. *S.E.C. v. Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993); *see also Binh Hoa Le*, 2021 U.S. App. LEXIS 6663 at *10 ("The presumption of openness is Law 101: 'The public's right of access to judicial records is a fundamental element of the rule of law.').

Argument & Authorities

I. A party alleging protection is necessary must maintain the burden to seek relief from the Court to support confidentiality designations.

A Rule 26(c) protective order must show "good cause" and a "specific need for protection." *Landry v. Air Line Pilots Ass'n*, 901 F.2d 404, 435 (5th Cir. 1990). "Good cause" may be established by "a finding that further discovery will impose undue burden or expense without aiding the resolution of dispositive motions." *Fujita v. United States*, 416 F. App'x 400, 402 (5th Cir. 2011); *see e.g., Kilmon v. Saulsbury Indus*., No. MO:17-cv-99, 2018 U.S. Dist. LEXIS 237653 at *12 (W.D. Tex. 2018) (noting that the defendant "cast[ed] its largest net" with its protective order and "fail[ed] to establish good cause and a specific need for protection").

A party making the claim of confidentiality has the burden to prove that the information is confidential. *See In re Terra Int'l*, 134 F.3d 302, 306 (5th Cir. 1998) (citing

United States v. Garrett, 571 F.2d 1323, 1326, n.3 (5th Cir. 1978)). Orders that effectively flip the burden of proving a lack of confidentiality, including by shifting the burden of requesting Court intervention away from the party claiming privilege, are contrary to well-established law. And because the designating party maintains the burden of proving confidentiality, that party should also maintain the burden to resolve before the Court a discovery dispute that may arise. Such a request would only be necessary *after* the receiving party provided notice of its challenge to the confidentiality of the document and the parties conferred regarding the objection to avoid piecemeal use of the Court's limited time and resources.

II. The Order provides a simple mechanism for parties to resolve misclassifications of confidentiality intended to reduce the necessity of Court intervention

Courts appropriately disfavor overly broad protective orders. *See In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 1996 U.S. Dist. LEXIS 10998 at *2 (E.D. La. July 30, 1996) (criticizing a proposed protective order because it failed to "specify a deadline for challenges to classifications of confidentiality."). But in most instances, orders omit a mechanism for expeditiously resolving abusive over-designations. By contrast, the Order provides:

> Prior to designating any material as subject to this Protective Order, Parties must make a bona fide determination that the material is confidential and is subject to protection under the laws of the State of Texas and/or Federal law, whichever may be applicable. If other Parties disagree with a confidentiality designation for any document subject to this Protective Order, the disagreeing Party will so notify the designating Party in writing. The designating Party will, within ten (10) days of receipt of such notice, apply to the Court pursuant to Judge Bennett's Rule 4 "Discovery Motions" Procedure to confirm whether disputed documents are entitled to protection in accordance with the Federal Rules of Civil Procedure. Parties shall consider any disputed documents subject to this Protective Order until the Court rules.

Order ¶ 7. On point with Fifth Circuit precedent, the Order provides a mechanism for challenging confidentiality designations and places the burden on a party asserting a privilege to seek relief from the Court, if necessary, to support confidentiality designations.

III. ESI discovery materials is addressed in the Order

To the extent that electronically stored information is produced in a format that does not permit the branding of the designation on the face of the document (e.g., native Excel files or database exports), any confidential designation shall be made by including the term "CONFIDENTIAL" in the name of the file and by adding a metadata field in the load file with the same designation.

IV. Automatic sealing, whether by default or abuse of standard protective orders, is particularly inappropriate in pattern and practice litigation with public entities

The Order recognizes the different standards for handling confidential documents produced in discovery and those that govern sealing or destruction of relevant documents during trial. Notably, the Fifth Circuit recently criticized the "growing practice of parties . . . presuming that whatever satisfies the lenient protective-order standard will necessarily satisfy the stringent sealing-order standard." *Binh Hoa Le* at *11. Illustrating this point, *In re Terra Int'l Inc.* was recently compared with *Van Waeyenberghe* to specifically acknowledge that the former case involved a protective order "for documents exchanged in discovery," while the latter case involved "sealing documents filed with the court." *United States v. Fisch*, No. H-18-1419, 2018 U.S. Dist. LEXIS 81141 at *2-3 (S.D. Tex. 2018).

