

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

|                                               |   |                                |
|-----------------------------------------------|---|--------------------------------|
| <b>In the Matter of the Review of Ohio</b>    | ) |                                |
| <b>Edison Company, The Cleveland Electric</b> | ) |                                |
| <b>Illuminating Company, and The Toledo</b>   | ) | <b>Case No. 17-0974-EL-UNC</b> |
| <b>Edison Company's Compliance with</b>       | ) |                                |
| <b>R.C. 4928.17 and Ohio Adm. Code</b>        | ) |                                |
| <b>Chapter 4901:1-37.</b>                     | ) |                                |

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**FIRSTENERGY CORP.'S MOTION FOR A PROTECTIVE ORDER**

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Pursuant to Ohio Administrative Code 4901-1-24(A), FirstEnergy Corp. ("FirstEnergy") moves for a protective order finding that a document produced by FirstEnergy to the Office of the Ohio Consumers' Counsel ("OCC") in response to OCC's September 24, 2021 subpoena is protected from disclosure. OCC notified FirstEnergy that it seeks to disclose publicly certain documents without any showing of why these documents are relevant to this proceeding. Accordingly, as discussed more fully in the accompanying memorandum, FirstEnergy respectfully requests that the Commission rule that FE\_CIV\_SEC\_0266685 is protected from disclosure.

Dated: July 5, 2022

Respectfully submitted,

/s/ Corey A. Lee

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*On behalf of FirstEnergy Corp.*

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| <b>In the Matter of the Review of Ohio</b>    | ) |                                |
| <b>Edison Company, The Cleveland Electric</b> | ) | <b>Case No. 17-0974-EL-UNC</b> |
| <b>Illuminating Company, and The Toledo</b>   | ) |                                |
| <b>Edison Company's Compliance with</b>       | ) |                                |
| <b>R.C. 4928.17 and Ohio Adm. Code</b>        | ) |                                |
| <b>Chapter 4901:1-37.</b>                     | ) |                                |

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**MEMORANDUM IN SUPPORT OF FIRSTENERGY CORP'S  
MOTION FOR A PROTECTIVE ORDER**

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**I. Introduction**

In response to OCC's September 24, 2021 subpoena, non-party FirstEnergy has produced and continues to produce on a rolling basis to OCC all productions to the plaintiffs in *In re FirstEnergy Corp. Securities Litigation* (the "*Securities Litigation*"),<sup>1</sup> which include all documents produced by FirstEnergy to the United States District Attorney for the Southern District of Ohio (the "DOJ") and the Securities and Exchange Commission ("SEC") as part of ongoing federal investigations. Given the sensitive nature of the document productions, FirstEnergy has provided these documents to OCC pursuant to a negotiated protective agreement in order to facilitate the exchange of information (the "Protective Agreement").<sup>2</sup>

Pursuant to the terms of the Protective Agreement, OCC must notify FirstEnergy of any intent to disclose publicly any documents with a confidential designation, after which FirstEnergy has the opportunity to seek a motion for protective order.<sup>3</sup> On June 24, 2022, OCC notified FirstEnergy that it seeks to disclose approximately 20 documents from the securities productions,

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<sup>1</sup> Case No. 2:20-cv-3785 (S.D. Ohio).

<sup>2</sup> FirstEnergy Corp. and OCC Protective Agreement, attached as Exhibit A.

<sup>3</sup> Exhibit A, Protective Agreement, ¶ 9.

merely stating it intends to “include, utilize, refer to, or copy” the documents “in the public domain”—without further explanation.<sup>4</sup> Counsel for FirstEnergy contacted OCC’s counsel in an effort to resolve the issue without Commission intervention.<sup>5</sup> However, FirstEnergy and OCC were not able to reach an agreement that would eliminate the need for a motion.<sup>6</sup> Accordingly, FirstEnergy respectfully requests that the Commission protect from public disclosure the document Bates-stamped FE\_CIV\_SEC\_0266685.

## **II. Argument.**

Protective Agreements or analogous protective orders are routinely upheld. Ohio courts have “broad authority to fashion a protective order that protects the security of any sensitive information.” *Esparza v. Klocker*, 2015-Ohio-110, ¶ 29, 27 N.E.3d 23, 30 (Ohio Ct. App. 2015). And the Commission, under O.A.C. 4901-1-24, has the authority to fashion appropriate protective remedies, as the Attorney Examiners have recently held in a nearly identical instance.<sup>7</sup> Specifically, Attorney Examiners can issue orders that may provide that “a trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way,” or “[i]nformation acquired through discovery be used only for purposes of the pending proceeding, or that such information be disclosed only to designated persons or classes of persons.” O.A.C. 4901-1-24(A)(7), (8).

To date, FirstEnergy has produced to OCC over 470,000 pages of documents that were produced in the *Securities Litigation*, and the productions will continue. FirstEnergy has never conceded these productions are relevant to any of the four PUCO investigative proceedings.

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<sup>4</sup> OCC Letter, dated June 24, 2022, attached as Exhibit B.

<sup>5</sup> Exhibit C, C. Lee Affidavit, ¶ 8.

<sup>6</sup> *Id.*

<sup>7</sup> Case No. 17-974-EL-UNC, Entry, at ¶ 25 (June 22, 2022) (“[T]he Commission is certainly an administrative agency of competent jurisdiction to determine whether the information deserves protection.”).

Rather, FirstEnergy agreed to transfer these materials to OCC in an effort of cooperation and only pursuant to a protective agreement such that the confidentiality designations from the *Securities Litigation*—which include “Confidential” and “Attorneys’ Eyes Only” (“AEO”) designations—would be honored. Accordingly, FirstEnergy and OCC agreed that “Confidential” and “AEO” documents would be treated as “Protected Materials” under the Protective Agreement in this proceeding.<sup>8</sup>

OCC, without any explanation as to relevance for this PUCO proceeding, now seeks to disclose FE\_CIV\_SEC\_0266685, which is designated “AEO” and thus afforded maximum protection under a court-approved stipulated protective order in the *Securities Litigation*. Pursuant to 4901-1-24, O.A.C., FE\_CIV\_SEC\_0266685 should remain confidential because (1) its public disclosure would undermine the court-approved stipulated protective order in the *Securities Litigation*; (2) it contains confidential information protected by the Commission and federal and Ohio courts; and (3) it contains non-public information that is the subject of ongoing federal investigations.

**A. Disclosure Would Undermine FirstEnergy’s Rights and Protections Under the Court-Approved Stipulated Protective Order in the Securities Proceeding.**

On August 18, 2021, the United States District Court for the Southern District of Ohio (the “District Court”) in the *Securities Litigation* approved a stipulated protective order, which governs designating and protecting “Confidential” and “AEO” documents.<sup>9</sup> Documents designated “Confidential” carry defined protections under the stipulated protective order, and those marked “AEO” are afforded maximum protection and restricted to a select subset of persons.<sup>10</sup> If there

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<sup>8</sup> Exhibit A, ¶ 3-4.

<sup>9</sup> *In re FirstEnergy Corp. Securities Litigation*, Stipulated Protective Order, attached as Exhibit D.

<sup>10</sup> *Id.* at §§ 6(b)-(c).

are unresolved disputes as to the confidentiality designations under the stipulated protective order, then a designating entity has the right to file a motion with the District Court pursuant to Federal Civil Rule 26(c). And the party who disagrees with the designation must “abide by that designation until the matter is resolved by agreement of the parties or by order of the Court.”<sup>11</sup>

Here, OCC’s noticed disclosures have created a situation that carries the potential to undermine and void FirstEnergy’s protections under the stipulated protective order in the *Securities Litigation*. This is apparent for at least three reasons.

**First**, courts across the country are reluctant in the first place to permit the wholesale transfer of discovery from one proceeding to another.<sup>12</sup> And when courts do permit such discovery, then courts require appropriate protections and safeguards to prevent disclosure.<sup>13</sup> For example, courts will not even permit discovery “that would require circumvention of a protective order in a separate litigation” without proper justification<sup>14</sup> or “procedural safeguards regarding the dissemination” of the materials.<sup>15</sup>

**Second**, it is now apparent that OCC’s practice of merely listing documents it wants to disclose—without explanation—is improperly forcing non-party FirstEnergy to litigate and defend its confidentiality designations in the PUCO despite that its designations were made pursuant to a

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<sup>11</sup> *Id.* at § 12.

<sup>12</sup> *Marquez v. Dole Food Co. Inc.*, No. 1:20-MC-042, 2021 WL 122997, at \*7 (S.D. Ohio Jan. 13, 2021) (finding “documents relating to satellite litigation . . . fall even further outside the scope of discovery” and granting non-party’s motion to quash); *Strategic Partners, Inc. v. FIGS, Inc.*, No. CV 19-2286-GW (KSX), 2020 WL 4354172, at \*9 (C.D. Cal. May 18, 2020) (collecting cases); *Pictsweet Co. v. R.D. Offutt Co.*, No. 3:19-CV-0722, 2020 WL 12968432, at \*4-5 (M.D. Tenn. Apr. 23, 2020). Unreported cases are attached as Exhibit E.

<sup>13</sup> *NuVasive, Inc. v. Alphatec Holdings, Inc.*, No. 18CV347-CAB-MDD, 2019 WL 201440, at \*2 (S.D. Cal. Jan. 15, 2019).

<sup>14</sup> *Pictsweet Co.*, 2020 WL 12968432, at \*4 (“[D]iscovery that would require circumvention of a protective order in a separate litigation should only occur in justified circumstances and not when the information could be obtained from another party in the same litigation.”).

<sup>15</sup> *NuVasive, Inc.*, 2019 WL 201440, at \*2 (“The Court will not permit collateral litigants to gain automatic access to Defendants’ confidential materials without providing some procedural safeguards regarding the dissemination of those materials, and without following proper procedure.”).

court-approved protective order in the *Securities Litigation*. OCC’s June 24 letter is its third notice of disclosure with respect to the productions made by FirstEnergy Corp in the securities litigation. In its noticed letters, OCC merely captions the letters with a docket number (or docket numbers), lists the documents, and states that it intends to “include, utilize, refer to, or copy” the documents “in the public domain.”<sup>16</sup> Nowhere does OCC explain why it seeks to disclose the listed documents nor how they are relevant to this proceeding, despite its obligation to do so under the Protective Agreement.<sup>17</sup> As FirstEnergy has already explained, the Protective Agreement prohibits the use of the documents beyond this proceeding.<sup>18</sup> Specifically, it allows for “prompt access to and review of” the materials “in a controlled manner that will allow *their use for the purposes of this Proceeding*”; and, the Protective Agreement reiterates that OCC is only to “use” the Protected Materials “*in conjunction with this Proceeding*.”<sup>19</sup> OCC’s notice is particularly deficient in this instance because OCC has captioned its notice with all *four* PUCO investigative proceedings: Case Nos. 17-974-EL-UNC, 17-2474-EL-RDR, 20-1502-EL-UNC, and 20-1629-EL-RDR. The Commission has expressly prohibited consolidated captions here, noting that these cases remain distinct and have not been consolidated.<sup>20</sup> Thus, OCC’s failure to explain relevance is highlighted by its inability to point to the relevant proceeding.

As a result, OCC’s practice forces non-party FirstEnergy to litigate the merits of its confidentiality designations in the PUCO before FirstEnergy has an opportunity to do so in the District Court even though FirstEnergy, under the securities stipulated protective order, has a right

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<sup>16</sup> Exhibit B, OCC Letter.

<sup>17</sup> See Case No. 17-974-EL-UNC, FirstEnergy Corp. Motion for Protective Order, at 9-10 (March 10, 2022).

<sup>18</sup> *Id.*

<sup>19</sup> Exhibit A, Protective Agreement, ¶ 1, 4.

<sup>20</sup> Case No. 17-2474-EL-RDR, Entry, at ¶ 16 (Dec. 15, 2021).

to file a motion for protective order before the District Court pursuant to Federal Civil Rule 26(c). Indeed, if left unchecked, OCC could create a situation where FirstEnergy is defending a majority of its confidentiality designations in the PUCO, thus eliminating the protections and procedures in place in the securities stipulated protective order. Further, this is all the more troubling because FirstEnergy designated the documents pursuant to a court-approved order for documents it produced *in response to party discovery*, unlike here. Here, the vast majority of the 470,000 pages of documents are irrelevant to any of the PUCO proceedings. These are the dangers that courts across the country consider before permitting the wholesale transfer of discovery from one litigation to another—or at the very least, wholesale transfer without appropriate protections.<sup>21</sup> Moreover, OCC’s desire to disclose FE\_CIV\_SEC\_0266685 without explanation carries particular significance because the document is designated AEO and is thus afforded maximum protection.

**Third**, OCC’s practice creates a risk of inconsistent rulings by the District Court and the PUCO. The crux of this issue is that OCC is receiving a voluminous amount of irrelevant information to the PUCO proceedings. Because of this, there is significant prejudice to FirstEnergy, which could be subject to conflicting rulings by the District Court and the PUCO depending on where FirstEnergy must defend its confidentiality designations first and which tribunal rules first (not to mention the complicating factor of the varying jurisdictional reaches of the District Court and the PUCO). It is possible FirstEnergy will have to file a motion for protective order over AEO documents in the *Securities Litigation*. If there is any overlap in documents noticed by OCC (including future notices), then FirstEnergy could be subject to conflicting rulings and obligations under orders from the District Court and the PUCO.

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<sup>21</sup> See, *supra*, fn. 12-15.

For this reason, significant harm would result from OCC's notice practice, if left unchecked.

**B. FE\_CIV\_SEC\_0266685 Is Protected Under Commission, Ohio, and Federal Precedent.**

A separate and independent reason warrants continued protection of FE\_CIV\_SEC\_0266685: it contains information that is protected under Commission, Ohio, and federal precedent. FE\_CIV\_SEC\_0266685 is an internal control analysis and memorandum, dated November 6, 2020.<sup>22</sup> Its information is not generally known to the public, or even inside FirstEnergy, and it has not been publicly disclosed in any other proceeding.<sup>23</sup> Rather, as noted above, it is afforded maximum protection in the securities litigation. Courts and the Commission have recognized a “legitimate private interest in maintaining . . . confidential internal studies and analyses under seal.” *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prod. Liab. Litig.*, 499 F. Supp. 3d 505, 519 (S.D. Ohio 2020).<sup>24</sup> For this reason alone, continued protective treatment over FE\_CIV\_SEC\_0266685 is necessary.

**C. FE\_CIV\_SEC\_0266685 Contains Non-Public Information That Is The Subject of Ongoing Federal Investigations.**

Through the September 24, 2021 subpoena, OCC sought from non-party FirstEnergy all documents produced to the DOJ and SEC. The Protective Agreement permits OCC “prompt

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<sup>22</sup> Exhibit C, C. Lee Affidavit, ¶ 11.

<sup>23</sup> Exhibit C, C. Lee Affidavit, ¶ 13.

<sup>24</sup> *In the Matter of the Application of Columbus S. Power Co. & Ohio Power Co. for Auth. to Establish A Standard Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Sec. Plan. in the Matter of the Application of Columbus S. Power Co. & Ohio Power Co. for Approval of Certain Acct. Auth.*, No. 11-346-EL-SSO, 2011 WL 3547480, at \*2, ¶ 7 (P.U.C.O. Aug. 4, 2011) (protecting internal analyses); *In the Matter of the Application of the E. Ohio Gas Co. for Auth. to Amend Its Filed Tariffs to Increase Its Rates & Charges for Gas Serv.*, No. 80-769-GA-AIR, 1981 WL 703452, at \*1, ¶¶ 4-6 (P.U.C.O. May 11, 1981) (allowing discovery of internal studies and analyses prepared by or for East Ohio but only pursuant to a protective order); *Procter & Gamble Co. v. Stoneham*, 140 Ohio App. 3d 260, 273, 747 N.E.2d 268, 277 (Ohio Ct. App. 2000), *cause dismissed*, 91 Ohio St. 3d 1478, 744 N.E.2d 775 (2001) (finding analysis and interpretation of raw data warranted protection when ruling on reasonableness of non-compete agreement).

access to and review of” the DOJ and SEC materials but in a “controlled manner that will allow their use for the purposes of this [p]roceeding while protecting such data from disclosure.”<sup>25</sup> FE\_CIV\_SEC\_0266685 is a non-public, internal memorandum and the matters addressed within it are subject to ongoing investigation by federal regulators.<sup>26</sup> Public disclosure risks compromising or interfering with an ongoing federal investigation—a concern the Commission has expressly recognized.<sup>27</sup>

Courts across the country likewise protect information that is the subject of ongoing government investigations.<sup>28</sup> To allow public disclosure of these documents now runs afoul of the purpose of the Protective Agreement, the Commission’s express concerns, and the general proposition that materials should remain confidential if their disclosure would harm a federal regulator’s “ability to complete [its] investigation” without potential interference.<sup>29</sup> Accordingly, the Commission should exercise its authority under O.A.C. 4901-1-24(A) to protect confidential documents produced to federal authorities as part of their ongoing investigations. OCC’s public disclosure of FE\_CIV\_SEC\_0266685 would result in unwarranted injury—an injury the Commission has already expressly recognized.<sup>30</sup>

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<sup>25</sup> Exhibit A, Protective Agreement, ¶ 1.

<sup>26</sup> Exhibit C, C. Lee Affidavit, ¶¶ 12-13.

<sup>27</sup> Case No. 20-1629-EL-RDR, Entry, at ¶ 20 (Feb. 9, 2022).

<sup>28</sup> *Wickens v. Rite Aid HDQTRS Corp.*, No. 1:19-CV-02021, 2021 WL 5876695, at \*2 (M.D. Pa. Feb. 23, 2021) (“With respect to information regarding ongoing investigations by the SEC, the Court finds it is necessary to seal this information because the disclosure of confidential information related to ongoing investigations would harm the SEC’s ability to complete these investigations and potentially interfere with the SEC’s ability to engage witnesses in future investigations.”); *Flagg ex rel. Bond v. City of Detroit*, 268 F.R.D. 279, 294 (E.D. Mich. 2010) (“[T]o date, the Court’s first and foremost concern in restricting public access to certain discovery materials and processes has been to ensure that the parties’ discovery efforts do not interfere with the active and ongoing investigation . . . .”); *Shelley v. Cty. of San Joaquin*, No. 2:13-CV-0266 MCE DAD, 2015 WL 2082370, at \*3 (E.D. Cal. May 4, 2015); *United States v. Smith*, 985 F. Supp. 2d 506, 531 (S.D.N.Y. 2013) (“As a general proposition, courts have repeatedly recognized that materials, including even judicial documents which are presumptively accessible, can be kept from the public if their dissemination might ‘adversely affect law enforcement interests.’”) (collecting cases).

<sup>29</sup> *Wickens*, 2021 WL 5876695, at \*2

<sup>30</sup> Case No. 20-1629-EL-RDR, Entry, at ¶ 20 (Feb. 9, 2022).

### III. Conclusion

For these reasons, FirstEnergy respectfully requests that FE\_CIV\_SEC\_0266685 be protected from public disclosure.

Dated: July 5, 2022

Respectfully submitted,

/s/ Corey A. Lee  
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*On behalf of FirstEnergy Corp.*

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on July 5, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Corey A. Lee  
*Attorney for FirstEnergy Corp.*

# EXHIBIT A

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Review of Ohio )  
Edison Company, The Cleveland Electric )  
Illuminating Company, and The Toledo ) Case No. 17-974-EL-UNC  
Edison Company's Compliance with R.C. )  
4928.17 and Ohio Adm. Code Chapter )  
4901:1-37. )**

)  
)  
**In the Matter of the 2020 Review of the ) Case No. 20-1629-EL-RDR  
Delivery Capital Recovery Rider of )  
Ohio Edison Company, The Cleveland )  
Electric Illuminating Company, and )  
The Toledo Edison Company )**

**PROTECTIVE AGREEMENT**

This Protective Agreement ("Agreement") is entered into by and between FirstEnergy Corp. and FirstEnergy Service Co. ("Producing Parties") and the Office of the Ohio Consumers' Counsel ("Receiving Party" or "OCC") (collectively, "the Parties"). This Agreement is designed to facilitate and expedite the exchange with Receiving Party of information in the discovery process in this proceeding, as this "Proceeding" is defined herein. It reflects agreement between the Producing Parties and Receiving Party as to the manner in which "Protected Materials," as defined herein, are to be treated. This Agreement is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials or any resolution of the Producing Parties's obligation to produce (including the manner of production) any requested information or material.

1. The purpose of this Agreement is to permit prompt access to and review of such Protected Materials in a controlled manner that will allow their use for the purposes of this Proceeding while protecting such data from disclosure to non-participants, without a prior ruling

by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection.

2. “Proceeding” as used throughout this document means the above-captioned case, including any appeals, remands and other cases related thereto.

3. A. “Protected Materials” means documents, deposition testimony, or any other information designated under this Agreement as “CONFIDENTIAL” that are treated by the Producing Parties or third parties as commercially sensitive, personally sensitive, or proprietary. “Protected Materials” include, but are not limited to, materials meeting the definition of “trade secret” under Ohio law and material nonpublic information under Regulation FD, 17 C.F.R. 243.

B. “Protected Materials” do not include any information or documents contained in the public files of any state or federal administrative agency or court and do not include documents or information which at, or prior to, commencement of this Proceeding, is or was otherwise in the public domain, or which enters into the public domain except that any disclosure of Protected Materials contrary to the terms of this Agreement or protective order or a similar protective agreement made between the Producing Parties and other persons or entities shall not be deemed to have caused such Protected Materials to have entered the public domain.

C. “Protected Materials” that are in writing shall be conspicuously marked with the appropriate designation, or counsel for the Producing Parties may orally state on the deposition record that a response to a question posed at a deposition is considered Protected Materials.

D. “Protected Materials” include documents or information that are stored or recorded in the form of electronic or magnetic media (including information, files, databases, or programs stored on any digital or analog machine-readable device, computers, discs, networks, or tapes) (“Computerized Material”). The Producing Parties at their discretion may produce

Computerized Material in such form. To the extent that OCC reduces Computerized Material to hard copy, OCC shall conspicuously mark such hard copy as confidential.

4. Protected Materials provided in the context of this Proceeding will be provided to OCC for use by OCC in conjunction with this Proceeding. Nothing in this Agreement precludes the use of any portion of the Protected Materials that becomes part of the public record or enters into the public domain. Nothing in this Agreement precludes OCC from filing Protected Materials under seal or otherwise using Protected Material in ways, such as *in camera* proceedings, that do not disclose Protected Materials.

5. As used in this Agreement, the term “Authorized Representative” includes OCC’s counsel of record in this Proceeding and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by OCC and engaged in this Proceeding.

6. Access to Protected Materials is permitted to OCC’s Authorized Representatives who are either a signatory to this Agreement or who have executed a Non-Disclosure Certificate in the form attached hereto as Exhibit A prior to any access. OCC must treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom as proprietary and confidential, and will safeguard such Protected Materials, copies thereof, information contained therein, and writings made therefrom so as to prevent voluntary disclosure to any persons other than OCC’s Authorized Representatives.

7. If any OCC Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person will be terminated immediately and such person must promptly return Protected Materials in his or her possession to another Authorized Representative of OCC and if there is no such Authorized Representative, such person must treat such Protected Materials in the manner set forth in Paragraph 16 hereof as if this Proceeding

herein had been concluded. Any person who has signed the foregoing Non-Disclosure Certificate will continue to be bound by the provisions of this Agreement even if no longer so engaged.

8. In this Proceeding, OCC may disclose Protected Materials or writings regarding their contents to any individual or entity that is in possession of said Protected Materials or to any individual or entity that is bound by a Protective Agreement or Order with respect to the Protected Materials. OCC may also disclose Protected Materials to employees or persons working for or representing the Public Utilities Commission of Ohio in connection with this Proceeding.

