IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CASE NO. 1:19-CV-386

MARY SMITH, as Administrator of the ESTATE OF MARCUS DEON SMITH, deceased,

Plaintiff,

v.

CITY OF GREENSBORO, Greensboro Police Officers JUSTIN PAYNE, ROBERT DUNCAN, MICHAEL MONTALVO, ALFRED LEWIS, CHRISTOPHER BRADSHAW, LEE ANDREWS, DOUGLAS STRADER, and JORDAN BAILEY, and Guilford EMS Paramedics ASHLEY ABBOTT and DYLAN ALLING,

Defendants.

BRIEF IN SUPPORT OF DEFENDANTS' JOINT MOTION TO SHOW CAUSE OR FOR OTHER RELIEF WITH RESPECT TO POTENTIAL VIOLATIONS OF PROTECTIVE ORDER AND LOCAL RULES

Defendants respectfully submit this brief in support of their motion requesting that the Court enter a show cause order or take other appropriate measures with respect to potential violations of the Protective Order or Local Rules by Plaintiff's counsel.

NATURE OF THE MATTER BEFORE THE COURT

This case involves claims against the City of Greensboro, eight current or former Greensboro Police Department officers (the "GPD Officers"), and two Guilford County Emergency Medical Services personnel (the "EMS Defendants"), arising from the death of Marcus Smith after an encounter with Defendants on 8 September 2018. Following the Court's ruling on Defendants' motions to dismiss, Plaintiff's remaining claims are

against the City under a *Monell* failure-to-train theory, and against the GPD Officers for alleged excessive force resulting in wrongful death. Plaintiff's sole remaining claim against the EMS Defendants asserts a federal statutory due process claim based on "deliberate indifference."

The parties have engaged in extensive discovery. To date, the City has produced approximately 13,000 pages of documents, 225 photos, 11 audio recordings, and 51 videos. Additionally, Plaintiff has conducted 17 depositions, most lasting full days, resulting in over 4,300 pages of transcripts. Plaintiff has deposed:

- The eight GPD Officer Defendants;
- The current and former Police Chiefs;
- The Mayor of Greensboro;
- The City Manager;
- Three other GPD supervisors; and
- The EMS Defendants.

From the early stages of this lawsuit, Plaintiff's counsel and members of the self-described "legal team" have engaged in a campaign of public communications. But the nature of these communications have changed dramatically in recent weeks. The consistent and increasing pattern of attempting to try this case in the public domain has culminated in the disclosure of discovery materials such as deposition transcripts and at least one expert report, and the conspicuous use of those materials by de jure or de facto agents of counsel.

BACKGROUND

A. Entry of Protective Order upon consent motion

Because discovery was likely to involve medical records and other information protected by North Carolina statutes, Defendants' counsel proposed a protective order to Plaintiff's counsel. In July 2020, the parties exchanged multiple drafts of a protective order. Plaintiff's counsel made numerous revisions that were included in the final agreed-upon submission. Plaintiff consented to submission. (Dkt. 77, ¶ 10.) On 16 July 2020, the Court entered the Protective Order. (Dkt. 79.)

The Protective Order includes provisions that are common to such orders:

- It authorizes "producing parties" (including nonparties that produce information in response to a subpoena) to designate discovery materials as "Confidential" or "Highly Confidential." (Dkt. 79, ¶¶ 3(a), 3(b), 3(f), 7.)
- Such "Confidential Information" must be "maintained in confidence" by the "receiving party" and "under the direct control of counsel of record," and may only be disclosed to "qualified persons," including the parties, counsel of record and their staff, retained expert witnesses, Court personnel, and the mediator. (Dkt. 79, ¶¶ 3(g), 3(h), 9, 16.) Confidential Information must also be prospectively filed under seal, consistent with Local Rule 5.4. (*Id.*, ¶ 19.)
- Deposition transcripts are automatically treated as "Confidential Information" until 30 days after the parties receive the transcript, and thereafter any

testimony designated in writing must continue to be treated as "Confidential Information." (Dkt. 79, ¶ 13.)

The Protective Order also includes a broader prohibition on the use of discovery materials for non-litigation purposes:

> *All information or documents disclosed in discovery in this Litigation and not otherwise available to the parties, shall be used by the receiving party solely for the purposes of preparation for trial, pretrial proceedings and trial of this action and not in connection with any other litigation or judicial or regulatory proceeding or for any business, commercial, competitive, political, personal or other purpose until such time as the documents are filed publicly with the Court.*

(Dkt. 79, ¶ 10 (emphases added).) This kind of provision, modeled on the language approved in *Seattle Times v. Rhinehart*, 467 U.S. 20, 27 (1984), is also common in this district, including in cases involving GPD and law enforcement-related matters. *See Alexander v. City of Greensboro*, No. 1:09-CV-934, Dkt. 60, ¶ 6; *Wray v. City of Greensboro*, No. 1:09-CV-95, Dkt. 35, ¶ 6; *White v. City of Greensboro*, No. 1:18-CV-969, Dkt. 100, ¶ 5; *Armstrong v. City of Greensboro*, No. 1:15-CV-282, Dkt. 55, ¶ 10; *see also Capital Associated Industries, Inc. v. Stein*, No. 1:15-CV-83, Dkt. 79, ¶ 2.

