

# SHARE WITH CAUTION: THE DANGERS BEHIND SHARING ORDERS

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A strong, symbiotic relationship exists between procedural rules and substantive rights—the former exist to give effect to the latter.

Miller<sup>1</sup>

## I. INTRODUCTION

Global information security spending is expected to exceed \$124 billion by the end of 2019—an increase of 8.7% over the projected spending for 2018—far outpacing spending on more traditional security solutions.<sup>2</sup> For businesses and individuals alike, the greatest threats no

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1. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 464 (1991).

2. Roger Aitken, *Global Information Security Spending to Exceed \$124B in 2019, Privacy Concerns Driving Demand*, FORBES (Aug. 19, 2018, 1:28 PM), <https://www.forbes.com/sites/rogeraitken/2018/08/19/global-information-security-spending-to-exceed-124b-in-2019-privacy-concerns-driving-demand/#295253427112> [<http://web.archive.org/web/20191027005155/https://www.forbes.com/sites/rogeraitken/2018/08/19/global-information-security-spending-to-exceed-124b-in-2019-privacy-concerns-driving-demand/>]; *The Home Security System Market is Expected to Reach USD 74.75 Billion by 2023 from USD 45.58 Billion in 2018, at a CAGR of 10.40%*,

longer arise from camera-less storerooms and unfenced yards but from unsecure networks and disloyal employees.<sup>3</sup> The stakes are higher now as well. Individuals now fear not only for their personal belongings but also for their personal identity.<sup>4</sup> Businesses are concerned not only about their cash register but about their trade secrets and confidential research as well.<sup>5</sup>

The world of discovery has its own data problems, but the principal concern seems to be data management rather than data security.<sup>6</sup> Today, discovery often entails the exchange of thousands—sometimes millions—of documents.<sup>7</sup> Many have lamented the heavy costs and inefficiency of discovery.<sup>8</sup> For their part, courts and practitioners have sought to streamline discovery through the use of, among other things, discovery sharing and protective orders.<sup>9</sup>

“Discovery sharing” is a process by which information received in discovery is disseminated by the party who requested it to nonparties—generally, collateral litigants and their counsel.<sup>10</sup> “Protective orders,” on the other hand, are court orders that prohibit or otherwise limit the

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MARKETWATCH (Sept. 4, 2018, 10:34 AM), <https://www.marketwatch.com/press-release/the-home-security-system-market-is-expected-to-reach-usd-7475-billion-by-2023-from-usd-4558-billion-in-2018-at-a-cagr-of-1040-2018-09-04> [<http://web.archive.org/web/20191026193027/https://www.marketwatch.com/press-release/the-home-security-system-market-is-expected-to-reach-usd-7475-billion-by-2023-from-usd-4558-billion-in-2018-at-a-cagr-of-1040-2018-09-04>].

3. See Warwick Ashford, *A Third of Employees Will Sell Company Data if the Price is Right, Study Reveals*, COMPUTER WEEKLY (July 29, 2015, 12:15 PM), <https://www.computerweekly.com/news/4500250705/A-third-of-employees-will-sell-company-data-if-the-price-is-right-study-reveals> [<http://web.archive.org/web/20191026193706/https://www.computerweekly.com/news/4500250705/A-third-of-employees-will-sell-company-data-if-the-price-is-right-study-reveals>] (discussing a study that indicates data security risk with employees).

4. See Anna Bahney, *Identity Theft Nightmares: 'It's the Fear of Losing Money'*, CNN MONEY (Oct. 3, 2017, 2:47 PM), <https://money.cnn.com/2017/10/03/pf/identity-theft-2/index.html>

[<http://web.archive.org/web/20191026193857/https://money.cnn.com/2017/10/03/pf/identity-theft-2/index.html>].

5. See Ashford, *supra* note 3.

6. See Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, 90 (2007) (discussing the importance of data management policy in light of discovery costs).

7. *Id.* at 19.

8. *Id.* at 6–10.

9. See, e.g., *Garcia v. Peebles*, 734 S.W.2d 343, 347 (Tex. 1987) (discovery sharing); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981) (protective order).

10. Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181, 2198–99 (2014).

discovery or dissemination of certain information.<sup>11</sup> Though protective orders and discovery sharing are not mutually exclusive, the use of one discovery sharing device in particular has generated substantial friction between litigants: the sharing order.<sup>12</sup> This peculiar sort of protective order—the terms of which enable parties receiving confidential information in discovery to share that information with nonparties—has split not only scholars and practitioners, but courts as well.<sup>13</sup>

Many courts and commentators argue for the wide application of sharing orders, citing greater convenience to the parties and enhanced judicial economy.<sup>14</sup> Other authorities and practitioners, particularly on the defense bar, are skeptical of the alleged benefits of sharing orders and suspicious of the motives behind them.<sup>15</sup> This Note refers to this dispute as the “sharing-nonsharing debate.” Though the common law is well-acquainted with similar debates regarding the scope of discovery and privacy,<sup>16</sup> the apparent vulnerability of digital data makes the sharing-nonsharing debate more pressing today than ever before.

This Note argues that the unique and irreducible risks sharing orders place on confidential information outweigh any of their alleged benefits.<sup>17</sup> As this Note will show, parties that produce information pursuant to a protective order have a protectable privacy interest in the information produced.<sup>18</sup> Sound legal and policy reasoning supports protecting this privacy interest with a presumption against sharing orders.<sup>19</sup> Therefore, this Note suggests that courts reject requests for sharing orders unless special circumstances are shown, and refer requesting parties to a more appropriate means of discovery sharing.<sup>20</sup>

Part II outlines the contemporary significance of protective orders, the history of the sharing-nonsharing debate, and the contours of the current jurisdictional split. Part III analyzes the arguments for and against sharing orders and the various standards the courts have applied.

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11. *Id.* at 2190.

12. *Id.* at 2208–09.

13. *Id.* at 2201–02, 2209.

14. *See, e.g., id.* at 2227–29.

15. *See, e.g.,* Joshua K. Leader & Gloria Koo, *Protective Orders and Discovery Sharing: Beware of Plaintiffs Bearing Sharing Agreements*, 82 DEF. COUNS. J. 453 (2015) (arguing against sharing orders).

16. *See generally* Louis F. Hubener, *Rights of Privacy in Open Courts—Do They Exist?*, 2 EMERGING ISSUES ST. CONST. L. 189 (1989) (discussing the right of individual litigants to control public access to personal information in light of the “well-established common law right of access to court proceedings and records”).

17. *See infra* Part III.A.

18. *See infra* Part II.D.

19. *See infra* Part III.C.

20. *See infra* Part III.C.

Part IV concludes by recommending that courts avoid granting sharing orders and encourage parties to pursue protective order modification instead. Part IV also recommends that courts adopt a revised version of the *Martindell v. International Telephone* standard for protective order modification.

