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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF OTTER TAIL **SEVENTH JUDICIAL DISTRICT**

Craig Stevenson, and Marie Stevenson

Plaintiffs,

vs.

Sean Christopher Stevenson, Renee Stevenson, Lisa Steven-Allen, and Ashley Anderson,

Defendants.

Case Type: Civil Misc./Other
Court File No.: 56-CV-20-2928
Assigned To: The Hon. Kevin M. Miller

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO REDESIGNATE CERTAIN DOCUMENTS AS NONCONFIDENTIAL

INTRODUCTION

On July 21, 2021, plaintiffs Craig Stevenson (herein "Craig"), and Marie Stevenson (herein "Marie") (and collectively herein "plaintiffs") and defendants Sean Stevenson (herein "Sean"), Renee Stevenson (herein "Renee"), and Ashley Anderson (herein "Ashley") (and collectively herein "defendants") stipulated to a blanket protective order. (Doc. 63 at 5.) In so doing, the parties agreed to permit either party to designate materials within the scope of Minn. R. Civ. P. 26 as confidential, as opposed to the Court making a good-cause determination for each piece of discovery a party wished to designate as confidential. (*Id.* at 2.) The Court approved the stipulated protective order on July 22, 2021. (Doc. 73 at 6.)

Here, the blanket protective order served a practical purpose to "to permit an orderly discovery process, while also providing a mechanism for resolving disputes if anyone later complains that a document has been improperly designated under the order." (Doc. 36 at 10). As plaintiffs' counsel explained in the motion seeking the protective order, the blanket protective order here was not intended to make unilateral confidentiality designations permanent. (*Id.*) To the

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contrary, the blanket protective order expressly allows a party to challenge an any designation and places the burden on the party asserting confidentiality to prove that the challenged material falls within the scope of Minn. R. Civ. P. 26.03. (Doc. 73 at 4.)

Defendants now move to lift the confidentiality designations from certain court records and discovery materials that plaintiffs have designated as confidential. Although the parties have operated under a blanket protective order, that order does not relieve plaintiffs of their burden to show good cause for maintaining confidentiality over specific records. The identified court records and discovery documents identified in the accompanying affidavit do not contain trade secrets, competitively sensitive information, private personal information warranting protection, or any other content warranting protection under Minn. R. Civ. P. 26.03.

Accordingly, pursuant to the governing blanket protective order, Minn. R. Civ. P. 26.03, and the caselaw addressing modification of blanket protective orders and public access to court records, defendants respectfully request that the Court lift the confidentiality designations from the materials identified below and permit those materials to be treated as non-confidential going forward.

FACTUAL BACKGROUND

I. The Blanket Protective Order

On April 4, 2021, plaintiffs moved the Court for a preliminary blanket protective order. (Doc. 34.) The Court adopted the parties' stipulated blanket protective order on July 22, 2021. (Doc. 73 at 1.[1]) The blanket protective order included the following: "[a] [p]arty may designate a document Confidential if necessary to protect that party from undue annoyance, embarrassment,

[1] On January 24, 2022, the Court accepted the parties' stipulation and amended protective order. (Doc. 174.) The language quoted in this memorandum is taken from (Doc. 73), which is identical to the language in (Doc. 174.), as such the memorandum will include only citation to (Doc. 73.) when referencing the blanket protective order.

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oppression, burden or expense, as determined consistent with the standards of Minn. R. Civ. P. 26.03, including sensitive business or personal information." (*Id.* at 2.) (internal quotation marks omitted). Included in the blanket protective order was the proper procedure for changing the designation of confidential information:

> Any party may request a change in the designation of any information designated Confidential . . . If the requested change in designation is not agreed to, the party seeking the change may move the Court for appropriate relief, providing notice to any third party whose designation of produced documents as Confidential in the action may be affected. The party asserting that the material is Confidential shall have the burden of proving that the information in question is within the scope of protection afforded by Minn. R. Civ. P. 26.03.
> . . . .
>
> Any party may apply to the Court for a modification of the Protective Order and nothing in this Protective Order shall be construed to prevent a party from seeking such further provisions enhancing or limiting confidentiality as may be appropriate.

(*Id.* at 4.[2]) (internal quotation marks omitted).

