IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02 N 0740 (CBS)

AMERICAN FRIENDS SERVICE COMMITTEE, a Pennsylvania not-for-profit corporation;
ANTONIA ANTHONY;
END THE POLITICS OF CRUELTY, an unincorporated association;
CHIAPAS COALITION, an unincorporated association;
STEPNE NASH; and
VICKI NASH,

Plaintiffs,

v.

CITY AND COUNTY OF DENVER,

Defendant.

MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF CHALLENGING DEFENDANT'S DESIGNATION OF CERTAIN DISCOVERY MATERIALS AS "CONFIDENTIAL INFORMATION"

The Denver Post Corp., ("the Denver Post") by their attorneys, Thomas B. Kelley, Steven D. Zansberg, and Adam Lindquist Scoville of the law firm of Faegre & Benson LLP, move this Honorable Court, pursuant to Fed. R. Civ. P. 24, for leave to intervene in this matter for the limited purpose of challenging the Defendant's designation of certain discovery materials as "confidential information." Contingent on permission to intervene, The Denver Post asks this Honorable Court to make the Defendant City and County of Denver justify its designation of certain discovery materials as "Confidential Information," pursuant to the Stipulation and Protective Order entered July 12, 2002 in this case, which

prohibits the Plaintiffs and their counsel from disclosing them to the Denver Post. As grounds for this motion, movant states as follows:

CERTIFICATION

Pursuant to D. C. Colo. LCivR 7.1.A., the undersigned certifies that he communicated with counsel for Plaintiffs in this action and is authorized to state that Plaintiffs do not oppose the Denver Post's motion to intervene and will state their position in response to the underlying motion for access when called upon to do so. The undersigned certifies that he attempted to communicate with counsel for Defendant in this action, and provided counsel with a draft copy of this Motion, but as of the date of filing has not received any response from Defendant's counsel.

INTRODUCTION

The subject matter of this civil action is one of intense public interest and concern. The Defendant acknowledged in March 2002 that the Denver Police Department had a history of collecting and maintaining intelligence files concerning activity of individuals and organizations that was protected by the First Amendment to the United States Constitution.

Notwithstanding the substantial public interest in the scope, duration and legality of the Defendant's surveillance of allegedly protected activity, the parties in this case stipulated to a Protective Order (docket number 16) that allowed a party unilaterally to designate materials produced in discovery as "Confidential Information." According to the Protective Order, if such designation is challenged, the party seeking to maintain confidentiality "shall bear the burden of proving by a preponderance of the evidence that disclosure of the subject

information outside the scope of this litigation would result in significant harm to the public interest." Protective Order at 6, ¶ 11.

The Defendant, by designating much of the information discovered in this case—including all of the Denver Police Department intelligence files that are the subject of the action—as "Confidential Information," has prohibited the Plaintiffs from disseminating these materials to the public or press, including the Denver Post.

The Denver Post Corp. owns and publishes the daily newspaper, *The Denver Post*, which is published internationally on the World Wide Web. The Denver Post has an interest in reporting information about these judicial proceedings to the public within the State of Colorado and across the nation. The Denver Post seeks to intervene in this proceeding to be heard in opposition to the unilateral and improper designation of documents and testimony as Confidential Information, which effectively prohibits the Denver Post and its readership from receiving newsworthy information concerning this proceeding and the underlying claims.[1] Particularly in light of the determination by the Mayorally-appointed three-judge panel that reviewed the files that none of them were legitimate law enforcement information, the Denver Post believes that much of the information produced by Defendant in discovery does not meet the definition of Confidential Information found in the Protective Order, and the

[1] The Denver Post seeks access to four categories of discovery materials, insofar as they have, on information and belief, been designated by the Defendant as "Confidential Information":
1. The DPD Intelligence Files themselves;
2. All deposition testimony in this case;
3. All other documents exchanged that refer to intelligence files' contents; and
4. All other documents that discuss city policies regarding the collection and maintenance of the intelligence files.

Defendant therefore cannot justify its claim that such material should be confidential. Therefore, the Court should enter an order requiring the Defendant to demonstrate why the disclosure of the information outside the scope of this litigation would result in significant harm to the public interest. *See* Protective Order ¶ 11. The Court should limit the designation to the particular documents that are properly designated Confidential Information and rule that all material not properly so designated is not subject to the Protective Order.

