SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue Denver, CO 80203 Phone Number: (303) 837-3785	
Petition for review of a decision of the District Court, Adams County, Colorado Judge: The Honorable Thomas R. Ensor Case No. 2004CV1073 In Re: Ruth Jessee, Plaintiff, v. Farmers Insurance Exchange and Farmers, Group, Inc., Defendants.	COURT USE ONLY Case Number: 05 SA 370
Petitioners: Ruth Jessee, Plaintiff below, and Irwin & Boesen, P.C. **Respondents:** Farmers Insurance Exchange and Farmers Group, Inc., Defendants below.	
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PETITIONERS' REPLY CONCERNING THE ORDER & RULE TO SHOW CAUSE

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The Petitioners offer this reply to the Response of Farmers Insurance Exchange and Farmers Group, Inc. ("Farmers"), to the Court's Order & Rule to Show Cause:

I. The Petition For A Rule To Show Cause Does Not Improperly Seek To Have This Court Act As A Finder of Fact.

Farmers complains that three affidavits have been annexed to the Petition which raise factual issues not addressed by the district court. This argument lacks merit.

Prior to this Court exercising original jurisdiction, the Petitioners had moved the district court to strike Farmers' confidential designation of the public domain documents. (*See* Farmers' Attachment D). In support of this request for relief, the Petitioners incorporated by reference the Petition for a Rule to Show Cause, which Petition *and attachments* were filed in the district court on December 21, 2005. (*See Id*. at pg. 2, ¶ 5).

Farmers responded to this district court motion in its pleading filed January 5, 2006. (*See* Supplemental Attachment 16). With respect to the merits of the arguments incorporated by the Petition, Farmers stated:

> 9. Plaintiff purports, at ¶ 5 of her Motion to Strike, to incorporate by reference the arguments and authorities set forth in her Petition to the Supreme Court of Colorado in support of her claims. However, *virtually the same argument and authorities were submitted to the Court in her Motion for Reconsideration, and rejected by the Court.*

(*See* Supplemental Attachment 17, pg. 2 ¶ 9) (our emphasis). Farmers is thus being disingenuous when it complains that Petitioners have in any way sought to have this Court serve as "a finder of fact… before the District Court has the opportunity to do so". (*See* Farmers' Response at 6).

The three affidavits put before the district court together with the motion to strike indeed did not raise any new factual issues for the district court to determine. The first affidavit, of Robert Dietz, was merely offered as further support of the irreparable injury Petitioners would suffer if the protective order was allowed to stand. (*See* Attachment 2). This affidavit refers to and includes a copy of Mr. Dietz' February 17, 2005 affidavit that had been filed nine months in advance of the date on which the district court entered the protective order. This previous affidavit, which was uncontradicted by Farmers, established that Mr. Dietz was in possession of numerous *unprotected* Farmers claim practice documents, including documents ordered produced in the *Grong* case. (*See* Attachment 2, pg. 10, 11).

The next affidavit, of Donna Coen, was also offered as support of the irreparable injury Petitioners would suffer. (*See* Attachment 3). The Coen affidavit merely identified a client of Irwin & Boesen, P.C. ("Irwin & Boesen") whose interests cannot be adequately represented, thus substantiating the conflict

of interest argument rejected by the district court when it denied the motion to reconsider its entry of the protective order. (*See* Attachment 12, pg. 2, ¶ 6).

The third affidavit, of Michael Abourezk, Esq., similarly did not raise any new factual issue. (*See* Attachment 5). This affidavit mostly corroborates the Dietz affidavit, but the Abourezk affidavit more importantly identifies for the Court those specific documents that Farmers seeks to clothe in secrecy in this case that were previously ordered to be produced without protection in the South Dakota action entitled *Tracy Grong v. Farmers Insurance Exchange*. (*See* Attachment 5, pg. 4, ¶ 15). The Abourezk affidavit did not raise any issue that was not already before the district court; to the contrary, the Petitioners steadfastly objected to the protective order on the ground that it was an improper attempt by Farmers to throw a cloak of secrecy over the publicly available *Grong* documents. (*See* Attachment 12, pg. 1, ¶ 2).

II. Irwin & Boesen Has Standing To Challenge The Protective Order.

Farmers also complains that the law firm of Irwin & Boesen has sought to be as a Petitioner herein. Farmers argues that Irwin & Boesen was not a party to the lawsuit and is otherwise "without a supporting basis for essentially intervening in this matter…". (*See* Farmers' Motion at 5).

