Catastrophe Claims: Insurance Coverage for Natural and Man-Made Disasters

§ 2:19. Post-claims handling practices issues—The presumption of public access vs. stipulated secrecy orders

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There is a strong presumption of public access to Court files. The origins of the presumption are both the common law and the First Amendment to the United States Constitution.[1] The Constitutional presumption of public access to Court files is independent of the common law.[2] This presumption is or should be at work in catastrophe claims in particular, but nowhere does it face greater challenges and nowhere else are the consequences of concealment as great.

Both presumptions of public access to Court files, whether based upon the common law or upon the First Amendment, apply with particular strength in the case of judicial records. For example, the presumption is very strong that judicial records relating to summary judgment should remain open and available to the public. This is because these proceedings adjudicate the relative rights of the parties and, in the case of summary judgment proceedings in particular, often serve as substitutes for trials.[3]

Some courts, such as the federal courts in the Ninth Circuit, have developed a test for access to or secrecy of judicial records, that is, records filed in the court file. Relying on a "federal common law right" of public access to judicial records, these courts require a showing of compelling reasons for secrecy when documents or motions are filed and the motion is "more than tangentially related to the merits" of the case.[4]

The idea that the public pays for judicial proceedings is central to both presumptions of public access to the records of judicial proceedings. "The parties are hereby advised that '[a]s an undertaking funded by the people of the United States, [this court's] decision will be publicly published to decide both the matter at hand, and also guide other entities on the law.'"[5] To put it another way:

> The court is aware of the cost to the parties and in some ways the cost to the truth-finding process that comes with proceeding in an open forum. But the public nature of [the] forum in which the parties have chosen to air their dispute and the manner of operation needed for the forum to maintain its legitimacy and integrity extract certain costs from the litigants that come before it. But for very limited circumstances, the publicity of an adjudication is one of those costs. The parties have not met the heavy burdens needed to permit this court to operate in secret.[6]

When the issue is sealing or otherwise keeping discovery a secret, as distinct from public access to judicial records, some courts follow a different, second test: "good cause." This test derives from Federal Rule of Civil Procedure 26(c), which authorizes a federal court to issue a protective order including a secrecy order "for good cause[.]"[7] "For good cause to exist," these courts hold, "the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted."[8] This requires the party seeking the protection of secrecy to make a particularized showing of good cause regarding each individual document, and even when such a showing is made the court must engage in a balancing test of the interests in secrecy versus the public interest in access to the document.[9]

Proving good cause to deny public access in such a case must be made by proffering witness testimony, whether in person or by declaration or affidavit, that an identifiable and identified particular harm would be the result of disclosing the document or testimony in question.

Generalities are not proof.[10]

First, there is the question of the American public's right of access to documents filed in court cases. If the document is part

of a filing submitted to a Court when asking the Court for a ruling, then the document is presumptively accessible to the public and it cannot be sealed without a showing of "extraordinary circumstances."[11]

In contrast, if the document is not part of a filing designed to elicit a dispositive ruling from the Court, i.e., if it is attached to "a non-dispositive motion," then the party seeking to seal it must instead show "good cause" to seal it. A successful showing of "good cause" to seal is a "particularized showing" of specific harm or prejudice that would happen to the party seeking to seal a document if the document is not sealed.[12]

In short, there are two recognized standards for secrecy in many cases and the Ninth Circuit case law provides good examples of both. One standard concerns the sealing of a "judicial record." In such a case, the party seeking to seal the record must show "compelling reasons" for the secrecy. The second standard concerns a variety of situations in which "good cause" is the standard for secrecy. Under Ninth Circuit case law, when the documents in question "are unrelated or only 'tangentially related' to the underlying cause of action," then "the presumption of public access can be overcome simply by showing 'good cause.'"[13]

In a case decided in July 2021, *Obertman v. Electrolux Home Care Products, Inc.,*[14] the Court outlined both the substance and the procedure of sealing court records from public view.