The Protective Order confirms that it "applies to all documents and information produced in the Litigation," (Dkt. 79, ¶ 4), which is of course the case here under the plain language of Paragraph 10.

Together, the specific limitations on "Confidential Information," which can only be disclosed to "qualified persons" and must be prospectively filed under seal, and the restriction on the non-litigation use of information and documents obtained in discovery,

help to ensure that parties will receive a fair jury trial. These limitations follow the principle that "pretrial depositions and interrogatories are not public components of a civil trial," *Seattle Times*, 467 U.S. at 33, and are consistent with the ethical obligation to avoid extrajudicial public statements that could have a prejudicial effect on an adjudicative proceeding.

B. Current record of public communications and release of discovery materials

From the start, Plaintiff's counsel have engaged in a campaign to generate prejudicial pretrial publicity. In recent weeks this unfortunate effort has accelerated, necessitating the filing of this motion.

Initial Press Conference. Plaintiff filed the Complaint on 10 April 2019. (Dkt. 1.) That same day, the legal team held a press conference in Greensboro. (**Exhibit P**.) They subsequently issued a press release including quotations from Flint Taylor and Graham Holt. (**Exhibit A**.) Both are attorneys of record. It ended by stating that the media could contact Mr. Taylor or Mr. Holt "[f]or more information." Plaintiff's counsel recently used their press release as a deposition exhibit, turning their own improper public statements into purported evidence.

"Truthout" Article. As the parties were briefing Defendants' motions to dismiss, Mr. Taylor published an advocacy article about Plaintiff's allegations in *Truthout*. (**Exhibit B**.) *Truthout* is a nonprofit news publication available on the internet.[1]

[1] "About Truthout," *Truthout*, http://www.truthout.org/about (last accessed 4 May 2021).

On 10 September 2019, YES! Weekly, a local print and online paper, published an article discussing the case. (**Exhibit C**.) The article included a link to Mr. Taylor's *Truthout* article and a statement from a member of the legal team calling it "an article [that] has gone around the nation about this case."

Articles and statements by Lewis Pitts. In the *Truthout* article, Mr. Taylor described "Greensboro civil rights lawyer Lewis Pitts" as a member of the "legal team" representing the Smith family in this case. In fact, Mr. Pitts has not been a licensed attorney in North Carolina since resigning from the North Carolina State Bar in 2014 (subsequently classified as having "relinquished" his membership in the State Bar).

In an April 2021 letter, Mr. Taylor confirmed that Mr. Pitts was indeed a "member of the legal team," as he wrote in the 2019 *Truthout* article. Mr. Taylor now advises, however, that "we collectively agreed soon after the motion to dismiss was decided and before discovery began that Mr. Pitts would not be a member of the legal team …." (**Exhibit S** at 11.)[2] But only a few days later, Mr. Pitts was interviewed by the Greensboro News & Record for a story about this Court's recent Order directing the City to produce body-worn camera footage from other incidents. (**Exhibit D**.) That interview reported that Mr. Pitts is now "a liaison between the Smith family legal team and the Greensboro activist community."

Mr. Pitts's public commentary began before the Complaint was filed. On 24 February 2019, he published a column in the News & Record that included language

[2] Exhibit S has filed under seal for reasons set forth in the accompanying motion to seal.

that closely tracked the Complaint filed shortly thereafter. (**Exhibit E**.) This suggests that he was already coordinating his public communications with counsel.

Several weeks after the Court ruled on the motions to dismiss, Mr. Pitts authored a column in the News & Record on 12 April 2020. (**Exhibit F**.) This column was published about two months before discovery began, so it appears that Mr. Pitts was still a "member of the legal team." In the column, Mr. Pitts discussed the Court's ruling and demanded that the City Council settle the litigation. He described Defendants' efforts to defend themselves as "further delay and wasteful lawyer enrichment tactics." He also criticized the City's retention of counsel as "wast[ing] … taxpayer money on enriching silk-stocking lawyers," a term, in context, that is intended to demean and insult the City's counsel. This same term is used repeatedly by Mr. Pitts and Mr. Taylor. Finally, Mr. Pitts noted that the medical examiner ruled the manner of death to be "homicide," and he incorrectly defined that term as "the illegal killing of a person." As Plaintiff's legal team well knows, the term "homicide" has a specific and neutral meaning when used in connection with an autopsy that does not connote any wrongdoing or illegality.

Mr. Pitts participated in a June 2020 press conference. (**Exhibit G**.) At that press conference, he referred to Defendants' then-pending motions related to discovery issues as "frivolous, useless motions."