Irwin and Boesen has standing to challenge the protective order entered by the district court because Irwin & Boesen has been made a party to the order. (*See*

Attachment 1, pg. 2, ¶ 5 pg. 5, ¶ 12, pg. 6, ¶ 12). Indeed, Farmers has sought through the order to impose mandatory *disclosure* requirements on Irwin & Boesen concerning any documents that "counsel currently have or come into possession of that reasonably could be considered to be the same type as those designated as Confidential information by any party…". (*See Id.* at pg. 6, ¶ 12).

Standing is conferred on Irwin & Boesen because it, like the Petitioner plaintiff herein, can demonstrate an injury in fact to a legally protected right. *See Maurer v. Young Life*, 770 P.2d 1317, 1323-24 (Colo. 1989). The secrecy provisions of the protective order impose the same prior restraint of Irwin & Boesen's First Amendment right of free speech as has been imposed on the Petitioner plaintiff.

Irwin & Boesen has also articulated separate harm caused to it by the secrecy provisions of the order, which prohibit Irwin & Boesen from using any of the documents except in the instant district court matter. This restriction on dissemination creates an immediate conflict of interest because Irwin & Boesen may not use publicly available documents while representing its other clients in claims disputes with Farmers. (*See* Petition at 5, 6). This harm is especially onerous given the provisions of the protective order which seek to extend the district court's enforcement jurisdiction over Irwin & Boesen beyond the conclusion of the underlying controversy. (*See* Attachment 1, pg. 6, ¶ 13).

III. The Validity Of The Protective Order Is Ripe For Review.

Farmers seeks to characterize the protective order as one "more accurately described as a procedural order to be followed where designation of confidential documents is challenged." (*See* Farmers' Response at 11). Farmers thus argues that the controversy is not ripe for review because their confidential designation of public domain documents may continue to be challenged by the Petitioners in the district court. This argument presents a *non sequitur*.

The Petitioners are before this Court after their prior efforts to first persuade the district court to reject the protective order and then to reconsider its decision to enter such an order. (*See* Attachments 11, 12). In these prior efforts the Petitioners specifically brought to the attention of the district court the unconstitutionality of the order and the manner in which the order offended the precepts of Colo. R. Civ. P. 26(c). (*See id*.). The district court entered the protective order nevertheless, and immediately rejected the motion to reconsider without requiring any response by Farmers and without entering any findings in support of its decision. (*See* Attachment 13). These circumstances hardly support the contention that the controversy created by entry of the protective order is not ripe for this Court's review.

Next, and more to the point, the Petitioners contend that the protective order entered is invalid as a matter of law. This order allows Farmers to assert

secrecy protection concerning documents obtained from any source. (*See* Attachment 1, pg. 5, ¶ 11). Such an order is repugnant to the good cause standard of Rule 26 and the order directly contravenes prior controlling precedent of this Court holding that such a restriction would constitute an impermissible prior restraint of free speech. *See In re Requests for Investigation of Attorney E*, 78 P.3d 300, 309-10 (Colo. 2003).

There also can be no procedural escape hatch for circumvention of the good cause standard of Rule 26. Farmers is presently allowed secrecy protection *before* making any showing of the commercial harm warranting such protection. Even if this was permissible, which it is not, Farmers cannot make such a showing in the circumstances here where it simply wishes to restrict dissemination of information demonstrating its wrongful claims practices. *See, e.g., Foltz v. State Farm Mut. Auto. Ass*., 331 F. 3d 1122, 1137 (9th Cir. 2003) (Insurance company's exposure to additional liability and litigation from disclosure of documents related to its claims practices does not constitute commercial harm within the meaning of Rule 26(c)); *Nestle Foods Corp. v. Aetna Cas. and Sur. Co*., 129 F.R.D. 483, 486 (D.N.J. 1990) ("[I]f the basis for defendants' motion is to prevent information from being disseminated to other potential litigants, then defendants application [for protective order] must fail."); *Wauchup v. Domino's Pizza, Inc.*, 138 F.R.D. 539, 546-47 (D.N.D.I. 1991) ("That

the shared information might be detrimental to Domino's in other litigation does not transform the concern into good cause…".).