Other federal courts have also addressed the distinction between protecting confidentiality during discovery, as opposed to the sealing of court records. *See In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) ("[a]nalytically distinct from the District Court's ability to protect discovery materials under Rule 26(c), the common law presumes that the public has a right of access to judicial materials."); *see also Fisch*, 2018 U.S. Dist. LEXIS 81141 at *2 ("A more stringent showing is needed to seal filed documents than to limit access to documents exchanged in discovery."); *Midwest Ath. & Sports All. LLC v. Rico*, No. 2:19-cv-00514-JDW, 2021 U.S. Dist. LEXIS 44658 at *7 (E.D.P.A. Mar. 10, 2021) (rejecting a movant's motion to seal one of its documents because the movant "conflate[d] the lesser standard applicable to issuance of protective orders that apply to discovery material with the more demanding common law right of access standard."); *Jao Bock Transaction Sys., LLC v. Fidelity Nat. Info. Servs., Inc*., No. 3:13-cv-223-J-32JRK, 2014 U.S. Dist. LEXIS 11205 at *1 (M.D. Fla. Jan. 24, 2014) (explaining that "a party's calling a document confidential pursuant to a protective order does not make it so when it comes to filing the document with the court.").

Contrary to federal law, orders presented by the City in litigation mandates that documents designated as confidential, even when used at trial or in support of dispositive motions, must be sealed and then destroyed without independent judicial review. In *Vantage Health Plan*, the Fifth Circuit cautioned against the practice of sealing documents as a "matter of routine, rather than a genuine belief that the documents contain[ed] confidential or sensitive information." *Vantage Health Plan v. Willis-Knighton Med. Ctr*.,

913 F.3d 443, 446 (5th Cir. 2019). The Circuit endorsed the district court's recognition that the parties' confidentiality designations contained "only boilerplate recitations" and reaffirmed the "presumption that all records should remain unsealed and open for [public] review." *Id*..

Automatic sealing, by default, is even less justified in pattern and practice litigation. Given the evidence already adduced that the Houston Police Department routinely engaged in securing illegal search warrants, covering up the fraudulent warrants, conducted illegal invasions of homes and illegal arrests, and used excessive force, there is justifiable public interest in the facts as further revealed in the trial preparation process. Pls.' Complaint. ¶ 1. The Fifth Circuit recently addressed a sealing request in a similar case involving a police-involved death. *See Bradley v. Ackal*, 954 F.3d 216 (5th Cir. 2020). In *Bradley*, a press organization sought to unseal the settlement agreement between a decedent's family and the police department. Agreeing with the organization, the Fifth Circuit explained that the allegations that law enforcement shot the decedent and then covered it up were "matters of local and national concern." *Id*. at 232. Underscoring the national relevance of the death, the Court noted:

> "Public access . . . will shed light on the resolution of a case that is of local and national interest and related to the criminal prosecutions of the [city's] sheriff and sheriff's deputies for allegedly violating the laws in ways similar to those that were alleged in this case—prosecutions that are also of local and national interest." *Id*. at 232.

Indeed, "[t]he public's interest is particularly legitimate and important where, as in this case, at least one of the parties to the action is a public entity or official." *Id*. at 233; *see also Macias v. Aaron Rents, Inc.,* 288 F. App'x 913, 915 (5th Cir. 2008) (rejecting the

litigant's argument that his motion to seal should be granted because of "the lack of importance to the public"). And regardless of the protective order, a judge is the "primary of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record" and thus must not "rubber stamp a stipulation to seal the record." *Fisch*, 2018 U.S. Dist. LEXIS 81141. at *3 (quoting *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co*., 178 F.3d 943, 945 (7th Cir. 1999)).