## II. BACKGROUND

### A. *In re Zyprexa and Beyond*

In November 2006, *New York Times* reporter Alex Berenson (Berenson) hatched a plan that would soon become a nightmare for pharmaceutical giant Eli Lilly & Company (Eli Lilly).<sup>21</sup> At the time, Eli Lilly was engaged in costly multidistrict litigation concerning undisclosed side effects of its anti-psychotic medication, Zyprexa.<sup>22</sup> The trial court had entered a protective order shielding millions of Eli Lilly documents that contained sensitive commercial and proprietary information.<sup>23</sup> Berenson became interested in the Zyprexa litigation but knew the protective order limited his insight.<sup>24</sup> Thus, Berenson conspired with Dr. David Egilman (Dr. Egilman), an expert witness for the Zyprexa plaintiffs, to thwart the protective order.<sup>25</sup>

Berenson and Dr. Egilman needed a subpoena to access the protected documents, so they enlisted the help of Alaskan attorney, James Gottstein (Gottstein).<sup>26</sup> As planned, Gottstein intervened in an Alaskan state court case (unrelated to the Zyprexa litigation), subpoenaed the protected documents from Dr. Egilman, and then sent them to Berenson.<sup>27</sup> On December 17, 2006, Berenson's story was on the front page of the *New York Times*.<sup>28</sup> Apart from being a popular story with

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21. See *In re Zyprexa Injunction*, 474 F. Supp. 2d 385 (E.D.N.Y. 2007); see also Martin C. Calhoun & Rebecca A. Womeldorf, *When Conspirators Defy Protective Orders: Lessons From In re Zyprexa Injunction*, WASH. LEGAL FOUND. (Apr. 27, 2007), <https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/042707womeldorf.pdf> [<http://web.archive.org/web/20191026200854/https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/042707womeldorf.pdf>] (discussing the facts and implications of the Zyprexa leak).

22. *Zyprexa*, 474 F. Supp. 2d at 391.

23. *Id.*

24. See *id.* at 392.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 392–93; Alex Berenson, *Eli Lilly Said to Play Down Risk of Top Pill*, N.Y. TIMES (Dec. 17, 2006), <https://www.nytimes.com/2006/12/17/business/17drug.html>

readers, Berenson's tale of an internal coverup at Eli Lilly was a favorite among Eli Lilly's competitors.<sup>29</sup> The stolen documents, which included trade secrets and confidential marketing techniques, were soon posted all over the internet.<sup>30</sup> The damage was so irreparable that, in issuing an injunction against Berenson, Egilman, and Gottstein, the trial court found that any attempt to hush the disseminating websites would be futile.<sup>31</sup> In the end, Eli Lilly settled substantially all of the claims from the Zyprexa litigation for \$1.42 billion.<sup>32</sup> A suit brought by Eli Lilly against Dr. Egilman resulted in a settlement of \$100,000.<sup>33</sup>

The facts behind the Zyprexa leak are unique, but the risks that it illustrates are all too common. While not every breach of a protective order generates such a fallout, the courts are no strangers to the sort of improper disclosures that endanger confidential information.<sup>34</sup> With the increasingly hazardous digital landscape, producing parties (especially repeat, commercial defendants) are rightfully skeptical that sharing orders can protect their private information.<sup>35</sup>

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[<http://web.archive.org/web/20191026203044/https://www.nytimes.com/2006/12/17/business/17drug.html>].

29. See *Zyprexa*, 474 F. Supp. 2d at 424–25.

30. See Calhoun & Womeldorf, *supra* note 21, at 2.

31. *Zyprexa*, 474 F. Supp. 2d at 426 (“Prohibiting five of the internet’s millions of websites from posting the documents will not substantially lower the risk of harm posed to Lilly.”); see also Calhoun & Womeldorf, *supra* note 21, at 2.

32. Associated Press, *Eli Lilly Settles Zyprexa Lawsuit for \$1.42 Billion*, NBC NEWS (Jan. 15, 2009, 6:45 PM), [http://www.nbcnews.com/id/28677805/ns/health-health\\_care/t/eli-lilly-settles-zyprexa-lawsuit-billion/#.XbSwJUVKgkg](http://www.nbcnews.com/id/28677805/ns/health-health_care/t/eli-lilly-settles-zyprexa-lawsuit-billion/#.XbSwJUVKgkg) [[http://web.archive.org/web/20191026204826/http://www.nbcnews.com/id/28677805/ns/health-health\\_care/t/eli-lilly-settles-zyprexa-lawsuit-billion/](http://web.archive.org/web/20191026204826/http://www.nbcnews.com/id/28677805/ns/health-health_care/t/eli-lilly-settles-zyprexa-lawsuit-billion/)].

33. Toni Clarke, *Update 1-Lilly Wins Apology, \$100,000 From Document Leaker*, REUTERS

(Sept. 7, 2007, 4:55 PM), <https://www.reuters.com/article/idUSN0721349620070907> [<http://web.archive.org/web/20191026205729/https://www.reuters.com/article/idUSN0721349620070907>].

34. See, e.g., *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 290 (5th Cir. 2002) (affirming sanctions for counsel’s disclosure of confidential information to the press); *Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 630 (8th Cir. 1984) (affirming sanctions for counsel’s sale of confidential information to counsel in related litigation).

35. In fact, it is believed that an errant email may have triggered the Zyprexa leak—though the leaking reporter has claimed otherwise. Debra Cassens Weiss, *Did Lawyer’s E-Mail Goof Land \$1B Settlement on NYT’s Front Page?*, ABA JOURNAL (Feb. 6, 2008, 11:55 AM), [http://www.abajournal.com/news/article/lawyers\\_e\\_mail\\_goof\\_lands\\_on\\_nyts\\_front\\_page](http://www.abajournal.com/news/article/lawyers_e_mail_goof_lands_on_nyts_front_page)

[[http://web.archive.org/web/20191026210551/http://www.abajournal.com/news/article/lawyers\\_e\\_mail\\_goof\\_lands\\_on\\_nyts\\_front\\_page](http://web.archive.org/web/20191026210551/http://www.abajournal.com/news/article/lawyers_e_mail_goof_lands_on_nyts_front_page)].

*B. Protective Orders in the Federal Rules and the States*

Federal Rule of Civil Procedure (Rule) 26(c) provides in relevant part:

A party or any person from whom discovery is sought may move for a *protective order* in the court where the action is pending – or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. *The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .*<sup>36</sup>

As Rule 26(c) makes clear, the protective order is a procedural mechanism that allows parties to control how their information is treated in litigation.<sup>37</sup> One standard use of protective orders—and the use with which this Note is concerned—is to shield sensitive commercial information from public disclosure.<sup>38</sup> Rule 26(c)(1)(G) provides that a protective order may “requir[e] that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way . . . .”<sup>39</sup> Rule 26(c)(1)(G) often materializes in a process whereby the producing party will disclose sensitive information on the condition that such information be viewed only by qualified persons—typically, counsel of the party seeking discovery and expert witnesses.<sup>40</sup> In this way, producing parties are not left to the good faith and competence of their adversaries alone, but may rely on court-ordered confidentiality to protect their sensitive information. The result, many courts and commentators observe, is less contentious and more efficient discovery.<sup>41</sup>

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36. FED. R. CIV. P. 26 (emphasis added).

37. See Benham, *supra* note 10, at 2190–91.

38. See Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 772–74 (1990); see also Benham, *supra* note 10, at 2190–91.

39. FED. R. CIV. P. 26.

40. Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 10 (1983).

