FILED
SEP 2 3 2019
JOHN T. FREY
Clerk of the Circuit Court
of Fairfax County, VA

VIRGINIA: IN THE CIRCUIT COURT OF FAIRFAX COUNTY

John C. Depp, II
Plaintiff
vs.
Amber Laura Heard
Defendant

Civil Action No. CL-2019-0002911

Previous Chancery No. CH

FRIDAY MOTIONS DAY - RESPONSE/OPPOSITION TO MOTION

Title of Motion(s) to which Response is filed: Motion for Protective Order

Responding Party: John C. Depp, II

DATE TO BE HEARD: October 18, 2019

Time Estimate (combined, no more than 30 minutes): 30 minutes

Responding Party will use ***Court Call*** **telephonic appearance:** ☐ Yes ☑ No

RESPONSE by: Benjamin G. Chew/John C. Depp, II — Printed Attorney Name/ Responding Party Name

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CERTIFICATIONS

☑ I certify that I have in good faith conferred or attempted to confer with other affected parties in an effort to resolve the subject of the motion without Court action; and,

☑ I have read, and complied with, each of the Instructions for Responding Party on the reverse side of this form.

Responding Party/Counsel of Record

CERTIFICATE OF SERVICE

I certify on the 6th day of September, 2019, a true copy of the foregoing Response was ☐ mailed ☐ faxed ☑ delivered to all counsel of record pursuant to the provisions of Rule 4:15(e) of the Rules of the Supreme Court of Virginia.

Responding Party/Counsel of Record

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JOHN C. DEPP, II	:	
Plaintiff,	:	
v.	:	**Civil Action No.: CL-2019-0002911**
AMBER LAURA HEARD,	:	
Defendant.	:	

PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION FOR PROTECTIVE ORDER

Plaintiff John C. Depp, II hereby opposes Defendant Amber Laura Heard's Motion for Entry of a Protective Order ("Defendant's Motion").

As set forth below, the Court should deny Defendant's Motion because Ms. Heard has not met her burden of establishing that good cause exists to enter a Protective Order, nor could she. Indeed, it would be grossly unfair to allow Ms. Heard – who has already disseminated to the media and the public as much defamatory material about her former husband as she could concoct – to now hide the objective facts that reveal her falsehoods behind an artificial wall of confidentiality.

Moreover, Mr. Depp is suing Ms. Heard for objectively disprovable lies that she and a few of her confederates and representatives have told about Mr. Depp *in the media*. The Protective Order Ms. Heard now seeks would perversely allow all these false and damaging public statements to stand uncorrected. Only the truth can restore the incalculable damage that Ms. Heard has inflicted on Mr. Depp.

A Protective Order would also cause administrative burden and be impractical and unavailing, with the trial only a few months away in any event, when everything will be public.

Mr. Depp, whose reputation has suffered severe harm from these false claims, should have the right to the restorative transparency of the truth that Ms. Heard seeks to hide. Even as Ms. Heard and her representatives continue their onslaught of false and defamatory statements about Mr. Depp in the media, it is clear that Ms. Heard's reaction to the avalanche of testimonial and other evidence Mr. Depp has produced is to seek to simply hide future discovery.

Background

Mr. Depp and Ms. Heard were married for only fifteen months, and the two had no children together. Mr. Depp has two children from a longstanding relationship with Vanessa Paridis, with whom he remains close. Prior to his marriage to Ms. Heard, no one had ever accused Mr. Depp of domestic violence. By contrast, Ms. Heard was arrested in a Washington State airport, and spent the night in jail, for domestic violence against her former partner/wife witnessed by a police officer.

As soon as the ink dried on the divorce decree, Ms. Heard began to engage in a relentless media campaign against her former husband, continuing the hoax that she began when she appeared in court May 27, 2016 with an apparently, suddenly "bruised" face, which she claimed (despite damning eyewitness testimony and video footage to the contrary) was caused in an incident six days prior, which she and her publicist then amplified a few days later on the cover of *People* magazine. Now that discovery has started, Ms. Heard wants everything about the matter hidden from the public for as long as possible. This matter clearly warrants transparency.

ARGUMENT

I. Ms. Heard Failed to Make the Requisite Showing of Good Cause

Rule 4:1(c) of the Supreme Court of Virginia provides that the Court may enter a protective order only "for good cause shown" or when "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." "[T]he party

moving for the protective order...bears the burden of establishing the requisite good cause." *Jarrell v. Kroger Ltd. P'ship 1*, No. 2:14CV57, 2014 WL 12770216, at *3 (E.D. Va. July 17, 2014). To meet this burden, the moving party must "demonstrat[e] that "specific prejudice or harm will result if no protective order is granted.'" *Id.* Accordingly, Virginia courts have concluded that "the issuance of a protective order requires both an allegation of significant harm and a demonstration of good cause." *See World Mission Soc'y Church of God v. Colon*, 85 Va. Cir. 134 (2012).[1]

Applying this authority, the Court should *deny* Defendant's Motion because Ms. Heard makes no showing whatsoever of good cause, offering only the conclusory assertion that the need for a protective order here "is undeniable and clearly appropriate." Defendant's Motion, ¶ 3. Ms. Heard's bare assertion does not suffice, as it is axiomatic that "[s]imply providing conclusory or speculative statements about the need for a protective order and the harm that would be suffered without one is insufficient." *Jarrell v. Kroger Ltd. P'ship 1*, No. 2:14CV57, 2014 WL 12770216, at *3 (E.D. Va. July 17, 2014). Although she has not yet made the assertion, being embarrassed by the factual evisceration of one's lies would not meet the standard. *See also Perreault v. The Free Lance-Star, et al.*, 276 Va. 375 (2008), which militates towards denying Defendant's Motion. In *Perreault*, the Supreme Court of Virginia affirmed the circuit court's discussion to disallow certain wrongful death settlements to be filed under seal, finding that the petitioner/appellant did not overcome the strong presumption in favor of public access to court filings. *Id.*

II. The Court Should Not Allow Ms. Heard to Use Confidentiality as Both a Sword and a Shield

[1] Because Virginia's Rule 4:1(c) and FRCP are similar, Virginia courts have looked to the Federal rule for guidance. *See id.*

The confidentiality clauses in the parties' divorce degree *explicitly* barred Ms. Heard, Mr. Depp, and their respective agents and attorneys from disclosing *any* information about their marriage, a prohibition Ms. Heard has *repeatedly* violated since November 2016, falsely accusing Mr. Depp of abuse in an apparent effort to promote her acting career and masquerade as an "abuse survivor" while damaging the reputation of her former husband. Yet the facts, including Ms. Heard's own, unsealed deposition admissions from her prior testimony, show Mr. Depp to be the actual victim of serious violence and other abuse at the hands of Ms. Heard.

Ms. Heard's serial media attacks culminated (but did not end) in the Op-Ed Ms. Heard published in the *Washington Post* in December 2018, the subject of this defamation action. Ms. Heard gratuitously attached to her failed motion to dismiss (for *improper venue*) a lengthy declaration appending hundreds of pages of fraudulent materials unrelated to the venue issue and calculated to further defame and prejudice the public against Mr. Depp. Simultaneous with Ms. Heard's filing of those materials, her California counsel publicly accused Mr. Depp of "despicable conduct" in the media. *See* **Exhibit A.**

In this context, it would be unfair to allow Ms. Heard, having used publicity of her hoax as a sword against Mr. Depp for years to destroy his reputation while burnishing hers, to now use a protective order as a shield against disclosures of materials which will undo all the damage her false publicity has done. Per Judge Ellis, the fact that disclosure might cause her *some* annoyance or embarrassment is insufficient. *See U.S. ex rel. Davis v. Prine*, 753 F. Supp. 2d 561 (E.D. Va. 2010). Here Ms. Heard has made no showing or even proffer of what discovery might merit confidential treatment. "Simply providing 'conclusory or speculative statements about the need for a protective order and the harm which would be suffered without one is insufficient" *Jarrell v. Kroger L&L P'ship 1,* No. 2:14CV57, 2014 WL 12770216, at 3 (E.D. Va. July 17,

2014). It is hard to imagine such a proffer in light of Ms. Heard's, her friends and ever her lawyers' prior media and other purported "disclosures" concerning Mr. Depp and even her recent public allegations on Capitol Hill. *See* **Exhibit B.**[2] Nor does Ms. Heard have standing to seek a protective order on behalf of unspecified non-party witnesses: "A party may not ask for an order to protect the rights of another party or a witness if that party or witness does not claim protection for itself, but a party may seek an order if the party believes its own interest is jeopardized by discovery sought from a third person." *See* Va. Prac. Civil Discovery § 2:43.

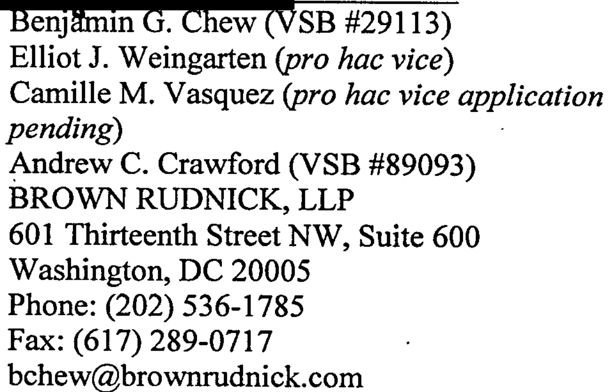
Having publicly defamed Mr. Depp, violated the confidentiality clauses in the divorce decree, hurled unsealed, perjurious and cherry-picked deposition testimony from the prior divorce case into the media, and filed in the public record of this case a demonstrably false and salacious declaration, Ms. Heard can hardly claim entitlement to the cloak of confidentiality, much less that an entitlement that outweighs the strong presumption in favor of public access to court filings, and considering the significant logistical burden on the Clerk's Office a Protective Order would entail here.

III. In the Alternative, the Court Should Enter a More Limited Protective Order

To the extent the Court is nevertheless inclined to enter some type of Protective Order, Mr. Depp respectfully requests that it be limited only to the Parties' redaction of their and others' personal identifiers (*e.g.*, addresses, contact information, or social security numbers, bank account numbers), and exclude non-party witnesses from its application.

[2] Presumably this trip caused Ms. Heard to pass through the Commonwealth of Virginia, where she claimed she had never traveled. Declaration, ¶ 56.

Respectfully submitted,



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Dated: September 6, 2019

Amber Heard Has Filed New Allegations That Johnny Depp Abused Her During Drug-Fueled Rages

"We called that version of Johnny, 'the Monster,'" Heard says in new court documents.

By Amber Jamieson
Posted on April 12, 2019, at 5:40 p.m. ET

BuzzFeed News Amber Heard Has Filed New Allegations That Johnny

Actors Amber Heard and Johnny Depp on Jan. 9, 2016, in Culver City, California.
Jason Merritt / Getty Images

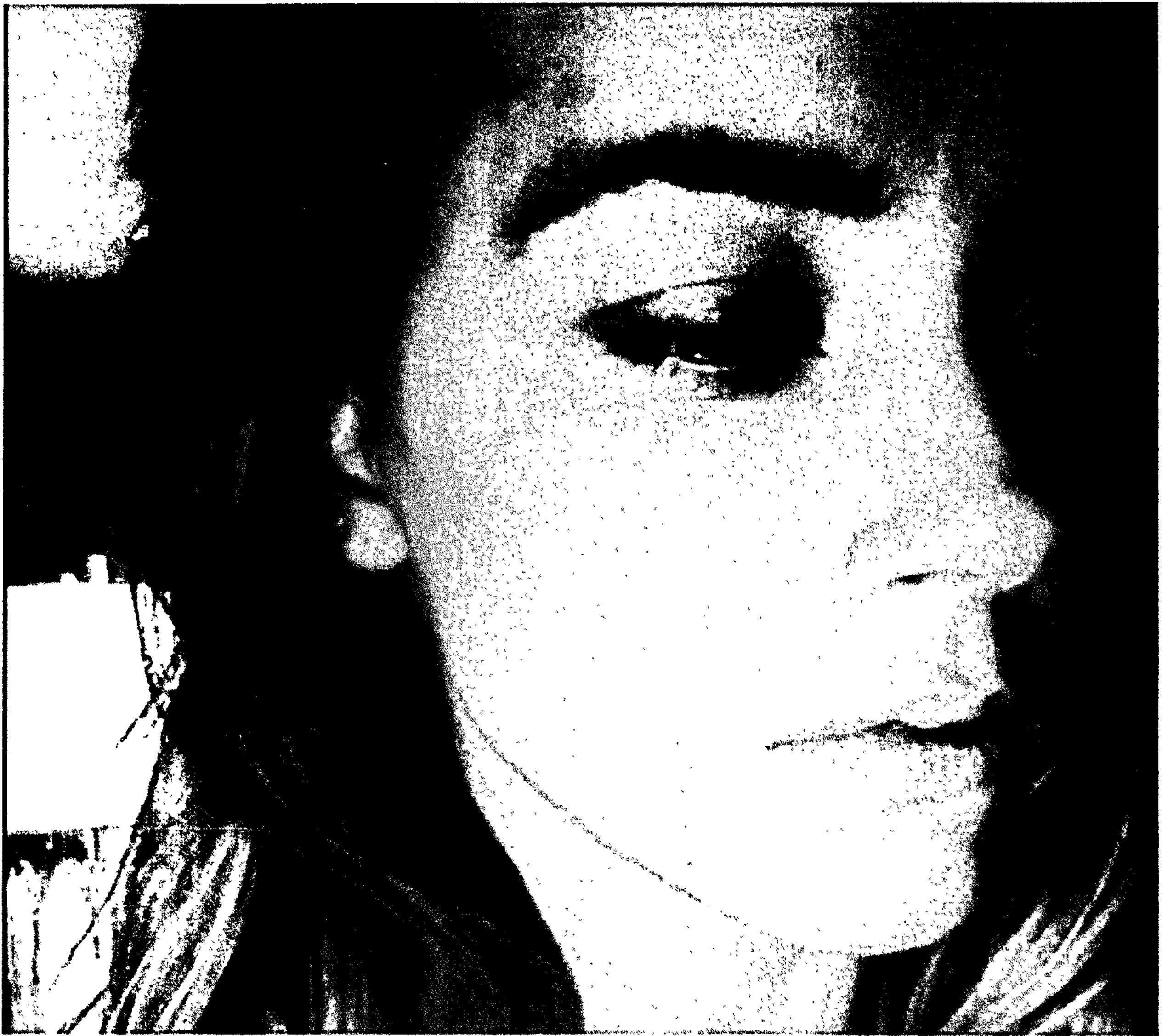
Amber Heard has filed new allegations against her ex-husband Johnny Depp, saying in court documents that he choked, hit, and

head-butted her during violent drug-fueled rages.

The 32-year-old *Aquaman* actor said Depp abused alcohol and drugs — both illegal and prescription — during their relationship and became a "totally different person, often delusional and violent," including threatening to kill her, according to documents filed in Virginia's Fairfax Circuit Court on Thursday and first reported by Page Six.

"We called that version of Johnny, 'the Monster,'" she said.

After consuming eight MDMA tablets in Australia in 2015, Depp choked Heard and then slammed her into a countertop, Heard says. Depp also accidentally cut off the tip of his fingertip on broken glass in the aftermath, and then wrote messages on a mirror in blood using his severed finger, the court documents state.



Facial injuries Heard said she suffered when Depp attacked her.
Amber Heard

Heard outlined the new allegations of abuse in a motion asking to dismiss the defamation lawsuit that Depp, 55, filed against her over an op-ed published in the Washington Post. In it, she wrote about being a public survivor of abuse, although Depp is not named.