The Court concisely summarized the current law undergirding the strong, constitutional presumption of public access to court records at the beginning of its opinion. First, the Court repeated the basic point that only judges, and not the parties or their lawyers, decide what the public can and cannot see in the records of courts.[15]

Then the Court listed the substantive reasons that are currently recognized as justification for denying the public access to court records despite the default presumption that access is ordinarily required:

- Protect against promoting either private spite or public scandal;
- Protect courts from being repositories of libel; and
- Protect "'sources of business information that might harm a litigant's competitive standing.'"[16]

After repeating the substance of the presumption of public access and outlining the exceptions to that default presumption, the Court addressed the procedures widely employed for parties and their lawyers to request an exception and deny public access to court records.

In the *Obertman* case, the Court summarized the procedures extant in the Ninth Circuit in which this Court sits:

- First, the judge must put the underlying motion or other document or record, into a frame whereby the judge determines whether or not the record is "'more than tangentially related to the merits of a case.'"

- If for example a motion is involved, and if the underlying motion is tangential, then the inquiry stops because the presumption does not apply. The judge's analysis continues, however, if she finds that the underlying motion is "more than tangentially related to the merits of the case[.]" When that determination is made, i.e., when the judge decides that the underlying motion is more than tangentially related to the merits of the case, then the party requesting to keep the record secret must provide evidence of "compelling reasons" for the secrecy.

- "Applying this standard, 'a court may seal records only when it finds 'a compelling reason and articulate[s] the factual basis for its ruling, without relying on hypothesis or conjecture,' and finds this reason outweighs the public's interest and the presumption of public access."

- The requirement of a "compelling reasons" showing is not satisfied simply by citing to an earlier stipulated protective order, or by citing to any other previously entered "generalized protective order, including a discovery phase protective order." The requirement is satisfied instead by a showing related to the specific document or other court records as to which the party seeks to have the judge order the secrecy.[17]

In the *Obertman* case, the request to seal judicial records concerned the plaintiffs' motion to certify a class. This motion was obviously more than tangentially related to the substance of the claim and so the "compelling reasons" requirement applied.

The party requesting secrecy showed only that the parties in the case had all previously stipulated to a protective order. This was hardly enough to overcome the presumption of public access to particular court records in that case.

Among other things, the lawyers do not control the outcome of the secrecy question, the court controls that outcome. Further, a mere stipulated protective order does not satisfy the required showing of compelling reasons to deny the public access to a specific court record.[18]

The presumption of public access to court records prevailed on this record. The party seeking secrecy did not satisfy the prevailing requirement at this time, but it could try again. "Accordingly, the request is **denied, but with the possibility of renewal**."[19]

To the group of documents subject to a "good cause" standard for secrecy may be added the nondisclosure of documents that are exchanged in discovery outside of the court file, for which, as has been noted earlier, the Rule 26(c) standard is "good cause,"[20] or they are the subject of a request for redaction to black out certain information or to limit remote electronic access to information in the court file, under what are clearly very broad Rule 5.2(e) provisions.[21]

Whether based on the common law or on the First Amendment, the presumption of public access to Court files is not absolute.[22] "The presumption of public access may be rebutted."[23]

Properly rebutting the presumption of public access may depend largely on whether a given case involves issues important to the public. An example is a case presenting "information bearing on defects and safety concerns with products."[24] Cases involving claims for damages allegedly caused by catastrophes and disasters, whether the disasters are natural or man-made, clearly contain within them issues important to the public.

So do cases involving insurance coverage for natural and man-made disasters, because it has been held that many issues present in ordinary insurance cases, while not perhaps "garden-variety," involve "claims-handling" practices and often involve claims of insurance bad faith as well. "Public importance" has effectively been equated with "the potential to impact concretely the legal rights of other carriers and/or insureds not before the court."[25]

This is the overall standard that one court has applied to an insurance case to determine whether that case contains issues of such importance to the public, that the public should be allowed to know them and the documents, testimony, and information that relate to those issues. The insurance carrier sought to seal and to keep a seal on its files and deposition testimony of its representatives. The insured involved in the case manufactured and sold clothing that protected coal miners including their ability to breathe. The insured sued its umbrella commercial CGL carrier in that case for alleged wrongful denial of coverage and bad-faith claims handling practices, among other things.