V. A sharing provision in pattern and practice litigation prevents abuse of the protective order process, and reduces the cost and burden on litigants and courts alike when addressing duplicative, highly relevant discovery

A. Public policy mandates limited sharing of relevant discovery to avoid the risk of discovery gamesmanship.

The public policy behind the promotion of judicial economy and an open and fair discovery process supports the Order. *See Binh Hoa Le*, 2021 U.S. App. LEXIS 6663 at *10 ("Americans cannot keep a watchful eye, either in capitols or in courthouses, if they are wearing blindfolds."). Permitting access by similarly situated litigants to the discovery materials produced in this case will thus allow them to focus more sharply their discovery requests in those cases and eliminate lengthy motions to compel. It will also help avoid the problem of the judges in those cases deciding discovery disputes without being able to actually see many of the underlying documents. Instead of having to make decisions "in the dark," the assigned judges in those cases will be able to actually review relevant documents before rendering some of their decisions. In short, sharing will help judicial economy by helping other judges manage those cases.

Commentators have frequently recognized the fact that lawyers representing plaintiffs need the ability to share information with other similarly situated litigants to ensure timely and effective discovery:

> Since the defendant possesses infinitely superior knowledge and resources, the need for cooperation among Plaintiffs'' attorneys is even greater than that of defendants....The sharing of information among Plaintiffs'' attorneys has four main goals: (1) to minimize the advantage of the defendant and allow the plaintiff to adequately prepare his case, (2) to enhance the speed and efficacy of the discovery process, (3) to provide a mechanism for verifying the accuracy of a manufacturer's response to the Plaintiffs' discovery requests, and (4) to reduce the cost of preparing each case... Courts should refrain from granting overly restrictive confidentiality orders that deny the plaintiff access to a cooperative discovery mechanism.

Hare and Gilbert, *Confidentiality Orders In Products Liability Cases*, 13 Am. J. Trial Advoc. 597, 612 (Fall 1989); *See also*, Marcus, Myth and Reality In Protective Order Litigation, 69 Cornell L. Rev. 1 (1983) ("By far the most important justification for granting nonparties access to discovery information is their need to use the information in other litigation").

The Order complies with federal and Texas law providing for limited sharing of discovery with similarly situated litigants and barring further dissemination outside the terms of the Order. Indeed, federal courts considering the issue have endorsed the confidential and protected sharing of discovery information to like-situated parties and claims. *See Charter Oak Fire Ins. Co. v. Electrolux Home Products, Inc.*, 287 F.R.D. 130, 134 (E.D.N.Y. 2012) (reasoning that the defendant would not be prejudiced because "the plaintiff in this action and any related action would be bound by the Protective Order" and "there will not be public dissemination"). And this case law is consistent with the weight of authority in state courts.

See Garcia v. Peeples, 734 S.W.2d 343, 347 (Tex. 1987) (explaining that "[i]n addition to making discovery more truthful, shared discovery makes the system itself more efficient."); *see also Idar v. Cooper Tire & Rubber Co*., No. C-10-217, 2011 U.S. Dist. LEXIS 26013 at *7 (S.D. Tex. Feb. 17, 2011) (concluding that under *Garcia*, "it would be an abuse of discretion for this Court to disallow any sharing among similarly situated litigants.").