At bottom, Farmers' contention that a district court procedure makes this appeal premature presents an "ends-might-justify-the-means" argument that is not recognized in American jurisprudence. Farmers' assertion that the Petitioners should be made to delay their challenge to the protective order until the confidentiality designations have been adjudicated is akin to arguing that a criminal defendant must wait to challenge an unconstitutional procedure (say, lack of a jury) simply because the judge might find him or her not guilty. That of course would not make sense, and it is similarly senseless to suggest that Petitioners should undergo more proceedings in the district court before being permitted to challenge the constitutionality *of that procedure*. It is difficult to conceive of a more pointless waste of time and judicial resources. The mere fact that Petitioners will be forced to participate in such a procedure absent intervention by this Court means that this appeal is anything but premature.

IV. The Protective Order Is An Unconstitutional Prior Restraint.

A. Every Court To Consider The Issue Has Held That Protective Orders That Bar Dissemination Of Documents Obtained From Outside The Litigation Violate The First Amendment.

Regarding the merits of the challenge, Farmers begins its response brief by asserting that "Petitioners misconstrue the First Amendment to contend that prior

restraint analysis is applicable to civil litigation and discovery rules. It is not." (*See* Farmers' Response at 2). This assertion is puzzling, given that both the U.S. Supreme Court and this Court – and myriad other courts from all across America, both state and federal – have unanimously held that discovery protective orders that purport to cover documents acquired from sources other than the litigation violate the First Amendment prohibition against prior restraints.[1]

As previously explained (*see* Petition at 11–13), *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), held that a protective order issued pursuant to Federal Rule of Civil Procedure 26(c) (which has a "good cause" standard identical to that of the Colorado rule at issue here) did not violate the First Amendment because the order merely prevented a party from disseminating information obtained through the discovery process *in that case*. In so holding, the Court made clear that the order *would* have been unconstitutional if it purported to bar the dissemination of information gained from other sources:

> [W]here, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and *does not restrict the dissemination of the*

[1] "Prior restraints on speech are the most serious and least tolerable infringement on First Amendment rights." *In re Requests for Investigation of Attorney E.*, 78 P.3d 300, 309 (Colo. 2003). As such, they are presumptively invalid. (*See* Petition at 14–15) (discussing *People v. Bryant*, 94 P.3d 624 (Colo. 2004)). Farmers understandably does not even attempt to argue that the protective order would overcome the presumption against its constitutional validity.

> *information if gained from other sources*, it does not offend the First Amendment.

Seattle Times, 467 U.S. at 37 (emphasis added). The rationale for this rule is clear. As the U.S. Court of Appeals for the Second Circuit has explained:

> Rule 26 . . . is not a blanket authorization for the court to prohibit disclosure of information whenever it deems advisable to do so, but is rather a grant of power to impose conditions on *discovery* in order to prevent injury, harassment, or abuse of the court's processes.

Bridge C.A.T. Scan Assocs. v. Technicare Corp., 710 F.2d 940, 944–45 (2d Cir. 1983).

This Court reached the exact same conclusion in *In re Requests for Investigation of Attorney E.*, 78 P.3d 300, 309–10 (Colo. 2003**),** which affirmed the entry of a protective order that prohibited a party to an investigatory proceeding from publicly disclosing discovery materials obtained therein. In so doing, the Court emphasized that the validity of the protective order hinged on the fact that it "did not limit [the party's] First Amendment freedoms to an extent greater than necessary to protect the judge's privacy interests. . . . *If he obtained the same information outside of his . . . case, the . . . order does not preclude him from disseminating such information*." *Attorney E.*, 78 P.3d at 311 (citing *Seattle Times*, 467 U.S. at 37) (emphasis added).[2]

[2] *Amicus curiae* Defense Research Institute ("DRI") argues that the Court's decision in *Attorney E.* somehow "suggests that . . . a court may properly restrict the use of discovery material obtained without a protective order in another case."

In contrast, the U.S. Supreme Court has made clear that a state may *not* restrict a party from disseminating information that the party has acquired "on his own." *Butterworth v. Smith*, 494 U.S. 624, 636 (1990). In *Butterworth*, the Court struck down a Florida law that infringed on the right of a grand jury witness to disclose information gleaned outside the investigation. The Court specifically distinguished *Seattle Times*:

> Here, by contrast, we deal only with respondent's right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury.