9. OCC may file Protected Materials under seal in this Proceeding whether or not OCC seeks a ruling that the Protected Materials should be in the public domain. If OCC desires to include, utilize, refer, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, then OCC must first give notice (as provided in Paragraph 15) to the Producing Parties, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Producing Parties will have five (5) business days after service of OCC's notice to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion must set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If the Producing Parties do not file such a motion within five (5) business days of OCC's service of the notice, then the Protected Materials will be deemed non-confidential and not subject to this Agreement.

10. The Parties agree to seek *in camera* proceedings by the administrative agency of competent jurisdiction or court of competent jurisdiction for arguments or for the examination of a witness that would disclose Protected Materials. Such *in camera* proceedings will be open only to the Parties, their counsel, other OCC Authorized Representatives, and others authorized by the administrative agency or court to be present; however, characterizations of the Protected Materials that do not disclose the Protected Materials may be used in public.

11. Any portion of the Protected Materials that the administrative agency of competent jurisdiction or court of competent jurisdiction has deemed to be protected and that is filed in this Proceeding will be filed in sealed confidential envelopes or other appropriate containers sealed from the public record.

12. It is expressly understood that upon a filing made in accordance with Paragraph 9 or Paragraph 13 of this Agreement, the burden will be upon the Producing Parties to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

13. OCC will give the Producing Parties notice (as provided in Paragraph 15) if OCC receives a public records request for Protected Materials. The Producing Parties will have five (5) business days after service of OCC's notice to file a pleading before a court of competent jurisdiction to prevent disclosure of the Protected Materials in question. If the Producing Parties file such a pleading, OCC will continue to protect the Protected Materials as required by this Agreement pending an order of the court. If the Producing Parties do not file at a court of competent jurisdiction within five (5) business days of service of OCC's notice, then such Protected Materials can be deemed by OCC to be non-confidential, not a trade secret, and not subject to this Agreement. Alternatively, the Producing Parties may provide notice to OCC that the Protected Materials may be disclosed in response to a public records request.

Notwithstanding the foregoing, nothing contained herein shall alter or limit OCC's obligations under Ohio's Public Records Act (Ohio Revised Code § 149.43), to respond to a lawfully issued subpoena, or to otherwise comply with the law with respect to the Protected Materials.

14. If, under Ohio's public records law, a court awards a relator or person or party attorney's fees or statutory damages or court costs in connection with OCC's non-disclosure or delayed disclosure of Protected Materials, then the Producing Parties will pay such awarded fees, statutory damages, and/or court costs to the relator or person or party so that the State of Ohio, OCC, and OCC's employees and officials are held harmless.

15. All notices referenced in Paragraphs 9 and 13 must be served by the Parties on each other by one of the following methods: (1) sending the notice to such counsel of record herein via e-mail; (2) hand-delivering the notice to such counsel in person at any location; or (3) sending the notice by an overnight delivery service to such counsel.

16. Once OCC has complied with its records retention schedule(s) pertaining to the retention of the Protected Materials and OCC determines that it has no further legal obligation to retain the Protected Materials and this Proceeding (including all appeals and remands) is concluded, OCC must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal. OCC may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross-examination, transcripts, briefs, and work product pertaining to such information and will maintain that copy as provided in this Agreement.

17. By entering into this Protective Agreement, OCC does not waive any right that it may have to dispute the Producing Parties' determination regarding any material identified as confidential by the Producing Parties and to pursue those remedies that may be available to OCC

before an administrative agency or court of competent jurisdiction. Nothing in this Agreement precludes OCC from filing a motion to compel.

18. By entering into this Protective Agreement, the Producing Parties do not waive any right it may have to object to the discovery of confidential material on grounds other than confidentiality and to pursue those remedies that may be available to the Producing Parties before the administrative agency of competent jurisdiction or court of competent jurisdiction.

19. This Agreement represents the entire understanding of the Parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement is valid, unless in writing signed by both Parties. Nothing in this Agreement should be construed as a waiver of sovereign immunity by OCC.

20. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

FirstEnergy Corp. and FirstEnergy Service Co.

The Office of the Ohio Consumers' Counsel

BY:

BY:

/s/ Corey A. Lee  
Counsel

/s/ John Finnigan  
Counsel

9/24/2021  
Date

9/23/2021  
Date

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

|                                        |   |                        |
|----------------------------------------|---|------------------------|
| In the Matter of the Review of Ohio    | ) |                        |
| Edison Company, The Cleveland Electric | ) |                        |
| Illuminating Company, and The Toledo   | ) | Case No. 17-974-EL-UNC |
| Edison Company's Compliance with R.C.  | ) |                        |
| 4928.17 and Ohio Adm. Code Chapter     | ) |                        |
| 4901:1-37.                             | ) |                        |

|                                         |   |                         |
|-----------------------------------------|---|-------------------------|
| In the Matter of the 2020 Review of the | ) |                         |
| Delivery Capital Recovery Rider of Ohio | ) | Case No. 20-1629-EL-RDR |
| Edison Company, The Cleveland Electric  | ) |                         |
| Illuminating Company, and The Toledo    | ) |                         |
| Edison Company                          | ) |                         |

**NON-DISCLOSURE CERTIFICATE FOR  
CONFIDENTIAL PROTECTED MATERIALS**

I certify my understanding that Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed \_\_\_\_\_ 2021, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from Protected Materials will not be disclosed to anyone other than in accordance with the Protective Agreement and will be used only for the purposes of this Proceeding as defined in Paragraph 2 of the Protective Agreement.

Name: \_\_\_\_\_

Company: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Date: \_\_\_\_\_

# EXHIBIT B



## Office of the Ohio Consumers' Counsel

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June 24, 2022

VIA EMAIL

Mr. Corey A. Lee  
Jones Day  
901 Lakeside Avenue  
Cleveland, Ohio 44114

Re: FirstEnergy Corp.'s Claims of Confidentiality, PUCO Cases 17-974-EL-UNC, 17-2474-EL-UNC, 20-1502-EL-UNC & 20-1629-EL-RDR

Dear Mr. Lee:

The Ohio Consumers' Counsel is sending this letter to notify FirstEnergy Corp under paragraph 9 of the protective agreements, that we intend to "include, utilize, refer to, or copy" the following documents in the public domain:

FE\_CIV\_SEC\_0246659-0246660, FE\_CIV\_SEC\_0024390, FE\_CIV\_SEC\_0106302-0106303, FE\_CIV\_SEC\_0158058, FE\_CIV\_SEC\_0184598-0184599, FE\_CIV\_SEC\_0189654-0189656, FE\_CIV\_SEC\_0189688-0189689, FE\_CIV\_SEC\_0203292-0203293, FE\_CIV\_SEC\_0443422-0443423, FE\_CIV\_SEC\_0371781-0371783, FE\_CIV\_SEC\_0298798-0298799, FE\_CIV\_SEC\_0239153-0239155, FE\_CIV\_SEC\_0022523, FE\_CIV\_SEC\_0022554, FE\_CIV\_SEC\_0238453 -0238454, FE\_CIV\_SEC\_0239153 -0239155, FE\_CIV\_SEC\_0249195-0249197, FE\_CIV\_SEC\_0246653-0246654, FE\_CIV\_SEC\_0106304-0106305, and FE\_CIV\_SEC\_0266685-0266695

FirstEnergy Corp. has marked these documents as "confidential."

We received these documents from FirstEnergy Corp. through agreement reached with FirstEnergy Corp. by a letter dated October 13, 2021. OCC and FirstEnergy Corp. signed protective agreements in all four of the above-referenced cases so that FirstEnergy Corp. could share with OCC information and documents that FirstEnergy Corp. deemed confidential as "Protected Materials" with OCC reserving rights to dispute claims of confidentiality.

Under the protective agreements, this OCC notice will result in the documents becoming unprotected (non-confidential) unless FirstEnergy Corp. files within the five-business-day timeline of the protective agreements (paragraph 9) to seek a ruling that the documents are confidential.

By sending this notice, OCC does not waive the right to identify additional discovery responses marked "confidential" and to seek disclosure of any such documents in the public domain.

Best regards,

*/s/ Maureen R. Willis*

Maureen R. Willis (0020847)  
Senior Counsel

# EXHIBIT C

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Review of Ohio )  
Edison Company, The Cleveland Electric )  
Illuminating Company, and The Toledo ) Case No. 17-974-EL-UNC  
Edison Company's Compliance with R.C. )  
4928.17 and Ohio Adm. Code Chapter )  
4901:1-37. )**

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**AFFIDAVIT OF COREY A. LEE IN SUPPORT OF  
FIRSTENERGY CORP.'S MOTION FOR A PROTECTIVE ORDER**

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I, Corey A. Lee, counsel for FirstEnergy Corp. ("FirstEnergy"), submit this affidavit in support of FirstEnergy Corp.'s Motion for a Protective Order.

1. On September 24, 2021, the Office of the Ohio Consumers' Counsel ("OCC") filed a motion for subpoena for FirstEnergy to produce all productions in *In re FirstEnergy Corp. Securities Litigation*, No. 2:20-cv-03785 (S.D. Ohio).
2. FirstEnergy and OCC reached a negotiated resolution of OCC's subpoena, agreeing that FirstEnergy would produce on a rolling basis all documents produced to the securities plaintiffs in *In re FirstEnergy Corp. Securities Litigation*, No. 2:20-cv-03785 (S.D. Ohio).
3. FirstEnergy agreed to provide the productions to OCC pursuant to a protective agreement, attached as Exhibit A to FirstEnergy's Motion for a Protective Order.
4. Within the productions provided to OCC, some documents are designated "Confidential," some documents are designated "Attorneys' Eyes Only," and others have no confidential designation. Under FirstEnergy and OCC's agreement, documents designated "Confidential" or "Attorneys' Eyes Only" are treated as "Protected Materials" under the Protective Agreement.

5. OCC is receiving the same productions as received by the securities plaintiffs, so the confidential designations on the documents provided to OCC are the same as those provided to the securities plaintiffs.
6. Pursuant to Paragraph 9 of FirstEnergy and OCC's Protective Agreement, OCC must notify FirstEnergy prior to disclosing any Protected Materials in the public domain, after which FirstEnergy has five (5) business days to file a motion for protective order.
7. On June 24, 2022, OCC's counsel sent notice via email that it intends to "include, utilize, refer to, or copy" certain materials "in the public domain." *See* Exhibit B to FirstEnergy's Motion for a Protective Order.
8. On June 29, 2022, I reached out to OCC's counsel to inquire whether OCC would be willing to withdraw certain documents from its notice of disclosure, however, we were not able to reach a resolution that would eliminate the need for FirstEnergy to file a motion for protective order.
9. Accordingly, pursuant to Paragraph 9 of the Protective Agreement, this Motion for a Protective Order follows for the document identified with Bates-stamp FE\_CIV\_SEC\_0266685.
10. FE\_CIV\_SEC\_0266685 is designated "Attorneys' Eyes Only" under the court-approved stipulated protective order in *In re FirstEnergy Corp. Securities Litigation*, No. 2:20-cv-03785 (S.D. Ohio) (the "Securities Protective Order"), which is attached as Exhibit D to FirstEnergy's Motion for Protective Order.
11. FE\_CIV\_SEC\_0266685 is an internal, non-public memorandum dated November 6, 2020.

12. The matters addressed within FE\_CIV\_SEC\_0266685 are subject to ongoing investigation by federal regulators.
13. To date, and to the best of my knowledge, FE\_CIV\_SEC\_0266685 has not been made public by any civil litigant (including, but not limited to, the securities litigants), in federal or state court, in any civil proceeding resulting from the House Bill 6 matters.

STATE OF OHIO )  
COUNTY OF CUYAHOGA ) SS:

I, Corey A. Lee, declare under penalty of perjury that this affidavit is true and correct to the best of my knowledge, information, and belief.

  
\_\_\_\_\_  
Corey A. Lee

Subscribed, sworn, and witnessed by me this 5th day of July, 2022.

  
\_\_\_\_\_  
Notary Public



ANTONIETTA BOCCARDI  
NOTARY PUBLIC  
FOR THE  
STATE OF OHIO  
My Commission Expires  
June 7, 2023

# EXHIBIT D

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE FIRSTENERGY CORP. SECURITIES  
LITIGATION,

This document relates to:

ALL ACTIONS.

Case No. 2:20-cv-03785-ALM-KAJ

Chief Judge Algenon L. Marbley

Magistrate Judge Kimberly A. Jolson

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**STIPULATED PROTECTIVE ORDER**

Pursuant to the parties' joint request that the Court enter this Order, and their agreement that the following limitations and restrictions should apply to documents and information produced for inspection and copying during the course of this litigation (the "Action"), the Court hereby **ORDERS** that:

1. **Scope.** This Protective Order (hereinafter "Protective Order" or "Order") shall apply to all documents or other information produced in the course of discovery in this Action that the producing person or entity (the "Producing Entity") has designated as "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER" or "ATTORNEYS' EYES ONLY – SUBJECT TO PROTECTIVE ORDER" (either a "Confidentiality Designation" or collectively the "Confidentiality Designations") pursuant to this Order, including but not limited to, all initial disclosures, all responses to discovery requests, all deposition testimony and exhibits, and all materials (including documents or testimony) produced by non-parties in response to subpoenas issued in connection with this matter, including all copies, excerpts, and summaries thereof (collectively the "Confidential Information").

2. **Purpose.** The purpose of this Protective Order is to protect against the unnecessary disclosure of Confidential Information.

3. **Disclosure Defined.** As used herein, "disclosure" or "to disclose" means to divulge, reveal, describe, summarize, paraphrase, quote, transmit, or otherwise communicate Confidential Information, and the restrictions contained herein regarding disclosure of Confidential Information also apply with equal force to any copies, excerpts, analyses, or summaries of such materials or the information contained therein, as well as to any pleadings, briefs, exhibits, transcripts or other documents which may be prepared in connection with this litigation which contain or refer to the Confidential Information or information contained therein.

#### **4 Designating Material**

(a) **Designating Material As Confidential:** Any party, or any third party subpoenaed by one of the parties, may designate as Confidential and subject to this Protective Order any documents, testimony, written responses, or other materials produced in this case if they contain information that the Producing Entity asserts in good faith is protected from disclosure by statute or common law, including, but not limited to, confidential personal information, medical or psychiatric information, trade secrets, personnel records, or such other sensitive commercial information that is not publicly available. Information that is publicly available may not be designated as Confidential. The designation of materials as Confidential pursuant to the terms of this Protective Order does not mean that the document or other material has any status or protection by statute or otherwise except to the extent and for the purposes of this Order.

(b) **Designating Material As Attorneys' Eyes Only.** Any party, or any third party subpoenaed by one of the parties, may designate as Attorneys' Eyes Only and subject to this Protective Order any materials or information that meet the test set forth in Paragraph 4.a, but as to which the Producing Entity also asserts in good faith that the information is so competitively sensitive that the receipt of the information by parties to the litigation could result in competitive harm to the Producing Entity.

#### **5 Form and Timing of Designation**

(a) **Documents and Written Materials.** The Producing Entity shall designate any document or other written materials as confidential pursuant to this Order by marking each page of the material with a stamp setting forth the Confidentiality Designation, if practical to do so. The person or entity designating the material shall place the stamp, to the extent possible, in such a manner that it will not interfere with the legibility of the document. Materials shall be so-designated prior to, or at the time of, their production or disclosure.

Information contained in responses to interrogatories or other discovery requests or responses may be designated by prominently marking every page of such documents containing the information with the chosen Confidentiality Designation.

All production materials produced without a Confidentiality Designation shall be treated as though designated “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” for a period of thirty days following the date of production. During that thirty-day period, should any party who is not the Producing Entity want to designate a document as “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” or “ATTORNEYS’ EYES ONLY – SUBJECT TO PROTECTIVE ORDER,” that has been produced in this action by another party without a Confidentiality Designation, that party may do so by notifying all counsel of record of the applicable designation(s) and causing the producing party to reproduce the documents with the requested Confidentiality Designation. At the time of each production, all producing parties (except for Plaintiffs) must state whether any documents in each production have been produced without a Confidentiality Designation. Nothing herein shall prevent a party from challenging a designation as set forth in this Order.

If timely corrected, an inadvertent failure to designate Confidential Information does not, standing alone, waive the Producing Party’s right to secure protection under this Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

(b) **Electronically Stored Information (“ESI”):** If a production response includes ESI, the Producing Entity shall make an effort to include within the electronic files themselves the Confidentiality Designation to the extent practicable. If that is not practicable, then the Producing Entity shall designate in a transmittal letter or email to the party to whom the materials are produced (the “Receiving Party”) using a reasonable identifier (*e.g.*, the Bates range)

any portions of the ESI that should be treated as “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER,” and any portions of the ESI that should be treated as “ATTORNEYS’ EYES ONLY – SUBJECT TO PROTECTIVE ORDER.”

(c) **Deposition Testimony.** Deposition testimony will be deemed confidential only if designated as such when the deposition is taken or within thirty days after receipt of the final deposition transcript. Such designation must indicate which Confidentiality Designation applies, and must be specific as to the portions of the transcript and/or any exhibits to which that Confidentiality Designation applies, except that any exhibit that was marked with a Confidentiality Designation at the time of production, and which still bears that mark at the time of its use in a deposition, shall be presumed to fall within the provisions of this Order without further designation.

## **6 Limitation of Use**

(a) **General Protections.** All information that has received a Confidentiality Designation, including all information derived therefrom, shall be used by any Receiving Party solely for purposes of prosecuting or defending this Action. A Receiving Party shall not use or disclose the Confidential Information for any other purpose, including but not limited to any business, commercial, or competitive purpose. Except as set forth in this Order, a Receiving Party shall not disclose Confidential Information to any third party. This Order shall not prevent the Producing Entity from using or disclosing information it has designated as Confidential Information, and that belongs to the Producing Entity, for any purpose that the Producing Entity deems appropriate, except that the Producing Entity’s voluntary disclosure of Confidential Information outside the scope of this Action may impact the protection that this Order would otherwise provide with regard to such information, once disclosed.

(b) **Persons to Whom Information Marked “Confidential” May Be Disclosed.** Use of any information, documents, or portions of documents marked “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER,” including all information derived therefrom, shall be restricted solely to the following persons who agree to be bound by the terms of this Protective Order, unless additional persons are stipulated by counsel or authorized by the Court:

(i) outside counsel of record for the parties, and the administrative staff of outside counsel’s firms;

(ii) in-house counsel for the parties, and the administrative staff for each in-house counsel;

(iii) any party to this action who is an individual;

(iv) as to any party to this action who is not an individual, every employee, director, officer, or manager of that party, but only to the extent necessary to further the interest of the parties in this litigation;

(v) independent consultants or expert witnesses (including partners, associates and employees of the firm which employs such consultant or expert) retained by a party or its attorneys for purposes of this litigation, but only to the extent necessary to further the interest of the parties in this litigation, and only after such persons have completed the certification attached hereto as Attachment A, Acknowledgment of Understanding and Agreement to be Bound;

(vi) the Court and its personnel, including, but not limited to, stenographic reporters regularly employed by the Court and stenographic reporters not regularly employed by the Court who are engaged by the Court or the parties during the litigation of this action;

(vii) the authors and recipients of the documents, or any person who otherwise possessed or had access to the document outside of the context of this litigation;

(viii) any court reporter or videographer reporting a deposition;

(ix) employees of copy services, microfilming or database services, trial support firms, and/or translators who are engaged by the parties during the litigation of this action;

(x) interviewees, potential witnesses, deponents, hearing or trial witnesses, and any other person, where counsel for a party to this action in good faith determines the individual should be provided access to such information in order for counsel to more effectively prosecute or defend this action (as long as the disclosure occurs in the presence of counsel, and copies, duplicates, images, or the like are not removed or retained by any interviewee, potential witness, deponent, or hearing or trial witness), provided, however, that in all such cases the individual to whom disclosure is to be made has been informed that the information contained in the disclosed document(s) is confidential and protected by Court Order, that the individual understands that he/she is prohibited from disclosing any information contained in the document(s) to anyone; or

(xi) any other person agreed to in writing by the parties.

Prior to being shown any documents produced by another party marked “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER,” any person listed under paragraph 6(b)(iv), 6(b)(v), or 6(b)(xi) shall be advised that the confidential information is being disclosed pursuant to and subject to the terms of this Protective Order.

(c) **Persons to Whom Information Marked “Attorneys’ Eyes Only” May Be Disclosed.** Use of any information, documents, or portions of documents marked “ATTORNEYS’ EYES ONLY – SUBJECT TO PROTECTIVE ORDER,” including all information derived therefrom, shall be restricted solely to the following persons who agree to be

bound by the terms of this Protective Order, unless additional persons are stipulated by counsel or authorized by the Court:

(i) outside counsel of record for the parties, and the administrative staff of outside counsel's firms;

(ii) one designated representative from in-house counsel for each party;

(iii) one designated representative from each plaintiff who has completed the certification attached hereto as Attachment A, Acknowledgment of Understanding and Agreement to be Bound;

(iv) independent consultants or expert witnesses (including partners, associates and employees of the firm which employs such consultant or expert) retained by a party or its attorneys for purposes of this litigation, but only to the extent necessary to further the interest of the parties in this litigation, and only after such persons have completed the certification attached hereto as Attachment A, Acknowledgment of Understanding and Agreement to be Bound;

(v) the Court and its personnel, including, but not limited to, stenographic reporters regularly employed by the Court and stenographic reporters not regularly employed by the Court who are engaged by the Court or the parties during the litigation of this action;

(vi) the authors and recipients of the documents, or any person who otherwise possessed or had access to the document outside of the context of this litigation;

(vii) any court reporter or videographer reporting a deposition;

(viii) employees of copy services, microfilming or database services, trial support firms, and/or translators who are engaged by the parties during the litigation of this action;

(ix) any other person agreed to in writing by the parties.

Prior to being shown any documents produced by another party marked "ATTORNEYS' EYES

ONLY – SUBJECT TO PROTECTIVE ORDER,” any person listed under paragraph 6(c)(ix) shall be advised that the confidential information is being disclosed pursuant to and subject to the terms of this Protective Order.