41. See Campbell, *supra* note 38, at 772 (“[Protective orders] have proven to be an effective means of expediting the discovery process by reducing the need for time-consuming discovery disputes that are wholly collateral to the underlying issues of the case.”).

Protective orders are also issued at the state-level, where they are sometimes referred to as “confidentiality orders.”<sup>42</sup> Many state rules governing protective orders borrow verbatim from the language of Rule 26(c).<sup>43</sup> Accordingly, many state courts look to federal protective order precedent in deciding whether a protective order is appropriate.<sup>44</sup> Some states, however, have statutory law that has produced sharp differences between state and federal application of protective orders. Virginia, for example, has expressly limited the scope of protective orders, seemingly to encourage discovery sharing.<sup>45</sup> Florida’s trade secret privilege, on the other hand, seems to empower commercial defendants to resist discovery sharing.<sup>46</sup>

A complete discussion of the protective order is outside the scope of this Note, but it is important to understand two basic aspects of any given protective order: (1) the method by which the protective order is sought, and (2) the scope of material it covers. Generally, a protective order is sought through one of two means: either on a motion by one or more parties seeking protection or by stipulation of the parties.<sup>47</sup> The latter is sometimes referred to as a “consent order.”<sup>48</sup> In either case, before a protective order can be entered, the party seeking protection must show “good cause.”<sup>49</sup> The substance of the good cause standard is a

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42. See, e.g., *Charlie H. v. Whitman*, 213 F.R.D. 240, 242 (D.N.J. 2003).

43. See, e.g., *Arkansas State Highway Comm’n v. Stanley*, 353 S.W.2d 173, 176 (Ark. 1962) (stating that the language of the Arkansas statute was “taken verbatim” from Rule 34).

44. See *id.* (citing *Hickman v. Taylor*, 329 U.S. 495 (1947) for the proper construction of a state statute modeled after federal Rule 34); see also *Stortz ex rel. Stortz v. Seier*, 835 S.W.2d 540, 541 (Mo. Ct. App. 1992) (“Rule 56.01(c) governs protective orders in the discovery process. It is modeled after Federal Rule of Civil Procedure 26(c). As a result, federal precedent concerning that rule and its predecessor, Rule 30(b), is a persuasive guide for the construction of Rule 56.01(c).”).

45. VA. CODE ANN. § 8.01-420.01 (1989) (“A protective order issued to prevent disclosure of materials or information related to a personal injury action or action for wrongful death produced in discovery . . . shall not prohibit an attorney from voluntarily sharing such materials or information with an attorney involved in a similar or related matter . . .”).

46. See *Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486 (Fla. Dist. Ct. App. 2011) (holding that Florida trade secret statute disallowed proposed sharing order).

47. See *Campbell*, *supra* note 38, at 772–73.

48. See *Jacqueline S. Guenego*, Note, *Trends in Protective Orders Under Federal Rule of Civil Procedure 26(c): Why Some Cases Fumble While Others Score*, 60 *FORDHAM L. REV.* 541, 561 (1991) (referring to stipulated protective orders as “consent orders”).

49. *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) (“Even if the parties agree that a protective order should be entered, they still have ‘the burden of showing that good cause exists for issuance of that order . . .’” (quoting *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 789 (1st Cir. 1988))); see also *Joseph F. Anderson Jr.*,

complex matter that varies by jurisdiction.<sup>50</sup> For purposes of this Note, it is sufficient to know that courts looking for good cause typically reject conclusory allegations and require the party seeking protection to identify clearly defined harms that would result from disclosure.<sup>51</sup>

Regarding scope, protective orders generally fall into one of two classes: “specific” or “umbrella.”<sup>52</sup> Specific protective orders are those that enumerate certain kinds of information entitled to protection.<sup>53</sup> Umbrella orders, on the other hand, allow parties to designate any information that they believe deserves protection as confidential.<sup>54</sup> Thus, umbrella orders allow parties to conveniently shield large volumes of information.<sup>55</sup> For this reason, umbrella orders are controversial among some courts and commentators.<sup>56</sup> Critics of the umbrella order see it as overinclusive and overused, shrouding the discovery process in

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*Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 715 (2004) (“[C]ourts too often rubber-stamp confidentiality orders presented to them, sometimes altogether ignoring or merely giving lip service to the body of law and existing court rules that are supposed to apply . . .”).

50. Guenego, *supra* note 48, at 542 (“Rule 26(c), however, does not define ‘good cause.’ Nor does the rule provide any authority or guidelines for lifting or modifying a protective order. Thus, practitioners and judges are faced with the challenge of applying a single, vaguely-defined standard . . . This has resulted in inconsistent rulings.”).

51. *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (citations omitted) (“‘Good cause’ is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury. Broad allegations of harm, unsubstantiated by specific examples, however, will not suffice.”); *see also* Benham, *supra* note 10, at 2191–92.

52. Umbrella orders are sometimes referred to as “blanket orders.” *See* Campbell, *supra* note 38, at 786 (“An ‘umbrella’ or ‘blanket’ protective order typically permits the defendant to designate as ‘confidential’ a large volume or entire class of discovery material.”). Some authorities further distinguish between umbrella and blanket orders and claim that there are three general types of protective orders. *See, e.g.,* *United States v. Ocwen Loan Servicing, LLC*, No. 4:12-CV-543, 2016 WL 278968, at \*3 (E.D. Tex. Jan. 22, 2016) (identifying “specific,” “umbrella,” and “blanket” as the three types of protective orders).

53. *Raytheon Co. v. Indigo Sys. Corp.*, No. 4:07-CV-109, 2008 WL 4371679, at \*2 (E.D. Tex. Sept. 18, 2008) (“Specific protective orders are the narrowest type and cover specifically identified information.”).

54. *See* Campbell, *supra* note 38, at 786. The adverse parties seeking discovery are typically allowed to challenge the confidential designation, and the burden of showing that such information is actually confidential remains with the protected party. *Id.*

55. Campbell, *supra* note 38, at 785–86.

56. *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 790 (1st Cir. 1988) (“Although such blanket protective orders may be useful in expediting the flow of pretrial discovery materials, they are by nature overinclusive and are, therefore, peculiarly subject to later modification.”); *see also* Campbell, *supra* note 38, at 787 (“[D]espite [umbrella protective orders] widespread use, especially in complex products liability cases, it is becoming increasingly unclear whether defendants can continue to rely upon their sustained validity.”).



secrecy.<sup>57</sup> However, many well-respected authorities, including the Manual of Complex Litigation, endorse umbrella orders as effective in reducing the private and judicial cost of litigation.<sup>58</sup> Indeed, umbrella orders have become commonplace in complex litigation where they are widely praised.<sup>59</sup>

### *C. The Discovery Sharing Debate from Past to Present*

Not all forms of discovery sharing inspire controversy. Litigants have a well-recognized constitutional right to share discovered information that is not protected by court order.<sup>60</sup> But when a protective order *has* been granted, the litigants' constitutional right to share discovery information is restricted, and the courts must decide whether to permit any sharing.<sup>61</sup> Thus, the discovery sharing at issue in this Note is that which involves the dissemination of information deemed confidential pursuant to a protective order.<sup>62</sup> This Note refers to authorities that generally approve of discovery sharing, including the sharing of confidential information, as "pro-sharing" and authorities that are more critical of discovery sharing as "pro-confidentiality."