Butterworth, 494 U.S. at 631–32. Consistent with this, the U.S. Court of Appeals for the Tenth Circuit recently upheld a Colorado statute prohibiting a grand jury witness from disclosing the content of her grand jury testimony, emphasizing that—unlike the law struck down in *Butterworth*—the Colorado law "does not

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(*See* DRI Brief at 4). This reading of *Attorney E.* ignores the Court's careful reasoning in that case. The controlling factor in *Attorney E.* was not that the attorney had originally obtained the documents without the restrictions of a protective order, but that he had obtained them as a direct result of the discovery process in his case—a process which was under the control of the Colorado disciplinary court. *See* 78 P.3d at 311 (explaining that a court has "continued control" over its own discovery process); *id.* at 311–12 ("Attorney E. . . . is a party to the investigative proceedings and thus information he received *only through the process of discovery in such proceedings* may be properly restricted upon a showing of good cause.") (emphasis added). This holding is consistent with other courts' decisions upholding limited protective orders. *See, e.g.*, *U.S. v. Smith*, 602 F. Supp. 388, 396 (M.D. Penn. 1985) (protective order constitutional where it did not prevent dissemination of information "obtained from a source unrelated to the pre-trial discovery process *in this case*") (emphasis added).

prohibit disclosure of information the witness already had independently of the grand jury process." *Hoffman-Pugh v. Keenan*, 338 F.3d 1136, 1139 (10th Cir. 2003), *cert. denied*, 540 U.S. 1107, 124 S. Ct. 1069 (2004).

In keeping with these decisions, numerous other courts have held that protective orders that seek to prevent dissemination of documents obtained from outside the discovery process violate the First Amendment prohibition against prior restraints. (*See* Petition at 13–14 (collecting cases). *See also Bridge*, 710 F.2d 940 (2d Cir. 1983) (protective order prohibiting disclosure of data compiled prior to filing of lawsuit would constitute unconstitutional prior restraint); *Rodgers v. U.S. Steel Corp.*, 536 F.2d 1001, 1007 (3d Cir. 1976) (protective order prohibiting disclosure of Justice Department memorandum obtained outside discovery process was unconstitutional prior restraint); *Int'l Prods. Corp. v. Koons*, 325 F.2d 403, 407–08 (2d Cir. 1963) (protective order that "went further [than discovery] and curtailed disclosure of information and writings which defendants and their counsel possessed before they sought to take [plaintiff's] deposition" constituted unconstitutional prior restraint); *cf. John Does I-VI v. Yogi*, 110 F.R.D. 629 (D.D.C. 1986) (court lacks power under Rule 26 to issue protective order covering information known by plaintiffs prior to litigation)).

B. Farmers' Claim That The Protective Order Does Not Violate The First Amendment Is Meritless.

In the face of this wealth of authority, Farmers does not cite a single case

holding that a protective order may legally restrict the dissemination of information obtained from outside the litigation. This is not surprising, because there is no such case.[3] Instead, Farmers makes two arguments in defense of the protective order, neither of which withstands even minimal scrutiny.

1. The *Grong* Documents Clearly Are "In the Public Domain" For Purposes Of The First Amendment.

Farmers' first claim is that the protective order does not violate the First Amendment on the ground that the *Grong* documents at issue – which were produced by Farmers in a South Dakota case *without any protective order* – never entered the public domain." (*See* Farmers' Response at 15–17).[4] With respect, this argument is fanciful.

Materials obtained through discovery are ordinarily public. If this were not the case, there would be no need for Rule 26(c). *See Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988). In *Liggett*, the U.S. Court of Appeals for the First Circuit held that, absent a protective order based on good

[3] Farmers' reliance (*see* Farmers' Response at 17) on *In re Korean Airlines Disaster*, 597 F. Supp. 621 (D.D.C. 1984), is misplaced. The protective order in that case concerned dissemination of materials obtained through discovery in multi-district litigation, rather than unrelated cases, and thus was well within the court's power to control the discovery process in its own case.