7. **Inadvertent Production.** Inadvertent production of any document or information with a Confidentiality Designation shall be governed by Fed. R. Evid. 502. Pursuant to subsections (d) and (e) of that Rule, the parties agree to, and the Court orders, protection of Protected Information against claims of waiver (including as against third parties and in other Federal and State proceedings) in the event such information is produced during the course of the Litigation, whether pursuant to a Court order, a parties’ discovery request, or informal production, as follows:

(a) the production of documents or electronically stored information (“ESI”) (including, without limitation, metadata) subject to a legally recognized claim of privilege or other protection from production or other disclosure (collectively, “Protected Information”), including without limitation the attorney-client privilege and work-product doctrine, shall in no way constitute the voluntary disclosure of such Protected Information;

(b) the production of Protected Information shall not result in the waiver of any privilege or protection associated with such Protected Information as to the receiving party, or any third parties, and shall not result in any waiver of protection, including subject matter waiver, of any kind;

(c) if any document or ESI (including, without limitation, metadata) received by a party is on its face clearly subject to a legally recognizable privilege, immunity, or other right not to produce such information, the Receiving Party will promptly notify the Producing Entity in writing that it has discovered Protected Information, identify the Protected Information by Bates Number range, and return or sequester such Protected Information until the Producing Entity confirms whether it does indeed assert any privilege protecting this information. Once the

Producing Entity asserts privilege over such Protected Information (as described in Subparagraph (e) below), the Receiving Party will return, sequester, or destroy all copies of such Protected Information, along with any notes, abstracts or compilations of the content thereof, within ten (10) business days of notice from the Producing Entity;

(d) upon the request of the Producing Entity, the Receiving Party will promptly disclose the names of any individuals who have read or have had access to the Protected Information;

(e) if the Producing Entity intends to assert a claim of privilege or other protection over Protected Information identified by the receiving party, the Producing Entity will, within ten (10) business days of receiving the Receiving Party's written notification, inform the Receiving Party of such intention in writing and shall provide the Receiving Party with a log for such Protected Information that is consistent with the requirements of the Federal Rules of Civil Procedure, setting forth the basis for the claim of privilege, immunity or basis for non-disclosure, and in the event any portion of the Protected Information does not contain privileged or protected information, the Producing Entity shall also provide to the Receiving Party a redacted copy of the Protected Information that omits the information that the Producing Entity believes is subject to a claim of privilege, immunity or other protection;

(f) if, during the course of the litigation, a party determines it has produced Protected Information, the Producing Entity may notify the Receiving Party of such production in writing. The Producing Entity's written notice must identify the Protected Information by Bates Number range, the privilege or protection claimed, and the basis for the assertion of the privilege and shall provide the receiving party with a log for such Protected Information that is consistent with the requirements of the Federal Rules of Civil Procedure, setting forth the basis for the claim of privilege, immunity or basis for non-disclosure, and in the event any portion of the Protected

Information does not contain privileged or protected information, the Producing Entity shall also provide to the receiving party a redacted copy of the Protected Information that omits the information that the Producing Entity believes is subject to a claim of privilege, immunity or other protection. The Producing Entity must also demand the return of the Protected Information. After receiving such written notification, the Receiving Party must, within ten (10) business days of receiving the written notification, return, sequester, or destroy the specified Protected Information and any copies, along with any notes, abstracts or compilations of the content thereof;

(g) a Receiving Party's return, sequestration, or destruction of such Protected Information as provided in the Subparagraphs above will not act as a waiver of the Receiving Party's right to move for the production of the returned, sequestered, or destroyed Protected Information on grounds that the Protected Information is not in fact subject to a viable claim of privilege or other protection. However, the Receiving Party is prohibited and estopped from arguing that the Producing Entity's production of the Protected Information in this matter acts as a waiver of applicable privileges or protections, that the disclosure of the Protected Information by the Producing Entity was not inadvertent, that the Producing Entity did not take reasonable steps to prevent the disclosure of the Protected Information, or that the Producing Entity did not take reasonable steps to rectify such disclosure; and

(h) nothing contained herein is intended to or shall limit a Producing Entity's right to conduct a review of documents or ESI (including, without limitation, metadata), for relevance, responsiveness, and/or the segregation of privileged and/or protected information before such information is produced to the Receiving Party;

(i) prior to production to another party, all copies, electronic images, duplicates, extracts, summaries, or descriptions (collectively "copies") of documents marked with a Confidentiality Designation under this Order, or in any individual portion of such a document,

shall be affixed with the same Confidentiality Designation if it does not already appear on the copy. All such copies shall thereafter be entitled to the protection of this Order. The term “copies” shall not include indices, electronic databases, or lists of documents provided these indices, electronic databases, or lists do not contain substantial portions or images of the text of confidential documents or otherwise disclose the substance of the confidential information contained in those documents.

**8 Filing Materials Containing Information With a Confidentiality Designation.**

In the event a party seeks to file with the Court any confidential information subject to protection under this Order, that party must take appropriate action to ensure that the document receives proper protection from public disclosure, including: (a) filing a redacted document with the consent of the party who designated the document as confidential; (b) where appropriate (*e.g.*, in relation to discovery and evidentiary motions), submitting the document solely for in camera review; or (c) when the preceding measures are inadequate, seeking permission to file the document under seal by filing a motion for leave to file under seal.

Any motion to file a document subject to this Order under seal must meet the Sixth Circuit’s standard set forth in *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Cir. 2016). The burden of demonstrating the need for and appropriateness of a sealing order is borne by the moving party, and requires the moving party to analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations. Regardless of whether the parties agree, it remains the Court’s independent obligation to determine whether a seal is appropriate for any given document or portion thereof. Any proposed sealing, even when compelling reasons exist, must be narrowly tailored to serve the compelling reasons.

When a party to this Order seeks to file documents which it believes may warrant sealing, but is not the party who may be prejudiced by the document or documents becoming part of the

public record, the filing party shall provide the potentially-prejudiced party or parties, or any potentially-prejudiced third party or parties, with written notification of its intent to file such documents at least (14) *fourteen days* before doing so. After being provided such notice, the potentially harmed party or parties will then have (7) *seven days* to file with the Court a motion for sealing. Alternatively, the party seeking to file with the Court any confidential information subject to protection under this Order may itself file a motion for sealing, in which case no notice is required. To the extent the Court requires additional support for the motion for sealing or a protective order, the potentially harmed party or parties will have five business days to file such protective order or additional support for the motion for sealing with the Court. The Court will rule on the motion as promptly as possible.

9. **Attorneys Allowed to Provide Advice.** Nothing in this Order shall bar or otherwise restrict any attorney for any party from rendering advice to his or her client with respect to this case or from doing anything necessary to prosecute or defend this case and furthering the interests of his or her client, except for the disclosure of the Confidential Information as proscribed in this Order.

10. **Excluding Others From Access.** Whenever information bearing a Confidentiality Designation pursuant to this Protective Order is to be discussed at a deposition, the person or entity that designated the information may exclude from the room any person, other than persons designated in Paragraph 6 of this Order, as appropriate, for that portion of the deposition.

11. **No Voluntary Disclosure to Other Entities.** The parties or anyone acting on their behalf may not voluntarily disclose any Confidential Information to any state or federal law enforcement or regulatory agency, or any employee thereof, except in this litigation as set forth in Paragraph 6 of this Order or as otherwise commanded by law or provided in this Order. Nothing in this Order shall prevent a party from providing information in its possession in response to a

valid order or subpoena from a law enforcement or regulatory agency requiring the production of such information, except that, prior to such production, the party producing the information shall provide as much advance notice as possible to the person or entity that designated the material as confidential to facilitate that party's efforts to preserve the confidentiality of the material, if warranted.

12. **Disputes As to Designations.** Each party has the right to dispute the Confidentiality Designation asserted by any other party or subpoenaed person or entity in accordance with this Protective Order. If a party believes that any documents or materials have been inappropriately designated by another party or subpoenaed party, that party shall confer with counsel for the person or entity that designated the documents or materials. As part of that conferral, the designating person or entity must assess whether redaction is a viable alternative to complete non-disclosure. If any party challenges the Confidentiality Designation of any document or information, the burden to properly maintain the designation shall, at all times, remain with the person or entity that made the designation to show that said document or information should remain protected pursuant to Federal Civil Rule 26(c). In the event of disagreement, then the designating person or entity shall file a motion pursuant to Federal Civil Rule 26(c). A party who disagrees with the designation must nevertheless abide by that designation until the matter is resolved by agreement of the parties or by order of the Court.

13. **Information Security Protections.** Any person in possession of Confidential Information received from another person or entity in connection with this Action shall maintain an information security program that includes reasonable administrative, technical, and physical safeguards designed to protect the security and confidentiality of such Confidential Information, protect against any reasonably anticipated threats or hazards to the security of such Confidential Information, and protect against unauthorized access to or use of such Confidential Information.

If a Receiving Party discovers a breach of security, including any actual or suspected unauthorized access, to Confidential Information subject to this Order, they shall: (1) notify the person or entity who designated the materials under the terms of this Order of such breach; (2) investigate and take reasonable efforts to remediate the effects of the breach; and (3) provide sufficient information about the breach that the Producing Entity can reasonably ascertain the size and scope of the breach. The Receiving Party agrees to cooperate with the Producing Entity or law enforcement in investigating any such security incident. In any event, the Receiving Party shall promptly take all necessary and appropriate corrective action to terminate the unauthorized access.

14. **All Proceedings Open to Public.** Pretrial proceedings and hearings, are presumptively open to the public (collectively a “Public Hearing” or “Public Hearings”). Absent further order of the Court, there will be no restrictions on any Party’s ability to use during a Public Hearing any document or information that has been marked with a Confidentiality Designation or documents or information derived therefrom that would disclose such confidential information. However, if a party intends to present at a Public Hearing any document or information that has been so designated, the party intending to present such document or information shall provide advance notice to the person or entity that made the Confidentiality Designation at least (5) **five** days before the Public Hearing by identifying the documents or information at issue as specifically as possible (i.e., by Bates Number, page range, deposition transcript line, etc.) without divulging the actual documents or information or, if this timeframe is not available, at a reasonable timeframe in advance of such Public Hearing such that the parties may address the merits of the designation with the Court. In no event shall such advance notice be provided less than two business days before any Public Hearing. Any person may then seek appropriate relief from the Court regarding restrictions on the use of such documents or information at proceedings, or sealing of the

courtroom, if appropriate. This paragraph shall not apply to the use of confidential information at trial which shall be addressed at the Final Pretrial Conference.

15. **No Waiver of Right to Object.** This Order does not limit the right of any party to object to the scope of discovery in the above-captioned action.

16. **No Determination of Admissibility.** This Order does not constitute a determination of the admissibility or evidentiary foundation for the documents or a waiver of any party's objections thereto.

17. **No Admissions.** Designation by either party of information or documents under the terms of this Order, or failure to so designate, will not constitute an admission that information or documents are or are not confidential or trade secrets. Neither party may introduce into evidence in any proceeding between the parties, other than a motion to determine whether the Protective Order covers the information or documents in dispute, the fact that the other party designated or failed to designate information or documents under this Order.

18. **No Prior Judicial Determination.** This Order is based on the representations and agreements of the parties and is entered for the purpose of facilitating discovery in this action. Nothing in this Order shall be construed or presented as a judicial determination that any documents or information as to which counsel or the parties made a Confidentiality Designation is in fact subject to protection under Rule 26(c) of the Federal Rules of Civil Procedure or otherwise until such time as the Court may rule on a specific document or issue.

19. **Order Subject to Modification.** This Order shall be subject to modification by the Court on its own motion or on motion of a party or any other person with standing concerning the subject matter.

20. **Parties May Consent to Disclosure.** Nothing shall prevent disclosure beyond the terms of this Order if all parties consent to such disclosure, or if the Court, after notice to all

affected parties, permits such disclosure. Specifically, if and to the extent any party wishes to disclose any Confidential Information beyond the terms of this Order, that party shall provide all other parties with reasonable notice in writing of its request to so disclose the materials. If the parties cannot resolve their disagreement with respect to the disclosure of any Confidential Information, then a party may petition the Court for a determination of these issues. In addition, any interested member of the public may also challenge the designation of any material as confidential, pursuant to the terms of this paragraph.

21. **Return or Destruction Of Materials Upon Termination of Litigation.** Upon the written request of the Producing Entity, within 30 days after the (i) entry of a final judgment no longer subject to appeal on the merits of this case; (ii) final disposition of an application for attorneys' fees and expenses; or (iii) finalization of a settlement that is no longer subject to appeal, whichever comes later, the parties and any person authorized by this Protective Order to receive confidential information shall return to the Producing Entity, or destroy, all information and documents subject to this Protective Order, unless the specific document or information has been offered into evidence or filed without restriction as to disclosure. The Producing Entity's request for the return of confidential information shall be limited to requests for the return of physical media used to transmit the confidential information, such as the return of a hard drive, and if the Producing Entity requests the return of materials, rather than the destruction of the materials, the Producing Entity shall pay the reasonable costs of responding to its request. The party returning or destroying the documents or other information shall certify that it has not maintained any copies of confidential information, except as permitted by this Order.

22. **Counsel Allowed to Retain Copy of Filings.** Nothing in this Protective Order shall prevent outside counsel for a party from maintaining in its files a copy of any filings in the Action, including any such filings that incorporate or attach Confidential Information. Moreover,

an attorney may retain and use his or her work product in subsequent litigation provided that such use does not disclose any Confidential Information.

**SO ORDERED.**

Date: August 18, 2021

/s/ Kimberly A. Jolson  
KIMBERLY A. JOLSON  
UNITED STATES MAGISTRATE JUDGE

*[signatures begin on next page]*

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**ATTACHMENT A**

The undersigned hereby acknowledges that [he/she] has read the Protective Order dated [INSERT DATE OF OPERATIVE PROTECTIVE ORDER] in the above-captioned action and attached hereto, understands the terms thereof, and agrees to be bound by its terms. The undersigned submits to the jurisdiction of the United States District Court for the Southern District of Ohio in matters relating to the Protective Order and understands that the terms of the Protective Order obligate [him/her] to use documents designated “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” or “ATTORNEYS’ EYE ONLY – SUBJECT TO PROTECTIVE ORDER” in accordance with the Order, solely for the purpose of the above-captioned action, and not to disclose any such documents or information derived directly therefrom to any other person, firm, or concern.

The undersigned acknowledges that violation of the Protective Order may result in penalties for contempt of court.

Name:

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Job Title:

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Employer:

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Business  
Address:

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Date:

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Signature

# EXHIBIT E

2021 WL 122997

Only the Westlaw citation is currently available.

United States District Court, S.D. Ohio, Western Division.

Luis Antonio Aguilar MARQUINEZ, et al., Plaintiffs,

v.

DOLE FOOD COMPANY INC., et al., Defendants.

Case No. 1:20-mc-042

|

Filed 01/13/2021

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**MEMORANDUM OPINION AND ORDER**

Stephanie K. Bowman, United States Magistrate Judge

\*1 On November 4, 2020, The Cincinnati Enquirer, a division of Gannett GP Media, Inc. ("The Enquirer") filed a motion to quash a subpoena pertaining to an underlying lawsuit in the District Court of Delaware. *See Marquez v. Dole Food Company Inc.*, Case No. 1:12-cv-695-RGA-SRF. The subpoena directs the Enquirer to appear and give testimony, and to produce 15 categories of documents that generally relate to an investigative journalism article ("the Article") that was initially published on May 3, 1998, but subsequently retracted by The Enquirer. For the following reasons, The Enquirer's motion to quash is granted.<sup>1</sup>

**I. Background****A. The Underlying Delaware****Case: Case No. 1:12-cv-695-RGA**

In the underlying Delaware lawsuit, Plaintiffs, who are foreign nationals, allege that multiple U.S. corporations exposed them to a toxic pesticide while Plaintiffs were working on banana plantations in Ecuador, Costa Rica, and Panama in the 1960s through the 1980s. (May 31, 2012 Complaint).<sup>2</sup> The pesticide was not used after 1985. (Doc. 2-2 at 22, PageID 153). Relevant to the subpoena at issue, Plaintiffs allege that a group referred to as the

"Chiquita Defendants" (hereafter "Chiquita") is liable based upon Plaintiffs' exposure to the pesticide in "Costa Rica or Panama." (Complaint at ¶¶29, 31, 44). The 2012 *Marquez* complaint generally alleges exposure to the pesticide in Ecuador on farms owned or controlled by other corporate Defendants. Chiquita has denied under oath that it owned, operated, or otherwise controlled banana plantations in Ecuador during the relevant years at issue. (Doc. 9, Exh. 1-3).<sup>3</sup>

Notwithstanding the lack of any direct allegation concerning Chiquita's control or ownership of farms in Ecuador in the original complaint, Plaintiffs now characterize the *Marquez* claims against Chiquita as involving "injuries from exposure to DBCP sustained on banana plantations in Ecuador, because of Chiquita's participation and assistance in licensing DBCP and keeping it on the market or its acts furthering the conspiracy among the various Defendants to place and keep DBCP on the market, or its operation and control of the plantations where Plaintiffs sustained their injurious exposures to the toxic chemical." (Doc. 9 at 10, PageID 295, emphasis added). Plaintiffs allege that the documents underlying the publication of the Article as well as documents relating to lawsuits filed after the publication of the Article will help them prove claims relating to their Ecuadorian exposure attributable to Chiquita.

**B. The Article**

\*2 On May 3, 1998, some 13 years after the last use of the pesticide at the heart of the underlying litigation, The Enquirer published an 18-page Article entitled "CHIKUITA SECRETS REVEALED: Hidden control crucial to overseas empire" (previously referenced as "the Article"). The article was one of a series of articles in a multi-part exposé spanning a wide range of topics about Chiquita's business practices in several countries in Latin America, published under the byline of journalists Michael Gallagher and Cameron McWhirter.

The specific Article that is the focus of the subpoena makes no mention of the pesticide at issue in the underlying lawsuit. Instead, the Article posits that Chiquita "secretly controls dozens of supposedly independent banana companies in Latin America" "through an international trust structure designed to avoid restrictions of land ownership and national security laws." (Doc. 2-1 at 10, PageID 30). Although the Article focused on Honduras, the Article reported that "nominee" and "trust" types of ownership, as well as subsidiary ownership,

were used in Guatemala and Columbia. At the end of the 18-page Article is a short 7-paragraph section that references Ecuador. The final section on Ecuador leads with the statement that Chiquita “used the trust structure to set up supposedly independent banana farm companies in Ecuador,” citing as source material a “March 1992 internal company report.” The Article states that the report, allegedly written by “Chiquita financial analyst Paul M. White” (hereafter “White report”), describes “the company's rationale for restructuring its Ecuadoran operations....” (Doc. 2-1 at 14, PageID 34). The 7-paragraph Ecuador section also cites to and quotes from a February 1992 “internal memo from Chiquita lawyer David Hills” that allegedly describes “how the company's Ecuadoran operations would be restructured under foreign trusts....” (*Id.*, emphasis added). It is clear from the quotations that the Hills memo discusses then *future* plans by Chiquita, post-dating the February 1992 memo. The Article concludes: “The restructuring outlined in Mr. Hills’ memo never became fully operational because there was glut of bananas in the European market and prices plummeted in 1992, forcing the banana company to halt its expansion plans in [Ecuador] at that time....” (*Id.*)

A number of lawsuits quickly arose after publication of the series of articles - in part because the exposé used voicemails that had been illegally obtained from Chiquita's voicemail system by lead reporter Michael Gallagher and a former Chiquita in-house lawyer, George Ventura.<sup>4</sup> In one case, the Sixth Circuit summarized the fallout:

[A] few weeks after the initial publication ..., Chiquita demonstrated to the newspaper that Gallagher had illegally invaded the voice-mail system.

As a result of these revelations, the Enquirer fired Gallagher on June 26, 1998, and demanded, both orally and in writing, that he return all Enquirer property in his possession including files, tape recordings, and notes. The Enquirer also publicly apologized for Gallagher's misconduct and paid Chiquita more than \$10 million in a settlement.

*Ventura v. The Cincinnati Enquirer*, 396 F.3d 784, 788 (6th Cir. 2005). Both Gallagher and Ventura were investigated and ultimately convicted of charges relating to the unauthorized access. *Id.*

As stated by the Sixth Circuit, The Enquirer retracted the entire series of articles, including but not limited to the Article at issue in the current discovery dispute. The language of the

retraction was unequivocal. “The Enquirer has now become convinced that the above representations, accusations and conclusions are untrue and created a false and misleading impression of Chiquita's business practices.” (Doc. 2-2 at 12, PageID 143). “We have withdrawn the articles from continued display on the Enquirer's Internet website and renounce the series of articles.” (*Id.*)

### C. The Subpoena

\*3 Plaintiffs seek discovery from The Enquirer, in part, as a means to prove up the retracted Article's references to Chiquita's operations in Ecuador, which Plaintiffs assert are relevant to “core” claims in the *Marquez* case. The original subpoena listed 15 broad categories of documents, including the two reporters’ complete personnel files. Although the subpoena has not been amended, Plaintiffs narrowed their requests during a meet and confer process to correspond to Topics 3, 4, 7, 8, 9 and 10 in the original subpoena.

1. All documents ... regarding either (1) the Nominee form of ownership or (2) the Trust form of ownership used by Chiquita, and any of Chiquita's affiliates or subsidiaries, to structure ownership of banana growing operations in Ecuador as described in [the Article].
2. The 1992 report written by financial analyst Paul M. White regarding the ownership structure of Ecuadoran banana growing operations identified in [the Article].
3. All documents ... pertaining to the case captioned *Ventura v. Cincinnati Enquirer, et al.*, No. 1:99-cv-00793-HJW-JS (S.D. Ohio) ...
4. All documents ... pertaining to the lawsuit case captioned *Chiquita Brands Intl v. Gallagher*, No. 1:8-cv-00467-SJD (S.D. Ohio) ....
5. All documents ... produced in the State of Ohio's investigation into George Ventura's actions related to [the Article]....

(Doc. 9-34 at 6, email correspondence).<sup>5</sup>

### D. Plaintiffs’ Two Prior Attempts to Obtain the Information

The instant subpoena represents Plaintiffs' third attempt to obtain either the same or substantially similar information.

### **1. Plaintiffs' Motion to Compel in the Underlying Delaware Case**

Plaintiffs first tried to obtain the information from Defendant Chiquita in the underlying case. In April 2020, Plaintiffs moved to compel Chiquita to produce additional documents related to Chiquita's alleged banana operations in Ecuador from 1965 to 1985, including evidence of business relationships with 62 banana plantations where Plaintiffs were employed and the March 1992 White financial report referenced in the Article. (See Doc. 308 in Case No. 1:12-cv-695-RGA). At a hearing held on April 23, 2020, U.S. Magistrate Judge Fallon denied the motion to compel. The Enquirer has filed a copy of the transcript as an exhibit to its motion to quash. (Doc. 2-2; see also Doc. 315 in Case No. 1:12-cv-RGA).

The Delaware Court spent considerable time discussing Plaintiffs' request for the White report. In response to Plaintiffs' motion, Chiquita questioned whether the White report had ever existed, given that its existence was based solely on the fully retracted Article. (Doc. 2-4 at 4). Chiquita further stated that it had searched for the alleged report "for several months, has not located it, and ... has no reason to believe that it ever existed." (*Id.*) Chiquita explained that its HR records reflected that Paul White was not a "financial analyst" as reported in the Article and had nothing to do with Chiquita's Ecuadorian operations but was instead a country manager for Russia who resided in the Czech Republic. (Doc. 310 in Case No. 1:12-695-RGA; see also Doc. 2-2, Transcript at 20; PageID 151). Judge Fallon similarly questioned, based upon The Enquirer's retraction, whether the White report "ever existed." (Doc. 2-2 at 9-11, PageID 140-142). The Court denied Plaintiffs' motion based upon The Enquirer's unequivocal retraction of the Article as "untrue." "[T]he Court will not ... allow a motion to compel something that was retracted, determined to be untrue as part of an entire series that had been published, and was withdrawn, retracted, and deemed to be untrue." (*Id.* at 13, PageID 144).

\*4 Plaintiffs' counsel conceded that The Enquirer's retraction "is as broad as I think the Court is reading it," but argued that "it was the product of resolution of litigation" and "there was no expressed denial that these documents [including the White report] existed." (*Id.*) Judge Fallon was

unmoved. "The motion to compel a report, should any exist, which the Court is highly doubtful of, is denied." (*Id.* at 21, PageID 152). Judge Fallon also denied Plaintiffs' motion to compel any other documents from Chiquita relating to alleged banana operations or activities in Ecuador.

### **2. Plaintiffs' Subpoena to a Former Enquirer Reporter**

Plaintiffs did not object to Magistrate Judge Fallon's order before the district judge. Instead, they subpoenaed the co-author of the Article in the Northern District of Georgia, Cameron McWhirter, seeking his testimony and production of most of the same decades-old documents that are sought from The Enquirer herein. McWhirter moved to quash the subpoena. See *Marquinez v. Dole*, Case No. 1:20-cv-4834-CAP. On December 2, 2020, U.S. Magistrate Judge Salinas granted the motion to quash in its entirety. The Enquirer has filed a copy of the hearing transcript, which was incorporated into the court's one-page order, as an exhibit to its reply. (Doc. 10-1).

At the Georgia hearing, Plaintiffs confirmed that "essentially we're seeking to establish the veracity of what was in the exposé." (*Id.* at 8, PageID 1585). McWhirter sought to quash the subpoena based upon Georgia's "Shield Law" and a qualified journalistic privilege recognized in the Eleventh Circuit. The hearing focused on whether the privilege had been waived or could be overcome. Importantly, the three factors on which the Court focused were whether the information is: (1) material and relevant to Plaintiffs' claims; (2) could not be reasonably obtained by alternative means; and (3) is necessary to the proper preparation or presentation of the underlying case. The Georgia court found for McWhirter and against Plaintiffs on all three factors.