The District Court denied the insurance company's motion to seal, holding under the circumstances of that case as follows:

> Finally, the information plaintiff seeks to maintain under seal is of public importance to defendant, its fellow carriers, the underlying claimants with unresolved claims and future claimants. The parties' dispute encompasses numerous issues of public importance, including plaintiff's claims-handling role, what constitutes proper exhaustion, the burden of proving the judgments or settled claims fall within the grant of coverage, the trigger of coverage for each type of dust/substance exposure involved, whether general administrative expenses in coordinating a national defense may be apportioned and proportionally allocated as a form of ultimate net loss covered under the policy and so forth. Other carriers and all current and future claimants have a significant interest in knowing (1) the types of litigation and settlement practices that will be deemed to be acceptable and give rise to indemnification under the standard terms in the policy and (2) the range and type of evidence and information as well as the legal arguments and precedents that a court will consider and find important in resolving these disputes. These entities and individuals are members of the public and have the potential to have their rights affected by the resolution of the issues forming the parties' dispute. That interest cannot be summarily discounted in the name of protecting the plaintiff's ability to minimize its financial exposure from the debacle created by its past products.[26]

The burden is on the party seeking to overcome the presumption of access to show the interests in secrecy at stake that arguably outweigh the presumption. It has been held that showing **"a clearly defined and serious injury"** equals the showing of "good cause" needed to overcome the presumption.[27] The burden is to show that disclosure will cause "a clearly defined and serious injury" and to show it with specificity. The showing cannot succeed, it has been held, if it is "bereft of specific examples."[28]

In *Hyundai Motor America, Inc. v. Midwest Industrial Supply Co*.,[29] both the defendants and the plaintiffs filed

motions to seal testimony and evidence. Both sides said that they had stipulated to this secrecy. Both sides said that they had "good cause" to seal this evidence.

> In their requests to seal testimony and other evidence, the defendants said:
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> Defendants represent that such filings contain confidential and proprietary information designated as confidential or for "attorney's eyes only" pursuant to the parties' stipulated protective order. Further, Defendants represent that [one of the witnesses' testimony] contains confidential settlement discussions.[30]

> Likewise, along with their own requests to seal testimony and other evidence, the plaintiffs said:
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> Plaintiffs represent that the above documents contain confidential, sensitive and non-public information and is designated as confidential under the parties' stipulated protective order.[31]

The Magistrate Judge ruled that the parties had shown good cause to seal ***neither*** the testimony ***nor*** the documentary evidence that they wanted to keep from public view. The testimony and the documents had been filed in support of dispositive motions, motions more than "tangentially related" to the issues in the case. The presumption of public access to court files trumped the parties' stipulation in this case.

To that point. The Magistrate Judge gave the parties in this case until Monday, June 17 to file more motions to seal. Until the new motions were ruled upon, the presumption of public access to evidence that judges rely on in their rulings—at the request of the same parties that want to keep the evidence secret even though they ask the judge to rule on it—prevailed. The electronic docket on PACER (Public Access to [Federal] Court Electronic Records) shows that the defendants and the plaintiff all filed further motions to seal, and that the Court granted the motions in an unreported (and inaccessible) order on June 20, 2019. A week after that order, the defendants filed a motion for attorney's fees—and requested that their motion be sealed.

In *Karrani v. JetBlue Airways Corp.*,[32] the Court applied the Federal Rules of Civil Procedure and the Local Rules of Court to a motion to seal evidence. The motion to seal already followed after a designation of the evidence as "confidential" pursuant to a Stipulated Protective Order previously approved by the Court in that case.