B. Sharing provision particularly appropriate in pattern and practice litigation

This suit arises from the Houston Police Department's obtainment of illegal search warrants and murder of Rhogena Nicholas and Dennis Tuttle, which are the subject of federal and state investigations and the current pending action. The inclusion of a sharing clause is thus critical in this case because similar litigation has already initiated litigation over the same pattern and practices by the City and even some of the same individual defendants. *See, e.g Khansari v. City of Houston*, No. H-13-2722, 2015 U.S. Dist. LEXIS 145969 at *11 (S.D. Tex. Oct. 28, 2015) (the plaintiff alleged that several Houston police officers infringed on his "right[] to be free from excessive force" and "proximately caused [him] to suffer severe injury"); *Garcia v. Harris Cty*., No. H-16-2134, 2018 U.S. Dist. LEXIS 192012 at *3 (S.D. Tex. 2018) (concluding that the Harris County District Attorney's "single constitutional action [was] enough to establish a municipal policy or custom" under *Monell*); *Brendle v. City of Houston*, 177 F. Supp 2d 553, 560 (N.D. Miss. 2001) (denying a Houston police officer's motion to dismiss as to the plaintiff's excessive force claim). The Order therefore provides:

> 8. Both the Protected Documents and the information contained therein shall be treated as confidential. Except as provided below, a Party may use Protected Documents that are disclosed in this litigation by any Person solely

> for prosecuting, defending, or attempting to settle this litigation; Protected Documents shall not be disclosed for any other purpose. Except upon the express written advance consent of counsel for the designating Person or upon order of this Court, the Protected Documents or information contained therein may be disclosed only to the following persons:
>
> (h) Litigants or attorneys for a litigant involving a similar allegation of violation of civil rights under 42 U.S.C. §1983 against the same Defendant or Defendants;
>
> 9. Before giving access to any of the Protected Documents or the information contained therein, each person described in paragraphs 7(c), 7(f), and 7(g) above shall be advised of the terms of this Order, shall be given a copy of this Order, and shall agree in writing, by signing a copy of the acknowledgment attached hereto as Exhibit A, to be bound by its terms and to submit to the jurisdiction of this Court.

Protective Order ¶ 8-9.

In *Estrada*, the court rejected the defendant city's protective order, acknowledging that "[c]urrent case law suggests the privacy interests police officers have in their records do not outweigh a plaintiff's interests in civil rights cases." *Estrada v. City & County of San Francisco*, No. 16-cv-00722-MEJ, 2016 U.S. Dist. LEXIS 173740 at *7 (N.D. Cal. 2016). Indeed, "[w]here, as here, the case involves pattern and practice litigation against the same police department, 'this balancing approach should be 'moderately pre-weighted in favor of disclosure.'" *Id.* (citing *Soto v. City of Concord*, 162 F.R.D. 603, 615 (N.D. Cal. 1995)).

Further, unlike commercial litigants that may face financial harm if required to produce company documents, the City of Houston cannot point to any similar potential injury. *Compare Johnson v. City & Cty. Of San Francisco*, No. C-09-5503, 2011 U.S. Dist. LEXIS 172187, at *7 (N.D. Cal. Feb. 9, 2011) (denying the City and County of San

Francisco's "request for the Court to impose the extremely restrictive type of protective order usually employed in patent and trade secret cases") *with Edco Plastics, Inc. v. Allynce, Inc*., No. SACV12-1168, 2012 U.S. Dist. LEXIS 181430 at *2 (C.D. Cal., Dec. 20, 2012) (justifying confidentiality designations "[b]ecause of the parties' status as former and/or present competitors"). Defendants simply do not have the same interest in avoiding disclosure of confidential documents to their competitors because the City of Houston does not have competitors.

Legitimately confidential information will remain confidential, even if shared under the strict terms of the Order. The Order will only permit sharing relevant documents with other similarly situated litigants if they agree to be bound by the same protective order and this Court's purview. Defendants are not endangered by the Order because only like-situated persons that submit to this Court's confidentiality order and subject themselves to this Court's jurisdiction for enforcement of the order fall under this limited exception. There is no legitimate purpose in encouraging discovery gamesmanship by assertion of confidentiality to avoid production of relevant materials to those that are not competitors. And neither Texas nor federal law mandates restriction of sharing to similarly situated plaintiffs who find themselves forced to pursue pattern and practice litigation against Defendants.