Beginning with whether the requested materials are relevant, material, or necessary to prove Chiquita's involvement in Ecuador, Judge Salinas first noted that the Article barely mentioned operations in Ecuador:

[T]here's a lot of stuff in the article about Honduras, right, like, super specific stuff about Honduras, then it has a little bit about Columbia and then maybe somewhere else, and then it kind of ends with Ecuador. It kind of – I mean, in a certain way it fizzles out,

because the last sentence of it is they didn't do it. I mean, to me it sounds like [Chiquita] ultimately didn't do it in Ecuador.

(Doc. 10-1 at 17, PageID 1594). Judge Salinas expressed additional concerns with the need for the materials after hearing that Plaintiffs were “trying to establish ... how much of [the] reporting was credible versus ... what were the internal discussions at the Enquirer about the retraction.” (Doc. 10-1 at 19, PageID 1596). The court responded:

I'm still just not sure where that gets you. I mean, you're still in – you're still not to the heart of it. I still feel like you're in a weird hearsay land that that -- whether or not the article is true, it was published. You know, you've got the back story of why it was retracted, it was retracted. So -- but the whole point of it is, did Chiquita own land in Ecuador during this certain period of time. I don't know that you've connected those dots.

(*Id.* at 19-20, PageID 1596-97). Consistent with the Delaware court's analysis, Judge Salinas stated that even asserting the existence of the 1992 White report<sup>6</sup> based upon a retracted newspaper article written in 1998 “seems to be rank speculation” and “a big fishing expedition.” (Doc. 10-1 at 17, PageID 1584).

\*5 The Georgia court also questioned the relevance of the information after the reporter's counsel pointed out that the underlying complaint did not allege Chiquita's involvement in Ecuador, and after noting the pesticide use allegedly stopped in 1985, whereas Plaintiffs sought a 1992 report referenced in a 1998 Article. “Is there a – am I wrong in wondering about that time difference ... in terms of relevance?” (Doc. 10-1 at 21, PageID 1598). While insisting that Chiquita's presence in Ecuador remains at issue, Plaintiffs’ counsel neither cited to specific allegations in the Delaware complaint that allege Chiquita's involvement in Ecuador, nor connect the disparate time periods. Instead, counsel conceded that Chiquita's involvement “could have been pled more clearly

in the complaint” and stated that “we're in the process of amending it to clarify it.” (*Id.* at 22, PageID 1599). As of the date of this Order, no motion to amend has been filed in the underlying Delaware *Marquez* case.

Last, Judge Salinas found that Plaintiffs had failed to show that they could not obtain the information through better sources, and/or alternative means that were less reliant on hearsay, calling the reporter is “the least best” person from whom to obtain the information. She pointed out that Plaintiffs appeared to have done little to subpoena the Chiquita employees “that you think were the ones, you know, making this plan and setting up the [Ecuadorian] trusts....” (*Id.* at 18, PageID 1595). Judge Salinas stated Plaintiffs could have filed objections to Magistrate Judge Fallon's order before the presiding district judge, but failed to do so. (*Id.* at 30, PageID 1607). She questioned Plaintiffs’ strategy of seeking the same information from a reporter. “[Y]ou know, it doesn't seem to me that means that you throw your hands in the air and then try to go get exactly what [Judge Fallon] said you can't have from the reporter.” (*Id.* at 31, PageID 1608).

## II. Analysis

The Enquirer seeks to quash the subpoena on grounds that the information sought by the subpoena is beyond the scope of discovery under Rule 26(b)(2), and is not material, relevant, or necessary to prove Plaintiffs’ claims in the Delaware case. The Enquirer further asserts that the subpoena should be quashed based upon the two prior adverse discovery rulings concerning the same or similar information. Third, The Enquirer maintains that the subpoena should be quashed because it seeks to have The Enquirer act as Plaintiffs’ “discovery agent” in a fishing expedition that would impose an extraordinary burden on the non-party newspaper. Last, The Enquirer suggests that the subpoena should be quashed because it seeks material subject to attorney client and work product privileges, as well as material that could be privileged under Ohio's journalistic Shield Law. The undersigned agrees with The Enquirer that the subpoena should be quashed.

### A. The Enquirer's Burden

As the moving party, The Enquirer has the burden to prove it is entitled to relief. *See Fed. R. Civ. P. 45(c)(3); Baumgardner v. Louisiana Binding Serv., No. 1:11cv794, 2013 U.S. Dist. LEXIS 27494, at \*4, 2013 WL 765574, at \*2 (S.D. Ohio Feb. 28, 2013).* “The scope of discovery under a subpoena is the same as the scope of discovery under Rule 26.”  *Hendricks*

*v. Total Quality Logistics*, 275 F.R.D. 251, 253 (S.D. Ohio 2011). To fall within that scope, the materials sought at a minimum must be “nonprivileged” and “relevant to any party's claim or defense and proportional to the needs of the case....” Rule 26(b)(1).

This Court retains the discretion “to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce.”  *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007). Upon a showing of “good cause,” a court may forbid discovery “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Rule 26(c)(1). In addition, under Rule 26(b)(2)(C), a court “must limit” discovery that “is unreasonably cumulative or duplicative” or if “the party seeking discovery has had ample opportunity to obtain the information by discovery in the action” or if “the proposed discovery is outside the scope permitted by Rule 26(b)(1).”

#### **B. The Subpoena Seeks Irrelevant Material and Would Unduly Burden the Nonparty Newspaper**

\*6 The Enquirer begins by arguing that the subpoena seeks information outside the scope of discovery. Alternatively, even if the materials are relevant, The Enquirer contends that the subpoena should be quashed as unduly burdensome.

In considering whether the discovery sought is unduly burdensome, the Court considers whether “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, and the importance of the discovery in resolving the issues.” Fed. R. Civ. P. 26(b)(2)(C)(iii) .... In addition, “the status of a person as a non-party is a factor that weighs against disclosure.”

 *Vietnam Veterans of America v. C.I.A.*, 2011 WL 4714000, at \*5 (S.D. Ohio 2011) (quoting  *American Elec. Power Co., Inc. v. U.S.*, 191 F.R.D. 132, 136 (S.D. Ohio 1999) (additional citations omitted)).

Given that the 2012 *Marquez* Complaint on its face does not allege that Chiquita controlled any farms in Ecuador, Plaintiffs face an uphill battle to show that any of the documents requested by the subpoena are relevant to any claim or defense. Without citing to any allegations in the underlying Complaint, Plaintiffs continue to insist that a “significant aspect of liability turns on the conduct

of whichever multi-national grower, including Chiquita, owned, operated, or otherwise controlled one or more of 62 plantations at issue” in Ecuador. (Doc. 9 at 4, PageID 289). Second, Plaintiffs maintain that proof of Chiquita's involvement in Ecuador will support other claims that allege “Chiquita's participation and assistance and conspiracy with other Defendants.” (Doc. 9 at 5, PageID 290). Finally, and again without citation to any specific answer, motion, or other documents in the underlying case,<sup>7</sup> Plaintiffs suggest that the information is relevant to “any defense asserted by Dole that Chiquita's predecessors were the Associate Producers’ partners on certain plantations” in Ecuador. ( *Id.*)<sup>8</sup>

Plaintiffs’ unsupported assertions that they seek to establish “that Chiquita owned, operated, or otherwise controlled banana plantations in Ecuador,” (Doc. 9 at 17, PageID 302), and that the requested materials “would support core allegations,” (Doc. 9 at 18, PageID 303), are unpersuasive. Plaintiffs have failed to cite to any such “core allegations” in the underlying Complaint. The temporal scope of the discovery sought also lacks relevance. The alleged toxic exposure occurred from the 1960s to 1985, whereas the 1998 Article (at most) speaks to Chiquita's attempts to restructure its holdings in various Latin American countries in the 1990s, years after the pesticide exposure at issue. Thus, the requested materials do not appear to be relevant to any claim or defense at issue in the underlying case so as to fall within the scope of discovery.

\*7 Even if Plaintiffs could point to a specific claim or allegation regarding Chiquita's role in Ecuador prior to 1985, the undersigned agrees with the Delaware court that the fact that The Enquirer explicitly retracted the Article as “untrue” seriously undermines the relevance of the decades-old supporting materials that newspaper may have retained, if they ever existed. And again, in context, the Article barely mentions Ecuador. Contemporaneous editor's notes confirm that the well-traveled reporters never visited Ecuador.<sup>9</sup> As the Georgia court pointed out, the sole reference to Ecuador occurs in a short section at the end of the 18-page article that references the alleged White report and the Hills memo. The Article concludes that the 1992 plans discussed in the Hills memo were never put into place. Thus, even if the 1992 White report and/or Hills memo existed, Plaintiffs’ position that those documents could be used to prove an (apparently non-existent) allegation in the underlying Complaint that Chiquita owned or operated farms in Ecuador prior to 1985 is widely speculative.

The Enquirer also has amply demonstrated that a thorough search for such materials would be unduly burdensome, based upon a comparison of the (purely hypothetical) relevance of the materials and the burden that Plaintiffs seek to impose upon the newspaper to search for decades-old materials that appear unlikely to exist. The “proportionality” concerns for discovery of questionable relevance from a party differs from that which can be obtained from a non-party, for good reason. Here, proportionality considerations alone would preclude such a blatant fishing expedition. In other words, given the remote likelihood of relevance of the discovery sought and The Enquirer's non-party status, the subpoena directed to The Enquirer is *not* appropriately proportional to the claims at issue.

Leaving aside the separate issues of privilege, documents relating to satellite litigation spawned by The Enquirer's retracted 1998 exposé fall even further outside the scope of discovery. For example, the primary claim in the *Ventura* case was whether The Enquirer breached its contract with Ventura not to identify him as a source of information for the Chiquita Report. Both the criminal and civil cases against reporter Gallagher concerned Gallagher's alleged unauthorized access to the Chiquita voicemail system and have nothing to do with Chiquita's alleged involvement with the use of a pesticide in Ecuador prior to 1985. Plaintiffs fail to make any reasonable argument linking the requested materials to any claim or defense in the underlying case.

### C. The Persuasive Reasoning of Two Courts' Prior Rulings

Pursuant to [Rule 26\(b\)\(2\)\(C\)\(i\) and \(ii\)](#), a court must limit discovery that is “unreasonably cumulative or duplicative” if “the party seeking discovery has had ample opportunity to obtain the information by discovery in the [underlying] action.” The Enquirer accuses Plaintiffs of seeking “an end run” around the Delaware court's adverse ruling in the underlying case, and urges this Court to follow the reasoning of both the Delaware court and the recent ruling by the Georgia court in denying nearly identical requests. In response, Plaintiffs argue that they are not bound by the Delaware court's ruling because that court denied their prior motion to compel discovery from Chiquita “without prejudice.” They attempt to distinguish the reasoning of the Georgia court as based primarily on privileges that are not recognized in Ohio or by the Sixth Circuit. Neither of Plaintiffs' arguments is persuasive.

First, Plaintiffs had ample opportunity to obtain the White report and much more relevant and probative discovery directly from Defendant Chiquita in the Delaware case. It should go without saying that the best source of evidence to prove any involvement of Chiquita in Ecuador during the relevant time frame is Chiquita officials and employees alleged to have been involved at that time. Plaintiffs filed a motion to compel and were granted a full hearing on the issues presented.<sup>10</sup> The Delaware court made a clear ruling that the White report was not sufficiently relevant or material to the issues in dispute, in light of the unequivocal retraction of the 1998 Article as “untrue” in its entirety. Following up Judge Fallon's denial of the motion to compel the White report (the existence of which was seriously called into question), counsel asked “if the plaintiffs develop additional information supporting the existence of the document, I'd like to know that we wouldn't be violating the Court's order to then pursue that in discovery.” (Doc. 2-2 at 36, PageID 167). The Court responded that all discovery rulings “are typically without prejudice” with the understanding that discovery is “a continual and updated process.” (*Id.*) Respectfully, the undersigned is doubtful that the Delaware court intended for Plaintiffs to subpoena the White report from the very same newspaper that retracted the entire Article as “untrue” decades ago. And, although the Delaware court's ruling was without prejudice, that does not mean that it has no impact on this Court's analysis under [Rule 26\(b\)\(2\)\(C\)](#). Plaintiffs had ample opportunity to object to Magistrate Judge Fallon's order before the district judge, and/or to seek out other Chiquita records or witnesses who could better prove the existence of Chiquita's alleged activities in Ecuador during the relevant time frame than through the discovery now sought from The Enquirer.

\*8 The Georgia court's ruling emphasizes the same point. Plaintiff readily concedes that the Georgia subpoena sought “nearly identical documents” (Doc. 9 at 13, PageID 298) and the undersigned finds the current requests to be both cumulative and duplicative of the prior rejected requests. Although the Georgia court granted the motion to quash on the basis of state and federal privileges that do not exist in this jurisdiction,<sup>11</sup> the court's analysis remains highly persuasive. In considering whether the asserted privilege could be overcome, Judge Salinas focused on distinct elements that align with those considered by this Court under [Rule 26\(b\)\(2\)\(C\)](#), including relevance, materiality, and Plaintiffs' opportunity to pursue more probative evidence directly from Chiquita.

Plaintiffs seek to turn the “cumulative” analysis on its head, suggesting that this Court should deny the motion to quash *because* it failed in its prior efforts to obtain the documents from Defendant Chiquita. Plaintiffs further accuse The Enquirer of “spoiling of documents” by “deep-six[ing] its own Article records, reporters’ notes, and documents ... at the behest of counsel and as part of a deal it struck with Chiquita to muzzle its journalists and disentangle itself from further legal problems with Chiquita.” (Doc. 9 at 16, PageID 301), citing *Ventura v. Cincinnati Enquirer*, No. 1:99-cv-793 (S.D. Ohio Aug. 7, 2001).<sup>12</sup> The insinuation of some nefarious purpose by The Enquirer and its counsel based upon the newspaper’s actions in unrelated litigation that occurred many years before Plaintiffs subpoenaed the records from the paper has no basis in fact or law. And to suggest that The Enquirer’s adherence to alleged terms of a 2003 contractual settlement amounts to some type of bad faith or legal spoliation is reprehensible. Criticism of the Enquirer’s actions in the unrelated litigation is simply not relevant to Plaintiffs’ cause in *this* case.

#### D. Asserted Privileges and the “Special Status” of a Newspaper

In addition to being outside the scope of discovery and unduly burdensome, The Enquirer seeks to quash the subpoena based upon its likely assertion of attorney client and work product privileges, at least for materials contained in litigation files from three unrelated cases.<sup>13</sup> However, Plaintiffs dispute the applicability of *any* privilege to materials filed of public record. The Enquirer also asserts that the materials relating to the Article may be covered by a state law privilege under Ohio’s journalistic “shield law,” see [Ohio R.C. 2739.12](#) – a privilege that Plaintiffs argue applies only to sources and not to “materials.” Finally, The Enquirer urges this Court to consider its particular status as a nonparty newspaper being asked to respond to extremely broad discovery requests.

The undersigned declines to reach the parties’ specific arguments on privilege because there is no particular document before the court to evaluate, and because it is abundantly clear that the motion to quash should be granted on other grounds. However, the undersigned will briefly address The Enquirer’s status as a nonparty newspaper. That status remains an appropriate factor to consider in determining whether the civil discovery request is unduly burdensome.

\*9 The Sixth Circuit’s repudiation of any qualified journalistic privilege is not to the contrary. In *Grand Jury Proceedings*, the Sixth Circuit cautioned that “courts should ... make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony,” taking into consideration whether the testimony sought amounts to harassment, or whether the discovery is sought in good faith, “whether the information sought bears more than a remote and tenuous relationship to the subject of the investigation, and whether a legitimate law enforcement need will be served by forced disclosure of the confidential source relationship.” *Id.*, 810 F.2d at 586. The undersigned agrees with the sentiment expressed by the court in *In re DaimlerChrysler AG Securities Litigation*, 216 F.R.D. 395, 406 (E.D. Mich. 2003): “Given the important role that newsgathering plays in a free society, courts must be vigilant against attempts by civil litigants to turn non-party journalists or newspapers into their private discovery agents.” *Id.*

The *DaimlerChrysler* court reasoned that the fact that the non-party is part of the press should be considered in the context of the “proper balance” required under *In re Grand Jury Proceedings*. Consideration of the particular burden imposed upon a nonparty member of the press also is consistent with proportionality concerns.

“If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through the press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties—particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation ... And permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties.”

 *In re DaimlerChrysler AG Securities Litigation*, 216 F.R.D. at 406 (quoting  *Gonzales v. Nat'l Broadcasting Co., Inc.*, 194 F.3d 29, 35 (2nd Cir. 1999)).

The fact that The Enquirer is a newspaper is neither irrelevant nor dispositive. At the end of the day, it is simply one more factor that adds to the totality of circumstances. Considering that totality, it is clear that the burden on The Enquirer to produce the requested documents vastly outweighs any hypothetical benefit to the Plaintiffs.

### III. Conclusion and Order

For the reasons discussed herein, The Enquirer's motion to quash (Doc. 1) is GRANTED, and this miscellaneous matter is closed.

IT IS SO ORDERED.

### All Citations

Slip Copy, 2021 WL 122997

### Footnotes

- 1 Based upon the extensive briefing and exhibits, which include the transcripts of two hearings held by other courts encompassing nearly identical discovery requests, oral argument is unnecessary for disposition of the pending motion.
- 2 Plaintiffs' counsel filed multiple cases containing similar allegations. Pursuant to the parties' stipulation, the *Marquez* case was consolidated solely for pretrial management purposes on November 29, 2012 with a second case, *Chavez v. Dole Food Co.*, Case No. 1:12-cv-697-RGA. (See Docs. 47, 48 in Case No. 1:12-cv-695-RGA). The *Chavez* action itself consists of six cases separately consolidated under that case number.
- 3 Plaintiffs argue that Chiquita's denial of control contradicts statements in Annual Reports by its predecessor companies that those companies entered into contracts with "Associate Producers" in Ecuador. (Doc. 9-4).
- 4 The second reporter, Cameron McWhirter, was not alleged to have any knowledge of the wrongdoing by his co-author.
- 5 Plaintiffs imply that they further narrowed the five topics listed in the email during an oral conference on October 29, (Doc. 9 at 12), but which topics were further narrowed is not readily apparent to this Court.
- 6 McWhirter had filed a declaration stating that he not only did not possess the White report or know its content, but that he could not recall ever having seen or read the White report. (*Id.* at 16, PageID 1593).
- 7 Plaintiffs more generally cite to a motion to dismiss filed by Chiquita and the Delaware court's denial of the same motion, but the cited docket entries do not correspond to the referenced documents in Delaware Case No. 1:12-cv-695. (See Doc. 9 at 10, citing Docs. 185, 225, 242).
- 8 Although Dole appears to be a named Defendant, a recently filed motion for summary judgment states that "Dole is not a party to the *Marquez* action." (See, e.g., Doc. 334 at PageID 12049 in Case No. 1:12-cv-695).
- 9 During their research for the Article, former editor Lawrence Beaupre stated that the reporters had traveled to "Costa Rica, Honduras, Panama and the Caribbean islands of St. Lucia and Dominica" as well as to "Brussels, Antwerp, Vancouver, New York and Washington, D.C." (Doc. 9-9, Exhibit 8).

- 10 The court declined to address some issues because Plaintiffs had failed to fully exhaust extrajudicial efforts to resolve them with Chiquita prior to seeking relief from the court.
- 11 See  *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987).
- 12 Plaintiffs seek depositions in the *Ventura* case discarded after the entry of judgment in Chiquita's favor. Plaintiffs admit the records appear to be retained in Sixth Circuit archives but were not requested until November 2020, at which time Plaintiffs were notified that the records are currently “unavailable for reproduction and digitization because of COVID-19.” (Doc. 9 at 9, PageID 294; Doc. 9-35 at 2, PageID 1565).
- 13 The Enquirer concedes that it has not located responsive documents and therefore does not claim a specific privilege.

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2019 WL 201440

Only the Westlaw citation is currently available.

United States District Court, S.D. California.

NUVASIVE, INC. a Delaware Corporation, Petitioner,

v.

ALPHATEC HOLDINGS, INC. a Delaware

Corporation and Alphatec Spine, Inc.

a California Corporation, Respondent.

Case No.: 18cv347-CAB-MDD

|

Signed 01/15/2019

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**ORDER ON JOINT MOTION FOR  
DETERMINATION OF DISCOVERY DISPUTE**

[ECF No. 129]

Hon. Mitchell D. Dembin, United States Magistrate Judge

**BACKGROUND**

\*1 At issue is the insertion of sharing language into three provisions of the Protective Order Governing Confidential Information between the parties. Plaintiff NuVasive seeks to include the attorneys of record for five additional cases in the operative definition of “Outside Counsel,” while Defendant Alphatec seeks to limit the term to the attorneys of record in the instant case and excluding in-house counsel. (ECF No. 129 at 8). With their proposed expanded definition of Outside Counsel, Plaintiff then proposes that information designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL-ATTORNEYS EYES ONLY” be automatically available to

the attorneys of record for use in not only the instant patent infringement case, but also the five collateral cases. (*Id.* at 9). Defendant opposes the sharing provisions.

The proposed collateral litigation is as follows:

1. *NuVasive, Inc. v. Miles, et al.*, No. 2017-0720-SG, in the Chancery Court of the State of Delaware: breach of fiduciary duties and the covenant not to compete.
2. *Alphatec Spine, Inc., et al. v. NuVasive, Inc.*, No. 37-2017-00038583-CU-BC-CTL, in the San Diego Superior Court: breach of a non-disclosure agreement.
3. *Pimenta v. NuVasive*, No. 37-2018-00016298-CU-BC-CTL, in the San Diego Superior Court: breach of an employment contract.
4. *Miles v. NuVasive, Inc.*, No. 2018-0397-SG, in the Chancery Court of the State of Delaware: seeking attorneys' fees pursuant to an indemnity agreement.
5. *Alphatec Spine, Inc. v. NuVasive, Inc.*, No. 37-2018-00016446-CU-MC-CTL, in the San Diego Superior Court: unfair competition.

Plaintiff contends that these five collateral cases are similar to the instant case as they all “arose from Alphatec’s poaching of NuVasive’s executive team....” (*Id.* 129 at 16). Plaintiff argues that the sharing provisions promote transparency and eliminate attempts to “‘game’ the system and promotes full and fair disclosure and discovery.” (*Id.* at 17). Defendant argues that Plaintiff’s proposed provisions encourage abuse and ensures that “no single court is in complete control of the discovery in the cases before it.” (*Id.* at 20). Defendant contends that the “wholesale and automatic” sharing and use of discovery produced for a patent infringement matter with five collateral cases, none of which are patent infringement cases, is inappropriate and encourages discovery abuse. (*Id.* at 20-21).

**LEGAL STANDARD**

The Ninth Circuit “strongly favors access to discovery materials to meet the needs of parties engaged in collateral litigation.”  *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003) (citing  *Beckman Indus. Inc. v. Int’l Ins. Co.*, 966 F.2d. 470, 475 (9th Cir. 1992) ). A court, however, should not approve a request to share

discovery automatically.  *Id.* at 1132. “As an initial matter, the collateral litigant must demonstrate the relevance of the protected discovery to the collateral proceedings and its general discoverability therein. Requiring a showing of relevance prevents collateral litigants from gaining access to discovery materials merely to subvert limitations on discovery in another proceeding.” *Id.* Importantly, “[s]uch relevance hinges on the degree of overlap in facts, parties, and issues between the suit covered by the protective order and the collateral proceedings.” *Id.*

\*2 The court that enters the protective order must “satisfy itself that the protected discovery is sufficiently relevant to the collateral litigation that a substantial amount of duplicative discovery will be avoided....” *Id.* Further, if the court finds relevancy, it must then “weigh the countervailing reliance interest of the party [opposing sharing] against the policy of avoiding duplicative discovery.”  *Id.* at 1133.