The blanket protective order set forth the following timing requirements for a party's request to change the designation of confidential information:

> Within 60 days of the termination of this action, including any appeals, each party shall take reasonable measures to delete or destroy all documents designated by opposing party as Confidential, including copies of such documents, and extracts and/or data taken from such documents. Each party, if requested by the opposing party, shall provide a certification of such reasonable measures within the 60-day period. However, Attorneys shall be entitled to retain a set of all documents filed with the Court, correspondence

[2] Absent the Court's order or a private agreement, the parties would be free to disclose their discovered materials. *Cf. Harris v. Amoco Prod. Co.*, 768 F.2d 669, 683-84 (5th Cir. 1985) ("A party may generally do what it wants with material obtained through the discovery process, as long as it wants to do something legal." (citation omitted)); *see also State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 679 (Minn. App. 2000) (noting that "[b]ecause there are only minor differences between Fed. R. Civ. P. 26(c) and Minn. R. Civ. P. 26.03, [Minnesota courts may] look to federal cases interpreting the federal rules"), *rev. denied* (Minn. Apr. 25, 2000).

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> generated in connection with the action, and any attorney work product.
> . . . .
>
> The obligations imposed by the Protective Order shall survive the termination of this action.

(*Id.*) (internal quotation marks omitted). Further, "[n]o action taken in accordance with the Protective Order shall be construed as a waiver of any claim or defense in the action or of any position as to discoverability or admissibility of evidence." (*Id.*)

II. Documents and Court Records Designated as Confidential

In relevant part, between July 2022 and September 2023, plaintiffs filed with the Court a total of 40 documents with the designation of confidential. (Aff. Defs.' Att'y at 1-9.) Additionally, and in relevant part, plaintiffs designated over 1,600 pages of discovery and 91 videos as confidential. (*Id.* at 10-13.)

Below, defendants have identified three categories of documents that were designated as confidential by plaintiffs. Those categories, as will be addressed in greater detail below, include: (1) court records and documents filed in support of dispositive motions; (2) court records and documents filed in support of nondispositive motions; and (3) discovery. Defendants, through this motion, move the Court to lift the confidentiality designations from the materials identified below and permit those records and documents to be treated as non-confidential going forward.

1. Confidential Records and Documents filed in support of dispositive motions

On February 15, 2023, defendants filed the second affidavit of attorney Ross Tentinger with defendants' memorandum of law in support of the motion for summary judgment. (Doc. 391.) Included among the confidential exhibits filed in support of the summary-judgment motion were the deposition transcripts for Lisa Stevenson-Allen, Craig, Marie, Makayla Stevenson, and Miranda Stevenson. (Doc. 386-88.)

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On March 1, 2023, plaintiffs filed their memorandum of law in opposition to defendants' motion for summary judgment. (Doc. 394.) Plaintiffs' memorandum was supported by affidavits from Craig, Marie, and plaintiffs' attorney Matthew Schaap. (Doc. 395-98.) On March 9, defendants' attorney filed an affidavit with defendants' reply memorandum in support of the motion for summary judgment. (Doc. 405.)

2. Confidential Records and Documents filed in support on nondispositive motions

On July 8, 2022, plaintiffs filed their memorandum of law in support of the motion for a protective order and to compel. (Doc. 237.) Plaintiffs' memorandum was supported by an affidavit of plaintiffs' attorney Matthew Schaap. (Doc. 238.) On July 18, defendants filed four documents in support of the memorandum of law in opposition to plaintiffs' motion for a protective order and to compel: (1) affidavit of defendants' attorney Ross Tentinger, (2) affidavit of Lisa Stevenon-Allen, (3) affidavit of Ross Rolshoven, and (4) defendants' proposed order denying plaintiffs' motion for a protective order. (Doc. 242-45.) On July 25, plaintiffs filed their reply memorandum of law in support of the motion for a protective order and to compel. (Doc. 246.) Plaintiffs' reply memorandum was supported by three affidavits: (1) plaintiffs' attorney Matthew Schaap, (2) Marie, and (3) Craig. (Doc. 247, 251-52.) On July 28, defendants' attorney Ross Tentinger filed a supplemental affidavit in support of defendants' memorandum of law in opposition to plaintiffs' motion for a protective order and to compel. (Doc. 253.)