ARGUMENT

I. THE DENVER POST SHOULD BE PERMITTED TO INTERVENE FOR THE LIMITED PURPOSE OF OPPOSING THE DEFENDANT'S DESIGNATION OF MATERIALS AS CONFIDENTIAL INFORMATION

Rule 24(b) of the Federal Rules of Civil Procedure provides that "anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common."[2] Third parties, including public interest groups and the press, have routinely been permitted to intervene in civil actions for the purpose of challenging the existence of "good cause" for the designation of discovery

[2] Although movant is seeking permissive intervention pursuant to Fed. R. Civ. P. 24(b), the movant may also be entitled to intervene as of right pursuant to Fed. R. Civ. P. 24(a). The Denver Post has an interest in the subject matter of the Defendant's designation of documents, discovery responses, and deposition testimony in this case as "Confidential Information" pursuant to the Protective Order. *See id.* Because Plaintiffs have indicated their willingness to release to the public such materials as the Court determines not to be properly designated as Confidential Information, the Denver Post is so situated that the designation, and the Protective Order's prohibition against Plaintiffs disclosing such information, as a practical matter, have impaired or impeded movant's ability to protect its interest in obtaining access to the material, as contemplated by Fed. R. Civ. P. 24(a). Moreover, because the Plaintiffs have not themselves formally moved to challenge the designations, and because the Denver Post may seek a determination of the confidentiality of information that the Plaintiffs have not or will not seek to have declared non-confidential, the interests of the Denver Post are not adequately represented by the existing parties. *See id.*

materials as confidential pursuant to protective orders. *See Doe v. Marsalis*, 202 F.R.D. 233, 235-36 (N.D.Ill. 2001) (granting intervention to challenge confidential designation in case involving allegations of police misconduct); *In re Bridgestone/Firestone, Inc., ATX, ATX II and Wilderness Tires Prods. Liab. Litig.*, 198 F.R.D. 654, 656-57 (S.D.Ind. 2001); *Greater Miami Baseball Club Ltd. P'ship v. Selig*, 955 F. Supp. 37 (S.D.N.Y. 1997) (allowing press to intervene to challenge designation of deposition as confidential where transcript was later filed under seal); *In re Brand Name Presciption Drugs Antitrust Litig.*, 1996 WL 84185 * 1 (N.D.Ill. 1996) (press granted leave to intervene to file a brief in support of motion to declassify document designated confidential) (copy attached as Exhibit A). Similarly, "every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders." *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir.1998).[3] As a magistrate judge of this District recently held, in granting a similar motion of the press to intervene to seek access to unfiled discovery materials, "Permissive intervention under Fed. R. Civ. P. 24(b) is the appropriate procedural device for third parties to challenge a protective or confidentiality order." *Exum v. United States Olympic Comm.*, 209 F.R.D. 201, 204 (D.Colo. 2002).

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[3] *See also Davis v. East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 926-927 (5th Cir. 1996); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994); *Pub. Citizen v. Liggett Group*, 858 F.2d 775, 780 (1st Cir. 1988); *In re Application of Dow Jones & Co.*, 842 F.2d 603, 608 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988); *Radio & Television News Dirs. Ass'n v. United States Dist. Court*, 781 F.2d 1443, 1445 (9th Cir. 1986); *Journal Publ'g Co. v. Mechem*, 801 F.2d 1233, 1235 (10th Cir. 1986); *In re Texaco, Inc.*, 84 B.R. 14, 15 (Bankr. S.D.N.Y. 1988); *Nat'l Broad. Co., Inc. v. Cooperman*, 116 A.D.2d 287, 501 N.Y.S.2d 405, 406 (N.Y. App. Div. 1986); 8 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE, CIVIL 2D § 2035 at 475-76 n.9 (1994 & Supp. 2002).