However, the court who issues the protective order is not the one that determines whether the collateral litigant will ultimately obtain the discovery materials. Rather, any “disputes over the ultimate discoverability of specific materials covered by the protective order must be resolved by the collateral courts.” *Id.*

The *Foltz* court further explained:

Allowing the parties to the collateral litigation to raise specific relevance and privilege objections to the production of any otherwise properly protected materials in the collateral courts further serves to prevent the subversion of limitations on discovery in the collateral proceedings. These procedures also preserve the proper role for each of the courts involved: the court responsible for the original protective order decides whether modifying the order will eliminate the potential for duplicative discovery.

*Id.*

## DISCUSSION

Here, Plaintiff seeks to circumvent the above principles and procedures by including, in the first instance, a sharing provision in the protective order to be entered in this case. In other words, Plaintiff seeks the ability to share confidential documents obtained in this case with collateral litigants without needing to seek to modify the protective order and obtain a relevancy determination from the Court, and without requiring the collateral courts to resolve any disputes which may arise with respect to discoverability of the materials in the collateral cases.

The Court is not persuaded by Plaintiff’s argument that all discovery in this case is necessarily relevant to the other cases. Further, the Court is not persuaded by the arguments in favor of an automatic sharing provision. Plaintiff, for example, argues that because their in-house counsel cannot “un-know” or “un-learn” information from discovery in this case, and because judicial economy dictates that they decrease duplicative discovery across the six cases, the sharing provision is “practically necessary.” (ECF No. 129 at 18). Entering the non-sharing provisions in the protective order, however, will not prevent sharing of discovery in the collateral cases. Rather, collateral litigants desiring any discovery produced pursuant to the protective order will simply have to go through appropriate steps to obtain that discovery, as set forth in *Foltz*. The Court will not permit collateral litigants to gain automatic access to Defendants’ confidential materials without providing some procedural safeguards regarding the dissemination of those materials, and without following proper procedure.

## CONCLUSION

The Court finds that Defendant’s proposed protective order should be entered. The entry of Defendant’s protective order provisions will not prejudice any potential collateral litigants to move for modification of the protective order in the future.

**IT IS SO ORDERED.**

**All Citations**

Not Reported in Fed. Supp., 2019 WL 201440

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Only the Westlaw citation is currently available.

United States District Court, M.D. Tennessee.

**The PICTSWEET COMPANY**

v.

R.D. OFFUTT COMPANY; R.D. Offutt Company-  
Northwest; and, CRF Frozen Foods, LLC

Case No. 3:19-cv-0722

I

Filed 04/23/2020

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### ORDER

[BARBARA D. HOLMES](#), United States Magistrate Judge

\*1 Pending before the Court is the motion to quash subpoena or, alternatively, for a protective order filed by Defendant CRF Frozen Foods, LLC (“CRF”) (Docket No. 25). The instant discovery dispute was referred to the undersigned for disposition. *See* Order at Docket No. 34. For the reasons detailed below, CRF's motion (Docket No. 25) is GRANTED by quashing the third-party subpoena issued to Houston Casualty Company and by a protective order against production of the requested documents in the third-party subpoena issued to Mound Cotton Wollan & Greengrass, LLP.

### I. Background

In this diversity action, which was removed from state court, Plaintiff, The Pictsweet Company (“Pictsweet”), asserts eleven statutory, contractual and common law claims for damages arising out of a 2016 recall of frozen vegetables due to Listeria contamination. (Docket Nos. 1; 1-4.)<sup>1</sup> Among the allegations made by Pictsweet is that, within one month of assuming an agreement to supply product to Pictsweet, CRF had knowledge of confirmed positive Listeria test results at its Pasco, Washington facility and with respect to products processed in and supplied from the Pasco facility. (Docket No. 1-4.)

On or about December 2, 2019, Pictsweet notified all defendants, as required by *Fed. R. Civ. P. 45(a)(4)* and Local Rule 45.01(d), that Pictsweet was issuing two third-party subpoenas, one to insurance company Houston Casualty Company and one to the law firm of Mound Cotton Wollan & Greengrass, LLP. The subpoenas seek documents prepared, produced, or received in connection with a lawsuit styled *Starr Surplus Lines Insurance Company & Houston Casualty Company v. CRF Frozen Foods, LLC*, Docket No. 1:17-cv-01030-PGG (S.D. N.Y.) (the “Starr litigation”) (Docket Nos. 25-3; 25-4.)

The Starr litigation involved claims against CRF brought by two of CRF's insurance carriers, Starr Surplus Lines Insurance Company (“Starr”) and Houston Casualty Company (“Houston”). (Docket No. 37-2.) In the Starr litigation, Starr and Houston sought rescission of excess recall insurance policies under which CRF made claims relating to the 2016 recall and declaratory judgments that they owed no coverage to CRF based on disputed allegations that CRF did not disclose material information in an insurance application.

Through the third-party subpoenas, Pictsweet seeks production from Houston of: (1) all discovery materials relating to the Starr litigation, that is non-privileged information of any kind produced or disclosed during the course of discovery; (2) the Houston claims file for the claim made by CRF relating to the 2016 recall that was at issue in the Starr litigation; and, (3) Houston's underwriting file relating to its excess follow form policy that was at issue in the Starr litigation. (Docket No. 32-1 at 3.) Pictsweet also seeks production from Mound Cotton, Houston's lawyers in the Starr litigation, of: (1) all documents filed with the court in the Starr litigation, including declarations and exhibits; (2) all communications between Mound Cotton and the court in the Starr litigation; (3) the written receipts for any hearings or other proceedings held in the Starr litigation; (4) all non-privileged documents and communications relating to discovery materials in the Starr litigation; and, (5) all non-privileged communications between Mound Cotton and any other person related to the Starr litigation. (Docket No. 25-4 at 6.)

\*2 CRF has moved to quash the subpoenas. (Docket No. 25.) CRF asserts that the requested information is protected by a Stipulated Confidentiality Agreement and Protective Order ("Confidentiality Order") agreed to by the parties and entered by the Court in the Starr litigation. (Docket No. 37-7.)<sup>2</sup> CRF also opposes the subpoenas as facially defective because they require compliance beyond the 100-mile geographical limitation imposed by [Rule 45\(c\)](#). Alternatively, CRF requests a protective order limiting Pictsweet's subpoenas as irrelevant, burdensome, and cumulative of information that can be more appropriately obtained through discovery in this case.

Pictsweet has responded that subpoenas *duces tecum* are not subject to the 100-mile geographical limitation, that the subpoenas are within the broad scope of discovery permitted by Rule 26, and that CRF, in whatever limited capacity it enjoys, has not demonstrated a basis to either quash the subpoenas or for a protective order. (Docket No. 37.)

The Court finds that the subpoenas are largely an improper end-run around the discovery rules and the Court will therefore grant CRF's motion, including as to protective relief.

[Rule 45 of the Federal Rules of Civil Procedure](#) governs third-party subpoenas. It permits parties to a lawsuit to command a non-party to, among other things, produce documents. [Fed. R. Civ. P. 45\(a\)\(1\)](#). A court is required to quash or modify a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies" or "subjects a person to undue burden." [Fed. R. Civ. P. 45\(d\)\(3\)\(A\)](#).

The scope of discovery under a subpoena is the same as the scope of discovery under Rule 26. [Fed. R. Civ. P. 45](#), Advisory Committee Notes (1970) ("The scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules."); see also  [Hendricks v Total Quality Logistics, LLC](#), 275 F.R.D. 251, 253 (S.D. Ohio May 6, 2011). The party seeking to quash a subpoena bears the burden of proof. *Id.* The Federal Rules of Civil Procedure grant parties the right to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." [Fed. R. Civ. P. 26\(b\)\(1\)](#). A trial court has broad discretion to determine the proper scope of discovery. [In re Ohio Execution Protocol Litigation](#), 845 F.3d 231, 236 (6th Cir. 2016). Although a party should not be denied access to information necessary to prove their contentions, neither should they be "permitted to go fishing and a trial court retains discretion to determine that a discovery request is too broad and oppressive." *Id.* (internal citation omitted). "A court must balance the "right to discovery with the need to prevent fishing expeditions." *Id.* at 236-37 (internal quotation marks and citation omitted).

[Rule 26\(c\)](#) provides 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 burden of establishing good cause for a protective order rests with the movant." [Nix v. Sword](#), 11 F.App'x. 498, 500 (6th Cir. 2001) (internal citations omitted). However, a showing of irrelevancy of proposed discovery can satisfy the good cause requirement of [Rule 26\(c\)](#). [Anwar v. Dow Chemical Company](#), 876 F.3d 841, 854 (citing [Smith v. Dowson](#), 158 F.R.D. 138, 140 (D.Minn.1994)). Ultimately, whether to grant a protective order is within the discretion of the trial court.  [Coleman v. American Red Cross](#), 979 F.2d 1135, 1138 (6th Cir. 1992).

## II. Legal Standards

## III. Analysis

\*3 As a threshold matter, the Court must consider whether CRF has standing to move to quash or otherwise oppose the subpoenas. “A party generally lacks standing to seek to quash a subpoena issued to a nonparty.”  *Hendricks*, 275 F.R.D. at 253 n.1. However, exceptions exist if the party “claims some personal right or privilege with regard to the documents sought.” *Lewis Environmental, Inc. v. Emergency Response & Training Solutions, Inc.*, 2019 WL 285641, at \*2 (S.D. Ohio Jan. 22, 2019) (quoting *Mann v. Univ. of Cincinnati*, 1997 WL 280188, at \*4, 114 F.3d 1188 (6th Cir. May 27, 1997) (per curiam)). Such rights or privileges have been recognized with respect to personal bank records, information in a personnel file, corporate bank records or Indian tribal records. *Hackmann v. Auto Owners, Ins. Co.*, 2009 WL 330314, at \*1 (S.D. Ohio Feb. 6, 2009). That documents are confidential “is not in itself grounds for quashing a subpoena.” *Id.* at \*2.

Even in the absence of standing to move to quash, courts within the Sixth Circuit have interpreted Rule 26(c) to permit a party to seek a protective order to preclude discovery demanded by a third-party subpoena. *Schweinfurth v. Motorola, Inc.*, 2008 WL 4981380, at \*2 (N.D. Ohio Nov. 19, 2008) (citations omitted).<sup>3</sup> Some courts have referred to the availability of Rule 26(c) as “standing to challenge third-party subpoenas via a motion for protective order.” *Id.* at \*3.

Here, CRF both seeks to quash the third-party subpoenas and requests alternative relief of a protective order. The Court finds that as to certain of the requested documents CRF has standing to move to quash the subpoenas and as to the other documents, CRF's standing to challenge the subpoenas is found in Rule 26(c).

With respect to the subpoena issued to Houston, the Court finds that CRF has a protectable right in the requested documents. The Court has no difficulty finding that the claims file and the underwriting file are the kind of financial records that are within the universe of protected interests that confer standing to seek to quash a third-party subpoena. The other documents requested in the Houston subpoena are not as easily categorized. But the threshold reason the Court is unable to determine the nature of the other documents is because of the breadth of the requested information, namely “[a]ll Discovery Materials,” (Docket No. 32-1 at 6), which is defined as “information of any kind produced or disclosed during the course of discovery.” (Docket No. 32-1 at 4.) Given the limited nature of the relationship between CRF and Houston, the Court finds that the broadly requested documents are more likely than not to be of a kind in which

CRF has a protectible interest. CRF therefore has standing to move to quash the Houston subpoena. And even if CRF does not have standing to move to quash the Houston subpoena as to this requested information, the Court finds that CRF has standing to challenge both subpoenas under Rule 26(c), which it has properly exercised.<sup>4</sup>

\*4 Satisfied that CRF has standing, the Court turns to the next question, namely whether the subpoenas are facially invalid.<sup>5</sup> CRF contends that the subpoenas are facially defective because they seek production of documents beyond Rule 45(c)(2)'s 100-mile limitation. (Docket No. 25-1 at 7.) Pictsweet correctly asserts that the 100-mile geographical limitation does not apply when a subpoena demands only documents that can be produced electronically or by mail. *United States v. Brown*, 223 F.Supp.3d 697, 703 (N.D. Ohio 2016). Because the subpoenas issued to Houston and to Mound Cotton do not require personal appearance, and the requested documents can be produced electronically or by other means, the geographical limitation does not apply and there is no facial defect in the subpoenas.

That leaves then whether there is any basis to quash the subpoenas or grant a protective order. CRF argues—and Pictsweet disputes—that the documents are protected from discovery by the Confidentiality Order in the Starr litigation.<sup>6</sup> The Court finds persuasive the reasoning of the court in determining the analogous issue in *Barella v. Village of Freeport*, 2012 WL 6103222 (E.D. N.Y. Dec. 8, 2012). In that case, Barella, the plaintiff in a Title VII employment discrimination and civil rights case issued a third-party subpoena to the attorney for a plaintiff in a case brought by another employee of the same employer “alleging primarily identical claims predicated upon most of the same facts” for “[a]ll deposition transcripts and discovery produced and received” in the separate action. *Id.* at \*1. The defendant in both cases moved to quash the subpoena because the previously produced discovery was subject to a protective order. The district judge in *Barella* affirmed the magistrate judge's determination that “Barella can and should conduct his own discovery.” *Id.* at \*2. The *Barella* court noted that discovery that would require circumvention of a protective order in a separate litigation should only occur in justified circumstances and not when the information could be obtained from another party in the same litigation. *Id.* at \*2-3. See also *Z Best Body and Paint Shops, Inc. v. Sherwin-Williams Co.*, 2017 WL 3730515 (C.D. Cal. Aug. 29, 2017) (court quashed subpoena that sought to obtain documents

subject to a protective order in separate litigation). The Court therefore grants the motion to quash the Houston subpoena.<sup>7</sup>

As to the Mound Cotton subpoena, the Court finds that CRF has demonstrated good cause for a protective order under [Rule 26\(c\)](#). A showing of irrelevancy of proposed discovery can satisfy the good cause requirement of [Rule 26\(c\)](#). *Anwar v. Dow Chemical Company*, *supra*. When, as here, an objection to the relevancy of the discovery sought is raised, “the party seeking discovery must demonstrate that the requests are relevant.” *Gazvoda v. Secretary of Homeland Security*, 2017 WL 168159, at \*4 (E.D. Mich. Jan. 17, 2017) (internal citations omitted). See also  *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992) (to prevent fishing expeditions, the proponent of discovery must make a threshold showing of relevance).

\*5 The Court finds that Pictsweet has failed to demonstrate relevancy of the broad universe of information produced in the Starr litigation. Indeed, “[a]sking for all documents produced in another matter is not generally proper. The propounding party cannot meet its burden to establish relevance, as the propounding party is not in a position to even know what they are actually asking for.” *Goro v. Flowers Foods, Inc.*, 2019 WL 6252499, at \*18 (S.D. Cal. Nov. 22, 2019). As noted by the court in *Goro*, “[t]here could be a number of reasons why documents appropriately requested and provided in another case—even if the subject of those cases seem to overlap—would be irrelevant or burdensome to produce in another case.” *Id.*

The Court finds this reasoning compelling. In contrast, the Court finds little helpful analysis in the cases upon which Pictsweet relies to overcome the pressing problem with “cloned discovery” requests, namely that Pictsweet cannot carry its burden of establishing relevancy because it does not even know what documents it has asked for. Simply because there may be overlap between the issues in the Starr litigation and those in this case does not establish relevancy of all the documents that Pictsweet seeks. See *TravelPass Grp., LLC v. Caesars Entm’t Corp.*, 2020 WL 698538, at \*6-7 (E.D. Tex. Jan. 16, 2020) (collection of cases reaching same conclusion); see also *Fields v Wright Med. Tec., Inc.*, 2017 WL 3048867, at \*3 (N.D. Ind. July 19, 2017) (plaintiff not entitled to “cloned discovery” just because it had been produced in other cases but was entitled to specifically requested documents for which relevancy was shown).

Beyond even an impermissible fishing expedition, Pictsweet casts a third-party subpoena net to obtain all discovery and more in the Starr litigation without any showing of relevancy under [Rule 26\(b\)](#) as to specific information. The Court is disinclined to give Pictsweet that kind of a discovery windfall. Instead, the Court finds that Pictsweet’s request for wholesale duplicates of discovery and other documents produced or created in the Starr litigation is improper as failing to make the requisite showing of relevance. If relevant and proportional documents exist in the custody or control of Mound Cotton, the appropriate thing to do is to request those documents. Or, even more appropriately, to request them from the source of the information, not from others who have gone to the trouble and expense to obtain the information first.

Moreover, contrary to Pictsweet’s contention that CRF has failed to offer specific facts to demonstrate burdensomeness, CRF points to the volume of information that would be responsive to the subpoenas, namely some 500,000 pages of materials. See Docket No. 25-1 at 1 and 7. CRF further asserts that the subpoenaed information is duplicative and cumulative, relying on the fact that Pictsweet has propounded 56 requests for production of documents on CRF and similar discovery including requests for admission to other defendants in this case. See Docket No. 25-1 at 9 and 10.<sup>8</sup> The Court finds these facts are sufficiently defined and concrete to demonstrate undue burden. Additionally, requiring CRF to engage in duplicate reviews, one for documents in its custody and control that are responsive to Pictsweet’s direct discovery requests and one of all the documents that were previously produced in the Starr litigation, is definitionally burdensome, as it would consume resources without providing any additional discernible benefit to Pictsweet.

\*6 The Court finds further support for limiting the subpoena requests in [Rule 26\(b\)\(2\)](#), which directs that a court must limit “the extent of discovery otherwise allowed by these rules ... if it determines that the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” [Fed. R. Civ. P. 26\(b\)\(2\)\(C\)\(i\)](#). Pictsweet has sought discovery from CRF. If that discovery does not provide the “key information” that Pictsweet seeks (see Docket No. 37 at 7-9), it may then appropriately subpoena that specific information from Mound Cotton.<sup>9</sup> Additionally, some of the information that Pictsweet requests are transcripts of hearings in the Starr litigation. The transcripts are presumably readily available to the public (or at least those with

PACER accounts) and there has been no contention that it is inconvenient, burdensome, or more expensive for Pictsweet to obtain the transcripts from the public records. It must therefore do so.  *Access 4 All, Inc. v. W&D Davis Inv. Co., Ltd.*, 2007 WL 614091, at \*3 (S.D. Ohio Feb. 21, 2007). For all these reasons, CRF's request for a protective order is appropriately granted.

Based on the foregoing, CRF's motion to quash the Houston subpoena is granted. Further, CRF's motion for a protective order as to the Mound Cotton subpoena is granted and the requested documents need not be produced, without limitation for Pictsweet to renew its subpoena in accordance with this Order.

It is SO ORDERED.

#### IV. Conclusion

#### All Citations

Slip Copy, 2020 WL 12968432

#### Footnotes

- 1 Familiarity with this case is presumed and only that background necessary to give context to the instant ruling is recited here.
- 2 CRF refers to the Confidentiality Order as Exhibit C to its memorandum of law in support of the motion to quash. See Docket No. 25-1 at 3-4. However, there is no such Exhibit C. In fact, the filed exhibits are not identified by letter at all. Moreover, the filing of a supporting memorandum of law as an exhibit to a motion is inconsistent with the Court's local rules, which require that the memorandum of law be separately filed. See Local Rule 7.01(a)(2). The Confidentiality Order is, however, provided as Exhibit G to Pictsweet's response. (Docket No. 37-7.)
- 3 [Rule 26\(c\)](#) states in pertinent part:

A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The 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\(c\)\(1\)](#).
- 4 CRF might well have standing to move to quash at least some of the requested documents in the Mound Cotton subpoena as well. The Court is unable to make that determination because of the broad categories sought in the subpoenas. Although CRF bears the burden of demonstrating a basis to quash the subpoena, the Court does not expect CRF to have created a list of all documents in which it claims a specific interest from the 500,000 pages that comprise the universe of subpoenaed documents. See Docket No. 25-1 at 1 and 7. That would stand ordinary discovery rules on their head.
- 5 Arguably, this facial validity attack applies only to those documents that CRF has standing to challenge by a motion to quash. However, the Court need not consume any more of this order in parsing that argument.
- 6 This argument also goes to whether CRF can claim a privilege in any of the subpoenaed documents for purposes of standing. Because the Court finds that CRF has standing to challenge the subpoenas under

[Rule 26\(c\)](#), there is no need to separately analyze whether the Starr protective order confers a privilege upon which CRF can base its standing to move to quash the subpoenas. Further, because the Court finds that the protective order provides a sufficient basis to quash the Houston subpoena, the Court need not determine whether the requested information is the kind of information that falls within [Rule 45\(d\)\(3\)\(B\)\(i\)](#).

- 7 Even without regard to whether the subpoena is properly quashed under [Rule 45\(d\)\(3\)](#), the Court finds that CRF would be entitled to a protective order as to the Houston subpoena for all the same reasons discussed below as to the Mound Cotton subpoena.
- 8 These circumstances, as well as relevancy considerations distinguish this case from the *Diamond Resorts International, Inc. v. Phillips* case upon which Pictsweet relies. [2018 WL 4328257 \(M.D. Tenn. July 16, 2018\)](#) (Newbern, M.J.). Additionally, while the categorial subpoena requests in that case were admittedly broad, they were not the kinds of wholesale information requests made here.
- 9 Similarly, even though the Court has quashed the Houston subpoena, if the information that Pictsweet seeks is not obtained in discovery from CRF, Pictsweet may issue a new subpoena to Houston for specific relevant and proportional documents.

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United States District Court,  
E.D. California.

Joan SHELLEY, et al., Plaintiffs,

v.

COUNTY OF SAN JOAQUIN, et al., Defendants.

No. 2:13-cv-0266 MCE DAD.

|

Signed May 1, 2015.

|

Filed May 4, 2015.

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#### ORDER

DALE A. DROZD, United States Magistrate Judge.

\*1 On April 17, 2015, this matter came before the undersigned for hearing of plaintiffs' motion to vacate the parties' stipulated protective order. Attorneys Mark Geragos, Sean Macias and Mark Connely appeared on behalf of the plaintiffs. Attorneys Mark Berry and Matthew Dacey appeared on behalf of the defendants. After hearing argument from the parties, the court took the motion under submission.

#### BACKGROUND

As explained by the assigned District Judge in this action, plaintiffs' complaint seeks to recover damages from the County of San Joaquin for the alleged violation of the U.S. Constitution during the exhumation of the body of plaintiffs' deceased relative, Jo Ann Hobson. (MTD Ord (Dkt. No. 32) at 1.) Jo Ann Hobson went missing in 1985 and it was suspected that she was a murder victim of Loren Herzon and Wesley

Shermantine, "commonly referred to as the 'Speed Freak Killers.'" (*Id.* at 2.)

Plaintiffs commenced this action on February 11, 2013. (Dkt. No. 1.) On September 12, 2014, the parties filed a stipulation for a protective order with the court, but failed to submit a proposed protective order with the stipulation. (Dkt. No. 34.) Accordingly, on September 17, 2014, the parties again filed their stipulation for a protective order, originally agreed to on September 11, 2014, as well as a proposed protective order. (Dkt. No. 36.)