Conclusion

For the reasons noted, the Harding Street families request that the Court enter a tailored Order in the form proposed.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

This will certify that Plaintiffs' counsel has conferred with Defendants' counsel regarding the form of the proposed protective order in writing and by teleconference, and reached an agreement as to certain modifications already incorporated, but is otherwise OPPOSED.

MICHAEL PATRICK DOYLE

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that a true and correct copy of the foregoing document was forwarded to the following counsel of record on this the 7th day of April, 2021, via CM/ECF, hand delivery, electronic mail, overnight courier, U.S. Mail, certified mail, return receipt request, and/or facsimile, pursuant to the Federal Rules of Civil Procedure.

MICHAEL PATRICK DOYLE

Appendix 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLIFFORD TUTTLE, et. al. Consolidated with JOHN NICHOLAS, et.al. Plaintiffs, v. CITY OF HOUSTON; ART ACEVEDO, et. al. Defendants.	Case No. 4:21-cv-00270 (JURY DEMANDED)

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' JOINT MOTION FOR PROTECTIVE ORDER

Plaintiffs have filed this Reply in Support their Joint Motion for Protective Order to address two narrow issues in Defendants' opposition brief. For the reasons identified below, Plaintiffs request that the Court enter their proposed form of the protective order.

1. **Plaintiffs' motion is not premature because all Defendants have been served, and Defendants have not even attempted to identify a basis for a complete stay of this case.**

As a threshold issue, Defendants have asserted that a protective order is premature because they have filed (and then re-filed) a slew of motions to stay discovery based on the indictments of Defendants Goines, Bryant, Gallegos, Ashraf, Wood, Pardo, Medina, Reyna, Lovings, and Gonzales ("the indicted Defendants").

In contrast to that broad request for a blanket stay of discovery, Defendants have largely ignored Plaintiffs' (1) claims for municipal liability, and (2) individual claims against the non-indicted Defendants. In their only attempt to address discovery related to those claims, the City and the non-indicted Defendants simply argue the following:

- "[T]he City and Acevedo's *Monell* defenses, will be much more difficult to establish without the testimony and discovery of the indicted defending officers."

- "[T]he individual defending officers, who were not present at Harding Street, or who were only tangentially involved ("tangential officers"), will need the testimony and discovery responses from those indicted officers to prepare their defenses."

Put simply, this argument does not justify a stay of discovery related to Plaintiff's *Monell* claims. Rather, Defendants conflate the limits for the discovery period with a blanket stay of all discovery. Defendants' "*Monell* defenses" cannot be prejudiced by allowing discovery related to the *Monell* claims. Instead, after the Court evaluates the scope and necessity of Defendants' request for a stay of discovery, the Court can easily determine the timing for depositions and discovery for the indicted Defendants. As a result, Defendants have not presented any legitimate basis to stay discovery related to the municipal claims and the non-indicted Defendants.

Similarly, Defendants Ashraf, Wood, Pardo, Medina, Reyna, Lovings, and Gonzales also have requested a stay based on the "similarity of issues in the underlying civil and criminal actions." In contrast, the United States and the State of Texas have not charged Ashraf, Wood, Pardo, Medina, Reyna, Lovings, and Gonzales related to the deaths of Plaintiffs or the illegal raid at 7815 Harding Street. As explained in Plaintiffs' response

to Defendants' motions to stay, Ashraf, Wood, Pardo, Medina, Reyna, Lovings, and Gonzales have not met their burden to stay all discovery.

Therefore, Plaintiff's proposed motion for protective order is ripe and necessary.

2. Based on the facts and circumstances of this case, the Court's agreed protective order is not appropriate for this case

Next, Defendants largely point to the Court's form of protective order and argue that the Court should simply enter that form. As explained below, Plaintiffs have identified three particular issues that the standard-form protective order does not address. Based on the unique and high-profile nature of this lawsuit, Plaintiffs' therefore request that their proposed form of protective order be entered.

a. Because this case involves allegations regarding a pattern/custom/usage of conduct by a public entity, sharing is appropriate and necessary.

