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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GEORGE MICHAEL MACIAS, JR., Plaintiff, v. STEVE CLEAVER, CESAR GONZALEZ, ERIC TAFAINE, ANGEL VELASQUEZ, THE CITY OF CLOVIS, Defendants.	Case No.: 1:13-CV-01819-BAM **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO UNSEAL JUDICIAL FILINGS AND MODIFY PROTECTIVE ORDER** **Date: May 20, 2016** **Time: 9:00 AM** **Location: Courtroom 8** **U.S. Mag. Judge Barbara A. McAuliffe**

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I. INTRODUCTION

Plaintiff, George Michael Macias, Jr. ("Mr. Macias") filed the instant action because in 2012, while handcuffed, he was savagely beaten and tasered by four City of Clovis police officers for no justifiable reason. Mr. Macias was then subjected to criminal prosecution and potential ***incarceration for up to one year*** based upon a false police report concocted by [redacted] and former Officer Steve Cleaver ("Cleaver"). Cleaver was the primary officer that instigated, escalated and orchestrated the wrongful beating of Mr. Macias and then later lied by claiming that Mr. Macias was resisting arrest. In addition, it was Cleaver who formulated the fabricated accounting of events which the other defendant officers were later required to try to validate and verify. It was also Cleaver who recommended criminal prosecution of Mr. Macias to the district attorney in an effort to cover up and substantiate his wrong-doing.

Mr. Macias successfully defended the false criminal allegations asserted against him and advanced by Cleaver. After considering the false testimony of the defendant officers, a jury found Mr. Macias not guilty of the charge of resisting arrest. However, defeating this criminal prosecution came at great expense to Mr. Macias and his family, both emotionally and financially.

However, the truth is a stubborn thing. [redacted]

[redacted] That is the truth about Officer Cleaver.

The Protective Order that was entered in this action unjustly prohibits the dissemination of the truth about Officer Cleaver. Indeed, the Protective Order was entered on November 20, 2015 and without the Court or Plaintiff being afforded the opportunity to review Internal Affairs Investigations #13-06 and #14-02 or learn the contents thereof. There is no rational basis to protect [redacted] by keeping the general details of these Investigations and corresponding results hidden. [redacted] should not be veiled in a shroud of secrecy and cover-up. Nor should the judicial filings that discuss the same be protected and withheld from public scrutiny.

Defendant has the burden to prove why these Investigations and related judicial filings should be protected now that both Plaintiff and the Court are privy to knowing what they involve. The presumption is that these investigations, and the judicial filings disclosing the same, are not protectable. Nevertheless, Plaintiff will explain in this Motion why this is so.

Great care and caution should be given by this Court in deciding this Motion because the ramifications are astounding. Specifically, this Court has a duty to see that this information is not concealed from the public so that other individuals who have been wrongfully arrested, convicted and incarcerated [redacted] may be vindicated. Indeed, the decisions of this Court, like all federal courts, have potentially greater reach than the instant litigation upon which they touch.

As set forth in Mr. Macias' Complaint, Cleaver lied about the events that gave rise to this action and then perpetuated those lies in an effort to ***wrongfully incarcerate*** Mr. Macias. [redacted] It goes to reason, that Cleaver has successfully done to others what he attempted to do to Mr. Macias. That is—***wrongfully arrest, convict and incarcerate individuals of crimes they did not commit.***

Although not nearly as important as the aforementioned reason, the Court should modify the Protective Order for the sole reason that it will assist Mr. Macias in prosecuting this action.

Specifically, it will allow Mr. Macias to seek out witnesses who have information regarding [redacted] As discussed in detail below, the Protective Order should be narrowly modified to allow the information regarding the Internal Affairs Investigations and the corresponding results to be available to other victims, potential witnesses and the general public [redacted] The Protective Order should also be modified to restore the public record of the judicial filings in this action, that discuss these Internal Affairs investigations, and that were filed under seal.

II. RELEVANT PROCEDURAL HISTORY

On November 11, 2013, Plaintiff filed his original Complaint. (Dckt. at # 1). On September 15, 2014, after the filing of a Motion to Dismiss and a First Amended Complaint, Defendants filed their Answer to Plaintiff's First Amended Complaint. (Dckt. at # 32).