Press Statements. Plaintiff's counsel of record have given numerous press statements to local media. The statements have often been untrue and inflammatory.

In a 17 March 2020 statement to YES! Weekly reporter Ian McDowell, Mr. Taylor made a public settlement demand of the City. (**Exhibit H**.) In the same article, Mr. Pitts criticized the City Council for "pay[ing] silk-stocking lawyers … to argue that the judge should throw out" the lawsuit. As discussed below, this reporter also plays a central role in the recent disclosure of deposition transcripts.

In a 31 March 2020 statement to Mr. McDowell at YES! Weekly, Mr. Taylor called the Court's partial grant and partial denial of the motions to dismiss "a resounding and long-awaited victory for the Smith family." (**Exhibit I**.) He criticized Defendants' retention of counsel as "paying their silk-stocking private lawyers … to defend this case," and forecast Plaintiff's plan to depose the former Chief of Police and the Mayor.

In a 9 June 2020 statement to Mr. McDowell at YES! Weekly, Mr. Taylor called Mr. Smith a "victim[] of racist and illegal police violence," and again made demands regarding the settlement of the case. (**Exhibit J**.)

In a 27 January 2021 statement to Mr. McDowell at YES! Weekly, Mr. Taylor mischaracterized the Court's ruling on the motions to dismiss, and then stated that "pre-trial discovery has so far only strengthened our case." (**Exhibit K**.)

Radio Interview. In April 2020, Mr. Taylor gave a radio interview about the case to a nationally-syndicated and internet-streamed radio program, "Law and Disorder." (**Exhibit T** at 40:29.)[3] In advance of the broadcast, YES! Weekly published an article by Mr. McDowell that included a link to the show. (**Exhibit L**.) In a statement, Mr. Taylor

[3] The 13 April 2020 episode of "Law and Disorder" is not attached, but remains available at: https://lawanddisorder.org/2020/04/law-and-disorder-april-13-2020/.

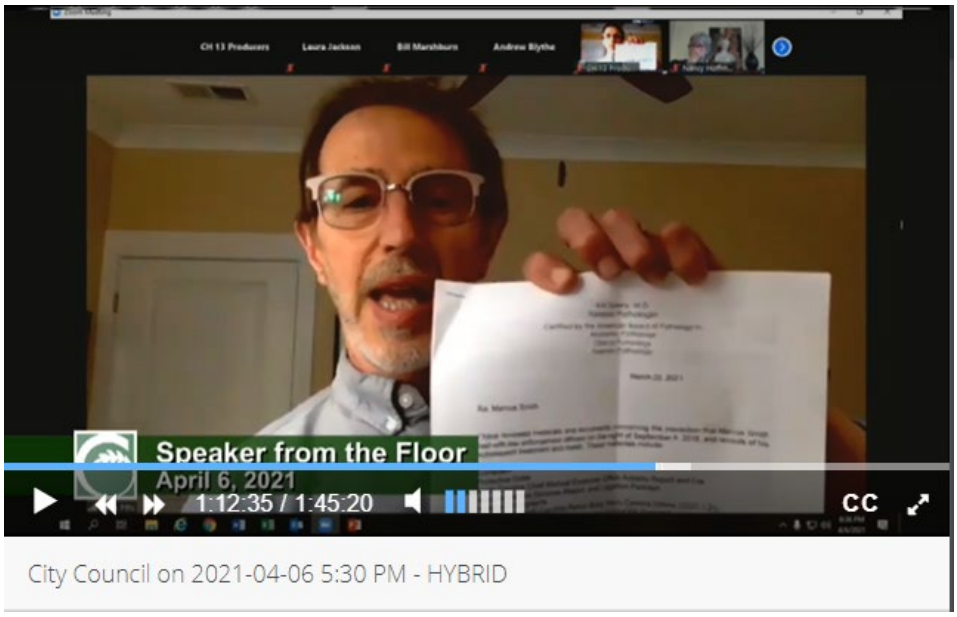
said the interview covered "the Marcus Smith homicide, the official coverup, the GPD's history of racially-motivated violence, the judge's recent decision to move the trial forward, and the community protests, as well as a bit about police torture in Chicago and the importance of the media in changing the official narrative."

In the radio interview, Mr. Taylor said that this suit was brought "with the support of" Mr. Pitts. (Ex. T at 46:30.) He misstated factual information and the Court's ruling on the motions to dismiss. For example, Mr. Taylor erroneously stated that Judge Biggs "found that the City had in fact failed to properly train their officers," which he described as a "major victory." (*Id.* at 52:32.) A lay listener would likely not know that it would be impossible to make such a factual finding on a Rule 12(b)(6) motion.