[4] *Amicus curiae* DRI concedes that the *Grong* documents were "publicly disclosed." (*See* DRI Brief at 5). Moreover, Farmers apparently does not dispute that the protective order is unconstitutional as applied to the Colossus manual and any other documents obtained outside the *Grong* litigation.

cause, the public has a presumptive right of access to discovery materials. The court explained that, "as a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." *Liggett*, at 789 (internal quotations omitted). Based on this presumptive right of access, the court held that Public Citizen, a non-party to the underlying litigation, had standing to challenge a protective order preventing the parties from disseminating documents produced in discovery. *Id.*

Once a document has been produced in discovery without a protective order, any question as to whether the public had a right of access to it is no longer relevant. The document is, simply, public. *See U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1158 (3d Cir. 1991) ("We must assume from the absence of a protective order that the information disclosed in discovery is potentially accessible to the public."); *U.S. ex rel. Stone v. AmWest Sav. Ass'n*, 999 F. Supp. 852, 856 (N. D. Tex. 1997) (collecting cases demonstrating that information revealed through discovery in civil litigation is considered "publicly disclosed"). And, because such materials are public, parties are free to disseminate them. *Exum v. U.S. Olympic Committee*, 209 F.R.D. 201, 205 (D. Colo. 2002) ("Parties to litigation have a First Amendment right to disseminate information they obtained in discovery absent a valid protective

order."); *see also Oklahoma Hospital Ass'n v. Oklahoma Pub. Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984).

In short, Farmers is wrong in arguing that, because the *Grong* documents never entered the public domain, the protective order does not violate the First Amendment. To the contrary, the documents clearly *are* public, rendering the protective order invalid on its face. *See Culinary Foods v. Raychem Corp.*, 151 F.R.D. 297, 302 (N.D. Ill. 1993) (refusing to enter protective order restricting the use of documents produced in another case, even though those documents had been produced subject to protective order in the other case, and explaining that "[t]he determining factor is whether the information has been obtained in pretrial discovery in *this* case. . . . This Court's power to control discovery does not extend to material discovered in *other* cases.") (emphasis added); *see also Kirshner v. Uniden Corp.*, 842 F.2d 1074, 1080–81 (9th Cir. 1988) (court lacks power to issue protective order compelling the return of documents obtained through discovery in separate case between the same parties).

2. The Colorado District Court Does Not Have the "Power and the Duty" To Decide *Anything* With Respect To The *Grong* Documents.

Farmers' second argument is that the protective order is appropriate because Colorado courts have the "power and the duty" to decide for themselves whether

the documents at issue are confidential. (*See* Farmers' Response at 17). This argument is just as weak as its predecessor.

There is no doubt that Colorado courts have the authority to control the terms of *discovery* that occurs *in Colorado courts*. This authority is derived from Rule 26, "General Provisions Governing Discovery." The protective order at issue in this case, however, seeks to control documents that *are not being sought in this litigation*, and thus exceeds the court's authority to control discovery. As explained above, these documents were produced in another litigation, free and clear of any protective order, and then entered the public domain. Because petitioners' counsel already possessed the documents, they had no need to seek them from Farmers in this litigation, and the documents have not been the object of *any* discovery request in *any* Colorado court. That being so, a Colorado court cannot now designate these documents as confidential, because the court's power under Rule 26(c) to issue protective orders simply does not extend beyond the *discovery* process under its control. *See Kirshner*, 842 F.2d at 1081 ("a district court's power to control discovery does not extend to material discovered in a separate action"); *Culinary Foods*, 151 F.R.D. at 303 ("Where [plaintiff] has made no solicitation of the information, the information received is outside the pretrial discovery process and this Court does not have the power to prevent [plaintiff's] further dissemination of the information.").

Likewise, even if it had the power to do so, the Colorado courts lack even an iota of interest in declaring the *Grong* documents confidential, let alone the "compelling" interest alleged by Farmers. Because the documents at issue are in the public domain, no Colorado court is being asked to exercise its authority to authorize or mandate their disclosure. That being so, Colorado has no colorable interest in controlling the terms of their dissemination.

Farmers cites no authority to the contrary. Instead, Farmers offers a grab bag of miscellaneous cases that do not even arguably support its argument. For example, Farmers cites three cases for the proposition that "the parties have an expectation, protected by due process, that Colorado law will govern all aspects of their dispute." (*See* Farmers' Response at 18). Those cases, however, merely hold that class members in nationwide class actions "have a due process right to have *their claims* governed by the state law applicable to their dispute." *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 457 (D.N.J. 1998) (emphasis added). Here, the parties' substantive "claims" *are* being governed by Colorado law, just as due process requires. What due process does *not* require – and what the First Amendment does not tolerate – is that Colorado courts be permitted to declare confidential documents that are in the public domain and that are not being sought through the discovery processes of any Colorado courts.