On February 3, 2015, Plaintiff served Requests for Production of Documents on Defendants Cleaver and City of Clovis. (*See* Piccuta Declaration in Support of Motion to Compel, Dckt. 49-1 at ¶ 3). On May 12, 2015, Defendants tardily served their privilege log. (*Id.* at ¶ 14).

On October 16, 2015, after several informal discovery conferences with the Court, Defendants' filed a Motion for Protective order seeking protection of three categories of documents[1]. (Dckt. at # 60). On November 18, 2015, the Court issued an Order ordering Defendants to produce the documents subject to a protective order. (Dckt. at # 67). The Court did not conduct an in-camera inspection of the documents. (See generally Court Docket). On November 20, 2015, the Protective Order was entered and ordered production of numerous documents that were in dispute including Cleaver's personnel files and the multiple internal affairs investigations it contained. (Dckt. at # 70).

Finally, in December 2015, Plaintiff received the documents he was entitled to and that were first requested in February 2015. (Dckt. # 84-1, Piccuta Decl. in Support of Motion to

[1] The three categories of documents include: 1) personnel records and internal or external investigations for each of the named defendant officers; 2) policies and procedures adopted by the Police Department at the time of Plaintiff's arrest on September 30, 2012; and 3) training materials in use at the time of Plaintiff's arrest on September 30, 2012.

Amend Based Upon Newly Discovered Evidence at ¶ 4). After stonewalling for almost ten months, Defendants produced ***nearly <u>two thousand</u> pages of unseen documents*** and several video recordings that they had previously withheld. (*Id.*). Included in these previously unseen documents were three Internal Affairs investigations [redacted]. (*Id.*). As discussed above, the last Internal Affairs Investigation unequivocally concluded that [redacted] (*Id.* at ¶ 5). As a result, [redacted]. (*Id.* at ¶ 7).

On February 5, 2016, based upon the newly discovered evidence contained in the Internal Affairs Investigations [redacted], Plaintiff filed a Motion for Leave to File A Second Amended Complaint Based Upon Newly Discovered Evidence under seal. (Dckt. at # 84). Over the Defendants' opposition, the Court found good cause existed to grant Plaintiff's Motion to File a Second Amended Complaint Based Upon Newly Discovered Evidence. (See Orders at Dckt. ## 96 and 97).The Court entered an Order that an unredacted version of the Second Amended Complaint be filed under seal and that another copy of the Second Amended Complaint be filed publicly on PACER with paragraphs 43-50 redacted. (Dckt. # 97). The Court also entered an order setting forth instructions for Plaintiff to follow when filing the instant Motion as well as instructions for any Motion to be filed by Defendants with respect to the Second Amended Complaint. (Dckt. # 96).

On March 29, 2016, Plaintiff's unredacted Second Amended Complaint was filed under seal. (Dckt. # 100). On March 30, 2016, Plaintiff's redacted Second Amended Complaint was filed publicly on PACER. (Dckt. #103). Plaintiff now files the instant Motion to modify the Protective Order and unseal all the judicial filings discussing and providing the Internal Affairs Investigations including the unredacted Second Amended Complaint.

III. SEALED JUDICIAL FILINGS AND REDACTED PARAGRAPHS

Based upon the Protective Order, the following documents were withheld from the public record and filed under seal: Plaintiff's Motion for Leave to Amend Based Upon Newly Discovered Evidence ("Motion to Amend") (Dckt. #84), Proposed Second Amended Complaint (Dckt. # 84-1), the Declaration In Support of the Motion to Amend with all exhibits (Dkct. # 84-

2), Defendant's Opposition to the Motion to Amend (Dckt. # 92), Plaintiff's Reply in Support of the Motion to Amend (Dckt. # 93), the Second Amended Complaint (Dckt. # 100). As aforementioned, a public version of the Second Amended Complaint was filed with paragraphs 43-50 redacted. Those paragraphs are as follows:

[redacted]

///

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[redacted]

IV. INTERNAL AFFAIRS INVESTIGATIONS #13-06 AND #14-02

Pages 5-12 of Plaintiff's Motion for Leave to File Second Amended Complaint Based Upon Newly Discovered Evidence set forth the pertinent details regarding internal affairs investigations #13-06 and #14-02. ***Plaintiff reinserts the same below forth the convenience of the Court[2]:***

[redacted]

[2] The Declaration of Charles Tony Piccuta was filed in conjunction with the Motion for Leave to File Second Amended Complaint based upon Newly Discovered Evidence and included both I.