Strader Deposition. At his 8 March 2021 deposition, Defendant Strader testified about his current employment. He had previously been separated from GPD. Mr. Strader testified that was hired by the Graham Police Department the previous week and gave his new rank. A week later, Mr. McDowell of YES! Weekly filed a public records request with the City that included Mr. Strader's hiring by Graham PD, start date, and new rank. (**Exhibit M**.) This occurred during the period when the entire deposition was deemed "Confidential Information" under Paragraph 13 of the Protective Order. The release of these details, therefore, would constitute a violation of the Protective Order's limitations on the release of "Confidential Information." Subsequently, there have been protests within this judicial district, demanding Mr. Strader's termination. At least one of those protests featured Len Butler, Plaintiff's son. (**Exhibit N**.)

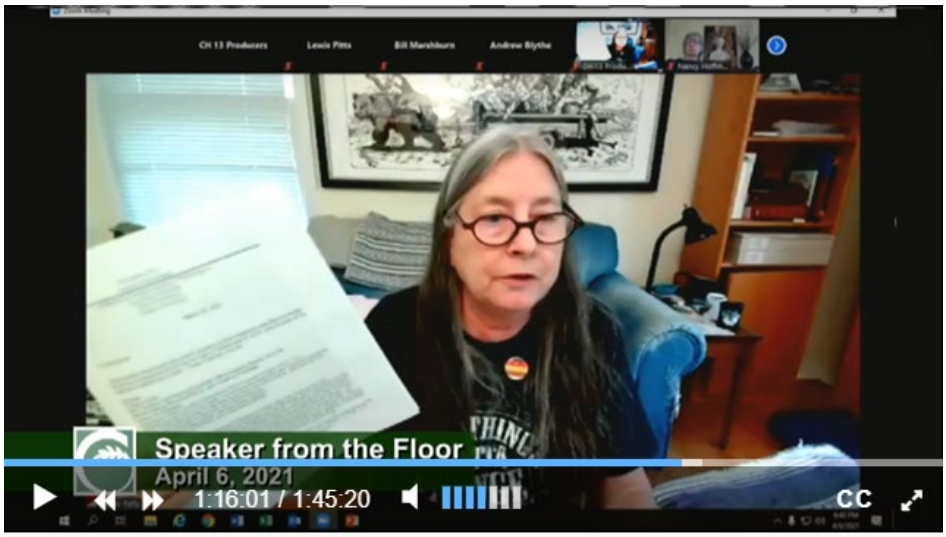
Distribution of Expert Report. On 22 March 2021, Plaintiff served reports from three purported expert witnesses, including Dr. Kris Sperry, a pathologist from Georgia. Dr. Sperry's report includes references to and summaries of the EMS Defendants' testimony. It also references records produced by the N.C. Office of the Chief Medical Examiner pursuant to subpoena. Because the Sperry report references or discusses information for which Plaintiff's counsel are "receiving parties," it is within the scope of Paragraph 10 of the Protective Order and cannot be used for a non-litigation purpose.

On 6 April 2021, during the Public Comment portion of the Greensboro City Council meeting, two speakers, who were appearing remotely, waved for the camera, and quoted from, Dr. Sperry's report. (**Exhibit U**.)[4] These meetings are broadcast locally and streamed online by the City. One speaker was Mr. Pitts, who read several of Dr. Sperry's conclusory statements from the report. (Ex. U at 1:11:35 to 1:15:01.)



[4] The recording of the 6 April 2021 City Council meeting is not attached, but is available from the City's website at: http://greensboro.granicus.com/player/clip/4403.

A Greensboro citizen named Hester Petty also waved a copy of the report in front of the camera. (Ex. U at 1:15:01 to 1:17:57.) She incorrectly referred to the Sperry report, and the two other reports from Plaintiff's purported experts, as "independent reviews into the death of Marcus Smith either completed or in progress." This statement suggests that Ms. Petty has all three reports. She emphasized that Dr. Sperry's report was based, among other things, on deposition testimony. As discussed below, there is more evidence that Ms. Petty is working in conjunction with Plaintiff's counsel to generate pretrial publicity about this case.



The disclosure of this evidence did not end with Mr. Pitts and Ms. Petty. On 16 April 2021, several local activist groups issued a press release stating that, at a press conference to be held on 20 April 2021, they would discuss and distribute Dr. Sperry's report. (Vaughan Decl., Ex. 1.) The press release was titled "New Expert Report

Confirms Death of Marcus Smith a Homicide," and it emphasized that Dr. Sperry's report was based, among other things, on "official depositions."

Upon learning about the upcoming press conference, Defendants' counsel contacted Plaintiff's counsel on 16 April 2021 to discuss the application of the Protective Order to expert reports and other discovery material. Following that call, Plaintiff's counsel sent an email that confirmed they had made a coordinated and "careful" effort to release case information to the public. (**Exhibit Q**.) Rejecting the plain language of Paragraphs 4 and 10 of the Protective Order, counsel wrote that the order "only governs the disclosure of 'Confidential Information.'"

