IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARK HOLICK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 16-1188-JWB-KGG
	)	
JULIE A. BURKHART,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM & ORDER
ON OBJECTION TO CONFIDENTIALITY DESIGNATIONS

Now before the Court is "Plaintiff's Objection to Defendant's Confidentiality Designation" (Doc. 155), in which asks the Court to "require [D]efendant to establish the necessity for confidentiality of each page" in Defendant's third document production. Having reviewed the submissions of the parties, Plaintiff's motion is **GRANTED in part** as more fully set forth herein.

FACTUAL BACKGROUND

In 2013, Defendant received a temporary order of protection from stalking against Plaintiff in Kansas state court (state court action). Plaintiff, who is a resident of Oklahoma, filed the present matter in federal district court on June 9, 2016, alleging malicious prosecution and abuse of process against Defendant, a

Kansas resident, relating to the allegations levied against him in the state court action. (*See generally*, Doc. 84.)

The Protective Order in effect in this case indicates that "[t]he parties agree that during the course of discovery it may be necessary to disclose certain confidential information relating to the subject matter of this action," but acknowledges that the parties did not agree as to "the scope and mechanics" of the Order. (Doc. 79, at 1.) Defendant asserts that "protection of" certain categories of "confidential information is necessary to avoid the invasion of her privacy and risk of harassment and harm to her and others that could result from public disclosure of materials in this litigation." (*Id*.) In conjunction with protections afforded to Plaintiff, the Court found this to be sufficient cause for entry of the Order. (*Id*.)

In entering the Protective Order, the Court acknowledges the "presumption in favor of open and public judicial proceedings in the federal courts" and indicates the Order "will be strictly construed in favor of public disclosure and open proceedings wherever possible." (*Id*., at 2.) The Protective Order defines "confidential information" as that which "the producing party designates in good faith has been previously maintained in a confidential manner and should be protected from disclosure and use outside the litigation because its disclosure and use is restricted by statute or could potentially cause harm to the interests of disclosing party or nonparties." (*Id*., at 2.) The Court ordered the parties to

> limit their designation of 'Confidential Information' to the following categories of information or documents:
>
> > (a) private information, including but not limited to personal information not currently available to the public, non-public financial records or information, and non-public personnel or employee information;
> >
> > (b) information that could jeopardize the safety of the parties or other individuals, or expose them to an increased risk of harm;
> >
> > (c) any information about minor children.
>
> Information or documents that are available to the public may not be designated as Confidential Information.

(*Id*., at 2-3.)

The Protective Order continues that any party may challenge a confidential" designation by filing a motion after conferral with opposing counsel. (*Id*., at 7.) That stated, "[t]he burden of proving the necessity of a confidentiality designation remains with the party asserting confidentiality." (*Id*., at 7-8.)

Defendant produced 357 pages to Plaintiff in her third document production. (Doc. 155, at 1; Doc. 165, at 2.) All 357 pages were designated as "confidential" pursuant to the Protective Order entered in this case. (Doc. 155, at 1; *see also* Doc. 79.) Plaintiff brings the present motion "challeng[ing] the designation . . . and moves to require defendant to establish the necessity for confidentiality of each page in the Third Production." (Doc. 155, at 1.) Since that original designation,

Defendant submitted a "re-production" of documents, which "de-designated over 100 pages of documents." (Doc. 165, at 4.) Thus, the parties have limited the documents at issue to three categories of emails, discussed *infra*. (*See* Doc. 172, at 4-6; Doc. 165, at 6.)

ANALYSIS

"Whether judicial records and other case-related information should be sealed or otherwise withheld from the public is a matter left to the sound discretion of the district court." ***Mann v. Boatright***, 477 F.3d 1140, 1149 (10th Cir. 2007) (citing ***Nixon v. Warner Commc'ns, Inc.***, 435 U.S. 589, 599, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978)). "Courts have long recognized a common-law right of access to judicial records." *Id.* (citing ***Nixon***, 435 U.S. at 597, 98 S.Ct. 1306; ***Lanphere & Urbaniak v. Colorado***, 21 F.3d 1508, 1511 (10th Cir.1994)). The public's right to access is not, however, absolute. "The 'presumption of access . . . can be rebutted if countervailing interests heavily outweigh the public interests in access.'" *Id*. (citing ***Rushford v. New Yorker Magazine, Inc***., 846 F.2d 249, 253 (4th Cir.1988)). In order to overcome the presumption of access, the party seeking to prohibit public access to such documents "'bears the burden of showing some significant interest that outweighs the presumption.'" *Id*. (citation omitted).

Defendant points out that the language of the Protective Order refers to a presumption of openness that applies to "public judicial proceedings." (Doc. 165,

at 4; Doc. 79, at 2). She argues that "[w]hile the Court favors public disclosure of documents filed on the case docket, the public interest is not a consideration for documents exchanged in document productions." (Doc. 165, at 4.) Defendant continues:

> Courts agree that because the confidentiality designations at issue govern private materials uncovered in discovery that are not part of the judicial record, there is no public interest in them:
>
> > The protective order requires no balancing test; there is no presumption in favor of public access. To qualify as confidential information under the protective order, Defendant only needed to demonstrate that disclosing the document could potentially harm his interests. This makes sense because ***the protective order is designed to allow the free flow of discovery information between the parties without fear of public disclosure – the public does not have a strong interest in documents merely exchanged between the parties***.
>
> ***Fish v. Kobach***, 2017 WL 4422645, at *6 (D. Kan. Oct. 5, 2017) (emphasis added); *see also* ***Pintos v. Pac. Creditors Ass'n***, 605 F.3d 665, 678 (9th Cir. 2010) ("The cognizable public interest in judicial records that underlies the 'compelling reasons' standard does not exist for documents produced between private litigants.").