[3] [redacted]

[redacted]

(*Id.* at pg. 3).

[redacted]

(*Id.*).

[redacted]

[redacted]

(*Id.* at pg. 38).

[redacted]

(*Id.*).

[redacted]

(*Id.* at pg. 15).

[redacted]

///

[4] Supplemental police reports are enumerated sequentially as .2, .3, .4, .5, etc.

[redacted]

[redacted]

(*Id.* at pg. 29-30 and 38).

[redacted]

(*Id.*).

[redacted]

[redacted]

(*Id.* at pgs. 9-10).

[redacted] (*Id.* at pg. 42-43).

[redacted]

(*Id.* at pg. 42-43).

[redacted] (*Id.*).

[redacted]

(*Id.*).

[redacted]:

[redacted]

(*Id.* at pg. 45).

[redacted]

(*Id.*).

[redacted]

[redacted] (*Id.*).

V. LAW AND REASONING

A. Why Protection Is Not Warranted

There is no rational basis for protecting the misconduct of police officers and hiding the truth regarding former [redacted] officer Cleaver. Certainly, the law does not support this proposition. Quite the contrary, the law favors disclosure.

The Court itself recognized this in its November 18, 2015 Order granting Defendant's Motion for Protective Order (Dckt. # 67):

> "Generally, the public has a common law presumptive right of access to "judicial documents," which are items filed with the court that are relevant to the performance of judicial function and useful in the judicial process. *Father M. v. Various Tort Claimants In re Roman Catholic Archbishop*, 661 F.3d 417, 421 (9th Cir. 2011)"

(Nov. 18, 2015 Order, Dckt. # 67 at pg. 9, lines 18-21)

Although the Court later cited to *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), in the same Order, in support of the argument that: "dissemination of confidential discovery documents for non-judicial purposes is unusual and rightly so." (Dkct. # 67 at pg. 9, lines 21-23). Plaintiff agrees with this general proposition, given that the purportedly confidential documents are rightfully designated confidential and meet the exacting standards required for protection. In addition, the purportedly confidential documents would have to be used for a non-judicial reason. Neither is the case here.

Here, the legal requirements are not satisfied for ordering protection as to the Internal Affairs Investigations [redacted] and the resulting outcomes. Certainly, justice is not advanced by keeping this information secret and preventing it from being used by Plaintiff to locate favorable witnesses for this litigation. Even more compelling, is the great injustice that would occur if this Court embraces Defendants' urgings of secrecy and furtive concealment of the truth. It is the duty of this court to uphold the public's access to these filings as the public almost certainly includes other individuals who were wrongfully arrested, convicted and incarcerated [redacted]

Quite heavy is the burden on the Court if one individual was wrongfully incarcerated for one day based upon [redacted] There is no question, where in a circumstance such as this, where that is clearly a possibility, the court must err on the side of maintaining the public record rather than backing the efforts of Defendants to conceal [redacted] Certainly, the Ninth Circuit Court of Appeals would agree, that it is not the job of District Courts to conceal the truth [redacted] and limit the liability of the local governments for which they work. However, it is the duty of this Court to allow the free dissemination of information, maintain the public record of judicial filings and expose ugly truths that sometimes are only uncovered through individuals exercising their constitutional rights through litigation.