Despite that, the Court ruled that Federal Rules and Local Rules trump a Stipulated Protective Order when it comes to sealing evidence in the Court file:

> Accordingly, a "good cause" showing under Rule 26(c) may suffice to keep under seal documents attached to non-dispositive motions. *Id.* Rule 26, which gives district courts flexibility in balancing and protecting the interests of private parties, states that "good cause" is shown where forbidding disclosure or discovery would "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense …." Fed. R. Civ. P. 26(c).
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> The Court's Local Rules explicitly instruct parties to present legal and evidentiary support in a motion to seal. Normally that motion must include "a specific statement of the applicable legal standard and the reasons for keeping a document under seal, with evidentiary support from declarations where necessary." Local Rules W.D. Wash. LCR 5(g)(3)(B).[33]

Lesson learned here: Stipulated Protective Orders are not enough standing alone to provide a basis for sealing evidence in a Federal Court's file. Federal Rules and Local Rules govern that decision, as in this case, where the Court denied both of the two motions to seal filed by the plaintiff even as the Court directed further compliance with the Stipulated Protective Order that it had previously approved in the case.[34]

Even a stipulated protective order is subject to a good cause showing to confer and maintain confidentiality. A motion to seal in the Ninth Circuit has been held to be subject to a compelling interest showing.[35]

Moreover, merely because the parties label their stipulated agreements "confidential" does not make them immune from the Federal Rules of Civil Procedure or the Local Rules of Court:

> In addition to the findings and analysis made previously in this Order, the Court additionally finds as follows. **First, merely because settling parties label a settlement agreement as "confidential" and agree to confidentiality terms amongst themselves, does not mean that a federal court cannot order such settlement agreement produced in discovery** if it is relevant and proportional under Rule 26(b)(1). "There is nothing magical about a settlement agreement." *Jen Weld Inc. [v. Nebula Glass Int'l, Inc.]*, 2007 WL 1526649 at *3 [(S.D. Fla. May 22, 2007)]. ***Secrecy is disfavored in our federal courts. Parties cannot insulate a document from discovery merely because they decide to label it as confidential; the federal courts are to decide such issue, not the parties***.[36]

In some cases, this apparently means a good faith belief by the lawyers who marked the thing "confidential" in the first place.[37]

In other cases, this expressly constitutes "a representation by the party or nonparty and its counsel that they believe in good faith" that the material designated "confidential" is, in fact, confidential.[38]

In still other cases, the last remaining alternative is written in the Stipulated Protective Order and the requisite "good faith" belief comes from "the producing party[.]"[39]

The contrary view is exemplified, although without analysis, in another case presenting a stipulated protective order. The ruling was made by another U.S. Magistrate Judge. It seems clear that the ruling was wrong:

> On July 2, 2018, the parties filed a stipulated protective order, which was entered by the court on July 11, 2018. [Docket Nos. 27 ("Protective Order"), 28.] The Protective Order permits the parties to designate certain materials produced during discovery as confidential in order to prevent their public disclosure. It states that a party "may challenge a designation of confidentiality at any time," by initiating a dispute resolution process and "providing written notice of each designation it is challenging and describing the basis for each challenge." Protective Order ¶¶ 6.1, 6.2. The Protective Order also states that if the parties cannot resolve a challenge through the meet and confer process, the designating party must file and serve a motion to retain confidentiality. *Id.* ¶ 6.3.[40]

After an exhaustive review of many factors that the Magistrate Judge wrote should be taken into account in any secrecy equation in the Ninth Circuit where this case was decided, the Magistrate Judge in this case ***granted*** the defendants' motion to ***retain confidentiality*** of certain documents. The defendants in the case had marked the documents confidential under the Stipulated Protective Order even as they were submitted as part of the reason for the defendants' motion for summary judgment.

In other words, the defendants submitted evidence which they argued was in favor of their summary judgment, and which they also marked "confidential" and so not available to the public to see.