The press conference on 20 April 2021 was live-streamed on Facebook. (**Exhibit V**.)[5] The speakers discussed Dr. Sperry's report and the lawsuit, and made repeated and inflammatory comparisons to the George Floyd case and the trial of Derek Chauvin in Minneapolis. Since the press conference, other public speakers at City Council meetings have discussed Dr. Sperry's report.

Additional communications between counsel. On 19 April 2021, Defendants' counsel sent a letter to Plaintiff's counsel. (**Exhibit R**.) This letter discussed the applicable law and the Protective Order, and requested that Plaintiff's counsel "immediately take all available steps to stop any distribution of or use of discovery materials in this case outside of the specific confines of the litigation process." It also asked counsel to confirm which discovery materials have been distributed.

[5] A recording of the 20 April 2021 press conference at the Beloved Community Center is not attached, but is publicly available at: https://www.facebook.com/353266698026803/videos/292658909058831.

On 23 April 2019, Mr. Taylor responded to the letter. (Ex. S.) The 11-page response is almost entirely focused on a skewed presentation of evidence from the case. Plaintiff's counsel did not respond to the reasonable requests for information about the scope of the potential Protective Order violation. Instead, the letter painted the picture that counsel's indignation about the evidence in this case somehow justifies their concerted efforts to try this case in a public forum instead of in this Court. As noted above, the letter also confirmed that Mr. Pitts was a member of the "legal team" for at least some part of this litigation when he was engaged in public communications about the case. The letter was a transparent attempt to inject more discovery information about this case into the public; it concluded with a request that the letter be "present[ed] to the full City Council for discussion, debate and vote in an open session at which public comment is encouraged."

Release of deposition transcripts to Mr. Pitts. The evidence shows that deposition transcripts have been released to Mr. Pitts. During the Public Comment portion of the 4 May 2021 City Council meeting, Mr. Pitts again spoke. (**Exhibit W** at 1:00:26.)[6] He purported to read from Mayor Vaughan's deposition transcript. (*Id.* at 1:02:40.) He then offered to publicly distribute copies of deposition transcripts. Specifically, he said that "[i]f anybody out there listening would like that deposition, email me, email me and I will send you the depositions." (*Id.* at 1:03:21.)

[6] The recording of the 4 May 2021 City Council meeting is not attached, but is available from the City's website at: http://greensboro.granicus.com/player/clip/4417.

Release of deposition transcripts to Ms. Petty. The evidence also shows that deposition transcripts have been released to Ms. Petty. On 23 April 2021, Ms. Petty wrote in an email to City Council members that "I suggest you take some time to read the depositions and exhibits that have already been generated. I expect you will find them illuminating." (Vaughan Decl., Ex. 2.)

At the City Council meeting on 4 May 2021, Ms. Petty again spoke. (Ex. W at 1:04:10.) Among other things, she read language that appears in the transcript of the deposition of Sgt. Matthew Stein, who conducted GPD's internal investigation of Mr. Smith's death.

Ms. Petty plays a bizarre role in this litigation. For years, she has frequently sought to communicate with City Council members and other officials. Her emails about the Marcus Smith case have been used by Plaintiff's counsel as deposition exhibits at least 11 times. In turn, Plaintiff's counsel have given discovery materials to Ms. Petty. Having received those materials, she has continued to email and publicly use them.[7]

Release of deposition transcripts to reporter. On or about 21 April 2021, Mr. McDowell wrote on Facebook that "I'm doing an article on the entire history of the case, using material from the depositions, for a statewide publication," which "should be

[7] Emails like this to Council members can become public records, as Plaintiff's counsel know. In fact, in August 2019, a Superior Court Judge initiated that court's disciplinary proceedings against Mr. Holt for using a public email to Council members to disclose details about body-worn camera footage that had been released to him under an order requiring confidentiality. (**Exhibit X**.) Those disciplinary proceedings have not concluded. (**Exhibit O**.)

out in May." (Vaughan Decl., ¶ 4.) He concluded the post by noting that "[t]hings are happening." (*Id.*)

On 1 May 2021, Mr. McDowell texted Mayor Vaughan stating, "I'm sorry, my friend, but I've read your redacted deposition, and I can't not write about [certain matter that was the subject of testimony]." (Vaughan Decl., ¶ 6.) He said his editor "wants to get this story out ASAP." (*Id.*)

As with Ms. Petty, Mr. McDowell also is part of a strange symbiotic relationship with Plaintiff's counsel. Articles or emails that he wrote have been used by Plaintiff's counsel for at least six deposition exhibits.

Tomorrow's press conference. On the day before this filing, a press release was issued about a press conference in Greensboro scheduled for tomorrow, 13 May 2021. (Vaughan Decl., Ex. 3.) Mr. Taylor will speak in-person at the press conference, including about information from the report of another purported expert witness, Scott Defoe, and about "the City's continuing refusal to admit any wrong-doing in the Marcus Smith case." Mr. Defoe's report is based on, and references, deposition testimony and other materials for which Plaintiff's counsel are the "receiving party," including "Confidential Information." Mr. Pitts is listed as the contact for the event.