B. <u>The Four Theories That Defendants Provide in Support of Protection</u>

Of course, Defendants misrepresent and sensationalize why the Internal Affairs Investigations and resulting outcomes warrant protection. In Defendants' Motion for Protective

Order they claim the following four reasons. ***First***, to protect the defendant officers (and their friends and family) from disclosure of personal identifying information[5] that could be used by others to retaliate against them. (Defendant's Motion for Protective Order, Dckt. #60-1 at pg. 19, lines 5-10). ***Second***, to keep confidential "personal identifying information for detainees, arrestees, victims and witnesses, including arrest, DMV and immigration history checks on detainees and arrestees, [and] the personal cell phone records of Officer Cleaver, [as well as] information on both the victim and perpetrator of [an] identity theft[6]." This information was encompassed in [redacted] cases that were examined in Internal Affairs Investigation #14-02. ***Third***, to prevent disclosure of the compelled statements of [redacted] "which if made public would put officers in a position that either give a compelled statement knowing it cannot be used against you in a criminal trial, but that it can be used against in civil trial, family court proceedings, or risk losing their job for refusing to give a statement." (*Id.* at pg. 20, lines 7-11). ***Fourth***, "public disclosure [of] confidential interviews of employees who are assured their statement will remain confidential, could lead to officers and other employees not wanting to come forward with important information in future Internal Affairs investigations for fear that their statements would get out to others." (*Id.* at lines 23-27). The Declaration of Lt. Katy Benham, submitted in support of Defendant's Motion for Protective Order, mimicked these theories. (See Benham Declaration, Dckt. # 60-2 at ¶¶ 4, 5, 10 and 11).

C. <u>Apparent Basis the Court Relied On in Finding the Investigations Were Protected</u>

After the Court considered these theories, it ordered that a Protective Order be issued as to every document that was previously in dispute including both Internal Affairs Investigations #13-06 and #14-02. However, at that time, neither the Court nor Plaintiff knew what either investigation consisted of, revealed or resulted in. Moreover, the Protective Order was entered without the Court being afforded the benefit of examining either Internal Affairs Investigation, much less any of the ***nearly 2000 plus documents encompassed by the Protective Order.***

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[5] "such as social security numbers, dates of birth, driver license numbers, home addresses, financial and credit histories, medical and ps

[6] [redacted]

In reaching its decision, the Court concluded that "some degree of confidentiality" was needed. The Court set forth one basis for protecting the Internal Affairs Investigations explaining that: "the reliability of the findings of Clovis Police Department internal investigations is largely dependent upon officers' candor and truthfulness." (November 18, 2015 Order, Dckt. # 67 at pg. 11, lines 14-16). Apparently, the Court gave credence to Defendants' theories that officers would not give candid and truthful testimony if they knew said testimony could be publicly disclosed later. In other words, officers would lie and breach their ethical and official police duties when confronted with the possibility that those against who the officers truthfully implicate may learn the same..

The second reason provided by this Court, in reaching its conclusion, that a protective Order was warranted, was "the institutional concerns articulated by Defendants and the risks that the indiscriminate public disclosure poses to police department operations and officer safety." (*Id.* at pg. 12, lines 19-21). Albeit, this second reason spoke to the protection of nearly all the 2000 plus documents in dispute, not specifically Internal Affairs Investigations ##13-06 and 14-02. Logically, this reason is more properly attributable to the unprotected disclosure of police training documents, policies and procedures and the personal identifying information of officers, as opposed to any Internal Affairs Investigations and their results.

D. Why Defendants' Four Theories Do Not Satisfy Their Burden for Protection

The first two theories offered by Defendants, to support the protection of the Internal Affairs Investigations, relate to the public dissemination of private and personal identifying information of officers, complainants, witnesses, detainees, arrestees, etc. With respect to the officers, the Defendants cite to safety concerns and potential retaliation against them. With respect to the others, Defendants cite to privacy concerns. This is a non-issue and does not provide any basis for providing blanket protection. All such identifying information is easily redacted and the Investigations could be produced without this concern.

Defendants' third theory is that disclosing the compelled statements of [redacted] could put officers in a position to either giving compelled statements knowing that it could be used against them in civil matters or family court proceedings or risk losing their job for refusing to give such

a statement. This certainly is a theory and a ridiculous argument. Here, it is particularly inapplicable as [redacted] At least that is what the Investigations concluded.