Discovery sharing, in one form or another, has long been praised by courts and commentators as an effective means of reducing the costs of litigation.<sup>63</sup> Apart from their alleged efficiency, sharing orders are also

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57. *Liggett*, 858 F.2d at 790 ("[T]he point of this protective order was to promote a fair trial, not to guarantee [the protected party] perpetual secrecy."); *see also* Anderson, *supra* note 49.

58. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.432 (2004); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981) (stating that the desirability of such orders "is too well established to belabor here"); *see also* Guenego, *supra* note 48, at 562 ("[C]onsent orders reduce motion practice and litigation costs. Reduced motion practice conserves untold hours of judicial time and allows courts to lend their attention to more pressing, substantive matters. With more time to spend on other matters, presumably justice is better served.").

59. *See, e.g., Zenith Radio Corp.*, 529 F. Supp. at 889 ("We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order similar to PTO 35 has not been agreed to by the parties and approved by the court."); *see also* Campbell, *supra* note 38, at 787 ("The use of umbrella orders in complex litigation has become commonplace.").

60. Benham, *supra* note 10, at 2190 ("[P]arties may freely disseminate anything they learn in discovery to the public at large, absent a contrary court order.").

61. *See id.*

62. *See id.* at 2199–2201.

63. *Id.* at 2184 ("[M]ost commentators that have considered the issue support some form of discovery sharing."); *Byrd v. U.S. Xpress, Inc.*, 26 N.E.3d 858, 863–64 (Ohio Ct. App. 2014) (noting that the permissibility of discovery sharing has been "dealt with in legions of cases across the country," and that discovery sharing may promote public health and safety and reduce wasteful duplication of discovery).

thought to act like “disinfectants” to an otherwise pernicious secrecy.<sup>64</sup> In other words, pro-sharing authorities tend to believe that there is something malignant about confidentiality and that sharing orders might keep everyone honest.<sup>65</sup>

In contrast, pro-confidentiality authorities remain skeptical of sharing orders, despite their alleged benefits.<sup>66</sup> These authorities tend to embrace a skepticism of either the motives of the sharing party or the sharing mechanism itself.<sup>67</sup> On the one hand, some courts and commentators have criticized the practice among some counsel, particularly the plaintiffs’ bar, of selling confidential information to nonparties under the guise of discovery sharing.<sup>68</sup> On the other hand, some argue that sharing orders impermissibly bypass more appropriate mechanisms of discovery sharing.<sup>69</sup>

Historically, pro-sharing litigants have sought to vindicate their position on three grounds: (1) the First Amendment to the Constitution; (2) Rule 5 of the Federal Rules of Civil Procedure; and (3) various provisions of “Sunshine” legislation, described in greater detail below.<sup>70</sup> In the 1970s, transparency advocates argued that protective orders violated their freedom of speech by restricting the disclosure of information obtained in discovery.<sup>71</sup> This argument seemed to have little

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64. *Wilk v. Am. Med. Ass’n*, 635 F.2d 1295, 1299 (7th Cir. 1980); *see also* Benham, *supra* note 10, at 2199 (noting that proponents of discovery sharing argue that it “increases discovery accountability”).

65. Benham, *supra* note 10, at 2199.

66. *See Long v. TRW Vehicle Safety Sys., Inc.*, No. CV-09-2209-PHX-DGC, 2010 WL 1740831, at \*1 (D. Ariz. Apr. 29, 2010) (“Plaintiffs seek to circumvent all of these principles and procedures by including . . . a sharing provision in the protective order . . . to share confidential and proprietary material discovered in this case ‘with collateral litigants without needing to seek to modify the protective order . . . .’ Plaintiffs’ request [will therefore] be denied.” (citation omitted)).

67. *See, e.g., Long*, 2010 WL 1740831, at \*1; Campbell, *supra* note 38, at 822.

68. Campbell, *supra* note 38, at 822. The sale of discovered information is quite controversial. Some authorities encourage the practice while others doubt that it is ethical. *Compare* Brad N. Friedman, Note, *Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Material Covered by A Protective Order*, 60 N.Y.U. L. REV. 1137, 1137–38 (1985) (encouraging the sale of discovered information), *with* Campbell, *supra* note 38, at 826 (“The outright sale of discovery materials may be ethically dubious at best.”). Thus, courts are well-advised to be wary of sharing orders that seem motivated by such sales. At the very least, the presence of a pecuniary motive should raise skepticism as to whether the proposed sharing order would *actually* promote efficiency. Miller, *supra* note 1, at 497–98.

69. Long, 2010 WL 1740831, at \*1.

70. For a more detailed discussion of each of the following grounds, *see* Benham, *supra* note 10, at 2193–97 (providing the basis for my own discussion) and Campbell, *supra* note 38, at 788–811 (discussing each ground more comprehensively).

71. Benham, *supra* note 10, at 2193–94.

traction in the courts until 1979, when the United States Court of Appeals for the D.C. Circuit applied strict scrutiny to invalidate a protective order.<sup>72</sup> The United States Supreme Court responded in 1984 with its opinion in *Seattle Times Co. v. Reinhardt*.<sup>73</sup> In *Seattle Times*, the Supreme Court unanimously rejected the D.C. Circuit's application of strict scrutiny and held that protective orders do not ordinarily implicate free speech concerns.<sup>74</sup> While the exact implications of *Seattle Times* are still debated,<sup>75</sup> most authorities agree that *Seattle Times* spelled the end of a constitutional dimension to protective order litigation.<sup>76</sup>

Transparency advocates have also tried to ground a right to discovery sharing in the Federal Rules of Civil Procedure. Before the 2000 amendments to the Rules, Rule 5(d) provided that all discovery materials were to be filed with the court.<sup>77</sup> Thus, some advocates argued that the public had a common law right to access all discovery materials.<sup>78</sup> The 2000 amendments seem to have ended this argument by forbidding parties from filing discovery materials with the court unless such materials are connected to a proceeding or are required to be filed by court order.<sup>79</sup>

The final and most significant front in the sharing-nonsharing debate is Sunshine legislation.<sup>80</sup> Sunshine laws, which appear at both the state and federal level, establish rules and procedures to encourage greater public participation in a more "open" government.<sup>81</sup> The central

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72. *Id.* at 2194.

73. *See Seattle Times Co. v. Reinhardt*, 467 U.S. 20 (1984).

74. *Id.* at 37. The Court held:

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

*Id.*; *see also* Benham, *supra* note 10, at 2194 ("The Supreme Court . . . rejected the D.C. Circuit's strict-scrutiny approach and instead held that, although the First Amendment did protect those who disclose discovery information, the special context of civil litigation implicated free-speech concerns to a lesser extent than in other contexts.").

75. Benham, *supra* note 10, at 2194; *see also* Campbell, *supra* note 38, at 797 ("Despite the seeming clarity of the *Seattle Times* opinion, courts have continued to struggle with the question of whether a first amendment public right of access to pretrial discovery materials exists.").

76. Benham, *supra* note 10, at 2194.

77. *Id.* at 2195-96.