QUESTIONS PRESENTED

1. Does the release of discovery material and information violate the Protective Order?

2. Does the pattern of public communications by counsel of record violate the Court's Code of Professional Responsibility?

3. What steps are warranted to investigate and address these issues?

ARGUMENT

The expanding campaign by Plaintiff's counsel and their associates to engage in pretrial public communications about the case raises serious questions under the Protective Order and the Court's Code of Professional Responsibility. In addition to the Court's authority with respect to a matter pending before it, the North Carolina State Bar has jurisdiction over potential violations of the ethics rules. Because the record also raises issues under this Court's Protective Order, undersigned counsel have collectively concluded that it would be more appropriate to bring these concerns to the Court's attention pursuant to Local Rules 83.10e and 83.10f(a), so that the Court can determine whether a referral to the State Bar or other action would be appropriate.

The impact of this public campaign is already apparent. City Council members and other public officials are regularly confronted by media and public commentary about the case, and must evaluate whether to respond and how to do so in an appropriate manner, if at all. While Plaintiff's counsel of record have injected discovery materials and information into the public dialogue to fuel these episodes, Defendants' counsel of record understand and believe that fidelity to the Protective Order and the expectations of counsel practicing in this Court do not allow for rebuttal or the release of discovery materials. Moreover, such a public rebuttal would only give Plaintiff's counsel what they seem to want, which is an excuse to discuss this case even more outside of the Court proceedings, which is the forum they chose when they brought suit and entered

appearances. The undersigned do not desire to unnecessarily burden the Court, but they believe that the Court's attention to these issues is now necessary.

I. The record suggests that Plaintiff's counsel of record may have violated the Protective Order.

The record establishes that Plaintiff's counsel of record have released discovery materials for purposes other than the preparation for trial, pretrial proceedings, or trial of this action. Plaintiff's counsel have released deposition transcripts to Mr. Pitts, the "liaison" between the legal team and community groups, to Ms. Petty, and to at least one reporter. In turn, Mr. Pitts and Ms. Petty have used those transcripts when speaking publicly about the case, and Mr. Pitts offered to distribute transcripts to anyone by email. The reporter has written that he is using the transcripts to prepare another story about the case.

Plaintiff's counsel obtained the deposition transcripts as a result of the Court's discovery mechanisms. Plaintiff's counsel are "receiving parties" of those transcripts. (Dkt. 79, ¶ 3(h).) The transcripts are therefore squarely within the prohibition on using "[a]ll information or documents disclosed in discovery" for any purpose other than "preparation for trial, pretrial proceedings and trial of this action and not in connection with any … political, personal or other purpose …." (Dkt. 79, ¶ 10 (emphases added).) This restriction is written in plain language. And it is plainly a different provision than the more restrictive prohibition on any disclosure or public filing of "Confidential Information."

The prohibition on the use of discovery materials for non-litigation purposes has a long history. In *Seattle Times*, 467 U.S. at 27, the Supreme Court approved a protective order that prohibited parties from "publishing, disseminating, or using the information [obtained in discovery] in any way except where necessary to prepare for and try the case," essentially the same restriction in Paragraph 10. In that case, a newspaper was a party, yet it was still subject to the valid restriction on the public use of discovery materials.

The leading case in this district is *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264 (M.D.N.C. 1988). The protective order provided that "[n]o information provided by [certain witnesses], whether or not designated as CONFIDENTIAL INFORMATION, shall be used by any person for any purpose other than preparing or assisting counsel for the parties in preparing this action for trial." *Id.* at 266.

At issue was the plaintiff's counsel's disclosure of a nonparty's deposition testimony to another witness during preparation for the witness's deposition. Later, those transcripts were used as evidence in unrelated litigation against the nonparty. *Id.* at 266. The nonparty filed a motion requesting an investigation and sanctions for the disclosure by the plaintiff's counsel to the witness.

As is the case here, the plaintiff's counsel argued that they could "show the deposition transcripts to anyone" because those transcripts were not designated as

confidential. *Id.* The plaintiff's counsel also argued that they had improvidently agreed to the protective order, and requested to be relieved of its obligations. *Id.* at 267.

The Middle District rejected this argument, noting that "[w]hen a party willingly accedes to the entry of a stipulated protective order, the Court will be hesitant to relieve that party of its obligations, particularly when the other party produced discovery in reliance on their agreement." *Id.* at 267. The Court also found that there was good cause for entry of the protective order. *Id.* at 268. Likewise, here there was a consent motion that provided information to the Court about the circumstances warranting entry of the protective order at the start of the discovery period. (*See* Dkts. 77, 78.)