If indeed, the compelled statements of an officer give rise to civil liability and are detrimental to his case in a family court proceeding, ***this is precisely the kind of information that should be made known and not hidden.*** If the officer is hiding information, that he is not willing to divulge because it could implicate him in misconduct giving rise to civil liability, this is all the more reason he should be required to disclose it or be dismissed from his position. This is a much better outcome than allowing officers to provide statements, that would implicate them in civil misconduct or reflect negatively upon them in a custodial proceeding, and then insulate them from dissemination of that information.

Expanding this reasoning further, Internal Affairs investigations, such as that of [redacted], which find [redacted], should absolutely be made available to the public. This is especially true with respect to subsequent employment. Here, [redacted] currently has a position as a Senior Assets Investigator with Pacific Gas and Electric Company who assumedly credited his law enforcement background as an attribute. It is doubtful that he would be placed in such a position of responsibility and power if Pacific Gas and Electric Company knew [redacted].

Assuming *arguendo*, that the Court somehow is persuaded that hiding these statements is warranted and protection should be afforded to them, then the statements themselves do not necessarily need to be disclosed. Those same statements may be redacted as well or omitted from the Investigations.

Finally, the fourth theory offered by Defendants, in support of protection, is that other officers would not provide candid and important information during investigations if they knew that such statements could be attributed to them. Following this flawed reasoning, Defendants argue that officers and department employees would conceal important information or lie during an investigation to prevent others from learning that they were the one who provided truthful and relevant information. Apparently, Defendants believe that a culture of transparency during

investigations is detrimental to the functioning of the Department.

Plaintiff does not embrace such fallacious thinking. To the contrary, it is more likely that an officer or employee would provide truthful testimony and pertinent disclosures, if they knew that his or her failure to do so could later be made known to others including the public. Further, to embrace Defendants' argument necessarily means that other officers are willing to breach their official police duties and withhold pertinent information from an investigation if they will later be "found out." This is counter-intuitive. The more sensible conclusion is that an officer that provides pertinent information in an investigation against a [redacted], will be lauded and recognized for his actions.

This theory as offered by Defendants seems to suggest that the disclosure of these confidential interviews really is only to disclosing this information to the officer investigated. In other words, officers would not want to offer truthful statements or come forth with pertinent information if it could later be learned that they "ratted" on the officer being investigated. However, this is also a preposterous argument as Internal Affairs Investigation [redacted]

[redacted] at Bates Pg. 720).

This theory has also already been debunked and discredited by courts that have considered it. See *Kelly v. City of San Jose*, 114 F.R.D. 653, 665 (N.D. Cal. 1987) ("To summarize, since there is no empirical support for the contention that the possibility of disclosure would reduce the candor of officers who contribute to internal affairs investigations, and since there are solid reasons to believe that that possibility might have the opposite effect (improving accuracy and honesty), there is no justification for offering near absolute protection

to the statements that go into such reports or to the opinions and recommendations that conclude them.") *Soto v. City of Concord*, 162 F.R.D. 603, 612 (N.D. Cal, 1995) ("The court in *Kelly* debunks the theory that officers will be less truthful or forthright in expressing their opinions if there is a risk of future disclosure...This Court concurs with *Kelly's* reasoning in this matter.") Nevertheless, if the Court is persuaded by Defendants' fourth theory, then this information could easily be redacted to prevent disclosing identities of officers or employees who offered statements or information in furtherance of the Investigations.

E. The Legal Standard for Protection Is Not Satisfied

Defendants in this action produced hundreds of documents which consisted of over 2000 plus pages. Of those documents, Plaintiff only seeks that this Court remove the blanket protection afforded to six of those documents. Those documents include Internal Affairs Investigations ##13-06 and 14-02 and the corresponding memorandum and letters related to the same. These are the same six documents that Plaintiff attached to the Declaration in Support of the Motion to Amend Based Upon Newly Discovered Evidence. (Dckt. #84-1). This constitutes a mere sliver of the documents produced. Notably, Plaintiff is not requesting that other internal affairs investigations be revealed, other citizen complaints be removed from protection or any policies, procedures or training materials be available for dissemination.