78. *Id.*

79. *Id.*

80. *Id.* at 2196.

81. Brian J. Caveney, Student Work, *More Sunshine in the Mountain State: The 1999 Amendments to the West Virginia Open Governmental Proceedings Act and Open Hospital Proceedings Act*, 102 W. VA. L. REV. 131, 134 (1999).

proposition of Sunshine legislation is that the public interest in transparency outweighs whatever privacy interests are implicated.<sup>82</sup> Indeed, the Sunshine in Litigation Act of 2017 (SILA), the most recent Sunshine bill directed toward litigation, would have strictly limited a court's discretion to grant a protective order in a case that implicated "public health or safety."<sup>83</sup> The result, as acknowledged by at least one pro-sharing commentator, would have been an extraordinary burden on repeat defendants in mass tort and product liability actions.<sup>84</sup> But there is little reason to expect federal Sunshine legislation anytime soon; SILA has been reintroduced into Congress every year since 1993, but has never materialized into law.<sup>85</sup> This past year proved no different.<sup>86</sup>

Though the most recent SILA battle has come to a close, the Sunshine legislation front is still active. Several states have passed litigation-oriented Sunshine legislation in the past couple decades,<sup>87</sup>

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82. See *id.* at 134–35. The same sentiment was seen earlier with respect to *Wilk* and its disinfectant analogy. See *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980) (referring to the "sunlight" of discovery sharing as a "disinfectant").

83. Sunshine in Litigation Act of 2007, H.R. 1053, 115th Cong. (2017). The bill provided:

In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enter, by stipulation or otherwise, an order otherwise authorized under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order otherwise authorized approving a settlement agreement that would restrict the disclosure of such information, or an order otherwise authorized restricting access to court records . . . .

*Id.* The bill provided an exception where the court found that either (1) the order did not prevent the disclosure of information relevant to "public health or safety," or (2) that the public interest was outweighed by a "specific and substantial interest in maintaining the confidentiality" and the order was "no broader than necessary" to protect that interest. *Id.*

84. Benham, *supra* note 10, at 2197 (discussing the substantially identical SILA of 2014). "[T]he Act's nexus to public health and safety would often preclude protective orders in the very class of cases that benefit most from discovery sharing-products liability and tort actions involving products and injuries of national proportions." *Id.*

85. Mary Elizabeth Keaney, *Don't Steal My Sunshine: Deconstructing the Flawed Presumption of Privacy for Unfiled Documents Exchanged During Discovery*, 62 HASTINGS L.J. 795, 820 n.7 (2011) (noting that SILA has been reintroduced into Congress annually since 1993); see also Benham, *supra* note 10, at 2196.

86. See H.R. 1053 – *Sunshine in Litigation Act of 2017*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/1053/all-actions?pageSort=desc> [<http://web.archive.org/web/20191027000230/https://www.congress.gov/bill/115th-congress/house-bill/1053/all-actions?pageSort=desc>] (showing that the bill's "[l]atest action" was its referral to the Subcommittee on the Constitution and Civil Justice on March 2, 2017).

87. See, e.g., FLA. STAT. § 69.081 (2014) (prohibiting protective orders that conceal information relating to a "public hazard"); VA. CODE ANN. § 8.01–420.01 (2014)

leading one to believe that a future SILA may yet find its place on the President's desk. Until then, however, the sharing-nonsharing debate will continue to be waged in courtrooms where, though the power to shield information is undisputed, the appropriate manner in which to exercise that power remains controversial.

#### *D. The Cost of Confidentiality*

This Note has treated the term "confidentiality" as if its significance were plain. In fairness, there is nothing remarkable about how the term is commonly defined. Something is said to be confidential when it is kept secret,<sup>88</sup> and so "confidentiality" is merely secrecy or "the state of having the dissemination of certain information restricted."<sup>89</sup> That it is synonymous with secret in common parlance—"secrecy" being the favored term of pro-sharing authorities<sup>90</sup>—seems to obscure the real social significance behind confidentiality.<sup>91</sup>

It is difficult, however, to discuss the value of confidentiality in the shadow of its supposed adversary—the truth. After all, what value can a truth-seeking enterprise like litigation reasonably assign to the interest that private parties—often for-profit, well-resourced businesses—have in keeping their affairs secret? The issue, here, is the framing of the purpose of litigation. This Note takes it as axiomatic that litigation is more than a fact-finding expedition; therefore, a party's interest in confidentiality can and should be weighed against other interests—even the public's interest in the truth.<sup>92</sup>

The courts have long accepted that the Federal Rules contemplate litigants' legitimate interest in privacy,<sup>93</sup> and that parties do

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(prohibiting protective orders that prevent attorneys to a personal injury or wrongful death action from sharing information).

88. *Confidential*, BLACK'S LAW DICTIONARY (11th ed. 2019).

89. *Confidentiality*, BLACK'S LAW DICTIONARY (11th ed. 2019). Indeed, as the editor comments, "The difference between 'secrecy' and 'confidentiality' is difficult to establish." *Id.* (quoting Ruth Soetendorp, *Confidential Information*, in THE NEW OXFORD COMPANION TO LAW 197, 197 (Peter Cane & Joanne Conaghan eds., 2008)).

90. See Benham, *supra* note 10, at 2188. Indeed, the term "secrecy" appears in one pro-sharing article over 100 times. See Anderson, *supra* note 49.

91. For a more comprehensive treatment of confidentiality and its present significance, see Miller, *supra* note 1, at 463–77.

92. Mirjan Damaska, *Truth in Adjudication*, 49 HASTINGS L.J. 289, 301 (1998) (arguing that "truth-conducive values cannot be an overriding consideration" and that other "countervailing considerations," such as privacy, exist).

93. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 n.21 (1984) ("Although [Rule 26(c)] contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule.")

not forfeit that interest simply by entering the courtroom.<sup>94</sup> Rule 26(c) protective orders are just one manifestation of our legal system's general deference toward privacy.<sup>95</sup> Indeed, courts have the *inherent* power to effectuate confidentiality—a power with equitable roots independent of the Federal Rules.<sup>96</sup> The question, then, must be how much weight should a party's legitimate interest in privacy be afforded?

As mentioned earlier, the synonymy between secrecy and confidentiality tends to conceal some of the latter's true significance.<sup>97</sup> While private businesses presumably enjoy much of the same protection as private individuals, there is good reason to afford the confidentiality of private businesses more deference than that of private individuals. Businesses have a well-recognized property interest in their confidential information.<sup>98</sup> Further, confidential information that is commercial in nature often has an ascertainable value that allows it to be treated like a tangible asset.<sup>99</sup> In other words, such information can be bought, sold, and even borrowed against.<sup>100</sup> But unlike tangible assets, confidential information cannot typically be locked away in a vault or bolted to the ground, and its theft may not be so plain or traceable.<sup>101</sup> While this distinction is meaningless with respect to value, it is meaningful insofar as it indicates the unique vulnerability of information.<sup>102</sup>

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94. *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987).

95. Other examples include the privacy guaranteed constitutionally, such as by the First Amendment, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958), and Fourth Amendment, *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), and statutorily, such as by the Federal Rules of Evidence. FED. R. EVID. 501, 502 (providing for the protection of privileged communications).

96. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994) (“[C]ourts have inherent equitable power to grant confidentiality orders, whether or not such orders are specifically authorized by procedural rules.” (citing *Seattle Times*, 467 U.S. at 35)).

97. See Miller, *supra* note 1, at 463–77.

98. *Carpenter v. United States*, 484 U.S. 19, 26 (1987) (“Confidential business information has long been recognized as property.”).

99. See Miller, *supra* note 1, at 467–68 (“[C]ommercial information often has a value that is tangible enough to be bought and sold for huge sums of money, and extraordinary efforts are expended to control it and to maintain its security and confidentiality.”).

100. *Id.*; see also *In re ProvideRx of Grapevine, LLC*, 507 B.R. 132, 143 (Bankr. N.D. Tex. 2014) (discussing creditor's alleged security interest in debtor's intellectual property).

101. See Lily Hay Newman, *Hacker Lexicon: What is the Attribution Problem*, WIRED (Dec. 24, 2016, 7:00 AM), <https://www.wired.com/2016/12/hacker-lexicon-attribution-problem/> [<http://web.archive.org/web/20191027004224/https://www.wired.com/2016/12/hacker-lexicon-attribution-problem/>] (discussing the difficulty in identifying the perpetrators of a data breach).

102. See Miller, *supra* note 1, at 470.

Some might observe, however, that not all confidential information resembles an asset. Information pertaining to a product's test failures might be valuable, insofar as manufacturers value the impact of its disclosure, but it is not *commercially* valuable in the same way that trade secrets are.<sup>103</sup> For the purposes of this Note, however, this is a distinction without a difference.<sup>104</sup> Businesses have a legitimate interest in preserving their reputation, and this interest should govern how potentially damaging information is treated.<sup>105</sup> The stakes for businesses with sensitive noncommercial information can be extraordinarily high. The Zyprexa leak and the "Audi Scare" of the 1980s are just two examples of the potential disasters that travel with sensitive information.<sup>106</sup>

In addition to its inherent value, confidentiality is also *instrumentally* valuable to the general public.<sup>107</sup> In today's data-driven market, businesses are increasingly concerned with managing their knowledge and information systems.<sup>108</sup> A business that cannot keep its most valuable information confidential will be at an enormous competitive disadvantage to those that can.<sup>109</sup> In 2018 alone, companies spent over \$114 billion on data security products and services, an increase of 12.4% from the previous year.<sup>110</sup> In 2019, this number is expected to jump to

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103. *See id.*

104. *Id.*

105. *Id.* ("[T]he disclosure of unsubstantiated information could unjustifiably damage the reputation, profitability, and conceivably the viability of a product or even the enterprise itself.").

106. *In re Zyprexa Injunction*, 474 F. Supp. 2d 385 (E.D.N.Y. 2007). The "Audi Scare" was a media-manufactured crisis surrounding an alleged defect in the Audi 5000 that allegedly caused sudden acceleration. Miller, *supra* note 1, at 470–71. It was only after substantial negative coverage and litigation that governmental studies revealed that driver error, not any defect, was the cause of the sudden acceleration. *Id.*

107. *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 905 (E.D. Pa. 1981) ("[T]here can be no doubt that society in general is interested in the protection of trade secrets and other valuable commercial information.").

108. Nick Lippis, *How Information Technology Completely Changed the Structure of the Modern Corporation*, FORBES (Apr. 13, 2018, 2:14 PM), <https://www.forbes.com/sites/quora/2018/04/13/how-information-technology-completely-changed-the-structure-of-the-modern-corporation/#2303e49fa327> [<http://web.archive.org/web/20191027004825/https://www.forbes.com/sites/quora/2018/04/13/how-information-technology-completely-changed-the-structure-of-the-modern-corporation/>].

109. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984) ("The economic value of that property right lies in the competitive advantage over others that Monsanto enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge.").

110. Aitken, *supra* note 2.

over \$124 billion, with increased privacy concerns driving demand.<sup>111</sup> This cost of confidentiality is borne not just by private businesses but also by the general public, whose interest in a competitive marketplace is sabotaged by the mistreatment of confidential information.<sup>112</sup> These considerations have persuaded a number of pro-confidentiality courts and commentators—but there are more than a few authorities who remain unconvinced.

### *E. A Two-Fold Split in the Courts*

Discovery sharing pursuant to a protective order generally takes one of two forms.<sup>113</sup> Parties seeking to share discovery will either (1) request the inclusion of a sharing provision in the protective order, or (2) request to modify an existing protective order to allow for sharing.<sup>114</sup> The first method is referred to as “upfront sharing.”<sup>115</sup> This is because the right to share confidential information arises “upfront,” without any need for later modification.<sup>116</sup> The protective order that results is, of course, the sharing order.<sup>117</sup> The second method is comparatively inconvenient for many litigants.<sup>118</sup> Even assuming the party seeking to modify the protective order can meet whatever burden the jurisdiction imposes,<sup>119</sup> it is simply easier to avoid modification altogether.<sup>120</sup>

Accordingly, discovery sharing implicates two distinct but closely related splits in the courts. The first split pertains to the propriety of including sharing provisions in protective orders, while the second split pertains to the appropriate standard for modifying a protective order.<sup>121</sup>

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111. *Id.*

112. Miller, *supra* note 1, at 469.

113. See Benham, *supra* note 10, at 2202, 2209 (describing the two primary forms of discovery sharing).

114. *Id.* at 2201. In the federal system, nonparties move to modify a protective order concurrent with or subsequent to a Rule 24(b) request for permission to intervene. See *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042 (D.C. Cir. 1998); Benham, *supra* note 10, at 2210 (stating that it is typically understood that courts retain the inherent power to modify their own orders).

115. See Benham, *supra* note 10, at 2201–02 (referring to discovery sharing conducted pursuant to protective orders with sharing provision as “upfront sharing”).

116. *Id.*

117. *Id.*

118. See *id.* at 2227–29 (arguing that upfront sharing is more efficient than protective order modification).

119. See Campbell, *supra* note 38, at 828 (lamenting the “confusing split of authority” with respect to the appropriate standard for modification).

120. See Benham, *supra* note 10, at 2201–02.

121. *Id.* at 2209 (“[T]here is currently a three-way split among jurisdictions on when and how to allow discovery sharing.”).