The *Parkway* Court noted some ambiguity in the order with respect to material that was not designated as confidential. *Id.* at 269. Nonetheless, the Court was able to determine the meaning of the "literal terms" of the protective order. When it did so, the Court held that the plaintiffs' counsel "did not violate the literal terms of the order by showing the depositions to [the witness]." *Id.* at 269. Without question, the use of the discovery material to prepare a witness for deposition was part of preparing for the trial of the case. The Court found that also giving copies of the depositions to the witness as part of the deposition preparation process was a violation of the spirit of the protective order, but not one that alone warranted sanctions. *Id.*

Applying *Parkway* here, the analysis quickly diverges. In clear language, the Protective Order prohibits the non-litigation use of discovery materials. Plaintiff's counsel did not provide these discovery materials to witnesses they were preparing for

deposition. Instead, they apparently provided them to Mr. Pitts, Ms. Petty, a journalist, and perhaps others. This is nothing other than a violation of the letter and the spirit of the Protective Order that Plaintiff's counsel consented to and participated in drafting.

Moreover, the full extent of the disclosure is not known to the undersigned. Plaintiff's counsel refused to respond to the request for more information about the extent of the disclosures. There is no other mechanism available to Defendants to develop this record. At a minimum, there is evidence suggesting that "Confidential Information" from Defendant Strader's deposition was released. To establish a full record, Defendants respectfully suggest that the Court could require Plaintiff's counsel to account for all materials that have been disclosed, to whom the disclosures were made, when the disclosures were made, and whether any "confidential information" was included in the disclosed materials, which would raise separate issues under the Protective Order.

Other courts have sanctioned similar conduct, including through contempt proceedings. In *Ross v. University of Tulsa*, 225 F. Supp. 3d 1254 (N.D. Ok. 2016), the plaintiff's attorney was found to have violated a similar provision prohibiting the non-litigation use of discovery materials, by disclosing materials to a journalist. The court rejected the attorney's "unreasonably narrow interpretation" of the protective order and found that his "'disclose now, ask for forgiveness later' approach justifie[d] a finding of civil contempt and sanction." *Id.* at 1269. *See also Fuentes v. Maxim Healthcare Services, Inc.*, 2019 WL 1751822 (C.D. Cal. Feb. 8, 2019) (sanctioning attorney who

violated similar provision by using discovery information to send solicitations to prospective clients).

II. The record suggests Plaintiff's counsel may have violated this Court's Code of Professional Responsibility.

This Court has adopted the North Carolina Rules of Professional Conduct as its Code of Professional Responsibility. L.R. 83.10e(b). Plaintiff's counsel of record are subject to the Court's Code of Professional Responsibility. L.R. 83.1, 83.10e, 83.10i.

The ongoing statements made by counsel of record, through columns, press conferences, and press statements, raise questions under RPC 3.6(a), regarding trial publicity. Rule 3.6(a) provides that "[a] lawyer who is participating … in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

In an ethics opinion, the State Bar noted that "whether the attorney intended a trial by media" is a "significant factor" in determining whether a public communication will materially prejudice an adjudicative proceeding. 98 FEO 4, Opinion 1. Here, there is strong evidence that Plaintiff's counsel intended a "trial by media," as evidenced by the articles published by the "legal team" in the media, by their press comments, press conferences, and press releases, and by the release of deposition transcripts to a reporter.

Under Comment 3 to Rule 3.6, "[a] lawyer who is subject to the rule must take reasonable measures to insure the compliance of nonlawyer assistants and may not

employ agents to make statements the lawyer is prohibited from making." Plaintiff's counsel are charged with responsibility for the conduct of Mr. Pitts, as either an admitted member of the legal team or as their "liaison" to community groups.[8] They are also charged with the conduct of Ms. Petty in light of the release of discovery materials to her.

The disclosure of Dr. Sperry's report, and resulting use of it by Mr. Pitts, Ms. Petty, and others, is particularly concerning.[9] Under Comment 5 to Rule 3.6, the State Bar concludes that "certain subjects [] are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury." Such subjects include "the performance or results of any examination or test." RPC 3.6, Comment 5(3). Dr. Sperry's report, purporting to reach pathological conclusions based on his review of the autopsy-related evidence, depositions, and other materials, is analogous to this category. Indeed, Ms. Petty falsely touted the report as an "independent review," and the press release touted Dr. Sperry's review of discovery materials. Mr. Taylor's press conference tomorrow, at which he will speak about another expert report, raises similar concerns.

III. The Court has several mechanisms to investigate and address these issues.

The record strongly suggests that Plaintiff's counsel have engaged in a public campaign that is not consistent with the Protective Order and the Court's Code of

[8] Similarly, under RPC 8.4(a), attorneys may not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

[9] To be clear, Defendants are not concerned about the substance of Dr. Sperry's conclusions, which will be dealt with in due time in a manner that is appropriate under the Local Rules and the Protective Order.

Professional Responsibility. The Court's inherent authority, and other applicable law, offer several options to investigate and address these issues.