With respect to these few documents, Plaintiff is not necessarily arguing that they be removed from the Protective Order entirely. Plaintiff is simply requesting that the blanket protections afforded to them be removed and that the Protective Order be modified so that it only calls for redaction of the information necessary to address any credible concerns of Defendants as set forth above. In other words, the documents would still be subject to protection, but the Protective Order would be modified to only remove the legitimately protectable material and information contained therein. ***Once appropriately redacted, there is no legitimate basis to conceal these documents and the related judicial filings from the public record.***

i. Good Cause Does Not Exist

Historically, courts have recognized a "general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*,

435 U.S. 589, 597 & n. 7, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). This right is justified by the interest of citizens in "keep[ing] a watchful eye on the workings of public agencies." *Id.* at 598, 98 S.Ct. 1306. Since privileges derogate the search for the truth they are supposed to be narrowly construed. *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974).

Under Fed.R.Civ.P. 26(c)(1), however, the court may, for good cause, nonetheless issue an order to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense, including ... specifying terms ... for the disclosure or discovery ..." Fed.R.Civ.P. 26(c)(1)(B). When a party seeks an order protecting from public disclosure information that has been produced in discovery but not filed in court, the Rule 26(c) good cause standard applies. *Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665, 678 (9th Cir.2010) (citing *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir.2006)), cert. denied, 131 S.Ct. 900 (2011); *Phillips ex rel. Estates of Byrd v. Gen'l Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002). It is well established that absent a court order to the contrary, the fruits of pretrial discovery are presumptively public. *San Jose Mercury News, Inc. v. United States Dist. Court*, 187 F.3d 1096, 1103 (9th Cir.1999).

To establish good cause, the party seeking a protective order in this context bears the burden of showing that specific prejudice or harm will result if no protective order is granted. *Phillips*, 307 F.3d at 1210–11. Broad and general allegations of harm do not satisfy the Rule 26(c) test. *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 476 (9th Cir.1992). For this reason, blanket protective orders are disfavored. See *San Jose Mercury News*, 187 F.3d at 1103.

In the instant case, Defendants argued that the Official Information Privilege applied and, as such, a blanket Protective Order was warranted as to all 2000 plus pages of documents. (See Court's November 18, 2015 Order at pg. 7, lines 16-17). Courts conduct a case-by-case balancing analysis, in which the interests of the party seeking discovery are weighed against the interests of the governmental entity asserting the [Official Information] privilege. *Kelly v. City of San Jose*, 114 F.R.D. 653, 660 (N.D. Cal. 1987). In the context of civil rights suits against police

departments, this balancing approach should be "moderately pre-weighed in favor of disclosure." The party invoking the [Official Information] privilege, however, must at the outset make a "substantial threshold showing" by way of a declaration or affidavit from a responsible official with personal knowledge of the matters to be attested to in the affidavit. *Soto* at 613. If the threshold showing requirements are met, the court must weigh whether confidentiality outweighs the requesting party's need for the information. *Hampton v. City of San Diego*, 147 F.R.D. 227, 231 (S.D. Cal. 1993); *see also Kelly*, 114 F.R.D. at 657-658.

In the case at hand, and for the reasons discussed above, Defendants have not met their threshold burden. The theories provided by Defendant as to the purportedly particularized harm are all easily negated by redactions or discredited by other courts considering the same arguments. Even if the Court found that the threshold burden was met, the additional factors set forth in *Kelly*, for weighing the disclosure of the information, favor disclosure of the documents and certainly do not embrace application of a blanket protective order.

ii. Compelling Reasons Are Not Present

As aforementioned, a good cause standard applies to the issuance of a protective order and to determine the propriety of the blanket protections of the Protective Order in the instant case. However, if the Court concludes that good cause exists to maintain the blanket protections of the Protective Order, it must necessarily decide whether or not ***compelling reasons*** exist that support sealing the judicial filings implicating the Internal Affairs Investigations and related documents.