Pursuant to the parties' stipulation, plaintiffs and defendants "AGREED AND STIPULATED ... that the documents produced by the COUNTY OF SAN JOAQUIN ["County"] pursuant to Plaintiffs' request for Production, Set # 1 or subsequent productions," would be governed by the parties' stipulated protective order. (SPO (Dkt. No. 36) at 1–2.) In this regard, because "the documents produced by the [County] involve and (sic) open and ongoing criminal investigation and that the suspect in the murders described in the documents were all or in part at the hand of Wesley Shermantine," who also has a pending appeal of his criminal conviction, the parties expressed concern "that the release of the produced documents may negatively interfere with Shermantine's appeal process or negatively interfere with the continuing investigative efforts of the San Joaquin County Sheriff's Office or other law enforcement agency(s)." (*Id.* at 2.) Accordingly, the parties agreed and stipulated that the documents produced by the defendant County "shall be used by the parties solely for the purpose of prosecuting and defending" this action and "shall not be duplicated, reproduced, transmitted, or communicated to any person" other than plaintiffs' counsel, plaintiffs, declared experts, deposition witnesses, trial witnesses, mediators or the court. (*Id.* at 2.) The undersigned considered the parties' stipulation and entered an order adopting their stipulated protective order on September 24, 2014. (Dkt. No. 38.)

On March 9, 2015, plaintiffs filed a motion to vacate the stipulated protective order and set the matter for hearing before the undersigned on April 17, 2015.<sup>1</sup> (MTV (Dkt. No. 44.)) Plaintiffs' motion seeks an order allowing "the public access to all information, including but not limited to, discovery responses, deposition transcripts and documents produced in this<sup>2</sup> case." (MTV (Dkt. No. 44 at 2.)) On April 8, 2015, the parties filed a joint statement re discovery disagreement. (JS (Dkt. No. 47.))

## LEGAL STANDARDS

\*2 “Generally, the public can gain access to litigation documents and information produced during discovery unless the party opposing disclosure shows ‘good cause’ why a protective order is necessary.”  *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir.2002). See also  *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir.2006) (unlike the case with respect to judicial records, “[a] ‘good cause’ showing will suffice to seal documents produced in discovery.”); FED. R. CIV. P. 26(c)(1) (“The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”). “While courts generally make a finding of good cause before issuing a protective order, a court need not do so where ... the parties stipulate to such an order. When the protective order was a stipulated order and no party has made a good cause showing, then the burden of proof remains with the party seeking protection.”  *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 424 (9th Cir.2011) (quotations and alterations omitted), *cert. denied* — U.S. —, 132 S.Ct. 1867, 182 L.Ed.2d 645 (2012).

When the confidentiality of information produced under a protective order is challenged, the court must conduct a two-step analysis. “First, it must determine whether particularized harm will result from disclosure of information to the public.” *Id.* (quotation omitted). “Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.” *Id.* (quoting  *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir.1992) (citation omitted)). “Second, if the court concludes that such harm will result from disclosure of the discovery documents, then it must proceed to balance ‘the public and private interests to decide whether [maintaining] a protective order is necessary.’” *Id.* (quoting  *Phillips*, 307 F.3d at 1211.) The Ninth Circuit has “directed courts doing this balancing to consider the factors identified by the Third Circuit in  *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir.1995)).” *Id.* (citing  *Phillips*, 307 F.3d at 1211.)

In *Glenmede Trust*, the Third Circuit recognized several factors that a district court may consider in determining whether “good cause” exists to continue the protection of

the discovery material produced pursuant to a stipulated protective order:

- 1) whether disclosure will violate any privacy interests; 2) whether the information is being sought for a legitimate purpose or for an improper purpose; 3) whether disclosure of the information will cause a party embarrassment; 4) whether confidentiality is being sought over information important to public health and safety; 5) whether the sharing of information among litigants will promote fairness and efficiency; 6) whether a party benefitting from the order of confidentiality is a public entity or official; and 7) whether the case involves issues important to the public.

\*3  56 F.3d at 483 (citing  *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787–91 (3rd Cir.1994)). The court in *Glenmede Trust* also advised that:

Discretion should be left with the court to evaluate the competing considerations in light of the facts of individual cases. By focusing on the particular circumstances in the cases before them, courts are in the best position to prevent both the overly broad use of [protective] orders and the unnecessary denial of confidentiality for information that deserves it.

*Id.* (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L.Rev. 427, 492 (1991)).

## ANALYSIS

### I. Whether Particularized Harm Will Result From Disclosure to the Public

Here, the protective order was issued based upon the parties' stipulation which stated "that the release of the produced documents may negatively interfere with Shermantine's appeal process or negatively interfere with the continuing investigative efforts of the San Joaquin County Sheriff's Office or other law enforcement agency(s)." (SPO (Dkt. No. 38) at 2.) In opposing plaintiffs' current motion to vacate the stipulated protective order, defendant explains that the documents produced to plaintiffs in discovery included "numerous inter-office memoranda between County investigators regarding the recovery of Hobson's remains, investigative reports regarding Hobson's disappearance, and communications regarding the criminal investigation of Wesley Shermantine and Loren Herzog." (JS (Dkt. No. 47) at 13.) Defendant notes that Wesley Shermantine has "never stated that he had killed or been involved in the killing of Hobson." (*Id.* at 17.)

Accordingly, the defendant County argues that the documents produced in discovery subject to the stipulated protective order "directly relate to [an] ongoing criminal investigation and Shermantine's pending criminal appeal in another matter." (*Id.* at 20–21.) In support of this assertion, the County cites to the declaration of Sergeant Chanda Bassett of the San Joaquin County Sheriff's Department. Because Sergeant Bassett's declaration has been filed under seal, the substance of the statements made therein will not be revealed in this order.<sup>3</sup> However, the undersigned notes that the declaration supports the County's assertion that the documents produced in discovery pursuant to the stipulated protective order concern an open and ongoing criminal investigation and that the disclosure of some documents could plausibly undermine that investigation. (Dkt. No 48.)

Conversely, in arguing to vacate the stipulated protective order plaintiffs offer merely a conclusory allegation that "there is no current criminal investigation regarding JoAnn Hobson's death." (*Id.* at 8.) Plaintiffs, however, offer nothing further in support of that assertion.

The undersigned finds that the defendant has made a specific and particularized showing that harm will result from disclosure of the documents to the public. See *United States v. Smith*, 985 F.Supp.2d 506, 531 (S.D.N.Y.2013) ("the Court finds that the letter adequately establishes both that there are ongoing investigations into criminal conduct related to the

discovery materials in this Case, and that public disclosure of some of these materials plausibly could undermine these investigations"); *Flagg ex rel. Bond v. City of Detroit*, 268 F.R.D. 279, 294 (E.D.Mich.2010) ("the Court's first and foremost concern in restricting public access to certain discovery materials and processes has been to ensure that the parties' discovery efforts do not interfere with the active and ongoing investigation into the murder ..."); *Tuite v. Henry*, 181 F.R.D. 175, 179 (D.D.C.1998) ("The court is unable to simply discount the weight of the declaration offered by Shaheen in determining whether OPR has demonstrated that disclosure will result in particularized harm to governmental processes."). See generally *Center for Nat. Sec. Studies v. U.S. Dept. of Justice*, 331 F.3d 918, 926 (D.C.Cir.2003) ("Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations"); *United States v. Valenti*, 987 F.2d 708, 714 (11th Cir.1993) ("we hold that the district court properly denied the Times's emergency motion to unseal as a necessary means to achieving the government's compelling interest in the protection of a continuing law enforcement investigation"); *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir.1991) ("Federal common law recognizes a qualified privilege protecting investigative files in an ongoing criminal investigation[.]"); *Swanner v. United States*, 406 F.2d 716, 719 (5th Cir.1969) ("pendency of a criminal investigation is a reason for denying discovery of investigative reports").

<sup>\*4</sup> Having reached this conclusion, the court must proceed to balance the public and private interests to decide whether maintaining the stipulated protective order is necessary in this instance.

### II. Balancing the Public and Private Interests

#### 1) Whether Disclosure Will Violate Any Particular Privacy Interests

"[P]rivacy interests are diminished when the party seeking protection is a public person subject to legitimate public scrutiny." *Pansy*, 23 F.3d at 787. Here, the party seeking protection from disclosure, the County, is a public entity subject to legitimate public scrutiny and, therefore, has a diminished privacy interest.

Nonetheless, as stated above, the defendant has a clear privacy interest in maintaining the confidentiality of an open and ongoing criminal investigation. See  *Peate v. McCann*, 294 F.3d 879, 885 (7th Cir.2002) (“the government has an interest in maintaining the confidentiality of files containing sensitive information regarding on-going investigations”);  *United States v. Amodeo*, 71 F.3d 1044, 1050 (2nd Cir.1995) (“If release is likely to cause persons in the particular or future cases to resist involvement where cooperation is desirable, that effect should be weighed against the presumption of access.”); *Hill v. City of Chicago*, Case No. 06 C 6772, 2011 WL 320204, at \*2 (N.D.Ill. Jan.31, 2011) (plaintiff’s interest in “civil matter do not outweigh the City’s interest in keeping this ongoing, active criminal investigation confidential to prevent any harm from public disclosure of the content of the investigation.”); *United States v. Park*, 619 F.Supp.2d 89, 94 (S.D.N.Y.2009) (holding that the need to “maintain the secrecy of the Government’s investigation” outweighed the public’s right of access to sentencing documents).

Accordingly, based upon the present showing the undersigned finds that consideration of this factor also weighs in favor of maintaining the stipulated protective order.

#### 2) Whether the Information is Being Sought for a Legitimate Purpose

An improper purpose for seeking disclosure of information would include the use of the produced discovery materials “to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets.”  *Kamakana*, 447 F.3d at 1179. Here, there is no compelling indication that plaintiffs seek to disclose the materials produced in discovery for an improper purpose. Accordingly, consideration of this factor weighs in favor of modifying the protective order.

#### 3) Whether Disclosure of the Information will Cause a Party Embarrassment

Here there is no indication that the disclosure of the materials produced in discovery by defendants pursuant to the stipulated protective order will cause a party embarrassment. The undersigned is, however, concerned about the potential that non-parties identified in a criminal investigative report could suffer embarrassment from the public dissemination of that document.

\*5 Accordingly, the undersigned finds that consideration of this factor weighs only slightly in favor of modifying the protective order.

#### 4) Whether Confidentiality is Being Sought Over Information Important to Public Health and Safety

According to the parties, the discovery produced which is at issue here concerns the maintenance of missing persons entries on the National Crime Information Center Missing Person File and the open criminal investigation of several unsolved murders potentially involving two serial killers. Clearly, those matters concern information important to public safety.

However, in their stipulation in support of the protective order both parties agreed that these documents concern on-going criminal investigations, that Wesley Shermantine is a suspect in connection with those investigations, that Shermantine has an appeal “of his criminal conviction pending and that the release of the produced documents may negatively interfere with Shermantine’s appeal process or negatively interfere with the continuing investigative efforts of the San Joaquin County Sheriff’s Office or other law enforcement agency(s)” (SPO (Dkt. No. 38) at 2.) Although plaintiffs presumably did not have access to the discovery documents at issue when they entered into the stipulated protective order, plaintiffs did have those documents when they brought the pending motion and they have not challenged the veracity of the representations made in the stipulation they previously entered into.

In this regard, the effectiveness of on-going criminal investigations is also clearly important to public safety.

See  *Black v. Sheraton Corp. of America*, 564 F.2d 531, 545 (D.C.Cir.1977) (“there is indeed a public interest in minimizing disclosure of documents that would tend to reveal law enforcement investigative techniques or sources”);  *United States v. James*, 663 F.Supp.2d 1018, 1021 (W.D.Wash.2009) (“the Court finds that Ms. James and the public have an interest in continuing to protect the details of Ms. James’ cooperation to protect her safety and that of her family and to further the on-going investigation”).

In light of the competing interests related to public safety, the undersigned finds that consideration of this factor tips in favor of maintaining the stipulated protective order.

### 5) Whether the Sharing of Information Among Litigants Will Promote Fairness and Efficiency

All of the litigants in this action already possess the discovery materials at issue here. Although plaintiffs' counsel asserted at the April 17, 2015, hearing that there may possibly be litigants in other future actions who could benefit from access to the materials produced in discovery in this case, that assertion remains purely speculative at this point. The undersigned finds that consideration of this factor weighs slightly in favor of maintaining the stipulated protective order given the present showing.

### 6) Whether a Party Benefitting From the Order of Confidentiality is a Public Entity

**\*6** The County is the party benefitting from the stipulated protective order and is a public entity. See  *LEAP Systems, Inc. v. MoneyTrax, Inc.*, 638 F.3d 216, 222 (3rd Cir.2011) (“we are more likely to require disclosure when a party benefitting from the order of confidentiality is a public entity or official”).

The undersigned finds that consideration of this factor weighs in favor of modifying the stipulated protective order.

### 7) Whether the Case Involves Issues Important to the Public

As noted above, the issue in this case is whether the County of San Joaquin violated plaintiffs' right to substantive due process during the exhumation of the body of plaintiffs' deceased relative. Clearly the case involves issues important to the public. It is less clear that the discovery produced by defendants pursuant to the stipulated protective order, which plaintiffs now wish to publicly disseminate, relates to any of the issues involved in this case. In this regard, plaintiffs assert that the “evidence in this matter addresses significant public interest regarding the maintenance and removal of missing persons entries from the NCIC Missing Person File.” (JS (Dkt. No. 47) at 8.) That, however, is not what is at issue in this civil action.

The undersigned finds that consideration of this factor also weighs in favor of maintaining the stipulated protective order.

Thus, consideration of these relevant factors weighs slightly in favor of maintaining the stipulated protective order. However, the court's task is not merely to count the factors that weigh in favor of against the protective order in making this determination but instead to “balance ‘the

public and private interests to decide whether maintaining [the] protective order is necessary.”  *In re Roman Catholic*, 661 F.3d at 424 (quoting  *Phillips*, 307 F.3d at 1211).

### III. Additional Considerations

The undersigned observes that plaintiffs' motion to vacate and the parties' joint statement re discovery dispute failed to thoroughly address the relevant legal standards and factors discussed above. Moreover, it is noteworthy that the parties' own stipulation in support of the issuance of the protective order specifically stated that the discovery materials at issue involved an open and ongoing criminal investigation and that the public dissemination of those materials could negatively impact that criminal investigation and possibly could even interfere with Wesley Shermantine's appeal.

Although it is likely that plaintiffs did not have access to the discovery materials prior to executing the stipulated protective order, since the parties entered into that stipulation defendant has produced to plaintiffs “well over two thousand pages of discovery documents in response to the Plaintiffs' production requests.” (JS (Dkt. No. 47) at 13.) Plaintiffs have not challenged the representation made in their prior stipulation that the documents at issue concern an on-going criminal investigation and that their public dissemination could negatively impact that investigation. Moreover, plaintiffs have not challenged the need for confidentiality with respect to any specific document produced to them in discovery by defendant.<sup>4</sup> Because no specific document has been brought before the court for consideration, the undersigned cannot determine whether, for instance, redaction of the particular document would allow for its public disclosure.  *In re Roman Catholic*, 661 F.3d at 425.

**\*7** In addressing the evidentiary burdens where the application of a broad protective order is challenged with respect to certain documents produced in discovery, one federal appellate court has observed as follows:

It is correct that the burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order; any other conclusion would

turn [Rule 26\(c\)](#) on its head. That does not mean, however, that the party seeking the protective order must necessarily demonstrate to the court in the first instance on a document-by-document basis that each item should be protected. It is equally consistent with the proper allocation of evidentiary burdens for the court to construct a broad ‘umbrella’ protective order upon a threshold showing ... of good cause. Under this approach, the umbrella order would initially protect all documents that the producing party designated in good faith as confidential. After the documents delivered under this umbrella order, the opposing party could indicate precisely which documents it believed to be not confidential, and the movant would have the burden of proof in justifying the protective order with respect to those documents. The burden of proof would be at all times on the movant; only the burden of raising the issue with respect to certain documents would shift to the other party.

 *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 (3rd Cir.1986). See also  *Pansy*, 23 F.3d at 787, n. 17;  *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 356 (11th Cir.1987).

Finally, the Ninth Circuit has previously recognized that another relevant consideration is whether a party has relied on a stipulated order in producing discovery. See  *Pansy*, 23 F.3d at 789 (“In determining whether to modify an already-existing confidentiality order, the parties’ reliance on the order is a relevant factor.”);  *Beckman*, 966 F.2d at 475 (“A related concern is the reliance interests of the party opposing modification.”); *SRS Technologies, Inc. v. Physitron, Inc.*, 216 F.R.D. 525, 530 (N.D.Ala.2003) (“The absence of repeated objections to discovery evidences the Defendants’ reliance upon the protection order. Plaintiff now wants to un-do the protective order to which it consented and upon which

Defendants relied during the course of discovery.”) In this action, defendant clearly did so and consideration of this factor weighs in favor of maintaining the parties’ stipulated protective order.

In this case, the court adopted the parties’ stipulated protective order prohibiting the public dissemination of those documents based upon their representation that the discovery documents at issue involve an open and ongoing criminal investigation and that their public disclosure could interfere with that investigation and the pending appeal of a convicted serial killer. Defendants in turn relied on that stipulated protective order in producing those materials to plaintiffs. Plaintiffs now ask the court to vacate that order in its entirety and allow them to publicly disseminate the documents produced to them in discovery. Plaintiffs do so without meaningfully addressing either their own prior representation contained in the stipulation or defendant’s continued representation that the public release of those documents could negatively impact an ongoing criminal investigation and possibly the pending appeal of a convicted serial killer. Finally, plaintiffs have failed to address any specific document they now believe should not be subject to the protective order which they agreed to. Under these circumstances, the undersigned cannot ignore the potential harm to public safety posed by vacating the parties’ stipulated protective order indiscriminately.

## CONCLUSION

\*8 Having balanced the public and private interests to determine whether maintaining the stipulated protective order is necessary, as required by Ninth Circuit precedent, the undersigned finds that, as currently presented, the balance tips in favor of maintaining the parties’ stipulated protective order. That conclusion is reached primarily in light of the risk that the indiscriminate public disclosure poses to the open and ongoing criminal investigation and, to a lesser degree, based upon the potential risk that the public disclosure could have on Wesley Shermantine’s pending criminal appeal, the imperilment of either of which could potentially endanger public safety.

Accordingly, plaintiffs’ March 9, 2015, motion to vacate the parties’ stipulated protective order (Dkt. No. 44) is denied without prejudice to the filing of a new motion.<sup>5</sup>

IT IS SO ORDERED.

## All Citations

Not Reported in F.Supp.3d, 2015 WL 2082370

## Footnotes

- 1 In analyzing plaintiffs' motion, it is important to understand the nature of the parties' dispute. This is not a situation in which one party is seeking to avoid providing the other party with discovery documents that may be relevant and discoverable. Nor is this a situation in which a party is seeking to prevent a third party from intervening in the action and becoming a party to the stipulated protective order. Moreover, this is not a situation in which a party is asking the court to limit the public's access to judicial records. Plaintiffs' motion to vacate the stipulated protective order does not challenge the sufficiency of the discovery defendant has produced in this action. Likewise, defendant is not arguing that the plaintiffs should be denied access to some document or that a document should be entered into the judicial record under seal. Instead, this dispute concerns whether, after previously agreeing to keep the documents provided to plaintiffs by defendant confidential, plaintiffs should now be relieved of the terms of their agreement and freely disseminate those documents to the public as plaintiffs see fit.
- 2 In their motion plaintiffs assert, in a conclusory manner, that the parties' stipulated protective order must be vacated or modified "[t]o allow Plaintiffs to properly investigate their claims against Defendant." (Pls.' MTV (Dkt. No. 44) at 2.) When asked about this statement at the April 17, 2015 hearing, plaintiffs were unable to articulate any support for this assertion and none is apparent to the undersigned. Again, nowhere in their motion do plaintiffs suggest that defendant has withheld any discovery from them.
- 3 In an order signed January 24, 2014, the assigned District Judge found good cause to file the declaration of Sergeant Chanda Bassett "Re: Status of Criminal Investigation" under seal. (Dkt. No. 31.)
- 4 The court is mindful of the fact that the documents at issue are subject to the protection of the parties' stipulated protective order. However, as counsel is aware, there are procedures available—including submission for in camera review—allowing a party to challenge the confidentiality of a document without first disclosing that document on the public record. See Local Rules 140, 141 and 141.1.
- 5 Of course, the appropriate degree of confidentiality differs depending on the stage of the litigation. Information that the parties kept confidential during discovery, may be treated differently if attached to a non-dispositive motion and still differently if attached to a dispositive motion. See generally  [Seattle Times Co. v. Rhinehart](#), 467 U.S. 20, 33, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984) ("Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information."); [California ex rel. Lockyer v. Safeway, Inc.](#), 355 F.Supp.2d 1111, 1115 (C.D.Cal.2005) ("the Ninth Circuit has drawn a sharp distinction between the impact of protective orders on the public's right of access to raw discovery and non-dispositive motions, and the impact of such orders on the public's right of access to dispositive motions, such as a summary judgment motion").

2020 WL 4354172

Only the Westlaw citation is currently available.

United States District Court, C.D. California.

STRATEGIC PARTNERS, INC.

v.

FIGS, INC., et al.

Case No. CV 19-2286-GW (KSx)

|

Filed 05/18/2020

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**Proceedings: (IN CHAMBERS) ORDER  
DENYING DEFENDANT FIGS, INC.'S MOTION  
TO COMPEL PLAINTIFF STRATEGIC  
PARTNERS, INC.'S PRODUCTION OF  
ADDITIONAL DOCUMENTS [DKT. NO. 89]**

The Honorable: Karen L. Stevenson, United States Magistrate Judge

**INTRODUCTION**

\*1 Before the Court is Defendant FIGS, Inc.'s ("Defendant's" or "FIGS's") March 13, 2020 Motion to Compel in the joint stipulation format pursuant to Local Rule 37-2 (the "Motion" or "Joint Stip."). (Dkt. No. 89.) FIGS requests an order compelling responses from Plaintiff Strategic Partners, Inc. ("Plaintiff" or "SPI") to its Requests for Production of Documents ("RFPs"). FIGS seeks two categories of documents: (1) documents relating to SPI's antimicrobial products, including SPI's advertising

concerning those products; and (2) documents from a prior federal lawsuit in which SPI was accused of false advertising related to its antimicrobial products. (Joint Stip. at 1-2.) The parties also submit a Declaration of Fanxi Wang, Defendant's counsel, in Support of the Motion with supporting exhibits (Dkt. No. 89-2); and a Declaration of Robert Estrin, Plaintiff's counsel, in support of SPI's Opposition to FIGS's Motion with supporting exhibits (Dkt. No. 89-3). On March 18, 2020, FIGS filed a Supplemental Memorandum in Support of its Motion. (Dkt. No. 94 ("Supp. Mem.")). On March 19, 2020, the Court, finding the matter suitable for decision without oral argument, vacated the hearing on the Motion and took the matter under submission. (Dkt. No. 97.)

For the reasons outlined below, the Motion is DENIED.

**RELEVANT BACKGROUND****I. The Fourth Amended Complaint and the Answer**

The operative pleading in this action is SPI's Fourth Amended Complaint (the "FAC") filed on May 1, 2020. (Dkt. No. 113.) The FAC makes the following allegations regarding FIGS's products, advertising, and business practices. SPI alleges that since FIGS's 2012 founding, it "recklessly advertise[d] the antimicrobial properties of its scrubs—making false and misleading statements for the sake of gaining market share[.]" (FAC ¶ 1.) FIGS makes medical apparel and other clothing items. (FAC ¶ 2.) One of FIGS's co-CEOs, Trina Spear, misappropriated confidential information about the medical apparel industry from her former employer, Blackstone Group Holdings, L.P., and along with co-CEO, Heather Hasson, used that information to create FIGS; SPI alleges that the information and data that Spear used to create FIGS was SPI's proprietary information "because Blackstone was in possession of [SPI's confidential] information at the time." (FAC ¶ 3.)

SPI alleges that FIGS misrepresented "through its advertising, marketing, and branding that its FIGS Products will protect healthcare workers by reducing hospital-acquired infection rates by 66%." (FAC ¶ 4.) SPI asserts that "FIGS's representations are untrue, misleading, and reasonably likely to deceive consumers, who consist of healthcare executives, hospital executives, retailers, reseller, and healthcare workers ... who purchase the FIGS Products. Further compounding the danger of making untrue and misleading claims, FIGS's health claims and public relations efforts have caused media outlets to repeat and disseminate

FIGS's false and misleading claims about [its] Products.... FIGS's false and misleading claims have helped it obtain millions of dollars in funding enabling FIGS to continue to spread its false claims to the public and unfairly build its brand through additional advertisements.” (FAC ¶ 5.)