(*Id*., at 5.)

As discussed by Defendant, the undersigned Magistrate Judge has, in a prior opinion, addressed the distinction between the marking as "confidential" of

documents produced in discovery versus those used in court filings. *See* ***Progressive N'wstern Ins. Co. v. Gant***, No. 15-9267-JAR-KGG, 2017 WL 656575 (D. Kan. Feb. 16, 2017). In ***Progressive***, the Court chose not to

> order Plaintiff to engage in a wholesale review of all documents previously marked as confidential in this case and make a revised determination as to the appropriateness of each specific confidential designation. To do so would invite disagreement between the parties as to hundreds of documents that may never need to be filed with the Court or seen by anyone other than counsel and the parties.

Progressive N'wstern Ins. Co. v. Gant, No. 15-9267-JAR-KGG, 2017 WL 656575, at *9 (D. Kan. Feb. 16, 2017).

In ***Progressive***, the attorneys were "instructed to meet and confer, as necessary, regarding any disagreements in the future about previously designated document(s) that counsel intends to use as an exhibit in this case." *Id*. This is the approach suggested by Defendant herein, as she contends that "[t]he subset of documents in [her] third production is reasonably marked confidential for the purposes of document exchange between the parties" but that she would be "available to meet and confer" when "Plaintiff seeks to attach a specific confidential document to Court filings . . . ." (Doc. 165, at 8-9.) Plaintiff replies, however, that this approach flies in the face of "judicial economy and efficiency" because he "will be required to file numerous motions for leave to file under seal

because of Defendant's improper, liberally applied, confidentiality designations." (Doc. 172, at 10.)

Plaintiff indicates he is not requesting a "wholesale review of all documents previously marked as confidential in this case" as was requested in ***Progressive***. Rather, he contends he has "clearly identified" a small number of emails marked as confidential, which fall into three categories, that he "intends to use . . . for his discovery depositions, substantive motions practice, and as part of his case-in-chief." (*Id*., at 11.) Plaintiff thus argues that the confidential designation of these documents should be analyzed now because they are no longer in "the realm of abstract, speculative 'private information'" like the documents in ***Progressive***.

The Court agrees that the situation presented herein is distinguishable from the circumstances existing in ***Progressive***. The three categories of emails at issue which Plaintiff intends to use as exhibits during depositions and/or attached to court filings have been enumerated as follows:

1) Emails from Nov. 16, 2012 (including (a) emails from Defendant directing her staff to create letters and press releases blaming Plaintiff and Spirit One for the death of Dr. Tiller; and (b) emails containing purported minutes of a phone conference between Defendant's board members in which Defendant discusses an upcoming protest and makes the same allegations against Holick and Spirit One). Plaintiff argues the documents are "highly relevant" to show Defendant's animus and attack the credibility of the PFS order being based on her "reasonable fear" of Plaintiff.

2) Emails exchanged after the "second ministry event" on February 15, 2013 and March 7, 2013, the date Defendant filed her PFS petition. Plaintiff contends that these documents are "highly probative because they include discussions of [Defendant's] version of events on February 15, 2013, which conflict with her deposition testimony. They also discuss plans to file a PFS order against [Plaintiff]." Plaintiff continues that "[t]he persons who participated in these emails hold discoverable information about the events that led up to the filing of the false PFS petition. As such, Plaintiff is entitled to depose them about their knowledge of these matters."

3) Email correspondence between Defendant and Officer David Hinners of the Wichita Police Department. Plaintiff contends these documents are "highly relevant to show (1) Defendant's continuing animus and malice against Plaintiff; (2) Defendant's efforts to continue and maintain the PFS order against [Plaintiff] for over two years; and (3) the very real risk to [Plaintiff] of criminal prosecution as the result of Defendant's wrongful allegations against him of stalking her."

(*See* Doc. 172, at 4-6.)

Plaintiff has established that the documents, in general, are more than mere private materials produced via discovery that will not be part of the judicial record. That stated, the Court cannot determine the confidentiality of these documents without having seen the specific emails at issue. Further, the Court anticipates that some of the approximately 250 pages that remain designated are unlikely to become part of the judicial record.

Plaintiff is therefore instructed to provide Defendant with an itemized list of documents it anticipates using as deposition exhibits and/or exhibits to motions in this case. Thereafter, the parties are instructed to meet and confer as to two issues:

1) whether any of the approximately 250 pages that remain designated as "confidential" should have that designation removed; and

2) as to those documents listed Plaintiff as likely to become part of the judicial record, whether such documents should be given a "sealed" designation by the parties, pursuant to D. Kan. Rule 5.4.6, in the event the documents become part of the judicial record. (*See also* Doc. 79, at 7.)

To the extent the parties cannot agree as to the confidential designation of a specific document(s) and/or whether a document(s) that becomes part of the judicial record should receive a sealed designation, the parties are instructed to submit the same to the Court for an *in camera* review **within thirty (30) days** of the date of this Order. This procedure will be the most expeditiously and judicially efficient way to address further issues regarding the protection of these documents going forward.

IT IS THEREFORE ORDERED that Plaintiff's Objection to Confidentiality Designation (Doc. 155) is **GRANTED in part**.

IT IS SO ORDERED.

Dated this 14th day of May, 2018, at Wichita, Kansas.

S/ KENNETH G. GALE
HON. KENNETH G. GALE
U.S. MAGISTRATE JUDGE