Seven pages later in the opinion, the Magistrate Judge announced a ruling to keep the materials under seal ***because the plaintiff did not follow the Stipulated Protective Order to challenge the defendants' confidentiality designations***:

> As Economus did not properly challenge the confidentiality designation of these documents pursuant to the terms of the Protective Order, that issue is not presently before the court. Accordingly, the court declines to lift the confidentiality designations on those documents.
>
> **III. CONCLUSION**
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> For the reasons stated above, the court grants Defendants' motion to retain confidentiality. The documents identified by Bates numbers CCSF_ECONOMUS 000837-841, 00117, and 002262-2267 shall remain confidential pursuant to the terms of the Protective Order entered in this case.[41]

In other words, the plaintiff Economus did not follow the Stipulated Protective Order in this case, the defendants did, and so the evidence marked "confidential" by the defendants and filed under seal had to remain under seal. With respect, the real issue was whether either party followed the Federal Rules of Civil Procedure.

In general terms, the presumption of access is not ordinarily overcome regarding "information that is used by a party to shelter itself from additional liability and litigation[.]"[42] In other words, the possibility or even likelihood that documents, testimony, and information revealed in one lawsuit may be shared with lawyers and parties in other lawsuits is not a good reason to conceal them from the public:

> With increasing frequency, defendants, as well as other insurers, are finding themselves embroiled in litigation over whether there is coverage for property damage as a result of environmental harm. The courts have emphatically held that a protective order cannot be issued simply because it may be detrimental to the movant in other lawsuits.[43]

The sections that follow will display some of the tensions at work in honoring the presumption of public access to the Court files of litigation over catastrophe claims and insurance coverage for natural and man-made disasters.

Footnotes

1 *E.g.*, Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1066, 1070 (3d Cir. 1984); Mine Safety Appliances Co. v. North River Ins. Co., 73 F. Supp. 3d 544, 559 (W.D. Pa. 2014).

2 *E.g.*, In re Cendant Corp. (Goldstein v. Forbes), 260 F.3d 183, 198 n.13 (3d Cir. 2001); Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 659 (3d Cir. 1991) (dicta; Third Circuit's analysis in this case was expressly confined to the common law).

3 *E.g.*, Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135-36 (9th Cir. 2003); Rushford v. New Yorker Mag., 846 F.2d 249, 252 (4th Cir. 1998).
The narrow legal issue in *Foltz* concerned the confidentiality of financial information. Distinguishing *Foltz*, a federal District Judge in Nevada granted a motion to compel production of financial information on the ground that such information is not always confidential, in Torres v. Rothstein, No. 2:19-cv-00594-APG-EJY, 2020 WL 3808899, at *7 (D. Nev. July 6, 2020).

4 See, e.g., Phillips v. General Mtrs. Corp., 307 F.3d 1206, 1212-13 (9th Cir. 2002); Intervention911 v. City of Palm Springs, No. 5:13-CV-01117-ODW(SP), 2018 WL 1441167, at *5, *10 (C.D. Cal. March 22, 2018).

5 Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd., No. 09-290, 2013 WL 1336204, at *11 (W.D. Pa. March 29, 2013). *Accord*, Mine Safety Appliances Co. v. North River Ins. Co., 73 F. Supp. 3d 544, 587 (W.D. Pa. 2014). Cf. Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1986) ("In addition, open proceedings may be imperative if the public is to learn about the crucial legal issues that help shape modern society. Informed public opinion is critical to effective self-governance.").

6 Mine Safety Appliances Co. v. North River Ins. Co., 73 F. Supp. 3d 544, 587 (W.D. Pa. 2014).

7 Fed. R. Civ. P. 26(c), https://www.law.cornell.edu/rules/frcp/rule_26.

8 *E.g., Phillips*, 307 F.3d at 1210-11; *see, e.g.,* Henry v. Ocwen Loan Servicing, LLC, No. 3:17-cv-688-JM-NLS, 2018 WL 1638255, at *3 (S.D. Cal. April 5, 2018) (Stormes, USMJ); Low v. Trump Univ., LLC, Nos. 3:10-cv-0940-GPC-WVG & 3:13-cv-02519-GPC-WVG, 2016 WL 4098195, at *4 (S.D. Cal. August 2, 2016) (requiring "particularized showing of good cause" to a "stipulated or 'blanket' protective order").

9 *See, e.g., Phillips*, 307 F.3d at 1211; *Henry*, 2018 WL 1638255, at *3-*4.