One or more Plaintiffs in this case have indicated their willingness to release to the public, including the Denver Post, such materials as the Court determines were not properly designated as Confidential Information. As a result, the Defendant's excessive and unjustified designation of discovery materials as Confidential Information pursuant to the Protective Order impairs the ability of the Denver Post to gather information from willing speakers and from public court files. Therefore, the Denver Post has standing to intervene in this matter for the limited purpose of opposing the designations or any other limitations on access to information. *See, e.g.*, *Daines v. Harrison*, 838 F. Supp. 1406, 1407-08 (D. Colo. 1993); *CBS Inc. v. Young*, 522 F.2d 234, 237-38 (6th Cir. 1975). The Denver Post's request to obtain access (through a willing speaker) to materials that have been exchanged between the parties pursuant to this Court's compulsory process, but which has been designated as Confidential Information, presents questions of fact and law in common with the Plaintiff's claims under 42 U.S.C. § 1983. *See* Fed. R. Civ. P. 24(b). Intervention by the Denver Post, solely in connection with the issues raised by the Defendant's designation of materials as Confidential Information, will not unduly delay or prejudice the adjudication of the rights of the original parties to this proceeding. Fed. R. Civ. P. 24(b).

Daines v. Harrison, *supra*, is on point. In *Daines*, this Court found that the media had standing to challenge an order denying access to an *unfiled* settlement agreement because the media were injured-in-fact by the order insofar as it precluded the possibility of the media obtaining access to the settlement agreement through the Colorado Open Records Act. 838 F. Supp. at 1407-08. Here, movants would be injured-in-fact by the Defendant's excessive

designation of discovery materials as "Confidential Information," which would preclude the movant from obtaining access to the discovery materials from a party to the litigation.

Likewise, the Denver Post should be permitted to intervene here on the same ground and for the same reasons that Magistrate Judge Coan, in the recent *Exum* case, permitted members of the press to intervene to be heard with respect to the entry of a protective order covering specific documents. 209 F.R.D. at 205. In that case, the court held that the press had standing to challenge the confidentiality of certain documents, even though the court could not compel the parties to disseminate discovery materials to third parties. *See id.* The court distinguished *Oklahoma Hospital Association v. Oklahoma Publishing Co.*, 748 F.2d 1421 (10th Cir. 1984), where the Tenth Circuit held the press lacked standing to seek unfiled discovery materials because neither party was willing to disclose the documents to the press. *See Exum*, 209 F.R.D. at 205. In *Exum*, the Plaintiff indicated that absent a protective order he would distribute the designated information to the press. *Id.* The court held that it was irrelevant to the press' standing that the Plaintiff might choose to redact some further information (although the court held there was no reasonable expectation of privacy). *Id.* Likewise here, because the Plaintiffs are willing to disclose at least some of the purported Confidential Information, the Denver Post has standing to intervene to challenge the Defendant's designations of material as Confidential Information.

The Denver Post does not challenge the *entry* of the Protective Order, but only how the parties have applied the Protective Order to certain documents exchanged in discovery. Even though it is not a "Party" to these proceedings, *see* Protective Order at 6, ¶ 11, the

Denver Post has standing to challenge the designation of documents as confidential. *See San Jose Mercury News, Inc. v. U.S. Dist. Court-Northern Dist. (San Jose)*, 187 F.3d 1096, 1101 (9th Cir. 1999) ("The right of access to court documents belongs to the public, and the Plaintiffs were in no position to bargain that right away."); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 43 (C.D.Cal. 1984). Indeed, one circuit has held that no blanket protective order is valid unless it "makes explicit that either party and any interested member of the public can challenge the secreting of particular documents." *Citizen's First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999) (Posner, C.J.).

Finally, because the Protective Order extends to materials that have been and will be filed with the Court by the parties in connection with various proceedings and motions, *see, e.g.*, docket nos. 70, 72; Protective Order ¶ 12, the Denver Post has standing to challenge the application of the Protective Order insofar as it would deny the media access to presumptively public civil court files. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982).