\*2 SPI contends that FIGS's misrepresentations are harmful to healthcare workers and employers, patients, the public, its competitors, healthcare executives, retailers, and medical consumers. (FAC ¶¶ 6-11.) Additionally, “FIGS's false and misleading claims concerning the properties and qualities of the FIGS Products has allowed it to gain market share at the expense of its competitors”; its “false and misleading claims jeopardize the safety of the consumers who purchase the FIGS Products (and the patients they care for) as those consumers are likely to believe the FIGS Products provide them with certain protections which testing has shown that the FIGS Products do not”; and “FIGS's false and misleading claims have enabled it to raise millions of dollars in funding, building public relations campaigns, and obtain the benefits of social influencers.” (FAC ¶ 12.) And FIGS made misrepresentations about its charitable donations as a marketing ploy and as a part of its “broader plan to deceive the public[.]” (FAC ¶ 13.) SPI maintains that it “has been harmed by FIGS's false advertising as FIGS has acquired market share at the expense of SPI due to FIGS's false advertising, thus costing SPI revenues and profits it should have earned.” (FAC ¶ 14.)

The FAC asserts claims against FIGS, Hasson, and/or Spear for false advertising in violation of  15 U.S.C. § 1125(a); unfair business practices in violation of  Cal. Bus. & Prof. Code § 17200; untrue and misleading advertising in violation of  Cal. Bus. & Prof. Code § 17500; intentional interference with prospective economic relations; negligent interference with prospective economic relations; conversion; unjust enrichment; breach of fiduciary duty; aiding and abetting breach of fiduciary duty; defamation; and trade libel. (FAC ¶¶ 98-268.) SPI seeks injunctive relief requiring FIGS to discontinue advertising, marketing, packaging, disseminating, using, and otherwise making false and misleading statements about FIGS's products; injunctive relief requiring FIGS to provide citation in future advertisements supporting any scientific or health claims it makes regarding FIGS Products or the fabric used in those products; compensatory damages; treble damages pursuant to  15 U.S.C. § 1117(a); punitive damages; restitution; actual damages; disgorgement of profits; interest rate at the legal

rate per annum; costs; attorney's fees; and all further relief the Court deems just and proper. (*Id.* at p. 55.)

FIGS has not yet filed an Answer to the FAC. However, in its Answer to the Second Amended Complaint (the prior operative proceeding), it generally denied SPI's allegations and asserted affirmative defenses, including one based on the doctrine of unclean hands. (Dkt. No. 48 at 19.)

## II. Pertinent Discovery Efforts Preceding FIGS's Motion

The parties' initial discovery cut-off date was set as December 13, 2019, but was later advanced to March 26, 2020. (Dkt. Nos. 23, 59.) In a January 14, 2020 meet-and-confer letter, FIGS wrote that SPI had failed to complete its document production obligations by the parties' agreed deadline. (Dkt. No. 89-3 at 73.) FIGS claimed that SPI's document production was deficient as to several RFPs, including RFP Nos. 79-80, 83-84, 87, 90-91, 100-04, 111-14, 123, 125-26, 128-29, 130, and 135, which concerned documents relating to SPI's own antimicrobial products and advertising. (*Id.* at 76-77.) FIGS rejected SPI's position that SPI's products were not at issue. (*Id.* at 76.) FIGS contended that “SPI's purported injury ar[ose] from the alleged displacement of SPI's products allegedly caused by FIGS's false advertising.” Additionally, “how SPI developed and advertised its medical apparel products [went] directly to FIGS's defense based on ... unclean hands. SPI's misconduct in advertising and/or misrepresentation of its product quality pertain[ed] to the very subject matter involved (i.e. FIGS's products are related advertising) that affect[ed] the equitable relations between the parties.” (*Id.*) FIGS also argued that document production was deficient for RFP No. 159, which concerned documents about SPI's prior related false advertising and unfair competition litigation with an industry competitor. (*Id.* at 76-77.)

On February 14, 2020, the parties, having reached an impasse on several discovery issues, requested a telephonic conference with the Court concerning, *inter alia*, the present issues. (*Id.* at 82-88.) FIGS requested documents responsive to its RFPs concerning SPI's products and advertising in *Scrubs Magazine*, which it claimed were relevant to the issues of damages, causation, mitigation, and unclean hands. (*Id.* at 84) SPI responded that its products were not at issue in the case and so, the requested documents were irrelevant and FIGS's attempt to compel their production was harassment. (*Id.*) FIGS also asserted that SPI refused to produce documents from SPI's other relevant litigation, including prior sworn statements of witnesses who would

testify in the instant litigation. (*Id.* at 84-85.) FIGS claimed those documents were relevant to its unclean hands defense and for impeachment. (*Id.*) In response, SPI averred that the documents FIGS requested were irrelevant; FIGS had not limited its request for documents; FIGS requested confidential documents that SPI could not provide; and federal courts routinely denied discovery into previously filed lawsuits by the parties. (*Id.* at 85.)

\*3 On February 25, 2020, following an informal telephonic conference during which the Court “questioned the relevance and proportionality of FIGS’s discovery requests for SPI documents pertaining to Plaintiff’s ... own antimicrobial products, and its relationship with *Scrubs Magazine*,” the Court authorized the parties to file a motion to compel in the joint stipulation format pursuant to Local Rule 37-2 as to those issues. (Dkt. No. 82 at 1.) As to the request for documents pertaining to SPI’s other litigation, the Court found that FIGS had not shown that this request was relevant or proportional to the needs of the case. (*Id.*) Thus, the Court denied without prejudice FIGS’s request to compel production of documents from prior SPI litigation. (*Id.*) However, the Court directed the parties to meet and confer no later than March 6, 2020 on the issue of the prior litigation. (Dkt. No. 89-3, Ex. 2 at 11.) The Court further stated that if the parties could not “reach an agreement on what can or should be produced in some narrowed fashion,” they could “include this category in any motion to compel ... but not until there’s been a thorough meet and confer on that issue.” (*Id.*)

On March 5, 2020, FIGS sent an email to SPI requesting deposition and trial transcripts, verified discovery responses, and declarations from 26 witnesses in the Vestagen Lawsuit (discussed *infra*). (Joint Stip. at 40.) The Motion followed.<sup>1</sup>

## THE MOTION

### A. Defendant’s Position

The Motion seeks an order compelling SPI to produce documents in response to FIGS’s RFPs, which SPI responded to on September 3, 2019. (Joint Stip. at 8.) The RFPs sought documents relating to SPI’s own antimicrobial products and related marketing, and its prior litigation. Specifically, the Motion seeks an order compelling SPI to respond to FIGS’s RFP Nos. 79-80, 83-84, 87, 90-91, 100-04, 111-14, 123, 125-26, 128-29, 130, 135, and 159.<sup>2</sup> FIGS argues that documents responsive to those RFPs are relevant because it and SPI use the same antimicrobial technology, SPI

made advertising claims about the antimicrobial effect of its products that are similar to the claims it is presently accusing FIGS of making, and SPI witnesses provided declarations and testimony in the prior lawsuit concerning the antimicrobial efficacy of its products that are relevant for impeachment purposes. (Joint Stip. at 1-2, 4-8, 16-39.)

### 1. Documents Relating to Plaintiff’s Antimicrobial Products and Related Marketing

The disputed RFP Nos. 79 through 135 concern FIGS’s requests for documents related to SPI’s own antimicrobial products and related advertising.<sup>3</sup> FIGS contends that SPI placed its antimicrobial products at issue when it asserted that FIGS made false and misleading statements about the properties of its products, in the following ways. First, SPI and FIGS use the same antimicrobial technology called Silvadur. (*Id.* at 5.) Second, SPI advertised for years that that its antimicrobial technology “starts to work upon contact with unwanted bacteria on the fabric ... essentially the bacteria is rendered ineffective immediately.” (*Id.*) As a result, details about SPI’s antimicrobial products are relevant to SPI’s ability to prove FIGS’s liability. (*Id.*) Third, SPI had previously been accused of falsely advertising the efficacy of its antimicrobial products in a counterclaim by Vestagen Protective Technologies, Inc. (“Vestagen”), another of SPI’s competitors, in *Strategic Partners, Inc. v. Vestagen Protective Technologies, Inc.*, C.D. Cal. Case No. CV 16-5900-RGK (PLA) (the “Vestagen Lawsuit”); in that lawsuit, SPI submitted evidence supporting the efficacy of Silvadur, and was found not liable for false advertising. (*Id.* at 5-6.)

\*4 FIGS claims that the requested documents are relevant to the issues of causation and damages—FIGS claims it is entitled to discovery how SPI’s products and marketing differ from FIGS’s, and how SPI could have been injured when both parties have made similar claims about the antimicrobial impact of the same technology. (*Id.* at 6.) Additionally, FIGS claims the evidence is relevant to its unclean hands defense because SPI’s alleged misconduct with respect to the subject matter involved affects the equitable relations between the parties. (*Id.*) Additionally, the timing of SPI’s antimicrobial product development is relevant in light of SPI’s claim that it had invested five years in the developing its antimicrobial technology. (*Id.*)

FIGS also contends that SPI’s other objections are meritless. First, considering the relevance of the requested evidence,

SPI's objection based on undue burden and harassment must fail. (*Id.* at 7.) Second, SPI's objection on the basis of overbreadth is meritless because the relevant time period for SPI's claims is from 2012 through the present, *i.e.*, the time period for which FIGS seeks documents. (*Id.*) Third, SPI has not made a timely and sufficient showing that the materials sought are protected by attorney-client privilege or the work product doctrine. (*Id.*) Finally, SPI cannot withhold documents based on any alleged privacy interests because a protective order has been entered in this case, which protects the proprietary nature and confidentiality of the materials sought. (*Id.* at 7-8.)

## 2. Documents Relating to the Vestagen Lawsuit

RFP No. 159 concerns FIGS's request for documents from the Vestagen Lawsuit, including deposition testimony, trial testimony, verified discovery responses, and declarations. (*Id.* at 36-37.) FIGS explains that the Vestagen Lawsuit involved a counterclaim by Vestagen against SPI for SPI's alleged false advertisement regarding the antimicrobial effect of its scrubs. (*Id.* at 37.) FIGS claims that the Vestagen Lawsuit documents show that SPI used Silvadur, it advertised for years about the impact of its antimicrobial technology, it submitted to the court substantial evidence about that technology, and it was ultimately found not liable for false advertising. (*Id.* at 37-38.) FIGS reiterates that the documents it seeks are relevant to the issues of causation, damages, and unclean hands. (*Id.* at 38.) And the prior sworn testimony of SPI's witnesses in the Vestagen Lawsuit are relevant because that lawsuit specifically relates to SPI's alleged false advertising involving the same technology at issue in this case; additionally, those statements are relevant for credibility and impeachment purposes. (*Id.*)

FIGS rejects as improper SPI's objections based on undue burden and harassment because the information it seeks is relevant. (*Id.* at 38-39.) Finally, SPI's objection to production of the Vestagen Lawsuit documents on the basis that those documents are shielded by a protective order is unavailing because the requested documents are within SPI's control; so, SPI may designate any of the documents as confidential under the protective order entered in this case. (*Id.* at 39.) Moreover, the Vestagen Lawsuit protective order does not cover trial testimony, which is public information. (*Id.*)

## B. Plaintiff's Position

### 1. Documents Pertaining to SPI's Antimicrobial Products and Related Advertising

In opposition to the Motion, SPI first observes that at the February 25, 2020 conference, the Court, seeking to understand how the requested documents were relevant or proportional to FIGS's needs, advised that it was not inclined to compel production of the documents. (*Id.* at 8-10.) SPI also contends that FIGS's unclean hands defense is conclusory and baseless, and it cannot propel discovery into thousands of documents that are irrelevant to this case. (*Id.* at 8-9.)

\*5 SPI contends that FIGS's attempt to analogize this case to the Vestagen Lawsuit is ill-fated. (*Id.* at 10-11.) SPI notes that Vestagen's products contained different technology than FIGS's products; Vestagen filed three counterclaims, including a false advertising claim, against SPI solely to exert leverage; and Vestagen presented little evidence to support the false advertising counterclaim. (*Id.*) In 2017, the Court dismissed the three counterclaims, finding the evidence presented did not support them. (*Id.* at 11.) SPI posits that Vestagen's meritless counterclaim was disingenuous because Vestagen later brought a post-trial motion on the Court's decision to dismiss the other two counterclaims, but did not include a request to revive the false advertising counterclaim; nor did it appeal the dismissal of that counterclaim. (*Id.*)

SPI argues and FIGS's request unreasonably seeks to impose undue burden and expense on SPI; and documents regarding research, development, and advertising of its antimicrobial products are irrelevant for several reasons. First, the requested documents are, in some cases, over five years old and do not speak to how FIGS's current products work, *i.e.*, the crux of SPI's claims. (*Id.* at 12.) Second, FIGS cannot obtain discovery into all aspects of SPI's antimicrobial products simply because FIGS uses Silvadur and SPI used to use Silvadur. (*Id.* at 12.) And SPI's prior use of Silvadur has no bearing on the issue here, which is FIGS's application, research, development, and testing of Silvadur on its products, and its statements about that application. (*Id.* at 12-13.) SPI emphasizes that the main issue is whether FIGS's products have the ability it claims they do, *i.e.*, to reduce hospital-acquired infections by 66 percent. (*Id.* at 13.)

SPI contends that FIGS cannot use an unclean hands defense to automatically broaden the scope of discovery, and the misconduct that forms the basis of the unclean hands defense must directly relate to SPI's use or acquisition of the right in suit. (*Id.*) SPI states that SPI's products do not relate to how it acquired its right to sue FIGS, *i.e.*, FIGS making false

claims about *its* products. (*Id.* at 14.) Finally, SPI contends that contrary to FIGS's contention otherwise, it never made false claims about its products' ability to reduce hospital acquired infections or to kill bacteria, or about the level of antimicrobial composition of its products. (*Id.* at 14-15.)

## 2. Documents Pertaining to the Vestagen Lawsuit

SPI first incorporates all of the above arguments in response to FIGS's RFP No. 159 seeking documents relating to the Vestagen Lawsuit. (*Id.* at 39 n.7.) SPI notes that FIGS's position about the request for documents related to SPI litigation has shifted. (*Id.* at 39.) Initially, FIGS wanted all documents related to other litigation in which SPI had been involved, but after several meet and confer discussions, it narrowed its request to deposition and trial transcripts, verified discovery responses, and declarations from SPI witnesses in the Vestagen Lawsuit. (*Id.*)

SPI argues that the Vestagen Lawsuit documents are irrelevant to the issues in *this* case, *i.e.*, FIGS's advertising and whether FIGS's products achieve the claims it advertises; moreover, federal case law generally prohibits discovery into a company's other litigation, which concerns issues different to those involved in the present dispute. (*Id.* at 40-41 (citing, *inter alia*, [Oklahoma, ex rel. Edmondson v. Tyson Foods, Inc.](#), 2006 WL 2862216, at \*1 (N.D. Okla. Oct. 4, 2006) (“*Tyson Foods*”).) SPI explains that courts have generally rejected the type of discovery FIGS seeks here: “cloned” or “piggybacking” discovery; and there is no reason to deviate from that rejection here. (*Id.* at 41 (citing  [Wollam v. Wright Med. Grp., Inc.](#), 2011 WL 1899774, at \*1 (D. Colo. May 18, 2011).)

\*6 Finally, SPI rejects the notion that FIGS is entitled to the Vestagen Lawsuit documents for impeachment purposes. (*Id.* at 41-42.) It argues that a party may only obtain documents for impeachment purposes if the information would be otherwise discoverable under [Federal Rule of Civil Procedure 26\(b\)](#). (*Id.*) Here, because the documents FIGS seeks are neither relevant nor proportionate to the needs of this case, FIGS cannot obtain those documents for impeachment purposes. (*Id.* at 41-42.)

## THE SUPPLEMENTAL MEMORANDUM [Dkt. No. 94]

In the Supplemental Memorandum, FIGS reiterates that the requested documents about SPI's antimicrobial products are relevant because SPI used Silvadur; it made at least one advertising claim about its own Silvadur-based products that is similar to a claim made by FIGS that SPI alleges to be false; and SPI submitted substantial evidence supporting the truth of its advertising in the Vestagen Lawsuit. (Supp. Mem. at 2.) FIGS claims that because SPI has accused FIGS of false advertising relating to Silvadur-based products, SPI's evidence supporting the truth of similar advertising is probative to the issues in this case. (*Id.*) FIGS also claims that in its Opposition to the Motion, SPI made claims about Silvadur and its advertising that lacked evidentiary support. (*Id.* at 2-3.) And FIGS claims the evidence submitted to the Vestagen Court is relevant because SPI defeated a false advertising claim involving similar products and statements based, at least in part, on the evidence it submitted in that lawsuit. (*Id.* at 3-4.) FIGS next reiterates that the requested documents are relevant to its unclean hands defense, and that the case law SPI cites in support of its position is inapposite. (*Id.* at 4-5.) In so arguing, FIGS maintains that SPI and FIGS both used Silvadur during the relevant time period and made similar claims about its efficacy. (*Id.*) Thus, FIGS's unclean hands defense concerns the same issues that are at the heart of SPI's claims against FIGS, and FIGS is entitled to discovery relating to those products so that FIGS can prove its unclean hands defense at trial. (*Id.* at 5.)

FIGS reasserts that the Vestagen Lawsuit documents concern the same subject matter as this lawsuit and are relevant for impeachment purposes, and argues that the cases SPI relies on in its Opposition are misplaced. (*Id.* at 6-7.) Finally, FIGS contends that the need for the requested documents outweighs any alleged burden to SPI because the documents FIGS seek go to the heart of the issues in this dispute, and SPI has not alleged any particularized burden other than a vague and unsubstantiated claim that it will need to provide thousands of documents. (*Id.* at 8.)

## LEGAL STANDARD

Under [Federal Rule of Civil Procedure 26](#), a party may obtain discovery concerning any nonprivileged matter that is relevant to any party's claim or defense and is proportional to the needs of the case. [FED. R. CIV. P. 26\(b\)\(1\)](#). As amended in 2015, [Rule 26\(b\)\(1\)](#) identifies six factors to be considered when determining if the proportionality requirement has been met, namely, the importance of the issues at stake in

the action, the amount in controversy, the parties' relative access to the relevant information, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit. *Id.* Relevant information need not be admissible to be discoverable. *Id.*

\*7 Rule 37 provides that “[a] party seeking discovery may move for an order compelling an answer, designation, production, or inspection.” *FED. R. CIV. P. 37(a)(3)*. The party seeking to compel production of documents under Rule 34 has the “burden of informing the court why the opposing party's objections are not justified or why the opposing party's responses are deficient.” *Best Lockers, LLC v. Am. Locker Grp., Inc.*, Case No. SACV 12-403-CJC (ANx), 2013 WL 12131586, at \*4 (C.D. Cal. Mar. 27, 2013).

District courts have broad discretion in controlling discovery. See  *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002). When considering a motion to compel, the Court has similarly broad discretion in determining relevancy for discovery purposes.  *Surfivor Media, Inc. v. Survivor Productions*, 406 F.3d 625, 635 (9th Cir. 2005) (citing  *Hallett*, 296 F.3d at 751). In resolving discovery disputes, the court may exercise its discretion in “determining the relevance of discovery requests, assessing oppressiveness, and weighing those facts in deciding whether discovery should be compelled.” *Unilin Beheer B.V. v. NSL Trading Corp*, Case No. CV 14-2210-BRO (SSx), 2015 WL 12698382, at \*4 (C.D. Cal. Feb. 27, 2015) (citing *Favale v. Roman Catholic Diocese of Bridgeport*, 235 F.R.D. 553, 558 (D. Conn. 2006) (internal quotation marks omitted)).

## DISCUSSION

At issue in the Motion is whether the documents FIGS seeks concerning SPI's own antimicrobial products and the Vestagen Lawsuit are relevant to the claims at issue and proportionate to the needs of this case, where SPI alleges that FIGS has made false statements regarding FIGS's products. As discussed below, the Court concludes that FIGS has not demonstrated the relevance or proportionality of the discovery sought and, consequently, the Motion must be DENIED.

### I. Documents Pertaining to SPI's Own Antimicrobial Products

The first category of documents—documents pertaining to SPI's antimicrobial products and related advertising—are not relevant to the claims or defenses at issue in this case. Despite FIGS's contention otherwise, neither party has put that at issue. SPI alleges that FIGS made false and misleading statements about its products that had the effect of inflating its market share and deceiving customers. (*See generally* FAC.) In the Answer, FIGS denies Plaintiff's allegations, but does not assert a counterclaim asserting any wrongdoing on SPI's part, or mentioning SPI's products, statements, or advertising practices. (*See generally* Dkt. No. 48.) FIGS merely asserted an affirmative defense based on unclean hands, which, as discussed in greater detail below, does not warrant compelling production of the requested documents. (*See id.* at 19.)

This lawsuit is a textbook example of a straightforward false advertising case concerning statements made in commercial advertisements that are false or misleading, which actually or have the tendency to deceive their audience, that influence purchasing decisions, and which cause likely injury to a plaintiff.<sup>4</sup>   *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 828-29 (9th Cir. 2011) (citing  *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997)). In such a case, as here, brought under the Lanham Act,  15 U.S.C. § 1125(a), a defendant's liability stems from the inherent falsity or misleading nature of its statements and the typical plaintiff is an industry competitor that suffers economic loss because of the impact of a defendant's misstatement.   *Jack Russell v. Am. Kennel Club*, 407 F.3d 1027, 1037 (9th Cir. 2005) (under false advertising prong of Lanham Act, “plaintiff must show: (1) commercial injury based upon a misrepresentation about a product; and (2) that the injury is ‘competitive,’ or harmful to the plaintiff's ability to compete with the defendant.”). The plaintiff's injury is caused by how the defendant's statements affect the balance of market share. *Id.* The plaintiff's products or advertising practices are generally immaterial in this analysis. SPI alleges that FIGS made statements about its products that were *intrinsically* false or misleading. Thus, on its face, SPI's products are not at issue and would not be relevant. But *Rule 26(b)* permits discover relevant to any claim or defense at issue in the action. *FED. R. CIV. P. 26(b)(1)*. So, the inquiry here is whether documents relating to SPI's products are somehow relevant to FIGS's defense(s).

\*8 FIGS contends that documents concerning SPI's antimicrobial products are relevant to its unclean hands defense because both companies' products employ the same antimicrobial technology called Silvadur. (Motion at 5-6.) SPI rebuts that contention by stating that it has not used Silvadur for many years. (*Id.* at 12.) FIGS provides no evidence to refute that rebuttal, but even if both companies use or used Silvadur, that does not matter for purposes of determining whether FIGS's statement about its products the ability to reduce hospital acquired infections to a precise degree were true or false. FIGS is not entitled to discovery how its and SPI's products differ because the differences between the parties' uses of the same product is immaterial to the veracity of FIGS's commercial statements about antimicrobial properties of its products – regardless of whether those products use Silvadur or not.

FIGS also believes the documents relating to SPI's antimicrobial products and advertising are relevant because both parties made similar claims in their advertising. The Court disagrees that the claims made by the parties are similar. FIGS stated that its products reduced the rate of hospital-acquired infections by 66%; that it has donated thousands of its products, which have significantly reduced hospital-acquired infection rates; and that its products were 100% antimicrobial and were made of silver. (*See generally* FAC.) The record here does not suggest that SPI has made any such claims. SPI claimed that its technology “kills bacteria immediately upon contact,” and that its products “start[ ] to work upon contact with unwanted bacteria on the fabric ... essentially the bacteria cell is rendered ineffective immediately.” (Motion at 5.) SPI has also advertised that its “latest antimicrobial technologies ... [lead to a] reduction in the growth of unwanted bacteria on [its] garments.” (*Id.* at 31 (citing RFP No. 126).) These are not, in fact, similar statements sufficient to warrant the broad discovery expedition FIGS seeks here.