10 *See* Theriot v. Northwestern Mutual LIfe Insurance Co., 382 F. Supp. 3d 1255, 1259 (M.D. Ala. 2019).

11 Plexxikon Inc. v. Novartis Pharm's Corp., No. 17-cv-04405-HSG, 2020 WL 7027432, at *1 (N.D. Cal. November 30, 2020).

12 *Plexxikon Inc.*, 2020 WL 7027432, at *2.

13 Miotox LLC v. Allergan, Inc., No. 2:14-cv-08723-ODW(PJWx), 2016 WL 3176557, at *1 (C.D. Cal. June 2, 2016).

14 Obertman v. Electrolux Home Care Prod's, Inc., No. 2:19-cv-02487-KJM-AC, 2021 WL 2823072 (E.D. Cal. July 7,

2021).

[15] *Obertman*, 2021 WL 2823072, at *1.

[16] *Obertman*, 2021 WL 2823072, at *1.

[17] *Obertman*, 2021 WL 2823072, at *1.

[18] *Obertman*, 2021 WL 2823072, at *2.

[19] *Obertman*, 2021 WL 2823072, at *2 (emphasis by the Court).

[20] Fed. R. Civ. P. 26(c), https://www.law.cornell.edu/rules/frcp/rule_26.

[21] Fed. R. Civ. P. 5.2(e), https://www.law.cornell.edu/rules/frcp/rule_5.2.

[22] *E.g*., Bank of America Nat'l Trust & Sav's Ass'n v. Hotel Rittenhouse Assoc's, 800 F.2d 339, 344 (3d Cir. 1986); Mine Safety Appliances Co. v. North River Ins. Co., 73 F. Supp. 3d 544, 560 (W.D. Pa. 2014).

[23] In re Cendant (Goldstein v. Forbes), 260 F.3d 183, 194 (3d Cir. 2001).

[24] Mine Safety Appliances Co. v. North River Ins. Co., 73 F. Supp. 3d 544, 561 (W.D. Pa. 2014).

[25] Mine Safety Appliances Co. v. North River Ins. Co., 73 F. Supp. 3d 544, 566-67 (W.D. Pa. 2014).

[26] Mine Safety Appliances Co. v. North River Ins. Co., 73 F. Supp. 3d 544, 581 (W.D. Pa. 2014).

[27] Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984) (emphasis added). *Accord*, Mine Safety Appliances Co. v. North River Ins. Co., 73 F. Supp. 3d 544, 560 (W.D. Pa. 2014).

[28] In re Cendant (Goldstein v. Forbes), 260 F.3d 183, 194 (3d Cir. 2001). In contrast, "servicing notes" on the servicing of a mortgage loan were held protected from public view for "good cause" in a case already cited, Henry, 2018 WL 1638255, at *3. A review of the electronic docket on PACER shows that the Magistrate Judge ruling in that case relied on an unsworn memorandum submitted by the mortgage servicer. Henry v. Ocwen Loan Servicing, LLC, DE 34-1, Defendants' Memorandum, filed March 26, 2018 (S.D. Cal. No. 3:17-cv-688-JM-NLS). The defendants seeking secrecy wrote in their memorandum that the servicing notes were "critically important," but they did not file a declaration of testimony or other evidence that would tend to establish that fact. Instead, they filed a declaration from one of their attorneys to establish their contention that there was no "meet and confer" and so there was no stipulated protective order as yet in that case. Henry v. Ocwen Loan Servicing, LLC, DE 34-2, Declaration in Support of Defendants' Motion for Entry of Protective Order, filed March 26, 2018 (S.D. Cal. No. 3:17-cv-688-JM-NLS).

[29] Hyundai Mtr. Am., Inc. v. Midwest Indus. Supply Co., No. 2:17-cv-03010-JCM-GWF, 2019 WL 2411420 (D. Nev. June 6, 2019) (Foley, USMJ).

[30] *Hyundai Motor America*, 2019 WL 2411420 at *1.