### 1. *Propriety of Upfront Sharing*

With respect to the first split, courts gravitate toward one of three positions along a rather messy spectrum of thought. The first position, tracing back to the Texas Supreme Court's opinion in *Garcia v. Peeples*, finds a presumption in favor of discovery sharing.<sup>122</sup> In *Garcia*, the petitioner alleged that the lower court abused its discretion by entering a protective order that limited the petitioner's ability to share confidential information obtained in discovery with collateral litigants.<sup>123</sup> The Texas Supreme Court agreed, and, after discussing the merits of discovery sharing, held that "[t]he public policies favoring shared information require that any protective order be carefully tailored to protect [defendant-manufacturer's] proprietary interests while allowing an exchange of discovered documents."<sup>124</sup> Subsequent opinions from Texas courts have appeared skeptical of *Garcia*,<sup>125</sup> but the case remains seminal pro-sharing authority.<sup>126</sup>

The second position, as seen in *Raymond Handling Concepts Corp. v. Superior Court*, seems to be the more neutral position in the sharing-nonsharing debate.<sup>127</sup> In *Raymond*, the petitioner sought a writ of mandamus to prohibit the dissemination of its confidential information pursuant to a protective order entered by the trial court.<sup>128</sup> The protective order provided that confidential information could be disclosed to counsel engaged in similar litigation subject to such counsel's agreement to be bound to the protective order.<sup>129</sup> The *Raymond* court rejected petitioner's request for mandamus relief, finding that the trial court did not abuse its discretion.<sup>130</sup> According to the *Raymond* court, the trial court was well within its discretion to craft an order that "accommodated the public interest" given that it provided certain safeguards for the petitioner.<sup>131</sup> In a similar manner, courts orbiting the second position

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122. *Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987).

123. *Id.* at 346.

124. *Id.* at 348 (emphasis added).

125. See, e.g., *In re Universal Coin & Bullion, Ltd.*, 218 S.W.3d 828, 834 (Tex. App. 2007) (distinguishing *Garcia*); *Shafer v. Bedard*, 761 S.W.2d 126, 129 (Tex. App. 1988) (distinguishing *Garcia*).

126. See Benham, *supra* note 10, at 2207 (referring to *Garcia* as a "seminal discovery-sharing case").

127. See 45 Cal. Rptr. 2d 885 (Cal. Ct. App. 1995).

128. *Id.*

129. *Id.* at 886.

130. *Id.* at 888.

131. *Id.*

generally endorse discovery sharing but leave its application to the wide discretion of the trial court.<sup>132</sup>

The third position is the most common among federal courts and also the most hostile toward sharing orders.<sup>133</sup> These courts typically reject sharing orders as improper and recommend that nonparties seeking information move to modify the protective order after it is entered.<sup>134</sup> The exact premises of the third position remain unclear, but as explained later, the basic proposition seems to be that the protected party's expectation of confidentiality outweighs the various pro-sharing interests,<sup>135</sup> absent some showing of need or prejudice to the party seeking to share discovery.<sup>136</sup>

The disorganized nature of the split between these positions tends to elude a neat survey. Indeed, the difference between positions is better understood as a difference in attitude toward sharing orders rather than an express difference in law. There are, nonetheless, some general observations that should be made. Among the federal circuits, the Fourth, Sixth, and Tenth Circuits lean toward the third position.<sup>137</sup> However, the Fifth and Ninth Circuits trend in the direction of the first.<sup>138</sup>

The majority of states seem to have adopted the second position, generally endorsing discovery sharing and applying a balancing test.<sup>139</sup> A

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132. Benham, *supra* note 10, at 2208.

133. See, e.g., *Long v. TRW Vehicle Safety Sys., Inc.*, No. CV-09-2209-PHX-DGC, 2010 WL 1740831, at \*1 (D. Ariz. Apr. 29, 2010) (rejecting a sharing order because it improperly bypassed the modification procedure); see also *Steede v. Gen. Motors, LLC*, No. 11-2351-STA-DKV, 2012 WL 2089761, at \*4 (W.D. Tenn. June 8, 2012) (approving of the magistrate judge's denial of a sharing order when the plaintiff could not show that a nonsharing order would prejudice her case).

134. See *Long*, 2010 WL 1740831, at \*1; accord *Clippard ex rel. Clippard v. Yamaha Meter Corp.*, No. 51:14 CV-83-12, 2015 WL 1208551, at \*3 (W.D. Ky. Mar. 17, 2015).

135. See *Clippard*, 2015 WL 1208551, at \*3 (recognizing *Steede*'s prejudice requirement and articulating it as a need that the party seeking a sharing order must show); *Steede*, 2012 WL 2089761, at \*4 (upholding denial of sharing order where plaintiff could demonstrate no prejudice to her case); *Long*, 2010 WL 1740831, at \*1 (rejecting a sharing order because collateral litigants have no presumptive right to confidential material and the sharing order bypassed the modification procedure); see also *infra* Part III.C.

136. See *Long*, 2010 WL 1740831, at \*1.

137. See, e.g., *Biazari v. DB Indus., LLC*, No. 5:16-CV-49, 2017 WL 1498122, at \*1 (W.D. Va. Apr. 26, 2017); *Clippard*, 2015 WL 1208551, at \*1; *Bertetto v. Eon Labs, Inc.*, No. CIV. 06-1136 JCH/ACT, 2008 WL 2522571, at \*1 (D.N.M. May 29, 2008).

138. See, e.g., *Alton v. Medtronic, Inc.*, No. 3:13-CV-409-PK, 2014 WL 12791878, at \*1 (D. Or. Mar. 13, 2014); *Garcia v. Cont'l Tire N. Am., Inc.*, No. SA-05-CA-0666-XR, 2006 WL 8434211, at \*1 (W.D. Tex. June 19, 2006).

139. See, e.g., *Raymond Handling Concepts Corp. v. Superior Court*, 45 Cal. Rptr. 2d 885, 887-88 (Cal. Ct. App 1995) (exemplifying the second position); *Willeford v. Toys R Us-Delaware, Inc.*, No. 03-L-134, 2005 WL 6299625, at \*1 (Ill. Cir. Ct. May 27,

minority of states follow the first position.<sup>140</sup> Indeed, Florida appears to be the *only* state to closely align with the third position.<sup>141</sup>

## 2. Appropriate Standard of Modification

Regarding the second split, the majority position, as stated in *Wilk v. American Medical Ass'n*, finds a presumption in favor of modification absent some “countervailing” factors such as “tangibl[e] prejudice” to the party opposing modification.<sup>142</sup> The minority position, as seen in *Martindell v. International Telephone*, observes a strong presumption against modification that the nonparty must satisfy by showing “extraordinary circumstances” or “compelling need.”<sup>143</sup> Subsequent case law has given the minority position greater nuance.<sup>144</sup> All federal circuits

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2005); *Doe v. Uber Techs., Inc.*, No. 27-CV-17-9688, 2018 WL 4705031, at \*1 (Minn. Dist. Ct. Feb. 15, 2018); *Rhodes v. Cooper Tire & Rubber Co.*, No. 02-1208, 2003 WL 25570313, at \*1 (Miss. Cir. May 6, 2003); *Pincheira v. Allstate Ins. Co.*, 190 P.3d 322 (N.M. 2008).