In May 2016, a week after filing for divorce from the *Pirates of the Caribbean* star, Heard obtained a restraining order against Depp, alleging physical abuse.

During their divorce proceedings in 2018, Heard accused Depp of hitting her in the face with a cellphone and pulling her hair. He

said in a counterclaim that she punched him in the face, twice. The abuse allegations were later dropped.

But the court documents filed on Thursday outline new accusations and reveal the extent of Depp's alleged behavior and addiction problems.

"Since their divorce, Mr. Depp has continued to publicly harass Ms. Heard, and attempted to gaslight the world by denying his abuse," Eric George, Heard's lawyer, said in a statement. "It is long past time for Mr. Depp's despicable conduct to end. Today, we presented to the court irrefutable evidence of Mr. Depp's abuse. It is regrettable that it will take a judge to finally end the persistent harassment of Ms. Heard by Mr. Depp, but Ms. Heard will take whatever action is necessary to vindicate the truth."

Representatives for Depp did not immediately respond to BuzzFeed News' request for comment.

In March 2013, Depp tried to set fire to a painting given to Heard by a former love interest, and later hit her in the face, leaving her with a bleeding lip, the court documents state.

Heard also says that Depp got drunk on a private plane in May 2014 and started throwing things at her because he was angry about a romantic scene she filmed with actor James Franco for the 2015 film *The Adderall Diaries*.

"Instead of reacting to his behavior, I simply moved seats," Heard states in the court documents. "That didn't stop him. He provocatively pushed a chair at me as I walked by, yelled at me, and taunted me by yelling out the name 'James Franco.'

"At some point, I stood up, and Johnny kicked me in the back, causing me to fall over. Johnny threw his boot at me while I was on the ground."

Depp allegedly wrote an apology text message — Depp appeared as "Steve" in her phone as a privacy measure — after the plane incident, saying that his "illness somehow crept up and grabbed" him.

No Service 3:22 PM

< Messages (101) **Steve** Details

May 25, [illegible]

Once again, I find myself in a place of shame and regret. Of course, I am sorry. I really don't know why, or what happened. But I will never do it again. I want to get better for you. And for me. I must. My illness somehow crept up and grabbed me. I can't do it again. I can't live like that again. And I know you can't either. I must get better. And I will. For us both. Starting today. I love you. Again, I am so sorry. So sorry...
I love you and feel so bad for letting you down...
Yours

May 25, 2014, 12:50 PM

I see that understanding and forgiveness ain't on the menu... I'm disappointed to see that, but, not too surprised, I suppose...

Send

An alleged text message from Johnny Depp in Amber Heard's phone, which lists him as "Steve."
Amber Heard

"Once again, I find myself in a place of shame and regret. Of course, I am sorry. I really don't know why or what happened. But I will never do it again," Depp allegedly wrote.

In Heard's court filing, she says that throughout the last three years of their relationship, Depp received medical treatment for his drug and alcohol addiction, including a live-in nurse at times.

During a vacation to the Bahamas in August 2014, Heard says Depp kicked and slapped Heard during a fight, before kicking a hole in the door. Later, his live-in nurse and private doctor flew to the Bahamas to help handle his "manic episodes," the court documents state.

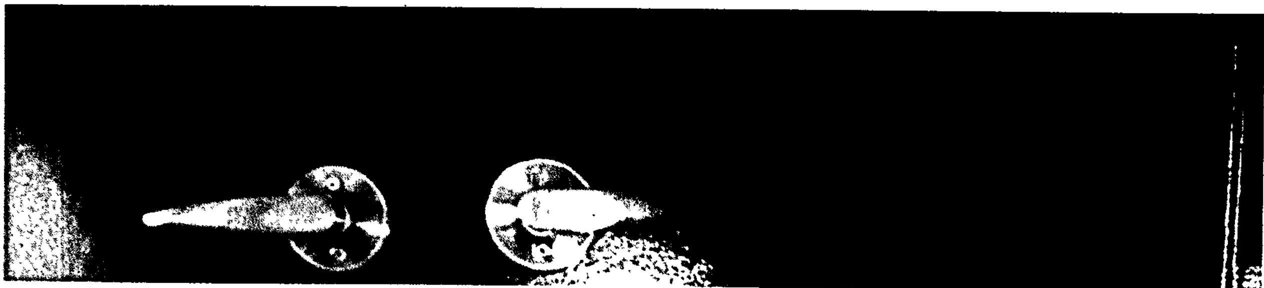


Photo of the door that Heard claims Depp kicked in.
Amber Heard

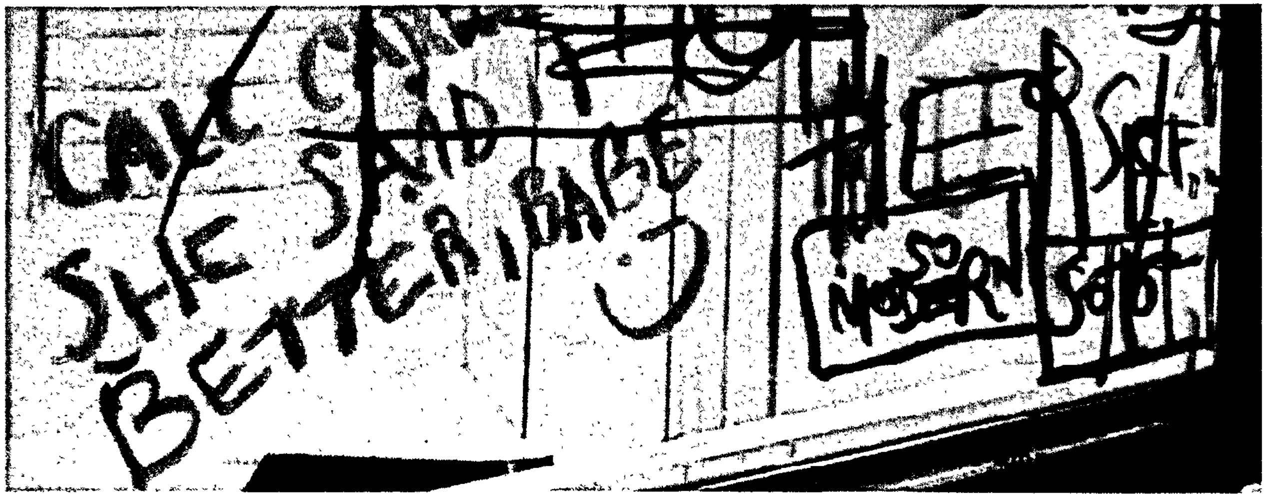
Heard also alleges that Depp went on an ecstasy and alcohol binge in March 2015 during a trip to Australia, where she says he violently assaulted her over three days, including choking and shoving her, spitting in her face, and throwing glass bottles at her.

Heard says that she still has scars on her arms and feet from the trip, stating in court documents:

> In one of the most horrific and scariest moments of this three-day ordeal, Johnny grabbed me by the neck and collarbone and slammed me against the countertop. I

> struggled to stand up as he strangled me, but my arms and feet kept slipping and sliding on to the spilled alcohol and were dragged against the broken glass on the countertop and floor, which repeatedly slashed my feet and arms. Scared for my life, I told Johnny, "You are hurting me and cutting me." Johnny ignored me, continuing to hit me with the back of one closed hand, and slamming a hard plastic phone against a wall with his other until it was smashed into smithereens.

While allegedly smashing the phone, Heard says Depp cut off the tip of his finger. The next morning, Heard awoke to messages scrawled on a mirror, allegedly by Depp in oil paint and the blood from his injured finger.

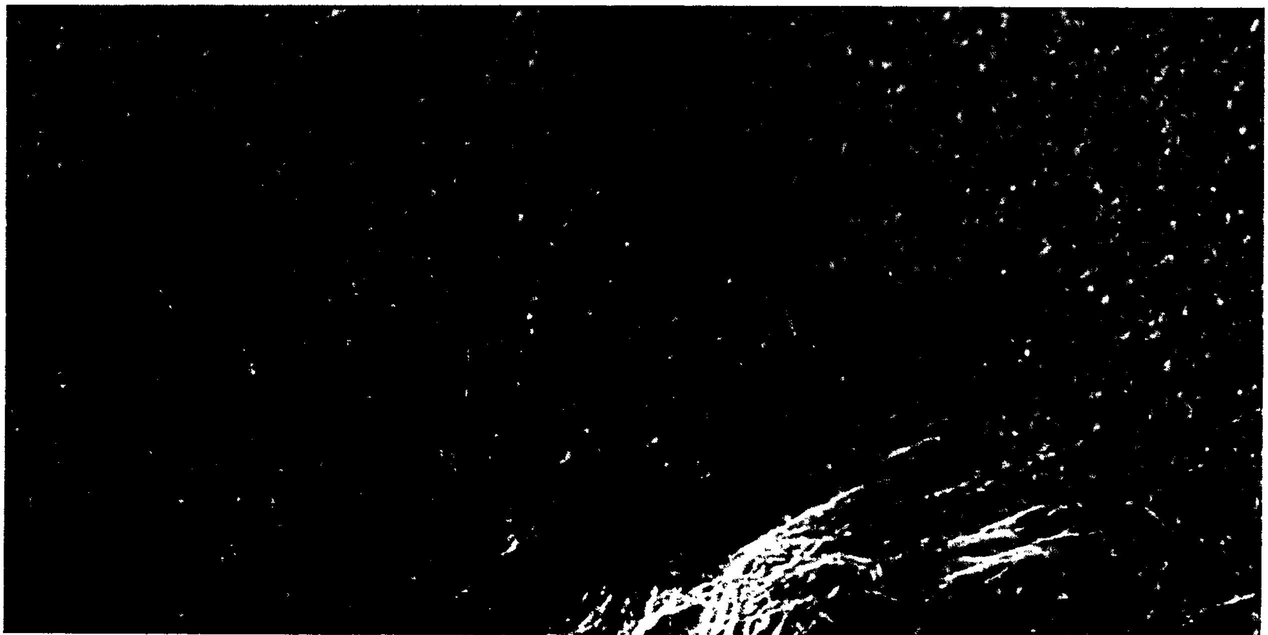


Photos of the messages scrawled in blood and paint.
Amber Heard

Heard admitted in the documents that shortly after their return to Los Angeles, she punched Depp when she feared he would hurt her sister.

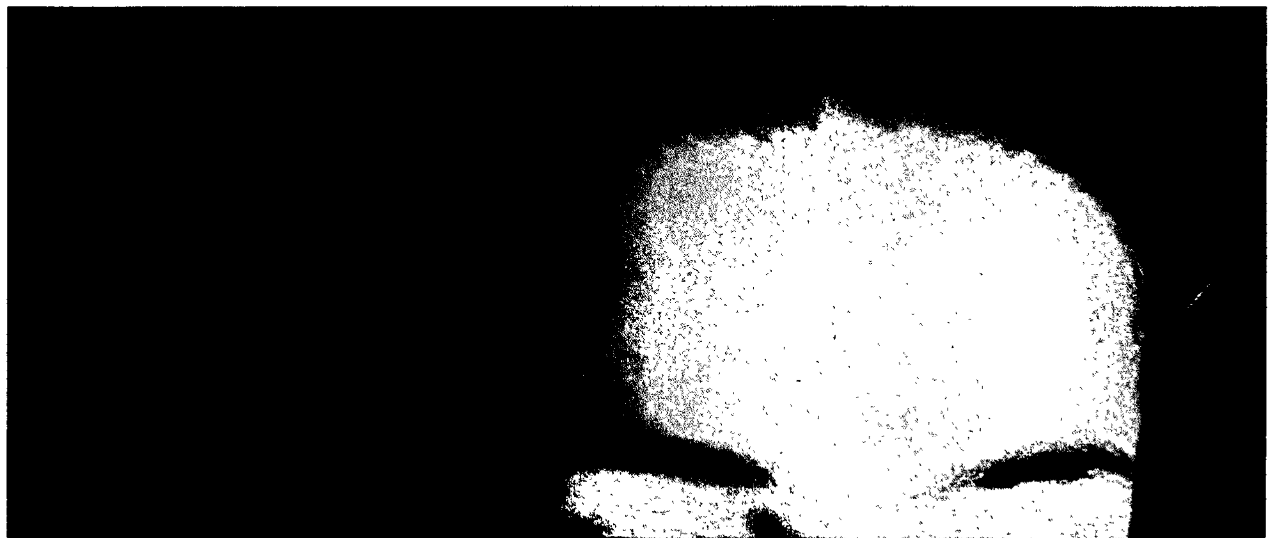
During another fight in their Los Angeles apartment in December 2015, Heard says, "He slapped me hard, grabbed me by my hair, and dragged me from a stairwell to the office to the living room to the kitchen to the bedroom and then to the guest room. In the process, he pulled large chunks of hair and scalp out of my head."

Photos from the incident show clumps of hair on the ground.



Photos of hair Heard claims that Depp ripped out.
Amber Heard

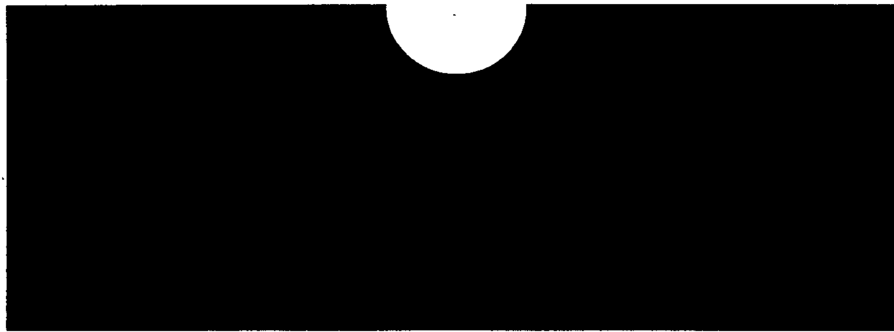
Heard states in the court documents, "each time he knocked me down, I chose to react by simply standing up and looking him in the eye. Johnny responded by yelling, 'Oh, you think you're a fucking tough guy?'"



Heard pictured after the December 2015 incident.
Amber Heard

When she told Depp she was leaving him, Heard says he began threatening to kill her, punching her in the face and pushing her into a mattress.

"For a while, I could not scream or breathe," she states in the court filling. "I worried that Johnny was in a blacked-out state and unaware of the damage he was doing, and that he could actually kill me."



video-player.buzzfeed.com

In a video from Heard's 2016 deposition, she describes Depp throwing a phone at her, hitting her face near her eye, before grabbing her head and pulling a fistful of her hair.

A visibly shaken Heard then says Depp yanked her head side to side by grabbing her hair.

"He's yelling at me, he's screaming ... and I'm screaming at the top of my lungs, 'Help, help, please help!'" she says, adding that she hoped the security guards would hear her. "Even though they never respond when I'm screaming 'help' — ever."

Amber Jamieson is a reporter for BuzzFeed News and is based in New York.

Contact Amber Jamieson at amber.jamieson@buzzfeed.com.

Got a confidential tip? Submit it here.

The Washington Post
Democracy Dies in Darkness

Cause Celeb: Amber Heard backs 'revenge porn' bill on Capitol Hill

By **Emily Heil**

May 22, 2019 at 4:20 p.m. EDT

Cause: Passage of the SHIELD Act — one of those cleverly acronym-ed pieces of legislation that stands for "Stopping Harmful Image Exploitation and Limiting Distribution." Basically, it targets people who share explicit images of someone without their consent, a.k.a. "nonconsensual pornography" or "revenge porn."