On October 17, 2022, defendants filed their memorandum of law in support of the motion to compel and to strike the pleadings. (Doc. 320.) Defendants' memorandum was supported by affidavit from defendants' attorney Ross Tentinger. (Doc. 319.) On October 24, plaintiffs filed affidavits with their memorandum of law in opposition to defendants' motion to from Craig and Marie. (Doc. 344-345.)

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On March 21, 2023, plaintiffs' attorney Matthew Schaap wrote the Court a letter identifying certain deposition facts designated as confidential. (Doc. 411.) On March 22, plaintiffs filed their memorandum of law in opposition to defendants' motion to strike statements. (Doc. 414.) In support of their memorandum, plaintiffs filed six affidavits from: (1) Miranda Stevenson, (2) Marie, (3) Marie's amended affidavit, (4) Craig, (5) Craig's first amended affidavit, and (6) Craig's second amended affidavit. (Doc. 415-20.)

On June 2, 2023, plaintiffs' attorney Matthew Schaap wrote a letter to the Court. (Doc. 424.) Defendants' attorney Ross Tentinger wrote a letter to the Court on June 7. (Doc. 426.) Plaintiffs' attorney, in response to the June 7 letter, wrote the Court another letter. (Doc. 428.)

On September 1, 2023, defendants' attorney Ross Tentinger filed two affidavits with defendants' memorandum of law in support of the motion for sanctions. (Doc. 445, 448.) On September 11, plaintiffs filed their memorandum of law in opposition to defendants' motion for sanctions. (Doc. 454.) In support of plaintiffs' memorandum, plaintiffs filed affidavits from Marie and Craig. (Doc. 455-56.)

3. Discovery Documents not filed with the Court.

As identified in Table 3 of the affidavit of defendants' attorney Ross Tentinger, defendants seek to lift the confidential designation from certain discovery provided by plaintiffs. This discovery includes emails, letters, notes created by plaintiffs and third parties, journal entries, charts and graphs created by plaintiffs, videos, photographs, transcripts of videos created by plaintiffs, affidavits, medical records, and deposition transcripts. (Aff. Defs.' Att'y at Table 3.00001-.01607.)

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III. Settlement Efforts and Stipulation to Remove the Confidential Designation from Certain Records Filed with the Court

On February 5, 2026, the Minnesota Court of Appeals issued its order denying defendants' motion for appellate attorney fees. (Aff. Defs.' Att'y at Table 3.01727-29.) And on February 26, the Minnesota Court of Appeals served the parties with the statement for judgment of costs and disbursements in favor of defendants. (Doc. 564 at 2.)

On March 6, 2026, defendants' attorney Ross Tentinger wrote a letter to plaintiffs requesting that certain documents and discovery designated a confidential be redesignated. (*Id.* at Table 3.01608-11.) The parties' attorneys exchanged correspondence regarding the March 6 letter. (*Id.* at Table 3.01612-13, .01614-15.)

On April 1, 2026, defendants moved the Court to amend the blanket protective order (Doc. 564.) On April 10, plaintiffs' attorney Matthew Schaap wrote in reply to defendants. (Defs.' Att'y Aff. at Table 3.01616-43.) The letter stated, in part, that: "Plaintiffs reserve all rights to seek appropriate relief from the Court with respect to any document that was improperly designated, improperly filed, improperly disclosed, or used outside the bounds of the Protective Order, including relief necessary to protect Plaintiffs' confidential information and to address any resulting prejudice." (*Id.* at Table 3.01630.) In the April 10 letter, plaintiffs stipulated to redesignating the following confidential documents:

- March 9, 2023 affidavit of defendants' attorney Ross Tentinger with defendants' reply memorandum of law in support of the motion for summary judgment, (Doc. 405.). (*See* Aff. of Defs.' Att'y at Table 3.01629.)
- July 18, 2022 affidavit of Ross Rolshoven with defendants' memorandum of law in opposition to plaintiffs' motion for a protective order and to compel, (Doc. 244.). (*See* Aff. of Defs.' Att'y at Table 3.01627.)
- July 18, 2022 proposed order denying plaintiffs' motion for a protective order and to compel, (Doc. 245.). (*See* Aff. of Defs.' Att'y at Table 3.01627.)