A compelling reasons test is the standard for determining whether or not a judicial filing, that is dispositive in nature, should be sealed if it attaches documents produced in discovery pursuant to a protective order. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006). In *Kamakana* the Ninth Circuit eloquently set forth the law as follows:

> Unless a particular court record is one "traditionally kept secret," a "strong presumption in favor of access" is the starting point. *Foltz v. State Farm Mutual Auto Insurance Company*, 331 F.3d, 11322, 1135 (9th Cir. 2003) (citing *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir.1995)). A party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the "compelling reasons" standard. *Foltz*, 331 F.3d at 1135. That is, the party must "articulate[ ] compelling reasons supported by specific factual findings," *id.* (citing *San Jose Mercury News, Inc. v.*

U.S. Dist. Ct., 187 F.3d 1096, 1102–03 (9th Cir.1999)), that outweigh the general history of access and the public policies favoring disclosure, such as the " 'public interest in understanding the judicial process.' " *Hagestad*, 49 F.3d at 1434 (quoting *EEOC v. Erection Co.*, 900 F.2d 168, 170 (9th Cir.1990)). In turn, the court must "conscientiously balance[ ] the competing interests" of the public and the party who seeks to keep certain judicial records secret. *Foltz*, 331 F.3d at 1135. After considering these interests, if the court decides to seal certain judicial records, it must "base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Hagestad*, 49 F.3d at 1434 (citing *Valley Broadcasting Co. v. U.S. Dist. Ct.*, 798 F.2d 1289, 1295 (9th Cir.1986)).

In general, "compelling reasons" sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such "court files might have become a vehicle for improper purposes," such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets. *Nixon*, 435 U.S. at 598, 98 S.Ct. 1306; accord *Valley Broadcasting Co.*, 798 F.2d at 1294. The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records. *Foltz*, 331 F.3d at 1136.

We acknowledged explicitly in *San Jose Mercury News*, 187 F.3d at 1102, and later confirmed in *Foltz*, 331 F.3d at 1136, that the strong presumption of access to judicial records applies fully to dispositive pleadings, including motions for summary judgment and related attachments. We adopted this principle of disclosure because the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the "public's understanding of the judicial process and of significant public events." *Valley Broadcasting*, 798 F.2d at 1294; accord *Foltz*, 331 F.3d at 1135–36 (noting that " 'summary judgment adjudicates substantive rights and serves as a substitute for trial' ") (quoting *Rushford v. The New Yorker Magazine*, 846 F.2d 249, 252 (4th Cir.1988)). Thus, "compelling reasons" must be shown to seal judicial records attached to a dispositive motion. *Foltz*, 331 F.3d at 1136. The "compelling reasons" standard is invoked even if the dispositive motion, or its attachments, were previously filed under seal or protective order. *Id.* ("[T]he presumption of access is not rebutted where ... documents subject to a protective order are filed under seal as attachments to a dispositive motion. The ... 'compelling reasons' standard continues to apply.") (internal citations omitted).

We have, however, "carved out an exception to the presumption of access" to judicial records, *Foltz*, 331 F.3d at 1135, for a "sealed discovery document [attached] to a non-dispositive motion," such that "the usual presumption of the public's right of access is rebutted." *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir.2002) (emphasis added). There are, as we explained in *Foltz*, "good reasons to distinguish between dispositive and non-dispositive motions." 331 F.3d at 1135. Specifically, the public has less of a need for access to court records attached only to non-dispositive motions because those documents are often " ***'unrelated, or only tangentially related, to the underlying cause of action.'*** " *Id.* (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)).