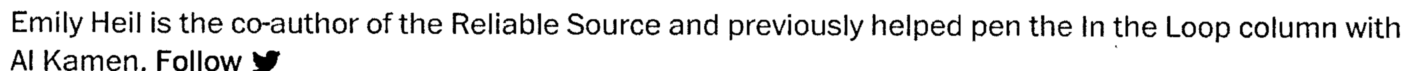
Celeb: Model-actress-activist Amber Heard (firmly putting aside those tabloid headlines currently swirling about her former marriage to actor Johnny Depp), sharing her own story of having been hacked in 2014 — along with a handful of other Hollywood actresses — and having her nude photos distributed around the Internet.

Scene: A Wednesday news conference with Reps. Jackie Speier (D-Calif.) and John Katko (R-N.Y.) in the Capitol Visitor Center to reintroduce the bill. Heard, wearing a sleek black dress with black and white loafers that looked ready to pound the marble halls of Congress, stood next to (and high-fived) lawmakers talking up the legislation before making her own case.

B

Sound bite: Heard's tone was passionate as she described the fallout, even years later, from her hacking. "My stolen and manipulated photos are still online to this day, posted again and again with sexually explicit and humiliating and degrading headlines about my body, about myself," she said. "I continue to be harassed, stalked and humiliated by the theft of those images."

"The consequences to my personal safety, dignity and livelihood are severe," she continued. "My relationships, my family, my profession, my opportunities, and moreover, my expectations for bodily autonomy and liberty are forever compromised."

Emily Heil

Emily Heil is the co-author of the Reliable Source and previously helped pen the In the Loop column with Al Kamen. Follow

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2019, I caused a copy of the foregoing document to be served by email and first class mail pursuant to Rule 1:12 of the Supreme Court of Virginia to the following:

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Benjamin G. Chew

63488317 v1

2014 WL 12770216
Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia,
Norfolk Division.

Julie S. JARRELL, Plaintiff,
v.
KROGER LIMITED PARTNERSHIP I, d/b/a Kroger Store #532, CenitMark Corporation d/b/a/ QuestMark, a Division of CentiMark Corporation, and Wimco Corp., Defendants.

Civil Action No.: 2:14cv57
|
Signed 07/17/2014

Attorneys and Law Firms

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OPINION AND ORDER

Tommy E. Miller, United States Magistrate Judge

*1 This matter is before the Court on Defendant Kroger Limited Partnership I's ("Kroger's") Motion for an Extension of Time to File Objections to Plaintiff's Request for Production and Inspection (ECF No. 30) and Motion for a Protective Order (ECF No. 31). For the reasons stated herein, Kroger's Motion for an Extension is DENIED and Kroger's Motion for a Protective Order is GRANTED in part and DENIED in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

This action arises from a "slip-and-fall" accident that allegedly occurred on February 11, 2012, at a Kroger store located in Virginia Beach, Virginia. Suit was originally filed in the Circuit Court for the City of Norfolk on January 6, 2014, and was subsequently removed to federal court on February 12, 2014. Order on Mot. to Dismiss for Failure to State a Claim Ex. A, ECF No. 29-1; Notice of Removal, ECF No. 1. Shortly after the accident, on February 21, 2012, Plaintiff's counsel sent a letter to Kroger requesting a copy of any video surveillance footage of the incident and requesting that Kroger preserve any video evidence that might be relevant to the case. Pl.'s Mem. in Opp'n to Def.'s Mot. for an Extension Ex. 1, ECF No. 32 ("Pl.'s Opp'n to Extension"). On May 7, 2014, Plaintiff, by counsel, served a Request for Production and Inspection on Kroger. As part of the Request, Plaintiff requested inspection of "[a]ny premises or remote 'security office', security cameras and video monitoring stations at the premises or operated remotely by or at the direction of the defendant." Pl.'s Req. for Produc. and Inspection No. 1(c), ECF No. 30-1 ("Pl.'s Req. for Produc.").

Kroger subsequently produced what it contends is the only remaining video footage from the time period in question to Plaintiff, which Plaintiff alleges "contains an approximate seven minute gap and abruptly stops at 6:43 p.m." [1] Pl.'s Opp'n to Extension Ex. 4; *see* Def.'s Resp. to Pl.'s First Req. for Produc. of Doc. No. 3, ECF No. 33-3 ("Def.'s Resp. to First Req. for Doc."). On May

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30, 2014, in discussions between counsel, Kroger agreed to allow Plaintiff to inspect the area where the accident occurred, but stated that it objected to Plaintiff's request to inspect the security office and surveillance equipment. Def's Mot. for an Extension of Time to File Objections ¶ 4, ECF No. 30 ("Def.'s Mot. for Extension"). On June 3, 2014, Kroger informed Plaintiff by letter that the video surveillance system at the store had been entirely replaced, and the locations of security cameras changed, as part of a storewide remodel that occurred in April 2012. Def.'s Mot. for Extension ¶ 5, Ex. B; Def.'s Mot. for Protective Order ¶ 4, Ex. B, ECF No. 31. In that letter, Kroger reiterated its objection to Plaintiff's request to inspect the security office on the grounds that such an inspection would be irrelevant because the entire system had been replaced since the accident. Def.'s Mot. for Extension ¶ 5, Ex. B. Plaintiff's counsel responded by letter on June 4, 2014, reaffirming its desire to inspect the security office and informing Kroger that its objections to the request were untimely. Pl.'s Opp'n to Extension Ex. 4.

*2 On June 5, 2014, Plaintiff's counsel inspected the area of the store where the accident occurred. At that time, Kroger agreed to let Plaintiff's counsel see the security office and surveillance equipment, on the condition that it not "photograph, video tape, or otherwise compromise the proprietary nature of the surveillance equipment." Def.'s Mot. for Extension ¶ 6. Plaintiff's counsel refused to abide by this condition and therefore did not inspect the security office or surveillance system. *Id.*

The next day, on June 6, 2014, Kroger filed a Motion for an Extension of Time to File Objections to Plaintiff's Request for Production and Inspection and attached as an exhibit a proposed Response and Objections to Plaintiff's Request for Production and Inspection. Def's Mot. for Extension Ex. C. Kroger admitted that its counsel had "neglected to see the Plaintiff's First Request for Production and Inspection." *Id.* at ¶ 1. Kroger maintains that an inspection of the security office would lead to no relevant information. *Id.* at ¶ 5.

On June 11, 2014, Kroger filed a Motion for a Protective Order seeking to prevent Plaintiff's counsel from inspecting the security office or surveillance equipment, again emphasizing that such an inspection would not lead to relevant discovery. Def.'s Mot. for Protective Order 3. Kroger stated that the equipment and surveillance system "are confidential commercial information and proprietary and, given the lack of relevance to the Plaintiff's accident in this case, ought not be revealed." *Id.* at ¶ 6. Kroger also attached as an exhibit a declaration from the loss prevention specialist for the store, who corroborated Kroger's previous statement that the surveillance system had been entirely replaced in April 2012 and nothing remained of the system in place at the time of Plaintiff's accident, including video footage. Harris Decl. ¶¶ 3–6, ECF No. 31-2. Plaintiff contends that Kroger "deliberately destroyed evidence of its prior surveillance system" and failed to preserve and produce complete, unedited video footage from the date of Plaintiff's accident, and thus an inspection of the new system is relevant to Plaintiff's case. Pl.'s Mem. in Opp'n to Def.'s Mot. for Protective Order 2, ECF No. 33 ("Pl.'s Opp'n to Protective Order"). Plaintiff urges the Court to deny Kroger's motions for a protective order and an extension to file objections.

II. DISCUSSION

Kroger has not demonstrated that its failure to timely file objections to Plaintiff's Request for Production and Inspection was due to excusable neglect, and therefore its Motion for an Extension of Time to File Objections to Plaintiff's Request for Production and Inspection is DENIED. Because Kroger has provided Plaintiff with incomplete video evidence without providing an adequate explanation for why the video evidence is incomplete, the security office and surveillance system are relevant to Plaintiff's claim, and therefore Kroger's Motion for a Protective Order is DENIED to the extent that it prohibits Plaintiff from inspecting the surveillance system and security office. Plaintiff may also photograph the security office but may not video tape the office since no need has been established. In consideration of the confidential and proprietary nature of the surveillance system and security office, Kroger's Motion for a Protective Order is GRANTED to the extent that it prohibits Plaintiff from disclosing any information obtained from the inspection to anyone not associated with this case, or from using any information obtained in any future actions.

A. Kroger's Motion for an Extension of Time to File Objections

*3 Kroger's Motion for an Extension of Time to File Objections to Plaintiff's Request for Production and Inspection is DENIED. Federal Rule of Civil Procedure 34 provides that, "[t]he party to whom the request [for production or inspection] is directed must respond in writing within 30 days after being served." Fed. R. Civ. P. 34(b)(2)(A). However, the Local Rules for the United States District Court, Eastern District of Virginia, provide that, "an objection to any interrogatory, request, or application under Fed. R. Civ. P. 26 through 37, shall be served *within fifteen (15) days* after the service of the interrogatories, request, or application." E.D. Va. Loc. Civ. R. 26(C) (emphasis added). The Court has discretion to grant additional time "if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B); *see* E.D. Va. Loc. Civ. R. 26(C) ("The Court may allow a shorter or longer time [to file objections].").

Kroger has not demonstrated that its failure to timely file objections was due to excusable neglect. Plaintiff's Request for Production and Inspection was served on May 7, 2014. Under the Local Rules, Kroger had until May 22, 2014 to file objections to Plaintiff's request. Kroger waited until June 6, 2014, fifteen days *after* the initial fifteen-day deadline had already passed, to file its motion and present its objections to the Court. Its only explanation for its failure to timely file these objections is that its counsel "neglected to see the Plaintiff's First Request for Production and Inspection." Def.'s Mot. for Extension ¶ 1. Kroger has offered no explanation for *why* it neglected to see Plaintiff's request, and admits that it saw the other documents Plaintiff served at the same time. *Id.* Therefore, Kroger has not demonstrated that its failure to timely file its objections was due to excusable neglect and its Motion for an Extension to File Objections to Plaintiff's First Request for Production and Inspection is thus DENIED. *See, e.g., Campbell v. Verizon Va., Inc.*, 812 F. Supp. 2d 748, 750 (E.D. Va. 2011) (stating that a failure to explain the reason a delay in filing occurred is insufficient to establish excusable neglect).

B. Kroger's Motion for a Protective Order

While Kroger's Motion for an Extension of Time to File Objections is denied, its Motion for a Protective Order, seeking to prohibit inspection of its security office and surveillance equipment, is GRANTED in part and DENIED in part. Under Federal Rule of Civil Procedure 26(c), "[t]he Court may, for good cause, issue an order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). As the party moving for the protective order, Kroger bears the burden of establishing the requisite good cause. *United States ex rel. Davis v. Prince*, 753 F. Supp. 2d 561, 565 (E.D. Va. 2010) (citing *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210–11 (9th Cir. 2002)). To meet this burden, Kroger must "demonstrat[e] that '*specific* prejudice or harm will result if no protective order is granted.' " *Id.* (quoting *Phillips*, 307 F.3d at 1210–11) (emphasis added). Simply providing "conclusory or speculative statements about the need for a protective order and the harm which would be suffered without one" is insufficient. *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 412 (M.D.N.C. 1991) (citing *Gulf Oil v. Bernard*, 452 U.S. 89, 102 n.16 (1981)).

Kroger contends that Plaintiff should not be permitted to inspect its security office and surveillance system because they are "confidential commercial information and proprietary." Def.'s Mot. for Protective Order ¶ 6. However, Kroger does not allege any specific harm or prejudice that it would suffer by permitting Plaintiff to inspect its surveillance system or security office. In the absence of such specific allegations, Kroger has failed to establish the requisite good cause for a protective order prohibiting Plaintiff from inspecting the surveillance system and security office. *See Prince*, 753 F. Supp. 2d at 565 (stating that a movant establishes good cause for a protective order only if he can show " 'specific prejudice or harm' " would otherwise occur) (quoting *Phillips*, 307 F.3d at 1210–11).

*4 Kroger also claims that its new surveillance system is irrelevant to Plaintiff's claim. Def.'s Mot. for Protective Order ¶¶ 4–6. Rule 26 defines the scope of discoverable information as "any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). A district court has "broad discretion" in determining whether requested discovery is relevant under Rule 26. *See, e.g., Watson v. Lowcountry Red Cross*, 974 F.2d 482, 489 (4th Cir. 1992). Moreover, where a party's deliberate actions result in the loss or destruction of potentially relevant evidence, a trial court may consider a wide

range of actions for the purpose of "leveling the evidentiary playing field." *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995).

Kroger has asserted that, because the surveillance system that was in place at the time of the Plaintiff's accident has been "entirely replaced" with a new system, the new system is irrelevant to the Plaintiff's claim. Def.'s Mot. for Protective Order ¶ 4. Kroger was put on notice as early as February 21, 2012 that Plaintiff would be seeking video evidence in Kroger's possession from the date of Plaintiff's accident. *See* Pl.'s Opp'n to Protective Order Ex. 2. Kroger has offered no explanation for why the only video evidence it has produced (and which is, according to Kroger, the only video evidence that remains from the time period in question) is incomplete, particularly when it was on notice to preserve such evidence as early as February 21, 2012. *See* Pl.'s Opp'n to Extension Ex. 4; *see also* Def.'s Resp. to Pl.'s First Req. for Doc. No. 3 (indicating that the video evidence Kroger provided to Plaintiff is "the only video during this time period"). Kroger has also admitted that, by replacing the surveillance system, it destroyed video footage contained in the previous system. *See* Harris Decl. ¶ 6 (stating that, "unless saved to a separate CD as was done in this case, any video associated [with the former surveillance system] no longer exists").

*5 Plaintiff asserts that Kroger's failure to produce complete video evidence from the time of Plaintiff's accident casts doubt on Kroger's assertion that an inspection of the new surveillance system and security office will not lead to relevant evidence. Pl.'s Opp'n to Protective Order 4. Kroger's only defense to this contention is that, because the surveillance system and security office were replaced after Plaintiff's accident, they are "remote and not probative to the underlying issues in the case." Def.'s Mot. for Protective Order 3. As it stands, however, Kroger is the only party that has had unfettered access to the complete video surveillance evidence from the time of Plaintiff's accident. Since Kroger has failed to either produce a complete video from the date of Plaintiff's accident or adequately explain why the video it provided to Plaintiff is incomplete, its security office and surveillance system are relevant to Plaintiff's claim for discovery purposes. *See* *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (stating that relevance in matters of discovery is "construed broadly"); *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003) (stating that discovery is "broad in scope and freely permitted"). Thus, Plaintiff shall be permitted to inspect Kroger's surveillance system and security office and to photograph the security office. Kroger's Motion for a Protective Order is therefore DENIED to the extent that it seeks to prevent Plaintiff from inspecting the security office and surveillance system and photographing the security office. Plaintiff may not, however, video tape the security office since no need has been established.

Despite the fact that Plaintiff shall be permitted to inspect Kroger's surveillance system and security office, the confidential and proprietary nature of the system must still be respected. Under Federal Rule of Civil Procedure 26(c), a protective order may be issued to protect or limit the disclosure of, among other things, "trade secret[s] ... [and] confidential research, development, [and] commercial information." Fed. R. Civ. P. 26(c)(1)(G). The Rule "confers broad discretion on the trial court to decide ... what degree of protection is required." *Francisco v. Verizon S., Inc.*, 756 F. Supp. 2d 705, 718 (E.D. Va. 2010) (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984)). Kroger's interest in protecting the confidentiality of its surveillance system and security office must be balanced against Plaintiff's interest in inspecting them. *See* *Seattle Times Co.*, 467 U.S. at 36 ("The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery [in fashioning protective orders].").