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- June 2, 2023 letter from plaintiffs' attorney Matthew Schaap to the Court, (Doc. 424.). (*See* Aff. of Defs.' Att'y at Table 3.01629.)

- June 7, 2023 letter from defendants' attorney Ross Tentinger to the Court, (Doc. 426.) (*See* Aff. of Defs.' Att'y at Table 3.01629.)

- September 1, 2023 affidavit of defendants' attorney Ross Tentinger with defendants' memorandum of law in support of the motion for sanctions, (Doc. 445.). (*See* Aff. of Defs.' Att'y at Table 3.01629.)

Defendants' memorandum of law in support of the motion to amend the blanket protective order follows:

ARGUMENTS

I. Plaintiffs Cannot Make the Requisite Good Cause Showing to Maintain the Confidentially Designation to Documents and Discovery Challenged by Defendants.

Discovery decisions are within the district court's broad discretion. *Humphrey*, 606 N.W.2d at 679. "Absent a clear abuse of discretion, a [district] court's decision regarding discovery will not be disturbed." *Star Tribune v. Minn. Twins P'hip*, 659 N.W.2d 287, 293 (Minn. App. 2003) (quotation omitted). And the party seeking continued protection from a blanket protective order bears the burden of showing good cause for that protection. *Id.* at 294. That burden is especially important when, as here, the blanket protective order permitted the parties to make confidential designations in the first instance, without a document-by-document good-cause determination by the Court. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1138 (9th Cir. 2003).[3]

Here, defendants move the Court to amend the blanket protective order as to certain documents and discovery designated as confidential by plaintiffs. Defendants have categorized the documents and discovery requested to be redesignated into three categories: (1) dispositive motions and accompanying filings, (2) nondispositive motions and accompanying filings, and (3) discovery not filed with the Court. (*See* Aff. of Defs.' Att'y at 1-13.)

[3] *See Humphrey*, 606 N.W.2d at 679.

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When discovery is filed with the district court in support of a dispositive motion, documents become part of the judicial record and are subject to the presumption of public access. Such materials are not ordinarily among those records that have "traditionally been kept secret for important policy reasons," *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989). Accordingly, "the public policy reasons behind a presumption of access to judicial documents (judicial accountability, education about the judicial process etc.)" apply. *Phillips v. Gen. Motors*, 307 F.3d 1206, 1213 (9th Cir. 2002)

Minnesota law reflects the same strong presumption of public access to court records. Rule 2 of the Minnesota Rules of Public Access to Records of the Judicial Branch provides that "[r]ecords of all courts and court administrators in the state of Minnesota are presumed to be open to any member of the public for inspection or copying at all times during the regular office hours of the custodian of the records." MN ST ACCESS TO REC Rule 2. While certain exceptions exist under Rules 4, 5, 6, and 8, the general rule is openness, not confidentiality. Thus, once documents are filed with the Court and become part of the judicial record, the party seeking to maintain restricted access bears the burden of identifying a sufficient basis to overcome that presumption.

This is consistent with Minnesota common law. Under the common-law balancing test, the party seeking to deny public access to court records must assert a sufficiently strong interest to overcome the presumption of access. *Star Tribune v. Minn. Twins P'ship*, 659 N.W.2d 287, 202 (Minn. App. 2003). A blanket confidentiality designation alone is not enough. Rather, the party seeking continued restriction must show that specific documents warrant protection under Rule 26.03. Minn. R. Civ. P. 26.03(a).

The same distinction applies to discovery materials. Where a district court has determined that a protective order is supported by good cause, confidential discovery attached to a nondispositive motion may rebut "the usual presumption of the public's right of access." *Phillips*,

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307 F.3d at 1213. But that principle does not automatically extend to every document designated confidential under a blanket protective order, where there has been no good cause finding, especially where the documents are filed in connection with dispositive motions or otherwise become part of the judicial record. *Id.* Moreover, "[a]bsent a protective order . . . nothing precludes a party from voluntarily disclosing discovery documents, sometimes known as discovery sharing." *Humphrey*, 606 N.W.2d at 686. Accordingly, Plaintiffs must do more than rely on their prior confidentiality designations; they must demonstrate a specific and sufficient good cause basis for continued confidential treatment.