Turning to FIGS's unclean hands defense as a basis to compel additional discovery from SPI regarding its own products, the Court first notes that FIGS's unclean hands defense is arguably stale because it was raised in its Answer filed in response to SPI's Second Amended Complaint, which is no longer the operative pleading. The Second Amended Complaint has been superseded by the FAC, to which FIGS has yet to file an Answer. But even assuming FIGS maintains an unclean hands defense in any future pleading, it still would not warrant that additional document production from

SPI that FIGS seeks here. In its Answer, FIGS asserted the following affirmative defense of unclean hands:

**“Twenty-Sixth Affirmative Defense (Unclean Hands) [:]**

The Complaint, and each and every claim for relief therein, are barred, in whole or in part, by the doctrine of unclean hands.”

(Dkt. No. 48 at 19.) This defense is conclusory, is not supported by any factual allegations, and does not cite any of SPI's products or advertising; thus, it is not “sufficient to put [SPI] on notice that [FIGS] intended to raise [unclean hands] allegations regarding” SPI's antimicrobial products or advertising related to those products.  *Pom Wonderful LLC v. Welch Foods, Inc.*, 737 F. Supp. 2d 1105, 1112 (C.D. Cal. 2012); *Monster Energy Co. v. Vital Pharm., Inc.*, Case No. CV 18-1882-JGB (SHK), 2019 WL 8112506, at \*8 (C.D. Cal. Oct. 16, 2019). Besides the arguable inference raised by the unclean hands defense that SPI engaged in unspecified misconduct, nowhere in the Answer does FIGS cite SPI's products or actions at all, either by raising a counterclaim against SPI or otherwise suggesting that SPI engaged in any misfeasance.

The defense of unclean hands is narrowly focused and the “misconduct that forms the basis for the unclean hands must be directly related to plaintiff's use or acquisition of the right in suit.”  *Id.* at 1110 (quoting as modified *Specialty Minerals, Inc. v. Pluess-Staufner AG*, 395 F. Supp. 2d 109, 113 (S.D.N.Y. 2005)). But “[d]irect relation,” is not the standard applied by the Ninth Circuit; rather, a defendant in a Lanham Act case must demonstrate “ ‘that the conduct related to the subject matter of its claims,’ for ‘equity requires that those seeking its protection shall have acted fairly and without fraud or deceit as to the controversy at issue.’ ”  *Pom Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085, 1095 (C.D. Cal. Feb. 19, 2016) (quoting  *Fuddrucker's, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 847 (9th Cir. 1987) (emphasis in original) (citation omitted)). An unclean hands defense, therefore, would allow for discovery *as to the controversy at issue*, which here, only concerns FIGS's representations and advertising about its antimicrobial products, not SPI's products or advertising.

\*9 The Court is also persuaded that the discovery FIGS seeks is not proportional to the needs of the case. FIGS seeks thousands of documents related to many of SPI's products and advertising related to those products. The Court strains to

understand how that request is anything other than a fishing expedition to discovery support for a conclusory unclean hands defense, or how access to that information would assist FIGS in defending against SPI's claims.

For the foregoing reasons, the Court concludes that the documents FIGS seeks pertaining to SPI's own products and related advertising are neither relevant to the claim san defenses at issue in the case nor proportionate to the needs of the case.

Accordingly, FIGS's request to compel production of those documents is DENIED.

## II. Documents Pertaining to the Vestagen Lawsuit

The second category of documents FIGS seeks is documents pertaining to the Vestagen Lawsuit, in which Vestagen asserted a false advertising counterclaim against SPI. FIGS argues that those documents are relevant and necessary for impeachment purposes. For the reasons discussed below, the Court DENIES FIGS's request to compel these documents.

FIGS's attempt to analogize this case to the Vestagen Lawsuit is unavailing. The crucial difference between this case and the Vestagen Lawsuit is that is in the Vestagen Lawsuit, Vestagen asserted a false advertising counterclaim against SPI, thereby putting SPI's products and statements about those products at issue in the litigation. Here, FIGS has not asserted such a counterclaim; it only raised an unclean hands affirmative defense, which, as discussed above, is insufficient to make documents about SPI's products and advertising relevant in this litigation. Vestagen made specific allegations about SPI's advertising practices relating to its own products that triggered SPI's obligation to produce information in that lawsuit. Here, there has been no comparable allegations by FIGS.

The mere fact that SPI produced certain documents in the Vestagen Lawsuit, and that case involved claims of false advertising does not necessarily make information discoverable here. *See Chen v. Ampco Sys. Parking*, 2009 WL 2496729, at \*3 (S.D. Cal. Aug. 14, 2009) (collecting cases, including *Moore v. Morgan Stanley & Co., Inc.*, 2008 WL 4681942, at \*5 (N.D. Ill. May 30, 2008), and *Tyson Foods*, 2006 WL 2862216, at \*2 (denying plaintiff's motion to compel discovery from similar case, finding that requested discovery “is not necessarily relevant to the current proceeding”); *but see*  *Schneider v. Chipotle Mexican Grill*,

*Inc.*, 2017 WL 1101799, at \*3-\*4 (N.D. Cal. Mar. 24, 2017) (distinguishing *Tyson Foods* and *Chen*, and permitting discovery of documents produced in separate cases with “significant factual and legal overlap”). To compel the discovery FIGS seeks, the Court must be persuaded that the requested documents are relevant to *this* case.

As emphasized above, this lawsuit concerns only FIGS's products, its advertising, and whether its products achieve the claims it advertises. Conversely, by bringing a false advertising counterclaim, Vestagen made allegations concerning SPI's products and advertising, triggering SPI to produce information about those. While the legal underpinning for the claims in both lawsuits may be similar, *i.e.*, a false advertising claim, the lack of factual overlap precludes compelling the discovery FIGS seeks. This lawsuit and the Vestagen Lawsuit involve different products made by different companies; additionally, FIGS made statements at issue here that are different from those made by either SPI or Vestagen in the Vestagen Lawsuit. Thus, the Court concludes that the documents FIGS seeks from the Vestagen Lawsuit are not relevant to the claims or defenses at issue in this lawsuit. *See* **FED. R. CIV. P. 26(b)(1)**.

\*10 Finally, the Court disagrees with FIGS that it should be permitted to obtain documents from the Vestagen Lawsuit for impeachment purposes. After **Rule 26(b)** was amended in 2015, the plain language of the Rule made clear that discovery is limited to matters relevant to the parties' claims and defenses; thus, “information that could be used to impeach a likely witness” is still discoverable pursuant to **Rule 26(b)(1)** if “suitably focused,” that is, that the information sought is relevant to the parties' claims and defenses. *See* **FED. R. CIV. P. 26**, Committee Notes on Rules—2015 Amendment; *see also IceMOS Tech. Corp. v. Omron Corp.*, 2020 WL 1905736, at \*3 (D. Ariz. Apr. 17, 2020) (discussing impact of 2015 amendment). As noted above, the Vestagen Lawsuit documents are not relevant to SPI's claims or FIGS's unclean hands defense. Thus, FIGS cannot obtain documents from the Vestagen Lawsuit for impeachment purposes.

## CONCLUSION

For the foregoing reasons, FIGS's Motion to Compel is DENIED.

**IT IS SO ORDERED.**

**APPENDIX A**

**FIGS' REQUEST FOR PRODUCTION NO. 79:**

DOCUMENTS sufficient to show when YOU first began developing YOUR ANTIMICROBIAL PRODUCTS.

**SPI'S RESPONSE TO REQUEST FOR PRODUCTION NO. 79:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 80:**

All DOCUMENTS and COMMUNICATIONS CONCERNING any scientific analysis, testing, and clinical studies CONCERNING YOUR ANTIMICROBIAL PRODUCTS, or any antimicrobial technology or agent used in YOUR ANTIMICROBIAL PRODUCTS or related fabrics, without regard to time.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 80:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 83:**

All DOCUMENTS CONCERNING the labels of YOUR ANTIMICROBIAL PRODUCTS, including all drafts and representative samples thereof, without regard to time.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 83:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 84:**

**\*11** All DOCUMENTS CONCERNING product inserts and labels for YOUR ANTIMICROBIAL PRODUCTS, including all drafts and representative samples thereof, without regard to time.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 84:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 87:**

DOCUMENTS sufficient to show the portion of YOUR annual advertising expenditure(s) directed to marketing,

advertising, and promoting YOUR ANTIMICROBIAL PRODUCTS since January of 2015.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 87:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 90:**

All DOCUMENTS and COMMUNICATIONS CONCERNING product reviews of YOUR ANTIMICROBIAL PRODUCTS.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 90:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 91:**

All DOCUMENTS and COMMUNICATIONS CONCERNING consumer complaints about YOUR ANTIMICROBIAL PRODUCTS.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 91:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**\*12 REQUEST FOR PRODUCTION NO. 100:**

All COMMUNICATIONS between YOU or on YOUR behalf and licensors, suppliers, sellers, or distributors of any antimicrobial technology or agents, including but not limited to DowDupont Specialty Products, DuPont Industrial Biosciences and DOW Chemical Company.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 100:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 102:**

All DOCUMENTS and COMMUNICATIONS CONCERNING any contracts or agreements CONCERNING SILVADUR.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 102:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it

seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 103:**

All DOCUMENTS and COMMUNICATIONS CONCERNING any antimicrobial properties or characteristics of SILVADUR.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 103:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 104:**

All DOCUMENTS and COMMUNICATIONS CONCERNING the use of SILVADUR in any product manufactured or sold by YOU.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 104:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its

attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**\*13 REQUEST FOR PRODUCTION NO. 111:**

All COMMUNICATIONS between YOU or anyone on YOUR behalf CONCERNING the efficacy of YOUR ANTIMICROBIAL PRODUCTS in inhibiting the growth of bacteria or preventing or reducing odors, deterioration, and discoloration, without regard to time.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 111:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 112:**

All DOCUMENTS CONCERNING the efficacy of YOUR ANTIMICROBIAL PRODUCTS in inhibiting the growth of bacteria or preventing or reducing odors, deterioration, and discoloration, without regard to time.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 112:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks

documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 113:**

All COMMUNICATIONS between YOU or anyone on YOUR behalf CONCERNING the efficacy of YOUR ANTIMICROBIAL PRODUCTS in resisting fluids and stains, without regard to time.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 113:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 114:**

All DOCUMENTS CONCERNING the efficacy of YOUR ANTIMICROBIAL PRODUCTS in resisting fluids and stains, without regard to time.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 114:**

\*14 SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 123:**

All DOCUMENTS and COMMUNICATIONS CONCERNING YOUR use of "Scrubs Magazine" to market or advertise YOUR ANTIMICROBIAL PRODUCTS.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 123:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 125:**

All DOCUMENTS and COMMUNICATIONS CONCERNING the April 24, 2015 publication titled "What's CERTAINTY? We're so glad you asked..." posted at scrubsmag.com, at <https://scrubsmag.com/whats-certainty-technology-were-soglad-you-asked-2/>.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 125:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 126:**

All DOCUMENTS and COMMUNICATIONS CONCERNING the statement that “CERTAINTY, the latest antimicrobial technologies in Cherokee, Dickies, and Code Happy medical apparel” leads to “[a] reduction in the growth of unwanted bacteria on our garments” in the April 24, 2015 publication titled “What’s CERTAINTY? We’re so glad you asked...” posted at scrubsmag.com, at <https://scrubsmag.com/whats-certainty-technology-were-so-glad-you-asked-2/>.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 126:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI’s proprietary and confidential information.

**\*15 REQUEST FOR PRODUCTION NO. 128:**

All DOCUMENTS and COMMUNICATIONS CONCERNING the April 24, 2015 publication titled “Protect and defend,” posted at scrubsmag.com, at <https://scrubsmag.com/protect-and-defend-2/>.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 128:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI’s proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 129:**

All DOCUMENTS and COMMUNICATIONS CONCERNING the statement that CERTAINTY “helps defend against bacteria and odors” in the April 24, 2015 publication titled “Protect and defend,” posted at scrubsmag.com, at <https://scrubsmag.com/protect-and-defend-2/>, including but not limited to clinical studies and test results.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 129:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI’s proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 130:**

All DOCUMENTS and COMMUNICATIONS CONCERNING the statement that CERTAINTY PLUS “resists fluids and stains” in the April 24, 2015 publication posted scrubsmag.com, at <https://scrubsmag.com/protect-and-defend-2/>, including but not limited to clinical studies and test results, without regard to time.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 130:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI’s proprietary and confidential information.

**\*16 REQUEST FOR PRODUCTION NO. 135:**

All DOCUMENTS and COMMUNICATIONS CONCERNING statements made by YOU or on YOUR behalf on any form of social media CONCERNING CERTAINTY and CERTAINTY PLUS, including but not limited to the statements made in video posted to youtube.com, at <https://www.youtube.com/watch?v=ooC4oKDCReg&feature=youtu.be>.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 135:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing as it seeks documents going back to January 1, 2012; (ii) seeks information that is protected by the attorney-client privilege, work product doctrine and/or other applicable privilege or right to privacy, specifically including documents and communications between Responding Party and its attorney(s) relating to FIGS and this lawsuit; (iii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iv) seeks SPI's proprietary and confidential information.

**REQUEST FOR PRODUCTION NO. 159:**

All deposition and trial transcripts from any lawsuit YOU have filed against an industry competitor, including but not limited to deposition transcripts, trial transcripts, and YOUR discovery responses from (i) Strategic Partners, Inc. v. Vestagen Protective Technologies, Inc., C.D. Cal. Case No. 2:16-cv-05900-RGKPLA, and (ii) Strategic Partners, Inc. v. Koi Designs, LLC, C.D. Cal. Case No. Case No. [sic] 2:17-cv-00236-BRO-GJS.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 159:**

SPI objects to this Request on the grounds it (i) is overly broad, unduly burdensome, and harassing to the extent that it seeks documents that are equally available to FIGS; (ii) is unduly burdensome, overly broad, and harassing to the extent it seeks documents and communications that are unrelated to FIGS and irrelevant to this lawsuit; and (iii) seeks information shielded by protective orders issued in the referenced matters.

**All Citations**

Slip Copy, 2020 WL 4354172

**Footnotes**

- 1 It is unclear on the record whether the parties engaged in any meet-and-confer discussions besides the March 5, 2020 email. However, SPI notes in the Motion that in the interests of conserving judicial resources and expediting resolution of the case, it does not object to FIGS including in the Motion the issue concerning the request for documents from other litigation involving SPI. (Joint Stip. at 10 n.4.)
- 2 Because of the voluminous nature of the disputed RFPs and responses, the Court will not recite each of the requests and objections in this Order, but has attached the relevant requests, along with SPI's responses and objections as Appendix A. (*See infra* at 18-25.)
- 3 Throughout the Motion, FIGS notes that SPI's objections to FIGS's RFPs are identical. (*See* Motion at 16-38.) Consequently, FIGS outlines in detail its position in support of RFP No. 79. (*Id.* at 4-8.) And in support of RFP Nos. 80 through 130, it states that it incorporates its statements provided in support of RFP No. 79. (Motion at 16-36.) Likewise, SPI details its opposition to RFP No. 79 through 130 solely in the section of the Motion discussing RFP No. 79 (*see id.* at 11-15, discussed *infra*), and states that it incorporates that position as to RFP Nos. 80 through 130 (*see id.* at 16-36).
- 4 The Ninth Circuit distinguishes between false advertising cases and false comparative advertising cases. See  *TrafficSchool.com, Inc.*, 653 F.3d at 828-31. A false comparative advertising case is one in which a

defendant makes alleged false or misleading statements *in relation to* a plaintiff, and where it is “reasonable to presume that every dollar defendant makes has come *directly* out of plaintiff’s pocket.” *Id.* at 1131 (emphasis added) (citing, *inter alia*,  [U-Haul Int’l, Inc. v. Jartran, Inc.](#), 681 F.2d 1159 (9th Cir. 2011) (newspaper ad falsely stated that defendant’s rental trucks were bigger, newer, and more fuel-efficient than trucks in plaintiff’s fleet)). In a false comparative advertising case, a plaintiff’s products and advertising are squarely at issue because the defendant’s alleged misstatements refer directly to those products. The Court concludes that the case at hand is *not* a false comparative advertising case.

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End of Document

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2021 WL 5876695

Only the Westlaw citation is currently available.  
United States District Court, M.D. Pennsylvania.

James WICKENS, Plaintiff

v.

RITE AID HDQTRS CORP., Defendant

No. 1:19-cv-02021

|

Filed 02/23/2021

**Attorneys and Law Firms**

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[Mara Slakas Brown](#), [Sarah E. Bouchard](#), Morgan, Lewis & Bockius LLP, Philadelphia, PA, for Defendant.

**ORDER**[Yvette Kane](#), District Judge**\*1 THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:**

Plaintiff James Wickens ("Plaintiff") commenced the above-captioned action by filing a complaint in this Court on November 25, 2019 alleging that Defendant Rite Aid HDQTRS Corp. ("Defendant") retaliated against him for reporting violations of federal securities law in violation of the Sarbanes-Oxley Act of 2002, as amended, [18 U.S.C. § 1514A](#) ("SOX"). (Doc. No. 1.) Upon completion of discovery, Defendant indicated its intention to file a motion for summary judgment and the parties jointly filed a motion for leave to file certain materials in the record under seal in connection with the briefing of such motion. (Doc. No. 28.) The Court subsequently directed the parties to file a brief in support of the motion to seal "addressing how the parties' desire for confidentiality outweighs the public interest in access to court records" pursuant to [In re Avandia Mktg., Sales Practices & Prods. Liability Litig.](#), 924 F.3d 662 (3d Cir. 2019). (Doc. No. 30.) The parties filed their brief on January 25, 2021. (Doc. No. 33.) Accordingly, the motion (Doc. No. 28) is now ripe for disposition.

As articulated by the United States Court of Appeals for the Third Circuit in [In re Avandia](#):

[T]here is a presumptive right of public access to pretrial motions of a nondiscovery nature, whether preliminary or dispositive, and the material filed in connection therewith. Summary judgment proceedings are no exception—documents filed in connection with a motion for summary judgment are judicial records.

Yet the common law right of access is not absolute. The presumption [of access] is just that, and thus may be rebutted. The party seeking to overcome the presumption of access bears the burden of showing that the interest in secrecy outweighs the presumption. The movant must show that the material is the kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure.

See [In re Avandia](#), 924 F.3d at 672 (internal citations and quotation marks omitted). Accordingly, a district court entertaining a motion to seal must "articulate the compelling, countervailing interests to be protected" and "make specific findings on the record concerning the effects of disclosure." See [id.](#) (internal citations omitted).

In the present case, the parties request to file only narrow portions of the record under seal. The parties seek to seal information that falls into four discreet categories: "(1) information regarding ongoing government investigations; (2) information regarding a non-party witness's confidential separation negotiations with the Company; (3) sensitive, non-public personal information of non-parties to this action; and (4) sensitive, non-public financial information of Plaintiff." (Doc. No. 33 at 5.) More specifically, the parties submit that: (1) during the course of discovery, they exchanged confidential, non-public information related to ongoing investigations by the Securities and Exchange Commission ("SEC"), which include non-party witness testimony, and have not received permission from the SEC or any of the non-party witnesses to publicly disclose substantive information regarding the investigations ([id.](#) at 6); (2) a non-party witness threatened claims against Defendant that were disposed of via a confidential separation agreement between Defendant and that non-party witness ([id.](#) at 8); (3) the parties exchanged sensitive and non-public information regarding the compensation of a non-party and a workplace investigation into the conduct of another non-party, neither of whom have consented to the disclosure of their sensitive personal information ([id.](#) at 11); and (4) the

record includes sensitive, non-public information disclosing Plaintiff's compensation information, including information regarding offers of severance pay (*id.* at 13).

\*2 As an initial matter, the Court acknowledges the limited nature of the parties' sealing request. The Court's review of the documents at issue indicates only minor proposed redactions, leaving the majority of the parties' arguments and materials open to the public. Next, the Court agrees with the parties that the information they seek to seal is information that courts typically protect. See, e.g., [!\[\]\(13e3a18591b05031b35d99363d61dd4d\_img.jpg\) LEAP Sys., Inc. v. MoneyTrax, Inc., 638 F.3d 216 \(3d Cir. 2011\)](#) (upholding the denial of a motion to unseal documents regarding a settlement agreement after determining the parties would not have entered into the agreement absent an assurance of confidentiality); [Bolus v. Carnicella, No. 15-cv-01062, 2020 WL 4275653, at \\*3-4 \(M.D. Pa. July 24, 2020\)](#) (granting the Pennsylvania Attorney General's request for a protective order where disclosure of confidential information would harm the integrity of the office's investigative processes and undermine the public's interest in protecting the integrity of the investigatory process); [Jerome v. Phila. Hous. Auth., No. 19-cv-272, 2019 WL 2433735, at \\*2-3 \(E.D. Pa. June 11, 2019\)](#) (protecting information regarding a confidential investigation conducted by the Philadelphia Housing Authority on the basis that disclosure may disturb the ongoing investigation and that the investigation implicated the privacy interests of non-parties, which outweighed any public interest in the unrestricted public disclosure of the report); [Onex Credit Partners, LLC v. Atrium 5 LTD., No. 13-cv-5629, 2017 WL 4284490, at \\*3 \(D.N.J. Sept. 27, 2017\)](#) (granting the plaintiff's motion to seal the personal financial information of a non-party because the non-party had legitimate privacy interests in the nondisclosure of that information); [!\[\]\(119b52ad7f81fe7a705ec6ea31d0d93c\_img.jpg\) Erwin v. Waller Capital Partners LLC, No. 10-cv-3283, 2012 WL 3528976, at \\*2 \(D.N.J. Aug. 14, 2012\)](#) (granting request to seal redacted information concerning personal salary offers, rejections, and negotiations between the parties due to legitimate privacy interests and competitive concerns).

With respect to information regarding ongoing investigations by the SEC, the Court finds it is necessary to seal this information because the disclosure of confidential information related to ongoing investigations would harm the SEC's ability to complete these investigations and potentially interfere with the SEC's ability to engage witnesses in future investigations. Information related to the confidential separation agreement between the non-party witness and Defendant should also be sealed because the disclosure of confidential settlement information would undermine both the non-party's privacy interests and Defendant's ability to engage in private dispute resolution. Similarly, the disclosure of financial information and information regarding workplace investigations into the conduct of non-parties who have not consented to their personal information being made public would harm the reputation and privacy interests of those non-parties. Finally, the disclosure of Plaintiff's personal compensation information, including information related to severance negotiations between the parties, would harm Plaintiff's privacy interests and Defendant's competitive position with respect to employee compensation. Accordingly, in light of the foregoing, and mindful of the narrow scope of the parties' request, the Court finds that the parties have met their burden in demonstrating that their interest in secrecy outweighs the presumption of public access and will grant the motion (Doc. No. 28).

**AND NOW**, on this 23rd day of February 2021, upon consideration of the parties' joint "motion for leave to file under seal and extend page, word count, and time limits" (Doc. No. 28), and upon the Court's finding that the parties' motion makes the requisite showing required by [In re Avandia](#) regarding the justification for sealing court records, **IT IS ORDERED THAT** the parties' motion (Doc. No. 28) is **GRANTED**. The Clerk of Court is directed to accept and maintain the parties' dispositive motions and any other supporting materials under seal to the extent they contain references to the above-referenced confidential information unless ordered otherwise by the Court.

#### All Citations

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Summary: Motion for Protective Order electronically filed by Mr. Corey Lee on  
behalf of FirstEnergy Corp.