Since Kroger has not produced complete video footage from the date of Plaintiff's accident and has failed to explain why the video produced is incomplete, Plaintiff has a legitimate interest in inspecting the security office and surveillance system, where video surveillance evidence is created and stored. However, Plaintiff's interest in inspecting the security office and surveillance system does not extend beyond the boundaries of this case, and Kroger has a legitimate interest in maintaining the confidentiality and proprietary nature of its security system. For this reason, Kroger's Motion for a Protective Order is GRANTED to the extent that Plaintiff and Plaintiff's counsel may not disclose any information obtained through the inspection of Kroger's surveillance system and security office to anyone who is not associated with this case. Additionally, neither Plaintiff nor Plaintiff's counsel may use any information obtained from the inspection for any purpose other than the present case and must comply with Local

Civil Rule 5 if the Plaintiff wishes to use any information obtained in court. The information obtained from the inspection may not be used in any future actions.

III. CONCLUSION

For the foregoing reasons, Defendant Kroger's Motion for an Extension of Time to File Objections to Plaintiff's Request for Production and Inspection is DENIED and Defendant Kroger's Motion for a Protective Order is GRANTED in part and DENIED in part. Plaintiff may inspect the surveillance system and security office, and may photograph the security office, but may not video tape the office nor disclose any information obtained to anyone not associated with this case. Plaintiff also may not use any information obtained in any future actions.

All Citations

Not Reported in Fed. Supp., 2014 WL 12770216

Footnotes

1 Plaintiff does not allege a specific time of accident. *See* Compl. ¶ 14, ECF No. 1-1.

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85 Va. Cir. 134
Circuit Court of Virginia,
Fairfax County.

WORLD MISSION SOCIETY CHURCH OF GOD, A NJ Nonprofit Corp.
v.
Michelle COLON et al.

No. CL–2011–17163.
|
July 20, 2012.

Attorneys and Law Firms

John W. Dozier, Jr., Esq., Dozier Internet Law, P.C., Glen Allen, VA, for Plaintiff.

Lee E. Berlik, Esq., BerlikLaw, LLC, Reston, VA, for Defendant Tyler Newton.

Opinion

CHARLES MAXFIELD, Judge.

***1** Dear Counsel:
This matter came before the Court on July 6, 2012 on Plaintiff's Motion for a Protective Order. Upon consideration of the respective briefs, oral arguments, and controlling authorities, the motion is Denied.

FACTUAL BACKGROUND

Plaintiff, World Mission Society Church of God, A NJ Nonprofit Corporation ("WMSCOG"), is a branch of the World Mission Society Church of God. The World Mission Society Church of God was founded in 1964 and boasts of over a million members worldwide.

In June of 2011, defendants Michelle Colon [1] and Tyler J. Newton ("Newton") began a series of purportedly defamatory attacks against WMSCOG. Newton allegedly created a Facebook group and YouTube videos for the purposes of attacking WMSCOG. Additionally, Newton operates an Internet website ("Website") that criticizes WMSCOG. [2] The Website discusses the World Mission Society Church of God's teachings, methods, and practices and monitors the World Mission Society Church of God's worldwide activities. A number of allegedly defamatory statements on the Website are enumerated in WMSCOG's complaint. Representative examples of the defamation complained of include allegations of money laundering, intentional destruction of families, deception, intimidation, misappropriation of finances, and improper financial relationships between secular corporations, the WMSCOG and its senior leadership.

In response to the perceived defamation, WMSCOG filed a complaint against Colon and Newton with claims for defamation, statutory conspiracy, civil conspiracy, trade libel, tortious interference with a business expectancy, and negligent interference with a business expectancy. [3] WMSCOG requested a permanent injunction requiring the removal of all purportedly defamatory material posted on the Internet. WMSCOG requested compensatory damages of five million dollars and requested the compensatory damages be trebled in accordance with Virginia Code § 18.2–500. WMSCOG additionally requested a punitive damages award of ten million dollars.

Pursuant to Rule 4:1 of the Rules of the Supreme Court of Virginia, Newton propounded written interrogatories and requests for production of documents on WMSCOG. WMSCOG generally refused to respond to Newton's discovery requests and stated that it would not fully respond until a protective order was entered.

ARGUMENTS

WMSCOG predicates its request for a protective order entirely upon its concern that Newton will publish on the Website any discovery materials obtained. WMSCOG asserts the sole purpose of discovery is to allow parties to prepare for trial, and Newton should not be permitted to share discovery information with the public. WMSCOG contends Newton should be entirely precluded from taking any discovery in the matter. If Newton is permitted discovery, WMSCOG requests the discretion to classify materials as confidential and only viewable by counsel.

Newton concurs with WMSCOG's conclusion that the sole purpose of discovery is preparation for trial. Newton subsequently lists sixteen specific allegations of defamation listed in the Complaint and argues he is entitled to discovery with respect to each of the allegations and all other claims made in WMSCOG's Complaint. Newton further contends WMSCOG has not articulated a particularized harm that would occur in the absence of the issuance of a protective order and argues a fear of public dissemination of discovery materials is insufficient to allege good cause. Although Newton requests unredacted discovery materials, Newton represents all identifying personal information of third parties will be redacted prior to publication.

ANALYSIS

*2 The issuance of protective orders is governed by Rule 4:1(c) of the Rules of the Supreme Court of Virginia. According to Rule 4:l(c), a protective order may be granted upon motion and a demonstration of good cause. VA. SUP. Ct. R. 4:l(c). Virginia courts have not articulated good cause in this context. Virginia's Rule 4:1(c) and Rule 26(c) of the Federal Rule of Civil Procedure are substantially similar with respect to the demonstrations necessary to grant a protective order.[4] Therefore, this Court will examine the federal standards applied to protective orders for guidance.

When applying Rule 26(c) of the Federal Rules of Civil Procedure, federal district courts have concluded the issuance of a protective order requires both an allegation of significant harm and a demonstration of good cause. *Trans. Pacific Ins. Co. v. Trans–Pacific Ins. Co.,* 136 F.R.D. 385 (E.D.Pa.1991). Furthermore, the significant harm must be demonstrated by specific factual assertions. *United States v. Garrett,* 571 F.2d 1323, 1326 n. 3 (5th Cir.1978).

In Virginia, parties may properly issue discovery with respect to any relevant issue that is not otherwise privileged. VA. SUP. Ct. R. 4:l(b)(l). Even if the discovery requested Would not be admissible at trial, a discovery request is not improper if it would lead to the discovery of admissible information. *Id.* To obtain such discovery, parties are permitted to utilize methods such as interrogatories, depositions, and requests for production of documents. Va. Sup.Ct. R. 4:1(a). The sole justification for obtaining discovery is to assist parties with trial preparation. *S hen andoah Publ. House v. Fanning,* 235 Va. 253, 260, 368 S.E.2d 253, 256 (1988)(citing *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 34–36, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)).

The fact that discovery can only be obtained for the purposes of trial preparation does not necessarily preclude discovered information from being used beyond solely trial preparation. The dissemination of discovered information is subject to the control of a trial court; however, no general rule prohibits the publication of admissions and documents obtained via discovery. *Cf. Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 34–36, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)(noting that access to discovered materials is subject to the control of trial courts). The threat or fear of publication, standing alone, has repeatedly been deemed

insufficient to justify the issuance of a protective order. *See, e.g., Jepson Inc. v. Makita Elec. Works, Ltd.,* 30 F.3d 854, 858 (7th Cir.1994). Judge Ellis of the Eastern District of Virginia recently considered the issue of public dissemination of discovery materials. *United States* ex rel. *Davis v. Prince,* 753 F.Supp.2d 561 (E.D.Va.2010). Judge Ellis specifically rejected the proposition of issuing a protective order conditioned entirely upon a party's intent to publish discovery materials. *Id.* at 567. Judge Ellis concluded:

> It cannot logically be the case that good cause exists to prohibit the public disclosure of discovery materials because a party states an intent to disseminate those materials in accordance with the law. [...] To show good cause, a party must demonstrate more than that an opposing party intends to disseminate discovery materials; rather, it must show that the disclosure of those materials will cause specific prejudice or harm, such as annoyance, embarrassment, oppression, or undue burden or expense. And, importantly, the fact that public disclosure of discovery materials will cause some annoyance or embarrassment is not sufficient to warrant a protective order; the annoyance or embarrassment must be particularly serious.

***3** *Id.* at 567–68.

WMSCOG filed its Complaint and specifically enumerated sixteen defamatory statements Newton had purportedly made. Generally, Newton's interrogatories and requests for production of documents directly address the defamatory statements WMSCOG chose to be the predicate of its Complaint. The discovery propounded clearly seeks to obtain relevant and otherwise discoverable information.

WMSCOG lodges a number of objections and purported classifications of confidential information with respect to Newton's discovery; however, WMSCOG predicates its assertion of good cause entirely upon the possibility Newton will publish discovery materials obtained on the Website. The only harm WMSCOG references are amorphous "threats" and "risks" that could befall the church and its members if Newton is permitted to publish discovery materials. Vague apprehensions with respect to potential publication are insufficient to demonstrate the requisite good cause necessary to issue a protective order.

WMSCOG failed to articulate a single serious harm likely to occur if Newton publishes the discovery material he obtains. Any annoyance or embarrassment WMSCOG suffers is directly related both to WMSCOG's decision to institute the current action and the extensive scope of the allegations propounded against Newton. The only embarrassment to members of the church will be a result only of their membership in WMSCOG.[5] Neither of these concerns justify issuing a protective order.

Conclusion

Accordingly, WMSCOG failed to demonstrate any good cause sufficient to issue a protective order. The motion for a protective order is DENIED.

Sincerely,

/s/

Charles J. Maxfield

Fairfax County Circuit Court

All Citations

Not Reported in S.E.2d, 85 Va. Cir. 134, 2012 WL 9321549

Footnotes

1 Colon's Motion to Dismiss for lack of jurisdiction was granted by Judge Bellows on March 16, 2012.

2 The website at issue is http://www.examiningthewmscog.com/

3 Judge Brodie sustained Newton's demurrer to the tortious interference with a business expectancy and negligent interference with a business expectancy on March 13, 2012.

4 Under the Federal rules, a protective order may be granted "for good cause [...] to protect a party or person." FED.R.CIV.P. 26(c)(1).

5 Newton requested that any order granted with respect to WMSCOG's motion for a protective order contain a provision that all third-party identifying information beyond names obtained through discovery will be redacted by *Newton* prior to any publication, and the Order will reflect Newton's request.

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753 F.Supp.2d 561
United States District Court,
E.D. Virginia,
Alexandria Division.

UNITED STATES of America ex rel. Melan DAVIS and Brad Davis, Plaintiffs,
v.
Erik PRINCE, et al., Defendants.

Case No. 1:08cv1244.
|
Nov. 5, 2010.

Synopsis
Background: Relators brought action under False Claims Act (FCA) against five corporate entities and individual who allegedly owned and controlled corporate entities, alleging that defendants submitted false claims in connection with government contracts to provide security services. Relators objected to magistrate judge's protective order, which authorized any party's counsel to designate any discovery materials as confidential and prohibited any party from making any public disclosure of that material.

The District Court, T.S. Ellis, III, J., held that protective order violated governing rule.

Order vacated.

Attorneys and Law Firms

***563** Susan L. Burke, Burke PLLC, Washington, DC, for Plaintiffs.

Richard L. Beizer, David William O'Brien, Crowell & Moring LLP, Washington, DC, for Defendants.

MEMORANDUM OPINION

T.S. ELLIS, III, District Judge.

In this False Claims Act [1] case, the magistrate judge issued a protective order that authorizes any party's counsel to designate any discovery materials [2] as confidential and then prohibits any party from making any public disclosure of that material. Plaintiffs filed an objection to the protective order, pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, arguing that the protective order is "clearly erroneous and contrary to law." For the reasons that follow, the magistrate judge's order must be vacated.

I.

Plaintiffs, Melan and Brad Davis, are former employees of one of the corporate defendants. Of the six named defendants, five are corporate entities and one is an individual. The five corporate entities are: (1) Xe Services, LLC, a private security company that provides tactical training, ***564** security services, logistics, and crisis management; (2) Blackwater Security Consulting,

LLC, a private company that provides private security services; (3) U.S. Training Center, Inc., the corporate owner of a training facility in North Carolina that provides tactics and weapons training to military, security, and law enforcement professionals; (4) Greystone, Ltd., an international provider of security and support services; and (5) Prince Group LLC, a private holding company. The individual defendant, Erik Prince, allegedly owns and controls all of the corporate defendants. All six defendants are collectively referred to herein as "Xe."

Plaintiffs brought this suit alleging that defendants submitted false claims to the U.S. Government in violation of the False Claims Act. More specifically, plaintiffs allege that defendants were awarded two government contracts: (i) a Department of Homeland Security contract to provide security services in Louisiana in the aftermath of Hurricane Katrina; and (ii) a Department of State contract to provide security services in Iraq and Afghanistan. According to plaintiffs, defendants submitted false claims with respect to both contracts by inflating the number of hours worked by employees, falsifying personnel muster sheets, billing for needless expenses, and providing worthless services.

After plaintiffs filed suit, defendants filed a motion for a comprehensive protective order prohibiting the disclosure of all discovery materials and enjoining the parties from making any extrajudicial statements relating to the litigation. In support of their motion, defendants argued that plaintiffs' counsel had already made a number of prejudicial comments to the media, and that she had stated an intent to publish all non-confidential discovery materials on the internet. Defendants argued that this public disclosure would serve no purpose other than to taint the jury pool and to annoy, embarrass, and harass the defendants.

In response, plaintiffs argued that defendants' proposed protective order would be contrary to well-established law. Specifically, plaintiffs contended that a blanket order prohibiting public disclosure of all discovery documents would be inappropriate because it would prevent the public from learning about information of legitimate public concern, and it would hinder plaintiffs' ability to gather evidence from witnesses who heard about the case from media outlets and then contacted plaintiffs' counsel.

Defendants' motion was referred to a magistrate judge, who, after hearing argument, issued a protective order prohibiting the parties from publicly disclosing any discovery materials designated as "confidential" by either party, and further prohibiting any party from making extrajudicial statements relating to those materials designated as "confidential" by either party. Specifically, the protective order states as follows:

> Until the court orders otherwise, no party or counsel for a party, or their agents or employees, may reveal or disseminate any information obtained through use of the discovery process in this action, which information has not also been gained through means independent of this court's processes, and which information has been designated as "confidential" by counsel for any party in this action. Extrajudicial statements by the parties and counsel are also limited to this extent, but no [sic] otherwise.
>
> No discovery materials may be filed with the court without prior order. No discovery material that has been designated "confidential" may be revealed in any motion, memorandum or exhibit thereto without prior order, and counsel ***565** feeling the need to reference such material shall file a motion to seal that complies with Local Civil Rule 5.

Plaintiffs filed a Rule 72(a) objection to the magistrate judge's protective order. In their pleadings, the parties re-state many of the arguments made in their initial pleadings submitted to the magistrate judge. As the parties have fully briefed and argued their respective positions, the issues presented by plaintiffs' objection are ripe for determination.

II.

Rule 72(a) of the Federal Rules of Civil Procedure permits a party to submit objections to a magistrate judge's ruling on nondispositive matters, such as discovery orders. Fed.R.Civ.P. 72(a); 28 U.S.C. § 636(b)(1)(A); *see Fed. Election Comm'n v. Christian Coalition,* 178 F.R.D. 456, 459–60 (E.D.Va.1998) (citing *Thomas E. Hoar, Inc. v. Sara Lee Corp.,* 900 F.2d 522, 525 (2d Cir.1990)). As a nondispositive matter, the magistrate judge's discovery order is properly governed by the "clearly

erroneous or contrary to law" standard of review. *See* *Jesselson v. Outlet Assocs. of Williamsburg, LP,* 784 F.Supp. 1223, 1228 (E.D.Va.1991).