Farmers' reliance on *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), is equally baseless. In *BMW*, the U.S. Supreme Court held that a state cannot punish a defendant for conduct that may have been lawful where it occurred. In *State Farm*, the Court held that a State does not have a legitimate concern in punishing a defendant for unlawful acts that were committed outside of its jurisdiction. It is hard to understand what these cases have to do with the matter at hand, which does not involve the extraterritorial application of any state law.

Citing these cases, however, Farmers argues that "the courts of South Dakota have no power to influence a dispute pending in the courts of Colorado." (*See* Farmers' Response at 19). This argument would only make sense if the documents were being sought pursuant to the discovery processes of the Colorado courts – which they are not. The undeniable fact is that these documents came into Petitioners' possession free and clear of the involvement of any Colorado courts. Farmers is not being asked to produce these documents in this proceeding, and the Petitioners are not seeking to invoke the power of the Colorado courts as a basis for using these documents in this proceeding. That being so, the Colorado courts are not being "influenced" by the discovery decisions of the South Dakota court. Nor are they being bound by anything, other than their lack of jurisdiction (not to

mention constitutional ability) to restrain the publication and use of documents in the public domain.

Any other result, moreover, would be flatly contrary to the Supreme Court's teaching in *Seattle Times*, 467 U.S. at 34. Farmers' argument boils down to the proposition that, even though these documents are in the public domain and were never the subject of any discovery in this case, Colorado's courts have the sovereign right "to decide whether the documents in question are confidential under Colorado law." (*See* Farmers' Response at 19). *Seattle Times* held, however, that a court's authority to issue protective orders is strictly limited to "information obtained through use of the discovery process," 467 U.S. at 34, and that any protective order extending beyond the limits of discovery materials in that case would violate the First Amendment. *See id*. at 37. *Seattle Times* and its progeny make clear that any interest that Colorado might have in throwing a cloak of secrecy over publicly available documents cannot trump the constitutional prohibition against prior restraints.

V. The Protective Order Also Violates Rule 26(c) Of The Colorado Rules Of Civil Procedure.

Putting aside the First Amendment, the protective order should be set aside because it is plainly contrary to Col. R. Civ. P. 26(c).

A. The Order Violates Rule 26(c) Because It Applies To Documents As To Which Discovery Has *Not* Been "Sought."

As previously explained, the protective order violates Rule 26(c) because it gives Farmers the right to designate as confidential documents *that were never even produced in discovery in this case*. This alone is an outright violation of the Rule, which merely permits a court to enter protective orders when disclosure "is due" or when discovery "is sought." The rule does not even arguably apply to documents as to which discovery is *not* being "sought."

Despite the clear inapplicability of the Rule to the documents at issue here, the district court entered an order that places the burden on Petitioners to identify documents obtained *in other litigation* and then gives Farmers the right to seek confidential treatment *as to those documents*, even though the documents were never "sought" in any Colorado courts. (*See* Attachment 1 at ¶¶ 11–12). This procedure is nothing short of bizarre given the clear limitations of Rule 26(c). For this reason alone, the protective order should be vacated.

Aside from vague references to "serious confidentiality and sovereignty" concerns (*see* Farmers' Response at 21), Farmers does not even attempt to demonstrate that the protective order's coverage of documents produced in other litigation is consistent with Rule 26(c). Instead, it simply argues that the order is valid because it "does not limit First Amendment freedoms to an extent greater than necessary." (*See* Farmers' Response at 20). This argument is perplexing,

given that the protective order directly tramples on "First Amendment freedoms" by permitting Farmers to seek confidential treatment of publicly available documents already in Petitioners' possession. *See Seattle Times*. In any event, even if the U.S. Constitution did not exist, the protective order still would violate the scope of Rule 26(c), which is limited to documents as to which discovery is being "sought."

Farmers also seeks to defend the protective order on the ground that it gives Petitioners the right to challenge any confidentiality designation and to use the documents in their litigation (albeit under a cloak of confidentiality). (*See* Farmers' Response at 21).[5] This argument, however, has no bearing on whether the protective order's coverage of documents in the public domain violates Rule 26(c) – which it clearly does. Try as Farmers might, it simply cannot defend an order that seeks to restrict dissemination of documents as to which discovery is *not* being sought. Rule 26(c)'s plain language could not be clearer, or more devastating to the position asserted by Farmers in this case.