II. THE COURT SHOULD REQUIRE THAT DEFENDANT MEET ITS BURDEN UNDER THE PROTECTIVE ORDER OF JUSTIFYING ITS DESIGNATION OF DISCOVERY MATERIALS AS "CONFIDENTIAL INFORMATION" BY SHOWING THAT DISCLOSURE WOULD CAUSE "SIGNIFICANT HARM TO THE PUBLIC INTEREST"

There is a "presumption of public access to discovery materials" in federal court civil litigation. *Citizens First Nat'l Bank*, 178 F.3d at 946 and citations therein; *see also Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002) ("Generally, the public can gain

access to litigation documents and information produced during discovery unless the party opposing disclosure shows 'good cause' why a protective order is necessary."). "In the absence of a showing of good cause for confidentiality, the parties are free to disseminate discovery materials to the public." *Exum*, 209 F.R.D. at 206. Although pretrial discovery, unlike a trial, is usually conducted in private, "[t]he judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it)." *Citizens First Nat'l Bank*, 178 F.3d at 945 (citations omitted); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) ("The District Court cannot abdicate its responsibility to oversee the discovery process . . . .").

Where a party seeks a protective order to prohibit disclosure of specific documents, the determination of good cause is made upon the entry of the order. But where, as here, the court enters an 'umbrella' or 'blanket' protective order that covers such future documents as a party might produce and deem "confidential," no particularized showing of good cause has been made at the time of the order's entry. *See, e.g.*, *San Jose Mercury News*, 187 F.3d at 1103 ("Such blanket orders are inherently subject to challenge and modification, as the party resisting disclosure generally has not made a particularized showing of good cause with respect to any individual document."). Therefore, in the case of a blanket protective order, the party resisting disclosure retains the burden of demonstrating the need for confidentiality as to each document upon a challenge to the designation. *See In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356-57 (11th Cir. 1987) ("Under the provisions of umbrella orders, the burden of proof justifying the need for the protective order remains on the movant; only the

burden of raising the issue of confidentiality with respect to individual documents shifts to the other party. . . . Efficiency should never be allowed to deny public access to court files of material of record unless there has been an appropriate predicate established."); *see also Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001) (holding that party who designates material as "confidential," in response to a challenge, "must establish good cause for continued protection under Rule 26"); *Greater Miami Baseball Club*, 955 F. Supp. at 39 ("Nor is the fact that the deposition was designated confidential under the protective order entitled to any weight."); MANUAL FOR COMPLEX LITIGATION (THIRD) § 21.432 (1995) ("[Umbrella] orders are made without a particularized showing to support the claim for protection, but such a showing must be made whenever a claim under an order is challenged.").

Defendant must demonstrate *specific interests* favoring confidentiality that outweigh the interests favoring disclosure. *Daines*, 838 F. Supp. at 1409; *see also* 8 WRIGHT § 2035 at n.32 ("The courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause."). The Protective Order entered in the instant case properly places the burden on the party seeking to prevent public disclosure to establish "significant harm to the public interest." By agreeing to the entry of the Stipulated Protective Order containing that language, the parties have acknowledged that it is the appropriate articulation of what "good cause" means in the context of a case such as this, where the public interest in the subject of this litigation is manifest. *See In re Texaco, Inc.*, 84 B.R. 14, 17 (Bankr. S.D.N.Y. 1988) (citing *In re "Agent*

Orange" Prod. Lia. Litig., 821 F.2d 139, 146 (2d Cir. 1987)) ("Access to discovery materials is particularly appropriate when the subject matter of the litigation is of general public interest.").

To the contrary, disclosure of a significant portion of the materials that the Defendants have designated as "Confidential Information" would be of significant benefit to the public's interest in knowing about the activities of the Denver Police Department, and indeed other law enforcement agencies, in conducting surveillance of ordinary citizens and groups engaged in peaceful discussion and non-violent political protest. The Denver Police Department's collection of so-called "Spy Files" on peaceful protest activity has received extensive coverage within Colorado, and has been covered by major national media outside Colorado. *See* Exhibit B, List of major newspaper stories on the Spy Files from without Colorado. Important issues of interest to the public have also been raised. These include evidence that allegedly shows:

- that the police knew of a plot to kill an activist but did not tell him. Amy Herdy and Carol Kreck, *'Spy file' target seeks scrutiny of cops*, DENVER POST, Dec. 19, 2002 at 1A (attached in Exhibit C);
- that the three judge panel that reviewed the files was told that they had access to all the intelligence files, but in fact were provided only a portion of the files. Kevin Vaughan, *Spy files oversight debated*, ROCKY MOUNTAIN NEWS, Dec. 19, 2002 at 5A (attached in Exhibit C);