III.

In general, there are three ways in which parties may seek to prevent public disclosure of discovery materials developed during the course of a litigation. First, parties always have the option of entering into a private non-disclosure agreement. A district court plays no role in reviewing or approving such agreements unless one of the parties files suit for breach of the nondisclosure agreement. Because non-disclosure agreements protecting discovery materials are problematic for a number of reasons, parties rarely resort to this means of preventing public disclosure of such materials.

The second means by which parties may protect discovery materials from disclosure is to seek a protective order, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. Rule 26(c) states that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed.R.Civ.P. 26(c). The party seeking a protective order has the burden of establishing "good cause" by demonstrating that "specific prejudice or harm will result if no protective order is granted." *Phillips v. Gen. Motors Corp.,* 307 F.3d 1206, 1210–11 (9th Cir.2002). [3]

The third means of preventing public disclosure of information in the course of litigation applies only to court documents (*i.e.,* documents filed in the court record). Under well-established Fourth Circuit precedent, there is a presumption ***566** in favor of public access to judicial records and a district court has the authority to seal court documents only "if the public's right of access is outweighed by competing interests." *See* *Ashcraft v. Conoco, Inc.,* 218 F.3d 288, 302 (4th Cir.2000). Importantly, before granting a motion to seal any court document, a district court must follow a three-step process: (1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object; (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting alternatives. *Id.*

In this case, the first and third means of preventing disclosure of litigation information are not in issue; there is no private non-disclosure agreement nor is there any sealing of court documents. Instead, at issue in this case is the magistrate judge's Rule 26(c) protective order, which broadly prohibits public disclosure of any discovery materials designated as confidential by any party. Plaintiffs have the burden of proving that this order is contrary to Rule 26(c). Plaintiffs have met this burden.

Under Rule 26(c), a district court may issue a protective order only upon a finding of good cause. [4] Yet, this does not mean that a district court must determine good cause on a document-by-document, or transcript-page-by-transcript-page, basis. Instead, a magistrate judge or district judge may issue an order protecting specifically delineated categories of documents upon a showing that good cause exists to protect each category. [5] Such an order—commonly referred to as an "umbrella" order—is faithful to Rule 26(c)'s good cause requirement because a judge has made a determination in the first instance that there is good cause to protect documents falling into a particular category. Under this type of "umbrella" order, the parties are authorized to designate whether discovery materials fall within any of the enumerated good cause categories set forth in the protective order. Of course, the parties may disagree whether specific documents, transcripts, or other discovery materials fall within one of the good cause categories. In the event that a party's designation of a particular document is challenged by the opposing party, the party seeking to avoid disclosure has the burden ***567** of persuading the court that the designated material falls within a particular good cause category.

Here, the protective order violates Rule 26(c) by delegating the good cause determination to the parties, thereby erasing the rule's requirement that there be a *judicial* determination of good cause. The use of good cause categories in a protective order prevents this inappropriate delegation and instead limits the parties to determining whether a particular document or other

discovery materials fits within a good cause category. To be sure, under the protective order at issue, a party may challenge a confidential designation, and the magistrate judge would then determine whether good cause exists to maintain the designation. This is not sufficient to comply with Rule 26(c), which requires a judicial finding of good cause in the first instance *i.e.*, before a protective order is granted. [6]

Nor is the protective order rescued by defendants' argument that there is good cause to prohibit public dissemination of all discovery materials because plaintiffs' counsel has stated her intent to publish all non-confidential discovery materials on her website. Many circuits have sensibly held that where discovery materials are not protected by a valid protective order, parties may use that information in whatever manner they see fit. *See* *Jepson, Inc. v. Makita Elec. Works, Ltd.,* 30 F.3d 854, 858 (7th Cir.1994) ("Absent a valid protective order, parties to a law suit may disseminate materials obtained during discovery as they see fit."). [7] It cannot logically be the case that good cause exists to prohibit the public disclosure of discovery materials because a party states an intent to disseminate those materials in accordance with the law. In other words, a party cannot lose the right to disseminate all discovery materials not protected by a protective order simply by stating an intent to exercise that very right. To show good cause, a party must demonstrate more than that an opposing party intends to disseminate discovery materials; rather, it must show that the disclosure of those materials will cause specific prejudice or harm, such as annoyance, embarrassment, ***568** oppression, or undue burden or expense. [8] And, importantly, the fact that public disclosure of discovery materials will cause some annoyance or embarrassment is not sufficient to warrant a protective order; the annoyance or embarrassment must be particularly serious. [9]

Finally, it is worth noting that defendants also sought a protective order prohibiting the parties from making any extrajudicial statements regarding this litigation on the ground that such statements risk tainting the jury pool. The magistrate judge appropriately denied the request for a blanket gag order. Broad gag orders are restraints on expression and raise First Amendment concerns. *See, e.g.,* *United States v. Brown,* 218 F.3d 415, 424–25 (5th Cir.2000). In the Fourth Circuit, district courts may restrict extrajudicial statements by parties and counsel only if those comments present a "reasonable likelihood" of prejudicing a fair trial. *In re Russell,* 726 F.2d 1007, 1010 (4th Cir.1984); *see also* *Am. Science & Eng'g. Inc. v. Autoclear, LLC,* 606 F.Supp.2d 617, 625–26 (E.D.Va.2008) ("Courts may disallow extrajudicial statements by litigants that risk tainting or biasing the jury pool."). Here, nothing in the current record of this case supports defendants' contention that a blanket gag order is warranted because nothing presented thus far suggests that statements made by either party present a "reasonable likelihood" of tainting the jury pool.

Yet, it is appropriate to prohibit extrajudicial statements revealing the substance of discovery materials that fall within a good cause category of a valid protective order. Omitting such a restriction renders a protective order toothless. Thus, it is appropriate in this case to enter a protective order that sets forth categories for which there is a judicial finding of good cause to protect information falling into those categories, and it is also appropriate to include in that order a prohibition on extrajudicial statements revealing the content of discovery materials falling into those categories.

IV.

Accordingly, the magistrate judge's protective order is vacated, and a new protective order will issue consistent with the principles outlined in this Memorandum Opinion.

An appropriate Order will issue.

All Citations

753 F.Supp.2d 561, 77 Fed.R.Serv.3d 1247

Footnotes

1 31 U.S.C. § 3729 (West 2010).

2 As used in this Memorandum Opinion, "discovery materials" refers to all information obtained in the discovery process, including documents, deposition transcripts, interrogatory questions and responses, and the like.

3 *See also Lathon v. Wal–Mart Stores East, LP,* No. 3:09cv57, 2009 WL 1810006, at *5 (E.D.Va. June 24, 2009) ("For good cause to exist the party seeking protection bears the burden of showing specific prejudice or harm that will result if no protective order is granted."); *Great Am. Ins. Co. v. Gross,* No. 3:05cv159, 2007 WL 1577503, at *12 (E.D.Va. May 30, 2007) ("Rule 26(c)'s good cause requirement indicates that 'the burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.' ") (quoting *SEC v. Dowdell,* No. 3:01cv00116, 2002 WL 1969664, at *2 (W.D.Va. Aug. 21, 2002)); *Brittain v. Stroh Brewery Co.,* 136 F.R.D. 408, 412 (M.D.N.C.1991) (holding that the party requesting the protective order "must make a particular request and a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which would be suffered without one").

4 *See* Fed.R.Civ.P. 26(c); *In re Wilson,* 149 F.3d 249, 252 (4th Cir.1998) (holding that a court may enter a protective order governing trade secrets upon a showing of good cause).

5 *See Pearson v. Miller,* 211 F.3d 57, 73 (3d Cir.2000) ("[A] district court is empowered to issue umbrella protective orders protecting classes of documents after a threshold showing by the party seeking protection."); *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.,* 178 F.3d 943, 946 (7th Cir.1999) (holding that "[t]here is no objection to an order that allows the parties to keep their trade secrets (or some other *properly demarcated category* of legitimately confidential information) out of the public record") (emphasis added); *Askew v. R & L Transfer, Inc.,* 3:08cv865, 2009 WL 5068633, at *1 (M.D.Ala. Dec. 17, 2009) ("Before entering any protective order, the Court must find that good cause warrants the entry of the order with respect to each category of documents or information sought to be included in the order.") (quoting *In re Alexander Grant & Co. Litig.,* 820 F.2d 352, 355–57 (11th Cir.1987)); *Gwerder v. Besner,* No. 07–335–HA, 2007 WL 2916513, at *2 (D.Or. Oct. 5, 2007) ("The court may issue protective orders that protect classes of documents upon a threshold showing of appropriate circumstances warranting such umbrella protection."); *Cumberland Packing Corp. v. Monsanto Co.,* 184 F.R.D. 504, 506 (E.D.N.Y.1999) ("[A] party is more likely to be able to establish such good cause if it presents to the court a discrete category of documents and explains why *those* documents should be sealed.").

6 Some cases contain broad language suggesting that a court may delegate to the parties the responsibility to make a good faith determination of good cause in the first instance, and that the court will only make a good cause determination if a party's good faith determination is challenged. *See, e.g., Chicago Tribune Co. v. Bridgestone/Firestone, Inc.,* 263 F.3d 1304, 1307 (11th Cir.2001) (emphasizing that umbrella orders obviate "the need to litigate the claim to protection document by document, and postpone[ ] the necessary showing of 'good cause' required for entry of a protective order until the confidential designation is challenged"). These cases are unpersuasive; Rule 26(c) explicitly requires a court to make a good cause determination *before* issuing a protective order.

7 *See also San Jose Mercury News, Inc. v. United States Dist. Ct.,* 187 F.3d 1096, 1103 (9th Cir.1999) ("It is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public."); *Public Citizen v. Liggett Group, Inc.,* 858 F.2d 775, 780 (1st Cir.1988) ("Indeed, the Supreme Court has noted that parties have general first amendment freedoms with regard to information gained through discovery and that, absent a valid court order to the contrary, they are entitled to disseminate the information as they see fit."); *Oklahoma Hosp. Ass'n v. Oklahoma Pub. Co.,* 748 F.2d 1421, 1424 (10th Cir.1984) ("While it may be conceded that parties to litigation have a constitutionally protected right to disseminate information obtained by them through the discovery process absent a valid protective order, ... it does not follow that they can be compelled to disseminate

such information."); *Exum v. U.S. Olympic Committee,* 209 F.R.D. 201, 206 (D.Colo.2002) ("In the absence of a showing of good cause for confidentiality, the parties are free to disseminate discovery materials to the public").

8 *See* *Glenmede Trust Co. v. Thompson,* 56 F.3d 476, 483 (3d Cir.1995) (" 'Good cause' is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury."); *Martinelli v. Petland, Inc.,* Nos. 10–407–RDR, 09–529–PHX–DGC, 2010 WL 3947526, at *10 (D.Kan. Oct. 7, 2010) ("A protective order may only issue if the moving party demonstrates the basis for the order falls into one of the categories listed in Rule 26(c): annoyance, oppression, undue burden or expense."); *Humboldt Baykeeper v. Union Pac. R.R. Co.,* 244 F.R.D. 560, 563 (N.D.Cal.2007) ("By definition, a protective order must protect against something—something negative.").

9 *See* *Cipollone v. Liggett Group, Inc.,* 785 F.2d 1108, 1121 (3d Cir.1986) ("[B]ecause release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious.").

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276 Va. 375
Supreme Court of Virginia.

Sue Carol PERREAULT, Administratrix and Personal Representative of the Estate of Albert L. Perreault, et al.
v.
THE FREE LANCE–STAR, et al.

Record No. 071978.
|
Sept. 12, 2008.

Synopsis
Background: Personal representatives of estates submitted three oral motions, and one written petition, for judicial confirmation of mediated compromise settlements of wrongful death claims, relating to cardioplegic solution manufactured and distributed by defendant and used for temporary paralyzation of heart muscle during cardiac surgical procedures. Newspapers intervened. The Circuit Court, Spotsylvania County, Ann Hunter Simpson, J., ruled that personal representatives were required to file written petitions for confirmation reciting the financial terms of the settlements. Appeal was awarded.

Holdings: The Supreme Court, Lawrence L. Koontz, Jr., J., held that:

the wrongful death statute requires a party seeking court approval of a compromise settlement of a wrongful death claim to file in the court a written petition that includes the complete and unredacted terms of the compromise settlement, including the financial terms;

statute addressing confidentiality of written mediated settlements does not allow a court to keep confidential the terms of a mediated compromise settlement of a wrongful death claim; and

plaintiffs and defendant did not establish a compelling reason sufficient to overcome presumption of public access to records of mediated compromise settlements of wrongful death claims against defendant.

Affirmed and remanded.

Attorneys and Law Firms

**354 Elizabeth M. Locke (Thomas A. Clare, Charles A. Gavin, Stephanie E. Grana, Kirkland & Ellis, Blackburn, Conte, Schilling & Click, Cantor Arkema, on briefs), Richmond, for appellants.

Craig Thomas Merritt (Roman Lifson, Christian Barton, on brief), Richmond, for appellees.

Present: HASSELL, C.J., KEENAN, KOONTZ, KINSER, LEMONS, AGEE, [1] and GOODWYN, JJ.

Opinion

OPINION BY Justice LAWRENCE L. KOONTZ, JR.

*380 This appeal arises from four separate wrongful death actions brought pursuant to Code § 8.01–50 and ultimately settled by the parties through mediation. The principal issue we consider is whether the circuit court erred in requiring the settling

parties to those actions to file written petitions reciting the financial terms of the compromise settlements in order to obtain court approval of those settlements pursuant to Code § 8.01–55. We also consider whether the contents of such petitions remain subject to the presumption of public access to court records mandated by Code § 17.1–208 notwithstanding the provisions of Code § 8.01–581.22, which govern the confidentiality of mediation proceedings. Finally, we review the decision of the circuit court denying a request to partially seal the records in these cases by permitting the redaction of the monetary amounts of the compromise settlements in the court records.

BACKGROUND

Sue Carol Perreault, Phyllis Ann Mulholland, Sue Ella C. Musselman, and Dona J. Holt, each in her capacity as administratrix of an estate (collectively, "the personal representatives"), brought wrongful death actions in the Circuit Court of Spotsylvania County against several defendants including B. Braun Medical, Inc. and its subsidiary Central Admixture Pharmacy Services (collectively, "CAPS"). With respect to the alleged liability of CAPS, each action asserted that the decedent's death resulted from the administration during open-heart surgery of an improperly formulated or contaminated cardioplegic solution manufactured and distributed by CAPS. [2]

The personal representatives entered into mediation with CAPS that resulted in compromise settlements of the wrongful death claims. ***381** As expressed in the settlement agreements, a principal concern of the personal representatives and CAPS was the desire to keep the terms, and specifically the financial terms, of the settlements confidential.

Thereafter, on a date not specified in the record, Perreault, Mulholland, and Musselman applied to the circuit court under Code § 8.01–55 for approval of their respective ****355** compromise settlements by making oral motions to the court in a closed, in camera hearing. Because no written petitions seeking approval of the settlements were submitted to the circuit court in these cases, the record originally provided to this Court by the circuit court was unclear as to how this hearing was docketed and whether notice was given to potential "parties in interest" or that such parties were convened as required by Code § 8.01–55.