Defendants, through this motion, now challenged plaintiffs' broad confidentiality designations. Plaintiffs therefore must do more than rely on their prior designations and generalized assertions of privacy, embarrassment, or annoyance. Plaintiffs must show good cause for continued protection as to the challenged documents and court records. They have failed to do so. (*See* Aff. of Defs.' Att'y at Ex. D).

A. Rule 26.03 permits protection only for good cause; the blanket order preserved the right to challenge designations; once challenged, Plaintiffs bear the burden.

"Absent a clear abuse of discretion, a [district] court's decision regarding discovery will not be disturbed." *Minn. Twins*, 659 N.W.2d at 293 (quotation omitted). Under Minn. R. Civ. P. 26.03, the district court may, "[u]pon motion by a party . . . for good cause shown . . . make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." S*ee also* Fed. R. Civ. P. 26(c)(1). This includes the authority to "fashion protective orders and to order discovery only on specified terms and conditions." *In re Paul W. Abbott Co.*, 767 N.W.2d 14, 17-18 (Minn. 2009) (quotation omitted); *Erickson v. MacArthur*, 414 N.W.2d 406, 409 (Minn. 1987) (citation omitted); *see also In re Abbott Co.*, 767 N.W.2d at 18 (citing this aspect of *Erickson*); *Miscellaneous Docket Matter No.*

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1 v. Miscellaneous Docket Matter No. 2, 197 F.3d 922, 925 (8th Cir. 1999) (applying similar analysis to *Erickson* to Fed. R. Civ. P. 26(c)).[4] But that discretion is tied to Rule 26.03's good-cause requirement. It allows the to district court to "safeguard the evidentiary privileges, while not allowing them to become vehicles for the suppression of evidence which is not privileged." *Humphrey*, 606 N.W.2d at 686 (quotation omitted).

The blanket protective order in this case adopts standard found in Rule 26.03. It permits a party to designate materials as confidential if necessary to "protect a party from undue annoyance, embarrassment, oppression, burden or expense, as determined consistent with the standard of Minn. R. Civ. P. 26.03, including sensitive business or personal information." (Doc. 73 at 4.) But it also expressly permitted any party to request a change in designation, and if no agreement was reached, to move the Court for appropriate relief. (*Id.*) Most importantly, the blanket protective order provides that the "party asserting that the material is Confidential shall have the burden of proving that the information in question is within the scope of protection afforded by Minn. R. Civ. P. 26.03." (*Id.*)

The provision placing the burden on the party seeking protection is consistent with Minnesota law. In general, the burden of demonstrating a document is properly designated as confidential rests with the party seeking the designation. *Minn. Twins*, 659 N.W.2d at 293. After documents are produced and an opposing party challenges the designation, "the burden of demonstrating good cause for each challenged document lies with the party seeking protection." *Id.* at 294.; *see, e.g.*, *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1102 (9th Cir. 1999) (holding that to gain protective order party must make "particularized showing of good cause with respect to any individual document"); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d

[4] *Id.*

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470, 476 (9th Cir. 1992) (stating that "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test" (quotation omitted)); *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653 (D. Md. 1987) (requiring party requesting protective order to provide "specific demonstrations of fact, supported where possible by affidavits and concrete examples, rather than broad, conclusory allegations of potential harm").[5]

Accordingly, defendants are not required to prove that each court document should be public or non-confidential. Plaintiffs, as the designating parties, must show good cause for maintaining confidentiality over each challenged record or discovery material identified in this motion. *See Foltz*, 331 F.3d at 1138.

B. Good cause requires a particularized showing of harm, not generalized assertions or prior confidentiality designations.

Plaintiffs' burden in showing an ongoing need for confidentiality is not met by mere existence of the protective order itself. Nor is it met by plaintiffs' prior unilateral confidential designations. Once defendants rightfully challenged these designations, plaintiffs were required to show good cause for continued confidentiality pursuant to Minn. R. Civ. P. 26.03, and the express terms of the blanket protective order.[6] (*See generally* Doc. 73.)

In general, "good cause means a legally sufficient reason." *TC/Am. Monorail, Inc. v. Custom Conveyor Corp.*, 840 N.W.2d 414, 420 (Minn. 2013) (quotation omitted); *see also In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987) (noting that good cause "is difficult to define in absolute terms, it generally signifies a sound basis or legitimate need to take judicial action").[7] To establish a good-cause showing, a party must present "a particular and

[5] *See id*.
[6] *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994); *see also Gen Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973) (stating that party requesting protective order must articulate "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements").
[7] *See Humphrey*, 606 N.W.2d at 679.