- that senior officials in Denver government, such as various current and former Police Chiefs, Managers of Safety, and Mayors were informed about the 'Spy Files' and the nature of their contents, despite having told the public that they had no such knowledge. John C. Ensslin and Peggy Lowe *'Spy files' turn political*, ROCKY MOUNTAIN NEWS, Dec. 19, 2002 at 45A; *Spies with city badges*, THE DENVER POST, Dec. 18, 2002 at 1A (attached in Exhibit C);
- that the DPD's surveillance, in addition to being performed on conduct and association protected under the First Amendment, was disproportionately performed on minority individuals and groups. Herdy and Kreck, *Spies with city badges*, *supra*;
- that the public assertions of Denver city officials shortly following disclosure that the files existed, namely that a valid policy on intelligence collection existed (and therefore that any surveillance of protected activity was contrary to city policy) was false and no such policy actually had been promulgated. Ensslin and Lowe, *supra*.
- that DPD has made such a regular practice of infiltrating local political groups that "Intelligence personal [sic] were well known to local activists" and the Intelligence Bureau had to recruit outside officers to attend groups' meetings. Det. Raymond Ayon, *Ongoing Investigation of DAN, Direct Action Now*, May 18, 2000, *available at* <http://www.aclu-co.org/spyfiles/Documents/DirectActionNowMemo.pdf> (attached as Exhibit D).

Information—embodied in city policies concerning the operation and oversight of the intelligence bureau, discussion of the contents of files during deposition testimony, and the

contents of the intelligence files themselves—that would tend to prove the truth *or falsity* of these allegations, is of vital public interest. *See* COLO. REV. STAT. §§ 24-50.5-101; 18-8-115 (demonstrating strong public policy in favor of encouraging speech that reveals or exposes unlawful conduct); *In re Texaco, Inc.*, 84 B.R. at 17.

The fact that the mayorally-appointed three-judge panel that reviewed the intelligence files determined that *none* of them were legitimate law enforcement files, suggests that no substantial public harm from the disclosure of information about pending investigations could result. Likewise, the history of this case demonstrates it would not be onerous to require that Defendant justify the need for a protective order on a particularized, document-by-document basis, because law enforcement has in fact done so already. *See* Docket no. 26 (Sept. 4, 2002) (Order concerning FBI request for protective order with respect to 22 specific intelligence files). If the discovery record contains heretofore undisclosed information concerning identifiable individuals that could properly be deemed confidential, those specific concerns may be addressed by narrowly tailoring the scope of information that remains "Confidential Information," *i.e.*, redacting such individuals' personal identifying information. *See Doe v. Marsalis*, 202 F.R.D. at 239 ("To the extent that the documents still bear private and personal information, such as social security numbers, home addresses and telephone numbers, said documents should be further redacted before they are turned over to Petitioners.").

Because of the strong public interest in learning about the contents of the Spy Files and the operations of the Police Department surrounding their collection, because the

Defendant is unlikely to be able to demonstrate that disclosure would cause significant harm to the public interest, and because of the adequacy of protecting individual files and documents as needed, the Court should hold the Defendant to its burden of justifying the continued confidentiality of the discovery exchanged in this case.

WHEREFORE, the Denver Post respectfully moves the Court for leave to intervene in this proceeding for the limited purpose of challenging the Defendant's designation of material as "Confidential Information" pursuant to the Protective Order; Movant further requests the opportunity to be heard in opposition to any showing defendants may attempt to make to establish that the disclosure of particular information "would result in significant harm to the public interest."

Respectfully submitted this 24th day of December, 2002.

FAEGRE & BENSON, LLP

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Attorneys for Proposed Intervenor
The Denver Post Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of December, 2002, a true and correct copy of the foregoing **MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF CHALLENGING DEFENDANT'S DESIGNATION OF CERTAIN DISCOVERY MATERIALS AS "CONFIDENTIAL INFORMATION"** was served on the following parties by U.S. Mail, first class, correctly addressed, as follows:

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December, 2002, a true and correct copy of the foregoing **MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF CHALLENGING DEFENDANT'S DESIGNATION OF CERTAIN DISCOVERY MATERIALS AS "CONFIDENTIAL INFORMATION"** was served on the following parties by U.S. Mail, first class, correctly addressed, as follows:

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