By writ of certiorari entered May 21, 2008, this Court directed the circuit court to forward the records of the original actions filed by the personal representatives. An examination of those records did not disclose any praecipe for, or notice to any parties of, the in camera hearing. The proceeding conducted during that hearing was not transcribed. The record merely reflects that on February 16, 2007, the circuit court entered orders approving the compromise settlements in these three cases. The orders recite only the fact that the claims against CAPS had been resolved by compromise and that the personal representatives and statutory beneficiaries of the decedent in each case agreed to and approved the compromise. [3]

By letter from counsel to the circuit court dated February 28, 2007, *The Free Lance–Star,* a newspaper published in Fredericksburg, and Media General Operations, Inc., publisher of *The Richmond Times–Dispatch* (collectively, "the newspapers"), complained of a "lack of transparency" in the approval of the compromise settlements in the Perreault, Mulholland, and Musselman cases. The newspapers contended that a reporter for *The Free Lance–Star* had been barred from attending the hearing concerning approval of the compromise settlements and that the failure to require petitions setting out the terms of the compromises was "inconsistent with" the requirements of Code § 8.01–55. The newspapers further contended that under ***382** *Shenandoah Publishing House, Inc. v. Fanning,* 235 Va. 253, 368 S.E.2d 253 (1988), petitions for approval of compromise settlements of wrongful death claims were judicial records subject to disclosure under Code § 17.1–208.

On March 2, 2007, the newspapers filed a formal petition to intervene in the Perreault, Mulholland, and Musselman cases. The newspapers again asserted that approval of a compromise settlement of a wrongful death claim pursuant to Code § 8.01–55 required the filing of a petition that recited the particulars of the settlement and, thus, that the circuit court erred in approving the settlements in these cases based on oral motions. The newspapers further asserted that, under *Shenandoah Publishing* and Code § 17.1–208, such petitions were judicial documents subject to inspection by the media and the general public. The newspapers

requested that Perreault, Mulholland, and Musselman be required to file petitions "that fully comply with [Code] Section 8.01–55." In response to the petition to intervene, on March 8, 2007, the circuit court entered orders suspending the February 16, 2007 orders approving the compromise settlements. On May 2, 2007, the court entered an order permitting the newspapers to intervene in the Perreault, Mulholland, and Musselman cases.

On June 6, 2007, Holt filed in the circuit court a written petition for approval of the compromise settlement of her wrongful death action against CAPS. The petition noted the fact of the compromise settlement and that "the reason for the compromise is that the matter is highly contested, liability is not admitted, there is uncertainty associated with litigation, the time value of settlement versus trial currently scheduled greater than one year from the date of the Petition [to approve the settlement], and the best interests of all parties concerned." However, no specific terms of the settlement with regard to the consideration to be paid were recited in the petition. An unexecuted copy of the settlement agreement appended to the petition was redacted to remove all references to payments to be made to the appropriate statutory beneficiaries of the estate.

****356** On June 11, 2007, the circuit court entered an order requiring Perreault, Mulholland, and Musselman to file petitions that "shall state as to each of the settled cases the compromise, its terms and the reasons therefor." The order further provided that "[t]he settling parties and the newspaper[s]" would be permitted "to present evidence and to otherwise be heard on the issue of whether the settling parties can meet the burden imposed by law to permit the petition[s] filed ... to remain under seal."

***383** Also on June 11, 2007, during a hearing on Holt's petition for approval of the compromise settlement in her case, the newspapers appeared and made an oral motion to intervene in that case as well. The circuit court directed that Holt be required to file under seal an unredacted copy of the settlement agreement. At the conclusion of the hearing, the court entered an order, styled as a final order, approving the settlement based upon the petition and the redacted exhibit. The order, however, provided that the issue whether Holt would be required to file an unredacted settlement agreement would be subsequently reviewed.

In response to the circuit court's order, Perreault, Mulholland, and Musselman filed the requested petitions, which were placed under seal. They also filed a joint motion to permit the petitions to be filed with "limited redactions" along with supporting affidavits by each of them and Michael Koch, Vice President of Sales and Support Services for CAPS, stating the reasons therefor. Holt filed an identical motion supported by her own affidavit and that of Koch. Each motion also contained exhibits showing the media coverage of wrongful death actions involving the alleged misformulation or contamination of cardioplegic solutions by CAPS.

The circuit court heard extensive argument on the issue whether Code § 8.01–55 required a party seeking approval of a compromise settlement in a wrongful death action to file a petition, whether that petition was required to contain comprehensive details of the compromise, and also whether the contents of such petitions were subject to disclosure both generally and in the present cases specifically. Apart from the affidavits already submitted, no additional evidence was received in the Perreault, Mulholland, and Musselman cases with respect to the request to redact the compromise settlements. Holt and two other beneficiaries under the compromise settlement in that case did testify. Their testimony was limited to explaining their decision to agree to the compromise.

On June 29, 2007, the circuit court entered orders in the four cases ruling that Code § 8.01–55 required the personal representatives to file petitions for approval of the compromise settlements and that the petitions must "includ [e] the terms and conditions of each such settlement." The court further ruled that "the settling parties have failed to meet their burden to establish a compelling reason sufficient to overcome the presumption of openness of such settlement information." Accordingly, the court denied the motions to permit the ***384** filing of redacted copies of the settlement agreements. However, the court permitted the petitions and the unredacted settlement agreements to remain under seal "for the purpose of preserving the settling parties' objections to the [c]ourt's ruling pending such appeal as they may choose to take from this Order."[4] In an order dated March 6, 2008, we awarded the personal representatives in all four cases and CAPS this appeal.

DISCUSSION

The personal representatives and CAPS (collectively, "the settling parties") have asserted three assignments of error in this appeal. First, they contend that the circuit court erred in construing Code § 8.01–55 to require the filing of a petition stating the particulars of a compromise settlement, and specifically the financial terms of the compromise settlement, in order for the court to approve the settlement of a wrongful death action. Next, they contend that the circuit court erred as a matter of law in these cases **357 by failing to give proper effect to the confidentiality provisions of Code § 8.01–581.22. Finally, the settling parties contend that even if the court did not err in its application of Code § 8.01–55 as applied to court-approved compromise settlements of wrongful death actions generally, it nonetheless erred in failing to find that the specific circumstances of these cases warranted permitting the filing of redacted settlement agreements. We will address these issues seriatim, beginning with the challenge to the circuit court's interpretation of Code § 8.01–55.

Because the construction of a statute presents a pure question of law, we apply a de novo standard of review to the judgment of the circuit court, as here, that is based solely on its interpretation of a statute. *Logan v. City Council,* 275 Va. 483, 492, 659 S.E.2d 296, 300 (2008). Code § 8.01–55 in relevant part, provides that:

> The personal representative of the deceased may compromise any claim to damages arising under or by virtue of § 8.01–50, including claims under the provision of a liability insurance policy, before or after an action is brought, with the approval of the court in which the action was brought, or if an action has not been brought, with the consent of any circuit court. *Such approval may be applied for on petition to such* *385 *court,* by the personal representative, or by any potential defendant, or by any interested insurance carrier.... *The petition shall state the compromise, its terms and the reason therefor.* The court shall require the convening of the parties in interest.... The parties in interest shall be deemed to be convened if each such party (i) endorses the order by which the court approves the compromise or (ii) is given notice of the hearing and proposed compromise as provided in § 8.01–296 if a resident of the Commonwealth or as provided in § 8.01–320 if a nonresident, or is otherwise given reasonable notice of the hearing and proposed compromise as may be required by the court.

(Emphasis added.)

The settling parties essentially contend that nothing in Code § 8.01–55 requires the "petition" made to the court for approval of a compromise of a wrongful death claim to be in writing or to otherwise require disclosure of the financial terms of that compromise in a public record. We disagree.

In resolving this issue, we consider the language of Code § 8.01–55 under the settled principle of statutory construction that courts are bound by the plain meaning of statutory language. *Hicks v. Mellis,* 275 Va. 213, 218, 657 S.E.2d 142, 144 (2008); *Young v. Commonwealth,* 273 Va. 528, 533, 643 S.E.2d 491, 493 (2007); *Alliance to Save the Mattaponi v. Commonwealth,* 270 Va. 423, 439, 621 S.E.2d 78, 86–87 (2005). Under this principle, when the language of a statute is plain and unambiguous, courts may not interpret that language in a manner effectively holding that the General Assembly did not mean what it actually stated. *Hicks,* 275 Va. at 218, 657 S.E.2d at 144; *Young,* 273 Va. at 533, 643 S.E.2d at 493; *Alcoy v. Valley Nursing Homes, Inc.,* 272 Va. 37, 41, 630 S.E.2d 301, 303 (2006).

Initially, we note that in enacting Code § 8.01–55, the General Assembly required that "settlements of wrongful death claims must be approved by the courts." *Shenandoah Publishing,* 235 Va. at 260, 368 S.E.2d at 256. In plain and unambiguous language, Code § 8.01–55 requires that before a circuit court may approve any settlement of a wrongful death claim, the

statutorily designated party must apply for such approval by petition to the court. The usual and accepted meaning of "petition" is "[a] formal *written* request presented to a court or other official body." *Black's Law Dictionary* ***386** 1182 (8th ed.2004) (emphasis added). Moreover, Code § 8.01–55 is equally unambiguous in its requirement that "[t]he petition shall state the compromise, *its terms* and the reason therefor." (Emphasis added.) Common sense dictates that the most significant of the "terms" of any compromise settlement of a wrongful death claim include the monetary provisions in consideration of which the party with the right to seek damages is compromising its right to sue for those damages. Clearly, the settling parties' contention that Code § 8.01–55 does not require a written petition to the circuit court or that such petition need not state the financial terms of ****358** the compromise settlement is not supported by the plain meaning of the language of the statute.

Furthermore, in *Ramey v. Bobbitt,* 250 Va. 474, 481, 463 S.E.2d 437, 441 (1995), we held that "[t]hose portions of a release that are not made part of a wrongful death compromise settlement approved by a circuit court [under Code § 8.01–55] are not binding on the parties to the release." Accordingly, if the terms of a settlement were not made express in the petition filed under Code § 8.01–55 or were not otherwise made a part of the record, there would be no definite basis upon which the court would later be able to determine what the parties had bound themselves to in the compromise settlement if a dispute subsequently arose regarding compliance with the settlement.

For these reasons, we hold that the circuit court did not err in construing Code § 8.01–55 to require a party seeking approval of a compromise settlement of a wrongful death claim to file in the court a written petition that includes the complete and unredacted terms of the compromise settlement.

We now turn to the settling parties' contention that the circuit court erred by failing to give proper effect to the confidentiality provisions of Code § 8.01–581.22. The resolution of this contention necessarily invokes the interplay among the applications of Code §§ 8.01–55, 8.01–581.22 and 17.1–208.

In relevant part, Code § 17.1–208 provides that:

> Except as otherwise provided by law, any records and papers of every circuit court that are maintained by the clerk of the circuit court shall be open to inspection by any person and the clerk shall, when requested, furnish copies thereof, except in cases in which it is otherwise specially provided.

***387** In *Shenandoah Publishing,* we identified the "judicial records" that ordinarily come within the ambit of this statute as "the pleadings and any exhibits or motions filed by the parties and all orders entered by the trial court in the judicial proceedings leading to the judgment under review." 235 Va. at 257, 368 S.E.2d at 255. The petition required by Code § 8.01–55 is clearly a pleading and comports with this definition of a judicial record. Accordingly, the petition comes within the statutory presumption of openness to the public contained in Code § 17.1–208.

In relevant part, Code § 8.01–581.22 provides that:

> All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential.... However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.
>
> Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the mediation agree, in writing, to waive the confidentiality, ... or (ix) as provided by law or rule.

The settling parties initially stress the undisputed fact that the compromise settlements of the wrongful death claims in these cases resulted from mediation and that the parties to the mediation agreed that the terms of the settlements were to remain confidential. Consequently, the settling parties contend, notwithstanding the mandate of Code § 8.01–55 that the terms of the compromise settlements be included in the proper petitions to the circuit court for approval of the settlements, that Code § 8.01–581.22 operates so as to ensure the confidentiality of the terms of the mediated settlements.

The settling parties' contention creates an unnecessary tension between the provisions of Code §§ 8.01–55 and 8.01–581.22 and is an unwarranted interpretation of the pertinent statutory scheme. The thrust of their contention is that the confidentiality provisions of Code § 8.01–581.22 require that the provisions of Code § 8.01–55 be applied so that the circuit court will be informed of the specific financial terms of the compromise settlement but those terms would not be included in the written petition so as to be subject to disclosure to the public under Code § 17.1–208. On brief in this appeal, the ***388** settling parties suggest that this could be accomplished by permitting the circuit court ****359** "to conduct all portions of the settlement approval petition in open court, but permit the [s]ettling [p]arties to present (but not file) a written document to the court that states the settlements' dollar amount and distribution." We disagree.

In resolving this issue we acknowledge that within the pertinent statutory scheme there exists at least a facial tension between the "[e]xcept as otherwise provided by law" provision contained in Code § 17.1–208 and the "as provided by law or rule" provision contained in the confidentiality provisions of Code § 8.01–581.22(ix). The former suggests a limitation upon public access to judicial records whereas the latter suggests a limitation upon otherwise confidential mediated agreements. Because of the view we take in resolving this case, we need not further address that issue.

The statutory scheme that provides for resolution of civil disputes through mediation found in Code § 8.01–581.21 *et seq.*, including the confidentiality provisions of Code § 8.01–581.22 at issue here, is one of general application to all mediated settlements, not just to settlements of wrongful death claims. By contrast, Code § 8.01–55 is a statute of precise and specific application, dealing only with the requirement for court approval of compromise settlements of wrongful death claims. *Cf. Peerless Ins. Co. v. County of Fairfax*, 274 Va. 236, 244, 645 S.E.2d 478, 483 (2007) (holding that when one statute addresses a subject in a general manner and another statute addresses part of the same subject in a more specific manner, the differing statutes should be harmonized if possible, but when they conflict the more specific statute prevails); *see also, Alliance to Save the Mattaponi*, 270 Va. at 439–40, 621 S.E.2d at 87; *Capelle v. Orange County*, 269 Va. 60, 65, 607 S.E.2d 103, 105 (2005).

Undoubtedly, and consistent with the provisions of Code § 8.01–581.22, it may be common for settlements of various types of civil claims to be achieved through mediation and, yet, for the terms of such settlements not to be publicly disclosed because the parties agree not to do so. In this case, however, we must consider the harmonious application of Code § 8.01–55 and Code § 8.01–581.22 in light of the fact that the settling parties were *required* to obtain court approval of the mediated settlements of these wrongful death claims and to disclose the terms of those settlements in the petitions to the court seeking such approval.

***389** Although *Shenandoah Publishing* did not involve a mediated settlement of a wrongful death claim, we nonetheless find the rationale underlying the decision in that case to be instructive. In *Shenandoah Publishing*, we stated that the legislative purpose underpinning Code § 8.01–55 served the public's "societal interest in learning whether compromise settlements are equitable and whether the courts are administering properly the powers conferred upon them." 235 Va. at 260, 368 S.E.2d at 256. This is so because "the people have a vital interest, one of personal and familial as well as community concern, in cases involving claims of medical malpractice on the part of licensed practitioners and other health care providers." *Id.*

Given the salutary purpose of Code § 8.01–55, we cannot conceive that the General Assembly intended to permit the confidentiality provisions allowed but not required by Code § 8.01–581.22 to trump the provisions of Code § 8.01–55 and, consequently, the right of public access provided for by Code § 17.1–208 in the context of the records of court approval of the compromise settlement of a wrongful death claim achieved through mediation. Accordingly, we hold that the circuit court did not err in ruling that in approving the compromise settlements in the present cases, the court was not subject to a de jure

requirement under Code § 8.01–581.22 to place the record, or at least that portion of it detailing the financial terms of the compromise settlements, under seal.