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specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 (1981).

This requirement is especially important where, as here, the Court is asked to maintain confidentiality over documents and court records after the blanket protective order has already served its initial purpose of facilitating discovery. In Minnesota, a blanket protective order may allow the parties to proceed efficiently during discovery, but it does not eliminate the need for a current showing of good cause once a designation is challenged. *See Humphrey,* 606 N.W.2d at 688.

In other words, if plaintiffs cannot identify a particularized harm from disclosure, continued confidentiality is not warranted. In the event that plaintiffs can identify such a harm, the Court then considers whether continued protection is justified under the relevant modification factors. *See Id.* at 687-88 (establishing nonexhaustive list of factors for district courts to consider).[8]

II. When Determining Whether Continued Confidentially is Warranted, the Court Balances the Relevant Circumstances Identified in *Humphrey*.

Minnesota courts have determined that "whether to modify a protective order is also within the broad discretion of the district court and the decision should be made only after balancing and considering all of the relevant circumstances." *Humphrey*, 606 N.W.2d at 687-88. "Among the factors [district] courts have balanced are the nature of the protective order, the parties' reliance on it, the ability to gain access to the information in other ways, the need to avoid repetitive discovery, the nature of the material for which protection is sought, the need for continued secrecy, and the public interest involved." *Id.* at 688.

[8] *Adams v. Metallica, Inc.*, 758 N.E.2d 286, 294 (Ohio Ct. App. 2001) (favoring balancing test from *Humphrey* over tests requiring "a showing of 'extraordinary circumstances' or 'compelling need' in order to modify a protective order").

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As discussed below, the factors identified in *Humphrey* favor redesignation. 606 N.W.2d at 687-88. The protective order was a blanket order entered to facilitate discovery, plaintiffs' reliance on that overinclusive order is limited, and plaintiffs have not made a particularized showing that the challenged documents or court records require continued confidentiality. The public interest also favors access to judicial records, particularly where the challenged records were filed with the Court in connection with dispositive motions.

A. The nature of the blanket protective order favors the redesignation of certain confidential documents and discovery.

The first factor is the nature of the blanket protective order. This factor favors redesignation because the blanket protective order was not narrowly tailored to any specific document or category of information. (*See generally* Doc. 73.) Instead, it was entered as a general protective order, commonly referred to as an "umbrella" or "blanket" protective order, which allowed the parties to designate documents and court records as confidential in the first instance, subject to later challenge. *Humphrey*, 606 N.W.2d at 686 ("umbrella"); *Beckman*, 966 F.2d at 476 ("blanket"); *see, e.g.*, *Marolf v. AyA Aguirre & Aranzabal S.A.*, No. 4:09-cv-3221, 2011 WL 855676, at *4 (D. Neb. Mar. 8, 2011) (differentiating scope of "blanket", "umbrella", and "particular" protective orders); *Moore v. Battelle Energy All., LLC*, No. 4:21-CV-00230, 2023 WL 1767391, at *4 (D. Minn. Feb. 3, 2023) (same).[9]

A blanket protective order:

> place[s] upon the parties themselves . . . the initial burden of determining what information is entitled to protection. Normally, a blanket protective order requires that counsel for a producing party review the information disclosed and designate that information it believes, in good faith, is confidential or otherwise entitled to protection. The designated information is thereafter entitled to the protections afforded by the blanket protective order unless the designation is objected to by an opposing party.

[9] *See Humphrey*, 606 N.W.2d at 679.

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Marolf, 2011 WL 855676, at *4; *cf. Moore*, 2023 WL 1767391, *4 ("Blanket protective orders cover information a party believes, in good faith, is confidential or otherwise subject to protection.").