First, limited sharing is particularly important in this case because Plaintiffs have alleged a long-term pattern, custom, or usage of civil rights violation by the City of Houston. By example, in its prior motion to dismiss in this case, Defendants have challenged Plaintiffs' complaint based on *Iqbal* and argued that Plaintiffs have not pleaded sufficient facts to support their claims. As other courts in this District have noted, "[i]n practical terms, it is nearly impossible for [Plaintiffs] to try to state a *Monell* claim without access to that limited discovery."[1] In contrast, by authorizing a limited sharing clause under the Protective Order, the Court would substantially increase judicial economy and save the

[1] *See e.g. Coucke v. Harris Cty.*, No. H-20-766, 2020 U.S. Dist. LEXIS 141944 (S.D. Tex. Aug. 7, 2020) (J. Miller)

parties' resources by decreasing repetitive discovery requests and motion practice, while also streamlining the argument in potential motions to dismiss.

The City's prior motion to dismiss further highlight the need for sharing of discovery in cases alleging *Monell* claims against the City. Specifically, the City argued that Plaintiffs must identify "a significant number of other instances, placed in context of the size of the police department and criminal incidents investigated[,]" to prove a wide-spread pattern.[2] Following that quotation, the City then cited to multiple examples of insufficient evidence of a "pattern" of constitutional violations.[3] As a result, the City has combined *Iqbal* with protective orders to create both a sword and a shield to fight victims of constitutional violations. On one hand, through its use of a non-sharing, confidentiality order, the City hides evidence of its conduct, including records regarding prior allegations of violations, its policies and standard operating procedures, training materials, and personnel files. Yet when faced with a lawsuit alleygating a Constitutional violation, the City simply asserts that the victim cannot identify a pattern of conduct because the victim does not have access to the very same records that it has withheld.

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[2] *See* Doc. 29 of Case Number 4:21-Cv-000272 now consolidated with 4:21-Cv-000270 at pg. 9-10.

[3] Id. at pg. 10 (the City cited to the following string cite: "*Davidson v. City of Stafford*, 848 F.3d 384, 396–97 (5th Cir. 2017) (finding three arrests over three and a half years did not establish a pattern of constitutional violations); *Carnaby v. City of Houston*, 636 F.3d 183, 189–90 (5th Cir. 2011) (holding two reports of violations of a policy in four years in Houston did not amount to pattern); *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 851–52 (5th Cir. 2009) (holding 27 complaints of excessive force over a period of three years in department with more than 1,500 officers did not constitute a pattern); and *Pineda v. City of Houston*, 291 F.3d 325, 329 (5th Cir. 2002) (holding eleven incidents cannot support a pattern of illegality in one of the Nation's largest cities and police forces)).[3]

Furthermore, the City has emphasized the need for sharing of discovery in this case because Defendants have coupled their motion to dismiss based on alleged factual insufficiency with a motion to stay all discovery. This attempt to conceal factual discovery follows the City's prior attempts to conceal any information regarding this incident, including the City's (1) objection to Plaintiffs' public records requests, (2) opposition to Plaintiff's pre-suit discovery petition under Tex. R. Civ. Pro. 202, and (3) opposition to the Nicholas' Plaintiff's intervention in a similar excessive force case.[4]

In sum, a narrowly tailored sharing provision is necessary in this case because Plaintiffs' claims include allegations regarding prior incidents, policies, customs, and usage, and thus, these records will be directly relevant to future pattern and practice claims. Therefore, Plaintiffs request that the Court enter their form of protective order.

b. Consistent with Rule 26, Plaintiffs proposed protective order only governs confidentiality of discovery, not the sealing of court records.

Next, the Court's protective order does not explicitly address the distinction between sealing documents and Rule 26 confidentiality. In particular, the order identifies the following procedure for filing records and testimony marked confidential under the protective order.