Gathering additional information. In *Parkway*, the Court "conducted a telephonic hearing … with counsel in order to establish the facts" related to a potential violation of the protective order. *Parkway*, 121 F.R.D. at 266.

Show cause proceedings. The Court can direct Plaintiff's counsel to fully disclose the distribution of materials covered by the Protective Order through a show cause proceeding. Upon a complete evidentiary record, the Court could evaluate whether the elements of civil contempt are shown by clear and convincing evidence:

1. The existence of a valid decree of which the alleged contemnor had actual or constructive knowledge;

2. That the decree was in the movant's favor;

3. That the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and

4. That the movant suffered harm as a result.

Ashcraft v. Conoco, Inc., 218 F.3d 288 (4th Cir. 2000) (internal brackets omitted).

The current record includes some evidence supporting each of these factors, and further evidentiary development directed by the Court would allow for a complete evaluation. *See Ross*, 254 F. Supp. 3d at 1258 (finding civil contempt following an evidentiary hearing); *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 2005 WL 6363553, at *2 (E.D. Va. Mar. 24, 2005) (holding that the record presented by the defendants would

justify an evidentiary hearing if the potential violation of the protective order would support contempt sanctions).

The *Custer Battles* court found the first two prongs were easily satisfied; the protective order had been entered by the court, and it favored the movant because it protected that party's discovery information. *Custer Battles*, 2005 WL 6363553, at *2. On the third prong, the court noted an ambiguity that is not present here.[10] The record to date strongly suggests, and counsel have at least partially admitted to, conduct that violates Paragraph 10. Likewise, in *Custer Battles* the court found that the release of discovery materials was prohibited. *Id.* at *3.

There is also evidence establishing the fourth prong. The disclosures of discovery materials here include actions that the State Bar states are "more likely than not to have a material prejudicial effect on a proceeding." RPC 3.6, Comment 5. It is for good reason that "pretrial depositions and interrogatories are not public components of a civil trial." *Seattle Times*, 467 U.S. 20, 33. "Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action." *Id.* That is true here, where Plaintiff's counsel have ranged far and wide in their depositions. The Supreme Court noted that "pretrial discovery by depositions and interrogatories has a significant potential for abuse," including "seriously implicat[ing]

[10] The protective order in *Custer Battles* directed that "Discovery Material shall be used only for the purpose of this action," but in the same paragraph stated that such materials could only be given "to those persons authorized pursuant to paragraph 5," which was the paragraph governing the limits on disclosure of "Confidential Information." *Custer Battles*, 2005 WL 6363553, at *3. Here, by contrast, Paragraph 10 does not explicitly, or implicitly, reference or invoke the additional disclosure limits in Paragraphs 3(g) and 9. (*See* Dkt. 79.)

privacy interests of litigants and third parties," which can be "damaging to reputation and privacy." *Id.* at 34-35. Additionally, Defendants have incurred costs associated with their efforts to address these issues. *See Ross*, 225 F. Supp. 3d at 1269.

Sanctions. The Court may issue sanctions under Rule 37 or its inherent authority. *Parkway*, 121 F.R.D. at 267. Under Rule 37, available sanctions include directing that certain facts be established for purposes of the litigation, prohibiting the introduction or use of evidence, striking pleadings, dismissing claims, or treating the matter as contempt of court. Fed. R. Civ. P. 37(b)(2)(A). By way of example, the Court could prohibit Plaintiff from introducing evidence that was improperly released, such as expert reports.

The Court also "has the inherent power to impose monetary sanctions on attorneys who fail to comply with discovery orders." *In re Howe*, 800 F.2d 1251, 1252 (4th Cir. 1986). The Court can order the payment of expenses, including attorneys' fees, caused by the noncompliance. Fed. R. Civ. P. 37(b)(2)(C).

Referral. Under Local Rule 83.10f(a), the Court "may refer the matter to counsel for investigation," or it "may refer the matter to the appropriate state bar." The Court may also exercise its inherent authority. *Id.* Ultimately, the Court may initiate proceedings requiring counsel to show cause why they should not be disciplined for violating the Code of Professional Responsibility. LR 83.10f(c), (d). Such discipline could include revoking special appearances or other sanctions.

CONCLUSION

Defendants respectfully request that the Court take appropriate steps to determine the scope of any potential violations of the Protective Order and the Code of Professional Responsibility, and take any appropriate actions in response to such violations.

This the 12th day of May, 2021.

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The undersigned hereby certifies that the foregoing document complies with Local Rule 7.3(d)'s limitation of no more than 6,250 words (excluding captions, signature lines, certificate of service and any cover page or index) as counted by word processing software.

This the 12th day of May, 2021.

/s/ Alan W. Duncan
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was electronically filed with the Clerk of Court through the CM/ECF system, which will send notice of filing to counsel of record.

This the 12th day of May, 2021.

/s/ Alan W. Duncan
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