Blanket protection orders are common in civil litigation because they allow parties to produce documents efficiently without requiring immediate court review of every confidentiality designation, but by its nature, allows the designation to be challenged later. *See Humphrey,* 606 N.W.2d at 686. But that efficiency comes from allowing parties to make initial designations without a contemporaneous good-cause determination by the district court. As a result, a party cannot rely on a document's designation under a blanket protective order, standing alone, to satisfy its burden to show good cause once that designation is challenged: "[a] party who has never made a good cause showing under Rule 26(c) justifying initial protection of disputed documents may not rely solely on the protective order to justify refusal when there is a reasonable request for disclosure." *Contratto v. Ethicon, Inc.*, 227 F.R.D. 304, 308 (N.D. Cal. 2005) (quotation omitted).[10]

When the district court orders a blanket protective order, as is the case here, a party may only designate information confidential in good faith. "The duty of good faith in the protective order is a duty to review the documents in good faith before designating them as [confidential]." *Cell Tr. Corp. v. ionLake, LLC*, No. 19-CV-2855, 2022 WL 1553558, at *2 (D. Minn. May 17, 2022) (quoting *Paradigm Alliance, Inc. v. Celeritas Techs. LLC*, 248 F.R.D. 598, 605 (D. Kan. 2008)); *cf. Edwards Vacuum, LLC v. Hoffman Instrumentation Supply, Inc.*, No. 3:20-CV-1681, 2021 WL 186932, at *2 (D. Or. Jan. 19, 2021) ("[A] party's confidentiality designations must be reasonably and narrowly tailored to protect the confidential information the party seeks to shield

[10] *See id.*

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from further disclosure.").[11] Minnesota courts have considered "the complexity of the case, the hope that counsel would cooperate and expeditiously complete discovery, the huge number of documents the [district] court would have had to review had it not allowed the parties to designate documents as confidential, and the emotionalism of the case" when determining whether to uphold a general protective order throughout the pendency of the proceedings. *Humphrey*, 606 N.W.2d at 688.

Applied to this case, those considerations may have justified the entry of a blanket protection order at the outset of discovery, but they do not justify continued confidentiality following specific challenges by defendants.

B. Plaintiffs' reliance on the blanket protective order for ongoing confidentiality is limited.

Consistent with the relevant caselaw, any claimed reliance by plaintiffs on the overinclusive blanket protective order is an insufficient reason to deny the motion to modify the protective order. *See Olympic Refining Co. v. Carter*, 332 F.2d 260, 265 (9th Cir. 1964) ("All that may be done is to afford such protection from disclosure as is practicable, consistent with the right of access thereto for purposes of litigation.").[12] "Reliance will be less with a blanket [protective] order, because it is by nature overinclusive." *Beckman*, 966 F.2d at 476.

In *Foltz*, the Ninth Circuit determined that "[b]ecause [respondent] 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." 331 F.3d at 1138. In so doing, the *Foltz* court held that "[respondent]'s reliance interest fail[ed] to offer a compelling reason to overcome the presumption in favor of access." *Id.*

[11] *See id.*
[12] *See Johnson*, 463 N.W.2d at 899 n.7.

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The same reasoning applies here. Plaintiffs could reasonably rely on the blanket protective order to govern the exchange of discovery during litigation but they could not reasonably rely on the blanket order to permanently shield every document that they designated as confidential. The blanket protective order explicitly allows any designation to be challenged and it further put the burden of providing why continued protection was warranted on the designating party. (Doc. 73 at 4.)

Pursuant to the blanket protective order:

> Any party may request a change in the designation of any information designated Confidential . . . . If the requested change in designation is not agreed to, the party seeking the change may move the Court for appropriate relief, providing notice to any third party whose designation of produced documents as Confidential in the action may be affected. The party asserting that the material is Confidential shall have the burden of proving that the information in question is within the scope of protection afforded by Minn. R. Civ. P. 26.03.
> . . . .
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> Any party may apply to the Court for a modification of the Protective Order and nothing in this Protective Order shall be construed to prevent a party from seeking such further provisions enhancing or limiting confidentiality as may be appropriate.

(*Id.*) (internal quotation marks omitted).

Plaintiffs' reliance is further limited because many of the challenged materials are court records, including documents filed in connection with summary judgment. Whatever reliance may exist during discovery is reduced once a party seeks to maintain confidentiality over materials submitted to the Court. *See Times Mirror*, 873 F.2d at 1219. At that point, there is a presumption of access to those records. *See* MN ST ACCESS TO REC Rule 2*; Phillips*, 307 F.3d at 1213.