Finally, we consider the settling parties' assertion that the circuit court erred in finding that the circumstances of these particular cases did not warrant their being permitted to redact from the record all references to the financial terms of the compromise settlements. When the sealing of a record or part thereof is not a duty imposed by law, the decision whether to seal the record rests within the sound discretion of **360 the circuit court. *See* *In re Worrell Enters., Inc.,* 14 Va.App. 671, 675, 419 S.E.2d 271, 274 (1992). In *Shenandoah Publishing,* we said that in order to overcome the strong presumption in favor of public access to judicial records "the moving party must bear the burden of establishing an interest so compelling that it cannot be protected reasonably by some measure other than a protective order." 235 Va. at 259, 368 S.E.2d at 256.

On brief, the settling parties assert that under *Shenandoah Publishing,* "when a court considers a motion to seal records, or exclude the public from civil judicial proceedings, 'it may not base its decision on conclusory assertions alone, but must make specific factual *390 findings.' " Thus, they contend that the circuit court was required to make express findings of fact supporting its decision not to permit redaction of the records. We disagree.

The settling parties' assertion wholly mischaracterizes the holding in *Shenandoah Publishing.* The quotation that the settling parties have drawn from the opinion appears only as a parenthetical to a citation in the opinion of the Court. 235 Va. at 259, 368 S.E.2d at 256 (citing and quoting *In re Washington Post Co.,* 807 F.2d 383, 392 (4th Cir.1986)). Moreover, in context it is clear that the citation and its explanatory parenthetical were supporting a proposition directly contradictory of the position being asserted by the settling parties in this case. When correctly interpreted, *Shenandoah Publishing* requires that a court may not base its decision to limit public access to court proceedings or records upon the conclusory assertions of the party requesting the closure. *Id.* Thus, the court must make specific factual findings only to support a decision to *restrict* public access to court records or proceedings. Because the presumption is in favor of openness, a court need not make findings of fact to justify a decision denying a request for closure of a proceeding or record absent any applicable statute or Rule of Court requiring such finding.

Similarly, the settling parties' reliance on *Richmond Newspapers, Inc. v. Commonwealth,* 222 Va. 574, 590, 281 S.E.2d 915, 924 (1981), to assert that the newspapers as "intervenors ... have the burden of showing that reasonable alternatives to closure are available" is misplaced. That burden exists only after the party seeking to restrict public access to judicial proceedings or records has made an adequate showing that it is entitled to such relief. Accordingly, our focus in this appeal is limited to whether the circuit court abused its discretion in finding that the settling parties failed to meet their burden to establish a compelling reason sufficient to overcome the presumption of public access to the records of the compromise settlements in these cases.

In Koch's affidavit submitted on behalf of CAPS, it is asserted that if the terms of the compromise settlements were made public, CAPS "could become the target of lawsuits by individuals and/or businesses who might file lawsuits for the sole purpose of extracting a 'nuisance value' settlement." Koch further asserted that CAPS would not have entered into the settlement agreements had it known that the terms would not remain confidential and that an order requiring disclosure of the financial terms of the settlement would *391 "deprive the CAPS defendants of one of the benefits it bargained for and obtained in exchange for the consideration paid."

CAPS's concern that disclosure of the financial terms of the compromise settlements might subject it to further litigation may be well founded. However, that concern reflects no more than an unsupported conclusory assertion and pales in view of the statutory presumption of public access to judicial records contained in Code § 17.1–208.

CAPS's assertion that the circuit court's order denying the request to redact the settlement agreements would deny it the benefit of its bargain is based on the legally flawed presumption that private parties can agree to deprive the public of the right of

access to judicial records guaranteed by Code § 17.1–208. While CAPS may have anticipated that the court would permit the petitions to approve the compromise settlements of the wrongful death claims at issue here to be made without disclosure of the financial terms of these settlements, it did so at its **361 own risk. Clearly it did not lose any benefit of its bargains through the court's decision denying its request to redact the financial terms of the settlement agreements. The personal representatives and the beneficiaries to the settlements are still bound by their agreements that they keep the terms thereof confidential, and they fulfilled that duty by joining with CAPS in seeking to have the records sealed. The court's decision to not permit redaction of the financial terms from the petitions does not constitute a breach of that duty.

In their affidavits submitted to the circuit court, the personal representatives stated various concerns they had with respect to having the financial terms of the compromise settlements made public. They asserted that the settlements of their claims were "private matter[s] between [the beneficiaries] and the defendants;" that they did not desire to be subject to further publicity as this would cause them "to re-live the trauma" associated with their decedents' demise; and, that publicity concerning the financial terms of the settlements might result in unwanted solicitations. Holt further expressed concern that she might be targeted by criminals and that she and her family "will be subject to public ridicule, criticism, and embarrassment" for having accepted the compromise settlement.

While we are not unmindful of the seriousness of the concerns expressed by the personal representatives with respect to the potential consequences of the financial terms of their settlements *392 being made public, concerns of emotional damage or financial harm when stated "in the abstract, [do not] constitute sufficient reasons to seal judicial records." *Shenandoah Publishing,* 235 Va. at 259, 368 S.E.2d at 256. "[T]he desire of the litigants is not sufficient reason to override the presumption of openness." *Id.* Moreover, it is not within the province of this Court to alter the pertinent statutory scheme which otherwise might warrant amendment by the legislature so as to preserve the confidentiality of the mediated settlement terms involving wrongful death claims such as those at issue here. Accordingly, we hold that the circuit court did not err in denying the settling parties' request to have the financial terms of the compromise settlements redacted in the court records.

CONCLUSION

For these reasons, we will affirm the judgment of the circuit court. We will remand the cases to the circuit court with direction that the records be unsealed in the Perreault, Mulholland, and Musselman cases and that an unredacted version of the settlement in the Holt case be entered into the record in accord with the prior order of the court.

Affirmed and remanded.

All Citations

276 Va. 375, 666 S.E.2d 352

Footnotes

1 Justice Agee participated in the hearing and decision of this case prior to his retirement from the Court on June 30, 2008.

2 Cardioplegia is the medical term for the temporary paralyzation of the heart muscle during cardiac surgical procedures. Since the 1960s, the most common method of protecting the heart during cardioplegia is the infusion of a cold crystalloid solution into the heart. Hans J. Geissler and Uwe Mehlhorn, *Cold crystalloid cardioplegia,* The Multimedia Manual of Cardiothoracic Surgery (2006).

3 There is no suggestion of any misconduct by any of the personal representatives in these cases or that the compromise settlements were not appropriate. We are confident in our assumption that the circuit court was made fully aware of the specific financial terms of the compromise settlement in each case.

4 In Holt's case, the court also granted, nunc pro tunc to June 11, 2007, the newspapers' motion to intervene in that case.

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September 10, 2019

FILED
COMPUTER SECTION
19 SEP 11 AM 10:45
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

VIA OVERNIGHT DELIVERY

Fairfax Circuit Court
Attn: Clerk's Office, 3rd Floor
4110 Chain bridge Road
Fairfax, VA 22030

Re: ***John C. Depp, II v. Amber Laura Heard*;**
Case No. CL-2019-2911;
Letter to Judge White

Dear Clerk:

Enclosed for filing, please find the attached letter addressed to Judge White. One original and two copies of the letter are enclosed. If you would, please file the original and deliver one copy to Judge White's chambers.

If you can file-stamp the second copy and return it to me in the enclosed, prepaid, overnight return envelope, I would appreciate it.

Thank you for your assistance and do not hesitate to contact me if you have any questions or concerns.

Sincerely,

WOODS ROGERS PLC

Joshua R. Treece

Enclosures

{2629524-1, 121024-00001-01}

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FILED
COMPUTER SECTION
19 SEP 11 AM 10:45
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

September 10, 2019

VIA OVERNIGHT DELIVERY

The Honorable Bruce D. White
Fairfax County Circuit Court
4110 Chain Bridge Road
Fairfax, VA 22030

Re: *Defendant's Motion for Protective Order – John C. Depp II v. Amber Laura Heard, CL 2019-02911*

Dear Judge White:

We write on behalf of Defendant Amber Laura Heard in the above-captioned matter to provide the Court with courtesy copies of certain documents referenced in her Memorandum in Support of Motion for Protective Order and similar filings, namely filings in which Plaintiff (and/or his affiliated entities) have sought, consented or stipulated to, or otherwise been protected by a protective order similar to the one Defendant seeks here. These include:

- Cases involving attorneys representing Plaintiff in this matter:
  - *Depp v. Bloom Hergott Diemer Rosenthal Laviolette Feldman Schenkman & Goodman, LLP*, No. BC680066 (Sup. Ct. L.A. Cty., Cent. Dist., 2017)
  - *Depp v. Mandel Co.*, No. BC646882 (Sup. Ct. L.A. Cty., Cent. Dist., 2017)
- One case not involving attorneys representing Plaintiff in this matter:
  - *Doe v. Depp*, No. BC482823 (Sup. Ct. L.A. Cty., Cent. Dist., 2012)

Copies of the relevant and available papers are appended.

Respectfully submitted,

Ben Rottenborn

Enclosures

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cc: Benjamin G. Chew, Esq.
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Andrew C. Crawford, Esq.
Camille M. Vasquez, Esq.
Adam R. Waldman, Esq.
Robert Gilmore, Esq.
Kevin Attridge, Esq.

Depp v. Bloom Hergott Diemer Rosenthal Laviolette Feldman Schenkman & Goodman, LLP,

No. BC680066 (Sup. Ct. L.A. Cty., Cent. Dist., 2017)

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12 *Attorneys for Plaintiffs John C. Depp, II,*
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13 *and Infinitum Nihil*

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Deputy

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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

15 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

16

17 JOHN C. DEPP, II, SCARAMANGA BROS., INC., a California corporation, L.R.D.
18 PRODUCTIONS, INC., a California corporation, INFINITUM NIHIL, a California
19 corporation,

20 Plaintiffs,

21 v.

22 BLOOM HERGOTT DIEMER ROSENTHAL LAVIOLETTE FELDMAN SCHENKMAN &
23 GOODMAN, LLP, JACOB A. BLOOM, and Does 1-30,

24 Defendants.

25
26
27
28

Case No. BC680066

PROTECTIVE ORDER

The Hon. Terry A. Green, Dept. 14

Action Filed: October 17, 2017
Trial Date: None set

BLOOM HERGOTT DIEMER ROSENTHAL LA VIOLETTE FELDMAN SCHENKMAN & GOODMAN, LLP,

Cross-Complainant,

v.

JOHN C. DEPP, II, SCARAMANGA BROS., INC., a California corporation, L.R.D. PRODUCTIONS, INC., a California corporation, INFINITUM NIHIL, a California corporation,

Cross-Defendants.

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IT IS HEREBY STIPULATED and between parties to *John C. Depp, II, et al. v. Bloom Hergott Diemer Rosenthal La Violette Feldman Schenkman & Goodman, LLP, et al.*, Case No. BC680066, Plaintiffs and Cross-Defendants John C. Depp, II, Scaramanga Bros., Inc., L.R.D. Productions, Inc., and Infinitum Nihil, and Defendants and Cross-Complainant Bloom Hergott Diemer Rosenthal La Violette Feldman Schenkman & Goodman, LLP, and Defendant Jacob A. Bloom ("Parties), by and through their respective counsel of record, that in order to facilitate the exchange of information and documents which may be subject to confidentiality limitations on disclosure due to federal laws, state laws, and privacy rights, the Parties stipulate as follows:

1. In this Stipulation and Protective Order, the words set forth below shall have the following meanings:

a. "Proceeding" means the above-entitled proceeding, Case No. BC680066.

b. "Court" means the Hon. Terry A. Green or any other judge to which this Proceeding may be assigned, including Court staff participating in such proceedings.

c. "Confidential" means any information which is in the possession of a Designating Party who believes in good faith that such information is entitled to confidential treatment under applicable law.

d. "Confidential Materials" means any Documents, Testimony or Information as defined below designated as "Confidential" pursuant to the provisions of this Stipulation and

Protective Order.

e. "Designating Party" means the Party or any third-party that designates Materials as "Confidential."

f. "Disclose" or "Disclosed" or "Disclosure" means to reveal, divulge, give, or make available Materials, or any part thereof, or any information contained therein.

g. "Documents" means (i) any "Writing," "Original," and "Duplicate" as those terms are defined by California Evidence Code Sections 250, 255, and 260, which have been produced in discovery in this Proceeding by any person, and (ii) any copies, reproductions, or summaries of all or any part of the foregoing.

h. "Information" means the content of Documents or Testimony.

i. "Testimony" means all depositions, declarations or other testimony taken or used in this Proceeding.

2. The Designating Party shall have the right to designate as "Confidential" any Documents, Testimony or Information that the Designating Party in good faith believes to contain non-public information that is entitled to confidential treatment under applicable law.

3. The entry of this Stipulation and Protective Order does not alter, waive, modify, or abridge any right, privilege or protection otherwise available to any Party with respect to the discovery of matters, including but not limited to any Party's right to assert the attorney-client privilege, the attorney work product doctrine, or other privileges, or any Party's right to contest any such assertion.

4. Any Documents, Testimony or Information to be designated as "Confidential" must be clearly so designated before the Document, Testimony or Information is Disclosed or produced. The parties may agree that the case name and number are to be part of the "Confidential" designation. The "Confidential" designation should not obscure or interfere with the legibility of the designated Information.

a. For Documents (apart from transcripts of depositions or other pretrial or trial proceedings), the Designating Party must affix the legend "Confidential" on each page of any Document containing such designated Confidential Material.

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b. For Testimony given in depositions the Designating Party may either:

i. identify on the record, before the close of the deposition, all "Confidential" Testimony, by specifying all portions of the Testimony that qualify as "Confidential;" or

ii. designate the entirety of the Testimony at the deposition as "Confidential" (before the deposition is concluded) with the right to identify more specific portions of the Testimony as to which protection is sought within 30 days following receipt of the deposition transcript. In circumstances where portions of the deposition Testimony are designated for protection, the transcript pages containing "Confidential" Information may be separately bound by the court reporter, who must affix to the top of each page the legend "Confidential," as instructed by the Designating Party.

c. For Information produced in some form other than Documents, and for any other tangible items, including, without limitation, compact discs or DVDs, the Designating Party must affix in a prominent place on the exterior of the container or containers in which the Information or item is stored the legend "Confidential." If only portions of the Information or item warrant protection, the Designating Party, to the extent practicable, shall identify the "Confidential" portions.

5. The inadvertent production by any of the undersigned Parties or non-Parties to the Proceedings of any Document, Testimony or Information during discovery in this Proceeding without a "Confidential" designation, shall be without prejudice to any claim that such item is "Confidential" and such Party shall not be held to have waived any rights by such inadvertent production of the Document, Testimony or Information without a "Confidential" designation. In the event that any Document, Testimony or Information that is subject to a "Confidential" designation is inadvertently produced without such designation, the Party that inadvertently produced the Document, Testimony or Information without a "Confidential" designation shall give written notice of such inadvertent production within twenty (20) days of discovery of the inadvertent production, together with a further copy of the subject Document, Testimony or

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1 Information designated as "Confidential" (the "Inadvertent Production Notice"). Upon receipt of
2 such Inadvertent Production Notice, the Party that received the inadvertently produced Document,
3 Testimony or Information shall promptly destroy the inadvertently produced Document,
4 Testimony or Information and all copies thereof, or, at the expense of the producing Party, return
5 such together with all copies of such Document, Testimony or Information to counsel for the
6 producing Party and shall retain only the "Confidential"-designated Materials. Should the
7 receiving Party choose to destroy such inadvertently produced Document, Testimony or
8 Information, the receiving Party shall notify the producing Party in writing of such destruction
9 within ten (10) days of receipt of written notice of the inadvertent production. This provision is
10 not intended to apply to any inadvertent production of any Information protected by attorney-
11 client or work product privileges. In the event that this provision conflicts with any applicable law
12 regarding waiver of confidentiality through the inadvertent production of Documents, Testimony
13 or Information, such law shall govern.