[31] *Hyundai Motor America*, 2019 WL 2411420 at *1.

[32] Karrani v. JetBlue Airways Corp., No. C18-1510 RSM, 2019 WL 2724046 (W.D. Wash. June 28, 2019).

[33] *Karrani*, 2019 WL 2724046, at *1.

[34] *Karrani*, 2019 WL 2724046, at *3.

[35] *See* Shields v. Federation Int'l de Natation, 419 F. Supp. 3d 1188, 1224 (N.D. Cal. 2019; Corley, USMJ).

[36] Kadiyala, individually, and as assignee of Credit Union Mortgage Utility Banc, Inc. v. Pupke, No. 17-80732-CIV-Marra/Matthewman, 2019 WL 3752654, at *4 (S.D. Fla. August 8, 2019) (Matthewman, U.S.M.J.) (emphasis added). *Cf.* Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1138-39 (9th Cir. 2003). In the *Foltz* case, the "central concern" identified by the Ninth Circuit Court of Appeals to resolving the question of access to documents that were sealed under a protective order "is whether that order was relied upon in the decision to produce documents." State Farm relied on two protective orders to seal documents in a settled case, and to keep the documents sealed after settlement. As to one of the protective orders, State Farm's reliance was well taken, but as to the other, the Ninth Circuit quite simply rejected the idea of reliance on a "blanket protective order" to file each and every document under seal and expect to keep them under seal forever. As the Ninth Circuit put it in rejecting State Farm's efforts to keep all documents under seal in the settled case, by relying on the blanket protective order that purported to seal

every document filed in the case:

> The second protective order on which State Farm allegedly relied is a blanket one treating all information produced in connection with the discovery process as confidential. As noted above, "[r]eliance will be less with a blanket [protective] order, because it is by nature overinclusive." [Citation omitted.] Because State Farm obtained the blanket protective order without making a particularized showing of good cause with respect to any individual document, it could not reasonably rely on the order to hold these records under seal forever. [Citations omitted.] Thus, State Farm's reliance interest fails to offer a compelling reason to overcome the presumption in favor of access, and State Farm offers no other.

Foltz, 331 F.3d at 1138.

[37] *See, e.g.*, Davey's Locker Sportfishing, Inc. v. Amco Ins. Co., No. 8:20-cv-01424 JVS (JDEx), 2020 WL 6681858, at *1, ***GOOD CAUSE STATEMENT*** (C.D. Cal. Nov. 12, 2020) (Stipulated Protective Order signed by USMJ).

[38] *See, e.g.*, Mullins v. Humana Health Plan, Inc., No. 4:20-cv-00192-CDL, 2020 WL 6706364, at *1, ¶ 3 (M.D. Ga. Nov. 13, 2020) (*Definition of Confidential Material* in Stipulated Protective Order signed by U.S. District Judge).

[39] Multicare Health Sys. v. National Fire & Marine Ins. Co., No. C20-5559 TSZ, 2020 WL 6700924, at *1, ¶ 2 (W.D. Wash. Nov. 13, 2020) ("'CONFIDENTIAL' MATERIAL" paragraph in Stipulated Protective Order signed by U.S. District Judge).

[40] Economus v. City and County of San Francisco, No. 18-cv-01071-HSG (DMR), 2019 WL 3842008, at *1 (N.D. Cal. August 15, 2019) (Ryu, USMJ).

[41] *Economus*, 2019 WL 3842008, at *8.

[42] Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1137 (9th Cir. 2003). To the same effect, *e.g.*: Wauchop v. Domino's Pizza, Inc., 138 F.R.D. 539, 547 (N.D. Ind. 1991) ("The risk—or in this case, the certainty—that the party receiving the discovery will share it with others does not alone constitute good cause for a protective order."); Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 129 F.R.D. 483, 486 (D.N.J. 1990) (stating that "if the basis for defendants' motion is to prevent information from being disseminated to other potential litigants, then defendants' application [for a Rule 26(c) protective order] must fail").

[43] Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 129 F.R.D. 483, 486 (D.N.J. 1990).