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> The public policies that support the right of access to dispositive motions, and related materials, do not apply with equal force to non-dispositive materials. *Phillips*, 307 F.3d at 1213. We reasoned in *Phillips* that when a district court grants a protective order to seal documents during discovery, "it already has determined that 'good cause' exists to protect this information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality." *Id.* The application of a strong presumption of access to sealed records, not directly relevant to the merits of the case, would eviscerate the "broad power of the district court to fashion protective orders." *Id.* Thus a "particularized showing," *Foltz*, 331 F.3d at 1138, under the "good cause" standard of Rule 26(c) will "suffice[ ] to warrant preserving the secrecy of sealed discovery material attached to non-dispositive motions." *Id.* at 1135.
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> In sum, we treat judicial records attached to dispositive motions differently from records attached to non-dispositive motions. ***Those who seek to maintain the secrecy of documents attached to dispositive motions must meet the high threshold of showing that "compelling reasons" support secrecy.*** *Id.* at 1136. A "good cause" showing under Rule 26(c) will suffice to keep sealed records attached to non-dispositive motions. *Id.* at 1135.
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> It is important to emphasize the difference between the "compelling reasons" standard and the "good cause" standard, especially because the City suggests that they essentially collapse in this case. A "good cause" showing will suffice to seal documents produced in discovery. Fed.R.Civ.P. 26(c) (stating that if "good cause" is shown in discovery, a district court may issue "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"). Rule 26(c) gives the district court much flexibility in balancing and protecting the interests of private parties. *Id.*
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> A "good cause" showing will not, without more, satisfy a "compelling reasons" test. See *Foltz*, 331 F.3d at 1135–36; *Phillips*, 307 F.3d at 1212 (observing that even if a court finds "good cause" under Rule 26(c) to seal a document, it must still determine whether the common law right of access compels production). Different interests are at stake with the right of access than with Rule 26(c); with the former, the private interests of the litigants are not the only weights on the scale. Unlike private materials unearthed during discovery, judicial records are public documents almost by definition, and the public is entitled to access by default. See *Nixon*, 435 U.S. at 597, 98 S.Ct. 1306. ***This fact sharply tips the balance in favor of production when a document, formerly sealed for good cause under Rule 26(c), becomes part of a judicial record. Thus a "good cause" showing alone will not suffice to fulfill the "compelling reasons" standard that a party must meet to rebut the presumption of access to dispositive pleadings and attachments.***

Plaintiff's Motion to Amend Based Upon Newly Discovered Evidence contained information regarding Internal Affairs Investigations ## 13-06 and 14-02. The Declaration filed in support of that Motion attached the Investigations themselves. The Motion was dispositive in nature because if the Court did not grant the Motion, it would necessarily have eliminated Plaintiff's claim for malicious prosecution. As such, the Motion was not "unrelated, or only tangentially related, to the underlying cause of action." Indeed, had the Motion been denied the

cause of action itself would have been forever barred. As such, the compelling reasons test must be applied to determine whether or not the judicial filings, that discuss the Investigations, and the Investigations themselves, which were attached as exhibits, must be withheld from the public record.

As stated in depth above, Defendants are unable to articulate a particularized showing that would satisfy the high threshold of showing that "compelling reasons" support continued secrecy, much less meet the good cause showing articulated under Fed.R.Civ.P. 26(c)(1) to justify the continuation of a blanket Protective Order. The only rational theory that Defendants can offer that warrants any protection whatsoever are privacy concerns of distributing personal information. However, all these purported concerns are mooted by redacting the documents to remove such references which Plaintiff agrees, and has always agreed, is appropriate.

VI. CONCLUSION

Plaintiff rightfully requests that the Court modify the Protective Order to eliminate the blanket protections that encompass Internal Affairs Investigations ##13-06 and 14-02 and the corresponding memorandum and letters related to the same. Good cause does not exist to apply protection to these documents given that the personal identifying information contained within them is appropriately redacted. Moreover, Defendants are unable to satisfy the compelling reasons test as to why this information should be concealed from the public.

The Court must be sensitive to the public's interest in these judicial filings given that the public likely includes other individuals who were wrongfully arrested, incarcerated and convicted because of the actions of [redacted]. Moreover, Plaintiff has the right to use this information in seeking out other witnesses and individuals who have also experienced, and will testify to, [redacted]

WHEREFORE, Plaintiff respectfully requests that the Court grant his Motion to Unseal Judicial Filings and Modify the Protective Order and issue any other such relief the Court deems just and appropriate.

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DATED: April 19, 2016

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