14 6. The Parties agree to the following "Clawback" provision to expedite and facilitate
15 discovery and to protect against inadvertent disclosure of irrelevant, confidential or otherwise
16 privileged information.

17 a. A Party's inadvertent or unintentional disclosure or production of any
18 irrelevant materials (e.g., the inadvertent production of an irrelevant document pertaining to a
19 third-party with no relation to the action) will not be deemed to waive a Party's right to assert that
20 the materials are irrelevant. If any Party believes that it has produced any such irrelevant
21 materials, the producing Party shall make a request to the receiving Party to return that
22 information, identifying it specifically by bates number. Upon receiving such a request as to
23 specific information or documents, the receiving Party shall return the irrelevant information or
24 documents to the producing Party within five (5) business days of the request. If the receiving
25 Party contests the claim of irrelevance, then the receiving Party may retain a copy of the
26 information or document identified, but may only use that information or document for the
27 purpose of contesting its relevance until that issue is resolved by the Court. Any good-faith,
28 inadvertent disclosure of the information or document by the other Party prior to such a clawback

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request shall not be deemed a violation of the provisions of this Order. However, if a Party can tell from the face of the document that it appears to relate to a subject matter irrelevant to the action (e.g., materials related to another Bloom Hergott client that is unrelated to the claims and defenses in the action), the other Party shall not file, use, or otherwise publicly disclose the information without first raising the issue of the potential inadvertent production with the producing Party and allow the producing Party to clawback the document. A Party shall not file, use or otherwise publicly disclose in any manner any irrelevant information where the producing Party has asserted that the materials were inadvertently produced except for the sole purpose of contesting that document's irrelevance.

b. If information subject to a claim of attorney-client privilege or work-product immunity or any other privilege or immunity is inadvertently or mistakenly produced, such production shall in no way prejudice or otherwise constitute a waiver of or estoppel as to any claim of privilege or work-product immunity for such information under the law. If a Party has produced information subject to a claim of immunity or privilege, upon written request made by the producing Party, all copies of such information shall be returned to the producing Party within five (5) business days of such request unless the receiving Party intends to challenge the producing Party's assertion of privilege or immunity. If a receiving Party objects to the return of such information within the five (5) day period described above, the producing Party may move the Court for an order compelling the return of such information.

7. In the event that counsel for a Party receiving Documents, Testimony, or Information in discovery designated as "Confidential" objects to such designation with respect to any or all of such items, said counsel shall advise counsel for the Designating Party, in writing, of such objections, the specific Documents, Testimony or Information to which each objection pertains, and the specific reasons and support for such objections (the "Designation Objections"). Counsel for the Designating Party shall have thirty (30) days from receipt of the written Designation Objections to either (a) agree in writing to de-designate Documents, Testimony or Information pursuant to any or all of the Designation Objections and/or (b) file a motion with the Court seeking to uphold any or all designations on Documents, Testimony or Information

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addressed by the Designation Objections (the "Designation Motion"). Pending a resolution of the Designation Motion by the Court, any and all existing designations on the Documents, Testimony or Information at issue in such Motion shall remain in place. The Designating Party shall have the burden on any Designation Motion of establishing the applicability of its "Confidential" designation. In the event that the Designation Objections are neither timely agreed to nor timely addressed in the Designation Motion, then such Documents, Testimony or Information shall be de-designated in accordance with the Designation Objection applicable to such material.

8. Access to and/or Disclosure of Confidential Materials designated as "Confidential" shall be permitted only to the following persons:

a. the court;

b. (1) Attorneys of record in the Proceedings and their affiliated attorneys, paralegals, clerical and secretarial staff employed by such attorneys who are actively involved in the Proceedings and are not employees of any Party. (2) In-house counsel to the undersigned Parties and the paralegal, clerical and secretarial staff employed by such counsel. Provided, however, that each non-lawyer given access to Confidential Materials shall be advised that such Materials are being Disclosed pursuant to, and are subject to, the terms of this Stipulation and Protective Order and that they may not be Disclosed other than pursuant to its terms;

c. those officers, directors, partners, members, employees and agents of all non-designating Parties that counsel for such Parties deems necessary to aid counsel in the prosecution and defense of this Proceeding; provided, however, that prior to the Disclosure of Confidential Materials to any such officer, director, partner, member, employee or agent, counsel for the Party making the Disclosure shall deliver a copy of this Stipulation and Protective Order to such person, shall explain that such person is bound to follow the terms of such Order, and shall secure the signature of such person on a statement in the form attached hereto as Exhibit A;

d. court reporters in this Proceeding (whether at depositions, hearings, or any other proceeding);

e. any deposition, trial, or hearing witness in the Proceeding who previously has had access to the Confidential Materials, or who is currently or was previously an officer,

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1 director, partner, member, employee or agent of an entity that has had access to the Confidential
2 Materials;
3 f. any deposition or non-trial hearing witness in the Proceeding who
4 previously did not have access to the Confidential Materials; provided, however, that each such
5 witness who is given access to Confidential Materials shall be advised that such Materials are
6 being Disclosed pursuant to, and are subject to, the terms of this Stipulation and Protective Order
7 and that they may not be Disclosed other than pursuant to its terms;
8 g. mock jury participants, provided, however, that prior to the Disclosure of
9 Confidential Materials to any such mock jury participant, counsel for the Party making the
10 Disclosure shall deliver a copy of this Stipulation and Protective Order to such person, shall
11 explain that such person is bound to follow the terms of such Order, and shall secure the signature
12 of such person on a statement in the form attached hereto as Exhibit A.
13 h. outside experts or expert consultants consulted by the undersigned Parties
14 or their counsel in connection with the Proceeding, whether or not retained to testify at any oral
15 hearing; provided, however, that prior to the Disclosure of Confidential Materials to any such
16 expert or expert consultant, counsel for the Party making the Disclosure shall deliver a copy of this
17 Stipulation and Protective Order to such person, shall explain its terms to such person, and shall
18 secure the signature of such person on a statement in the form attached hereto as Exhibit A. It
19 shall be the obligation of counsel, upon learning of any breach or threatened breach of this
20 Stipulation and Protective Order by any such expert or expert consultant, to promptly notify
21 counsel for the Designating Party of such breach or threatened breach; and
22 i. any other person that the Designating Party agrees to in writing.
23 9. Confidential Materials shall be used by the persons receiving them only for the
24 purposes of preparing for, conducting, participating in the conduct of, and/or prosecuting and/or
25 defending the Proceeding, and not for any business or other purpose whatsoever.
26 10. Any Party to the Proceeding (or other person subject to the terms of this Stipulation
27 and Protective Order) may ask the Court, after appropriate notice to the other Parties to the
28 Proceeding, to modify or grant relief from any provision of this Stipulation and Protective Order.

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8/26/2013

11. Entering into, agreeing to, and/or complying with the terms of this Stipulation and Protective Order shall not:

a. operate as an admission by any person that any particular Document, Testimony or Information marked "Confidential" contains or reflects trade secrets, proprietary, confidential or competitively sensitive business, commercial, financial or personal information; or

b. prejudice in any way the right of any Party (or any other person subject to the terms of this Stipulation and Protective Order):

i. to seek a determination by the Court of whether any particular Confidential Material should be subject to protection as "Confidential" under the terms of this Stipulation and Protective Order; or

ii. to seek relief from the Court on appropriate notice to all other Parties to the Proceeding from any provision(s) of this Stipulation and Protective Order, either generally or as to any particular Document, Material or Information.

12. Any Party to the Proceeding who has not executed this Stipulation and Protective Order as of the time it is presented to the Court for signature may thereafter become a Party to this Stipulation and Protective Order by its counsel's signing and dating a copy thereof and filing the same with the Court, and serving copies of such signed and dated copy upon the other Parties to this Stipulation and Protective Order.

13. Any Information that may be produced by a non-Party witness in discovery in the Proceeding, pursuant to subpoena or otherwise, may be designated by such non-Party as "Confidential" under the terms of this Stipulation and Protective Order, and any such designation by a non-Party shall have the same force and effect, and create the same duties and obligations, as if made by one of the undersigned Parties hereto. Any such designation shall also function as a consent by such producing Party to the authority of the Court in the Proceeding to resolve and conclusively determine any motion or other application made by any person or Party with respect to such designation, or any other matter otherwise arising under this Stipulation and Protective Order.

14. If any person subject to this Stipulation and Protective Order who has custody of

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any Confidential Materials receives a subpoena or other process ("Subpoena") from any government or other person or entity demanding production of Confidential Materials, the recipient of the Subpoena shall promptly give notice of the same by electronic mail transmission, followed by either express mail or overnight delivery to counsel of record for the Designating Party, and shall furnish such counsel with a copy of the Subpoena. Upon receipt of this notice, the Designating Party may, in its sole discretion and at its own cost, move to quash or limit the Subpoena, otherwise oppose production of the Confidential Materials, and/or seek to obtain confidential treatment of such Confidential Materials from the subpoenaing person or entity to the fullest extent available under law. The recipient of the Subpoena may not produce any Documents, Testimony or Information pursuant to the Subpoena prior to the date specified for production on the Subpoena.

15. Nothing in this Stipulation and Protective Order shall be construed to preclude either Party from asserting in good faith that certain Confidential Materials require additional protection. The Parties shall meet and confer to agree upon the terms of such additional protection.

16. If, after execution of this Stipulation and Protective Order, any Confidential Materials submitted by a Designating Party under the terms of this Stipulation and Protective Order is Disclosed by a non-Designating Party to any person other than in the manner authorized by this Stipulation and Protective Order, the non-Designating Party responsible for the Disclosure shall bring all pertinent facts relating to the Disclosure of such Confidential Materials to the immediate attention of the Designating Party.

17. This Stipulation and Protective Order is entered into without prejudice to the right of any Party to knowingly waive the applicability of this Stipulation and Protective Order to any Confidential Materials designated by that Party. If the Designating Party uses Confidential Materials in a non-Confidential manner, then the Designating Party shall advise that the designation no longer applies.

18. Where any Confidential Materials, or Information derived from Confidential Materials, is included in any motion or other proceeding governed by California Rules of Court,

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1 Rules 2.550 and 2.551, the party shall follow those rules. With respect to discovery motions or
2 other proceedings not governed by California Rules of Court, Rules 2.550 and 2.551, the
3 following shall apply: If Confidential Materials or Information derived from Confidential
4 Materials are submitted to or otherwise disclosed to the Court in connection with discovery
5 motions and proceedings, the same shall be separately filed under seal with the clerk of the Court
6 in an envelope marked: "CONFIDENTIAL – FILED UNDER SEAL PURSUANT TO
7 PROTECTIVE ORDER AND WITHOUT ANY FURTHER SEALING ORDER REQUIRED."
8 19. The Parties shall meet and confer regarding the procedures for use of Confidential
9 Materials at trial and shall move the Court for entry of an appropriate order.
10 20. Nothing in this Stipulation and Protective Order shall affect the admissibility into
11 evidence of Confidential Materials, or abridge the rights of any person to seek judicial review or to
12 pursue other appropriate judicial action with respect to any ruling made by the Court concerning
13 the issue of the status of Protected Material.
14 21. This Stipulation and Protective Order shall continue to be binding after the
15 conclusion of this Proceeding and all subsequent proceedings arising from this Proceeding, except
16 that a Party may seek the written permission of the Designating Party or may move the Court for
17 relief from the provisions of this Stipulation and Protective Order. To the extent permitted by law,
18 the Court shall retain jurisdiction to enforce, modify, or reconsider this Stipulation and Protective
19 Order, even after the Proceeding is terminated.
20 22. Upon written request made within thirty (30) days after the settlement or other
21 termination of the Proceeding, the undersigned Parties shall have thirty (30) days to either (a)
22 promptly return to counsel for each Designating Party all Confidential Materials and all copies
23 thereof (except that counsel for each Party may maintain in its files, in continuing compliance with
24 the terms of this Stipulation and Protective Order, all work product, and one copy of each pleading
25 filed with the Court and one copy of each deposition together with the exhibits marked at the
26 deposition), (b) agree with counsel for the Designating Party upon appropriate methods and
27 certification of destruction or other disposition of such Confidential Materials, or (c) as to any
28 Documents, Testimony or other Information not addressed by sub-paragraphs (a) and (b), file a

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motion seeking a Court order regarding proper preservation of such Materials. To the extent permitted by law the Court shall retain continuing jurisdiction to review and rule upon the motion referred to in sub-paragraph (c) herein.

23. After this Stipulation and Protective Order has been signed by counsel for all Parties, it shall be presented to the Court for entry. Counsel agree to be bound by the terms set forth herein with regard to any Confidential Materials that have been produced before the Court signs this Stipulation and Protective Order.

24. The Parties and all signatories to the Certification attached hereto as Exhibit A agree to be bound by this Stipulation and Protective Order pending its approval and entry by the Court. In the event that the Court modifies this Stipulation and Protective Order, or in the event that the Court enters a different Protective Order, the Parties agree to be bound by this Stipulation and Protective Order until such time as the Court may enter such a different Order. It is the Parties' intent to be bound by the terms of this Stipulation and Protective Order pending its entry so as to allow for immediate production of Confidential Materials under the terms herein.

This Stipulation and Protective Order may be executed in counterparts.

Dated: 3/16/18 By:__________
Attorneys for Plaintiffs

Dated: 3/16/18 By:__________
Attorneys for Defendants

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03/26/2018

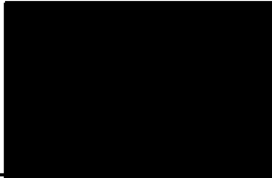
1 ORDER

2 **GOOD CAUSE APPEARING,** the Court hereby approves this Stipulation and Protective

3 Order.

4 **IT IS SO ORDERED.**

5 DATED: 3/27, 2018



8 THE HONORABLE TERRY A. GREEN

9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

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EXHIBIT A

CERTIFICATION RE CONFIDENTIAL DISCOVERY MATERIALS

I hereby acknowledge that I, ____[NAME],

____[POSITION AND EMPLOYER],

am about to receive Confidential Materials supplied in connection with the Proceeding Case No. BC680066. I certify that I understand that the Confidential Materials are provided to me subject to the terms and restrictions of the Stipulation and Protective Order, I have read it, and I agree to be bound by its terms.

I understand that Confidential Materials, as defined in the Stipulation and Protective Order, including any notes or other records that may be made regarding any such materials, shall not be Disclosed to anyone except as expressly permitted by the Stipulation and Protective Order, except as provided therein or otherwise ordered by the Court in the Proceeding. I will not copy or use, except solely for the purposes of this Proceeding, any Confidential Materials obtained pursuant to this Protective Order, except as provided therein or otherwise ordered by the Court in the Proceeding.

I further understand that I am to retain all copies of all Confidential Materials provided to me in the Proceeding in a secure manner, and that all copies of such Materials are to remain in my personal custody until termination of my participation in this Proceeding, whereupon the copies of such Materials will be returned to counsel who provided me with such Materials.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed this ____ day of ____________, 20__, at ___________.

DATED: ____________________ BY: ________________________

Signature

____

Title

____

Address

____

City, State, Zip

____

Telephone Number

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