> No Confidential Information shall be filed with the Court or used in a hearing unless the party seeking to file or use the Confidential Information has provided, at least five (5) business days before the filing or hearing, written notice to all parties and any person designating the information as Confidential Information. This pre-filing notice shall identify the specific information that the party intends to file or use. Any objections to such filing or use shall be made in writing to the Court within the five-day period with

[4] *Estate of Baker v. Castro*, H-15-3495, 2020 U.S. Dist. LEXIS 80521 *10-11 (S.D. Tex. May 7, 2020)

> a request for an expedited hearing. If objections are lodged, the Confidential Information must not be filed or used until further instruction from the Court, unless the information is filed pursuant to the Court's procedures for filing documents under seal.

Under this process, the moving party merely needs to object to the filing of documents marked confidential under the protective order, and the non-moving party must file these records under seal, pending review of the Court.

In contrast, Plaintiffs' proposed form of protective order only governs the exchange of document in discovery, not the filing of judicial records. And as a result, if a party seeks to seal Court Records at the adjudicative or dipositive motion stage, that party must file a tailored motion to justify the heavy burden of sealing. The Fifth Circuit explained this precise point in *Binh Hoa Le v. Exeter Fin. Corp*.

> In our view, courts should be ungenerous with their discretion to seal judicial records, which plays out in two legal standards relevant here. The first standard, requiring only "good cause," applies to protective orders sealing documents produced in discovery. The second standard, a stricter balancing test, applies "[o]nce a document is filed on the public record"—when a document "becomes a 'judicial record.'" Under both standards, the working presumption is that judicial records should not be sealed That must be the default because the opposite would be unworkable: "With automatic sealing, the public may never know a document has been filed that might be of interest."
> . . .
> At the discovery stage, when parties are exchanging information, a stipulated protective order under Rule 26(c) may well be proper. Party-agreed secrecy has its place—for example, honoring legitimate privacy interests and facilitating the efficient exchange of information. But at the adjudicative stage, when materials enter the court record, the standard for shielding records from public view is far more arduous. This conflation error—equating the standard for keeping unfiled discovery confidential with the

> standard for placing filed materials under seal—is a common one and one that over-privileges secrecy and devalues transparency. [5]

Therefore, Plaintiffs request that the Court enter their proposed protective order to address the exchange of discovery, and separately handle sealing of Court Records at the appropriate disposition.

c. <u>When a party (or non-party) marks a document confidential in good faith, that document should be deemed authentic, absent an objection to the designation.</u>

Finally, Defendants have also objected to the presumed authentication of documents marked "confidential" under the protective order. Under Rule 901(a), parties must properly authenticate documents as a condition precedent to their admissibility "by evidence sufficient to support a finding that the matter in question is what its proponent claims."[6] In meeting this condition, the party may authenticate the document by "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."[7] Importantly, objections regarding authentication of documents must be made in good faith.

In this case, the proposed protective order authorizes the disclosing party to mark a document confidential, so long as the party "reasonably and in good faith believes [the record] contains or comprises (a) law enforcement privileged information under federal law, (b) proprietary business information, or (c) information implicating an individual's

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[5] *See Binh Hoa Le v. Exeter Fin. Corp*., No. 20-10377, 2021 U.S. App. LEXIS 6663 *14 - 17 (5th Cir. Mar. 5, 2021

[6] FED. R. EVID. 901(a).

[7] *United States v. Smith*, 918 F.2d 1501, 1510 (11th Cir.1990); *Law Co. v. Mohawk Constr. & Supply Co.*, 577 F3d 1164 (10th Cir. 2009).

applicable. If other Parties disagree with a confidentiality designation for any document subject to this Protective Order, the disagreeing Party will so notify the designating Party in writing. The designating Party will, within ten (10) days of receipt of such notice, apply to the Court pursuant to Judge Bennett's Rule 4 "Discovery Motions" Procedure to confirm whether disputed documents are entitled to protection in accordance with the Federal Rules of Civil Procedure. Parties shall consider any disputed documents subject to this Protective Order until the Court rules.