C. Redesignation will promote judicial economy and avoid future collateral disputes between the parties.

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The likelihood that a similarly situated non-party would bring or defend a separate action comparable to this litigation may be low, but the more immediate concern is not hypothetical third-party litigation. Rather, it is the substantial likelihood of future disputes between these parties over the use, disclosure, or perceived disclosure of materials that plaintiffs designated confidential during this case. Given the sheer volume of materials designated confidential, and given plaintiffs' demonstrated willingness to litigate aggressively throughout these proceedings, continued over-designation is likely to generate additional motion practice and disputes unless the designations are addressed now. Judicial economy therefore weights in favor of resolving the challenged designations now. *See Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 628-29 (Minn. 2012) (addressing in interest of judicial economy issues not reached by court of appeals); *Miller v. Shugart*, 316 N.W.2d 729, 733 n.3 (Minn. 1982) (noting that "[i]t is . . . important to consider judicial economy, the need to save court time and litigation expense"); *Finch v. Wemlinger*, 310 N.W.2d 66, 69 (Minn. 1981) (addressing issue specifically "[f]or the guidance of the parties at trial and in the interest of judicial economy"). *Foltz*, 331 F.3d at 1131 ("Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery.") (citing *Beckman*, 966 F.2d at 475)); *cf. United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990) (adopting the standard "that where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification" (quotation omitted)).[13]

D. The need for continued protection is minimal and favors the redesignation of specific confidential documents.

[13] *See Humphrey*, 606 N.W.2d at 679.

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"The next consideration is whether parties seeking a continued protective order have shown a particular need for protection or established that materials are protected by privilege or are irrelevant." *Humphrey*, 606 N.W.2d at 690. In general, documents not considered privileged require an additional showing or justification for continuing a protective order beyond the trial. *Id.* at 691. "[C]ontinued sealing must be based on current evidence to show how public dissemination of the pertinent material now would cause the . . . harm [they] claim." *In re Cendant Corp.*, 260 F.3d 183, 196 (3d Cir. 2001) (emphasis omitted); *see Contratto*, 227 F.R.D. at 309-12 (rejecting defendants' confidentiality designations for materials, including communication with FDA, because defendants failed to show specific harm that will result from disclosure of each document).

The same reasoning in the above factors applies equally here. Plaintiffs cannot satisfy their burden by relying on the fact that the materials were previously designated confidential under a blanket protective order. The purpose of a blanket protective order is to facilitate discovery without requiring the district court to adjudicate confidentiality over every document at the time of production. But once specific designations are challenged, the designating party must do more than point to the prior designation. Plaintiffs must identify a present, document-specific need for continued protection and show that disclosure of the challenged materials would cause a clearly defined and serious injury. *See Foltz*, 331 F.3d at 1138

E. Public interest favors the redesignation of specific confidential documents and discovery.

The law recognizes a strong presumption that that judicial records will be public, because individuals have a common law right "to inspect and copy public records and documents." *Nixon v. Warner Comms.*, 435 U.S. 589, 597 (1978); *Schumacher*, 392 N.W.2d at 202 (citing this aspect of *Nixon*); *see Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1376 (8th Cir.

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1990) (recognizing common-law right of access to judicial records).[14] This presumption serves the public interest in monitoring the judiciary and promotes confidence in judicial administration. Specifically, this right to public records has been described as presumptively attaching absent "compelling reasons [to] justify non-disclosure." *In re Neal*, 461 F.3d 1048, 1053 (8th Cir. 2006).[15]

CONCLUSION

In sum, the rules of procedure, caselaw, and plain language of the general protective order allow defendants the opportunity to challenge plaintiffs' confidentiality designations and seek redesignation of materials that do not warrant continued protection. In civil matters, documents filed in district court are presumptively accessible to the public under the common law. Absent a showing of actual injury, the challenged documents should be redesignated as public. Given the nature of the blanket protective order, Plaintiffs' limited reliance on the challenged designations, the interests of judicial economy, the absence of any cognizable need for continued post-litigation confidentiality, and the public's interest in access to judicial records, Defendants respectfully request that the Court lift the confidentiality designations from the materials identified below and permit those materials to be treated as non-confidential going forward.

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[14] *See id.*
[15] *See id.*

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