Farmers also attempts to defend the protective order on the ground that, absent such orders, plaintiffs would be free to share discovery information amongst themselves, somehow putting defendants at an unfair disadvantage. (*See* Farmers'

[5] As explained below, moreover, the challenge mechanism is itself fatally flawed.

Response at 21–22) ("[Farmers] apparently must maintain a perfect record when asserting the confidentiality of its documents in litigation around the country, lest that confidentiality be lost.").

This argument turns well-established public policy regarding the benefits of discovery sharing on its head. Many courts have recognized that discovery sharing is highly beneficial. Collaboration among attorneys has been specifically approved as promoting the speedy and less expensive resolution of cases, as well as the conservation of resources. *See Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (2d Cir. 1981); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982); *U.S. v. Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421, 426 (W.D.N.Y. 1981); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 153-54 (W.D. Tex. 1980); *Williams v. Johnson & Johnson*, 50 F.R.D. 31, 32–33 (S.D.N.Y. 1970). As the district court noted in *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 87 (D.N.J. 1986), "[R]equiring each plaintiff in every similar action to run the same gauntlet over and over again serves no useful purpose other than to create barriers and discourage litigation against the Defendants. Good cause as contemplated under Rule 26 was never intended to make other litigation more difficult, costly and less efficient."

Farmers' contrary argument that protective orders should be used to require relitigation of confidentiality disputes in every case involving the same documents

would be terrible public policy. Not only would it erect unwarranted "barriers" to justice, *Cippalone,* 113 F.R.D. at 87, it would needlessly squander judicial resources by forcing court after court to relitigate identical issues of confidentiality. No court has ever endorsed such a result, and this Court should reject Farmers' invitation to do so here.

B. The Protective Order Violates Rule 26(c)'s "Good Cause" Requirement.

As previously explained (Petition at 16-19), the protective order also violates Rule 26(c)'s good cause requirement. "Blanket protective orders" are permissible only where (a) the party seeking the order has made a threshold showing of good cause for secrecy; (b) the party seeking secrecy agrees to only invoke the designation in good faith; and (c) the order contains a mechanism for challenging confidentiality designations that, if invoked, places the burden back onto the party seeking secrecy to demonstrate "good cause" for confidentiality. *Gillard v. Border Valley School Dist.*, 196 F.R.D. 382, 386 (D. Colo. 2000). *See also Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986) (discussing requisite elements of blanket protective orders).

None of these requirements has been met in this case. First, there was no threshold showing of "good cause," as Rule 26(c) requires. (*See* Petition at 18). Second, the protective order does not contain any limitation – good faith or otherwise – on Farmers' ability to designate documents as confidential. (*See*

Attachment 1 at ¶¶ 3–4). Third, and most importantly, the protective order does not contain a proper mechanism for challenging confidentiality designations.[6] These defects alone – which Farmers does not even attempt to defend – warrant a decision vacating the protective order. *Gillard*, 196 F.R.D. at 386.

C. The Protective Order Improperly Permits The Sealing Of Court Records.

Finally, the protective order violates the First Amendment and the common law right of access to court records by providing that any "confidential materials that are filed with the court must be filed under seal." (*See* Attachment 1 at ¶ 12). It is well established that court records are subject to a powerful presumption of public access that can only be overcome by a showing of compelling need for secrecy. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, *supra* at 1135 (9th Cir. 2003) (recognizing "strong presumption in favor of access to court records" that can only be overcome by "compelling reasons for secrecy"); *see also San Jose Mercury News, Inc. v. United States Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 165 (3d Cir.

[6] Although the order does contain a challenge mechanism, it fails to specify that, in the event of a challenge, the burden of proving good cause for secrecy rests on the proponent on confidentiality. Instead, it merely provides that the Plaintiffs must "move the Court to determine whether said documents are entitled to continued protection under this Order." (*See* Attachment 1 at ¶ 12).

1993)*; Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988). Even Farmers does not attempt to claim that any such showing has been made in this case.

VI. Conclusion

For the reasons argued and based on the authorities presented, the Petitioners respectfully urge the Court to reverse the district court and vacate the protective order entered on November 17, 2005.

Respectfully submitted on the 15th day of February, 2006.

Attorneys for Petitioners

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this _____day of February, 2006, sent by United States Mail, first class postage prepaid, true and complete copies of PETITIONERS' REPLY CONCERNING THE ORDER & RULE TO SHOW CAUSE to:

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