8. Both the Protected Documents and the information contained therein shall be treated as confidential. Except as provided below, a Party may use Protected Documents that are disclosed in this litigation by any Person solely for prosecuting, defending, or attempting to settle this litigation; Protected Documents shall not be disclosed for any other purpose. Except upon the express written advance consent of counsel for the designating Person or upon order of this Court, the Protected Documents or information contained therein may be disclosed only to the following persons:

a. Counsel of record in this case, including other members of counsel's law firm and any other counsel associated to assist in the preparation or trial of this case, to the extent reasonably necessary to render professional services in this litigation;

b. Employees and independent contractors of counsel or of associated counsel, who assist in the preparation or trial of this case, to the extent reasonably necessary to render professional services in this litigation;

c. Experts and consultants retained by a Party for the preparation or trial of this case;

d. The Court and the Court's staff;

e. Other Courts and other Court's staffs involved in this litigation (e.g., appellate courts);

f. A non-party who will arrange for copying and dissemination of the documents pursuant to this Order (i.e. a copy service);

g. A witness identified in a Party's disclosures, to the extent necessary to prepare that witness for deposition or commencement of trial within thirty (30) days of such deposition or testimony;

h. Litigants or attorneys for a litigant involving a similar allegation of violation of civil rights under 42 U.S.C. §1983 against the same Defendant or Defendants; and;

i. A Party or Party's representative, if such representative is designated in writing by the Party as its representative for trial.

9. Before giving access to any of the Protected Documents or the information contained therein, each person described in paragraphs 8(c), 8(f), 8(g); and 8(h) above

shall be advised of the terms of this Protective Order, shall be given a copy of this Protective Order, and shall agree in writing, by signing a copy of this Protective Order, to be bound by its terms and to submit to the jurisdiction of this Court.

10. To the extent that Protected Documents or information contained therein is used in the taking of depositions, such documents or information shall remain subject to the provisions of this Protective Order.

11. To the extent that electronically stored information is produced in a format that does not permit the branding of the designation on the face of the document (e.g., native Excel files or database exports), the confidential designation shall be made by including the term "CONFIDENTIAL" in the name of the file and by adding a metadata field in the load file with the same designation.

12. This Protective Order shall not apply to the disclosure of Protected Documents or the information contained therein at the time of trial, through the receipt of Protected Documents into evidence or through the testimony of witnesses. The closure of trial proceedings and sealing of the record of a trial involve considerations not presently before the Court. These issues may be taken up as a separate matter upon the motion of any of the parties at the threshold of the trial.

13. Protected Documents produced pursuant to this Protective Order are deemed authentic under the Federal Rules of Evidence, and no further proof of authentication as to such documents shall be required.

14. This Protective Order shall be binding upon the parties hereto, all persons given access to Confidential Information pursuant to paragraph 8 above, upon their attorneys, and upon the parties' and their attorneys' successors, executors, personal representatives, administrators, heirs, legal representatives, assigns, subsidiaries, divisions, employees, agents, independent contractors, or other persons or organizations over which they have control.

15. No Party shall have liability, under this Order, for any disclosure or use of privileged information occurring before the designating Party provides notice of its claims of privilege.

If any of the foregoing violates the Federal Rules of Civil Procedure, the Federal Rules of Civil Procedure control and such provision will not be enforced.

_____ _____

Date

ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN NICHOLAS, et.al. Consolidated with CLIFFORD TUTTLE, et. al. Plaintiffs, v. CITY OF HOUSTON; ART ACEVEDO, et. al. Defendants.	Case No. 4:21-cv-00270 (JURY DEMANDED)

EXHIBIT "A"

I, _____, do hereby acknowledge that I have received and read a copy of the attached Protective Order, and I agree to be bound by the terms of such Order. I further agree to be subject to the jurisdiction of this Court including, but not limited to, its contempt powers.

DATED this _____ day of _____, 2021

_____

Relationship to this Lawsuit:

_____