140. *See, e.g.*, *Comes v. Microsoft Corp.*, 775 N.W.2d 302, 312 (Iowa 2009); *Farnum v. G.D. Searle & Co.*, 339 N.W.2d 384, 391 (Iowa 1983); *Converge, LLC v. Hickox*, No. 01-5005-L2, 2001 WL 1692072, at \*1 (Mass. Super. Dec. 27, 2001); *Sorci v. Ford Motor Co.*, No. CV06-02091, 2009 WL 5909726, at \*1 (Nev. Dist. Ct. Sep. 09, 2009). Texas naturally has the most detailed case law here. *See, e.g.*, *Garcia v. Peeples*, 734 S.W.2d 343 (Tex. 1987); *Eli Lilly & Co. v. Marshall*, 850 S.W.2d 155 (Tex. 1993) (following *Garcia*); *Am. Honda Motor Co. v. Dibrell*, 736 S.W.2d 257 (Tex. App. 1987); *Enter. Prods. Co. v. Sanderson*, 759 S.W.2d 174 (Tex. App. 1988) (following *Garcia*). *But see In re Cooper Tire & Rubber Co.*, No. 04-18-00005-CV, 2018 WL 1511774, at \*1 (Tex. App. Mar. 28, 2018) (affirming *Garcia* as good law but holding it to be limited by *In re Continental General Tire, Inc.*, 979 S.W.2d 609 (Tex. 1998)); *In re Universal Coin & Bullion, Ltd.*, 218 S.W.3d 828 (Tex. App. 2007) (distinguishing *Garcia*); *Shafer v. Bedard*, 761 S.W.2d 126 (Tex. App. 1988) (distinguishing *Garcia*).

141. *Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486 (Fla. Dist. Ct. App. 2011); *Cordis Corp. v. O'Shea*, 988 So. 2d 1163 (Fla. Dist. Ct. App. 2008).

142. *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1301 (7th Cir. 1980) (holding that a collateral litigant was “presumptively entitled to access” confidential discovery in the absence of countervailing factors such as “tangibl[e] prejudice”). Although the Seventh Circuit would later cast doubt on *Wilk*’s reasoning in light of the 2000 Amendment to Rule 5, discussed *supra* Part II.C., *Wilk* remains the leading example of liberal modification. *See Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009) (stating that the 2000 Amendments superseded *Wilk* “[t]o the extent” it was premised upon a principle of presumptive public access to court proceedings); *Benham*, *supra* note 10, at 2241 (“Most courts to consider the issue [of modification] take [the] liberal approach, championed by *Wilk v. American Medical Association*.”).

143. *Martindell v. Int'l Telephone*, 594 F.2d 291, 296 (2d Cir. 1979) (holding that modification requires a showing of “some extraordinary circumstance or compelling need”); *accord S.E.C. v. TheStreet.Com*, 273 F.3d 222, 229 (2d Cir. 2001).

144. *See, e.g., In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308, 318 (D. Conn. 2009) (holding that the *Martindell* standard only applies when there is “reasonable reliance” on the protective order).

except the Second Circuit subscribe to some variation of the majority position.<sup>145</sup>

The split among the states is more complex. Many states follow the majority position,<sup>146</sup> but many others seem to reject both the minority and majority positions, opting to implement their own tests.<sup>147</sup> No state, however, seems to adopt the minority position.

Despite the fact that the great majority of jurisdictions favor more permissive discovery sharing—both with respect to upfront sharing and protective order modification—the more justified position remains on the side of confidentiality. As will be explained in Part III, the error in the analysis of most courts is not judicial oversight. Rather, the issue is that most courts miscalculate the value of confidentiality, both as a right of litigants and as good public policy. Additionally, many courts are persuaded by the disarmingly intuitive economic reasoning promoted by pro-sharing authorities—an economic reasoning that does not withstand closer scrutiny.

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145. See, e.g., *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131–32 (9th Cir. 2003); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990); *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 791 (1st Cir. 1988); *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1301 (7th Cir. 1980).

146. See, e.g., *Doe v. Roman Catholic Bishop of Monterey*, No. H040662, 2015 WL 4594102, at \*1 (Cal. Ct. App. July 31, 2015); *Westinghouse Elec. Corp. v. Newman & Holtzinger*, 46 Cal. Rptr. 2d 151 (Cal. Ct. App. 1995); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 970 A.2d 656 (Conn. 2009); *Wolhar v. Gen. Motors Corp.*, 712 A.2d 464 (Del. Super. Ct. 1997); *Hall v. Sprint Spectrum L.P.*, 858 N.E.2d 955 (Ill. App. Ct. 2006); *Comes v. Microsoft Corp.*, 775 N.W.2d 302 (Iowa 2009); *Adams v. Metallica, Inc.*, 758 N.E.2d 286 (Ohio Ct. App. 2001); *Ballard v. Herzke*, 924 S.W.2d 652 (Tenn. 1996).

147. See, e.g., *Holland v. Eads*, 614 So. 2d 1012 (Ala. 1993) (adopting the test developed by the District of Columbia in *Mokhiber v. Davis*, 537 A.2d 1100 (D.C. 1988)); *Flynn v. E.I. du Pont de Nemours & Co.*, 988 P.2d 97 (Alaska 1999); *State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676 (Minn. Ct. App. 2000); *State ex rel. Ford Motor Co. v. Manners*, 239 S.W.3d 583 (Mo. 2007); *Visentin v. DiNatale*, 798 N.Y.S.2d 349 (N.Y. Sup. Ct. 2004); *Oncor Commc'ns Inc. v. State*, 636 N.Y.S.2d 176 (N.Y. App. Div. 1996); *Marine Power & Equip. Co. v. State, Dep't of Transp.*, 734 P.2d 480 (Wash. 1987); *State ex rel. Wright v. Stucky*, 517 S.E.2d 36 (W. Va. 1999), modified, *In re Daniel D.*, 562 S.E.2d 147 (W. Va. 2002). The District of Columbia has also developed its own test, which has gained the support of Alabama courts. *Mokhiber*, 537 A.2d 1100; see also *Holland*, 614 So. 2d at 1012 (adopting the *Mokhiber* test).

## III. ANALYSIS

*A. The Irreducible Risks of Disclosure*

As the Zyprexa leak illustrates, few assets are more valuable to defendants than confidentiality in litigation. With the world becoming increasingly connected, the dangers of a malicious conspiracy, rogue acts of whistleblowing, or inadvertent disclosure seem stronger now more than ever. Many courts, and even opposing litigants, are cognizant of these dangers and have thus made protective orders a staple of commercial and complex litigation.<sup>148</sup>

Importantly, and as admitted by at least one pro-sharing commentator, the danger of a Zyprexa-like disaster increases each time confidential information is shared.<sup>149</sup> Producing parties are forced to trust not only the diligence of opposing counsel but also the integrity of every network through which their confidential information is shared. An inadvertent leak by a negligent litigant or nonparty could be as disastrous as a malicious conspiracy to aid competitors.<sup>150</sup>

Pro-sharing critics correctly note, however, that no substantial disclosure of confidential information under a sharing order has been reported despite decades of discovery sharing.<sup>151</sup> Further, they argue that sharing orders, like nonsharing orders, may be violated, and so the use of sharing orders presents no unique danger.<sup>152</sup> They also emphasize that nonparties with whom confidential information is shared are subject to the same rules that impose contempt for litigants that violate a protective order.<sup>153</sup>

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148. Benham, *supra* note 10, at 2192–93.

149. *Id.* at 2204 (“[A]s a matter of simple probability, each additional person who receives the information under the sharing order makes it marginally more likely that the information makes its way to a competitor.”); *see also* Williams v. Taser Int’l, Inc., No. 1:06-CV-0051-RWS, 2006 WL 1835437, at \*2 (N.D. Ga. June 30, 2006) (“[T]he more widely confidential documents are disseminated, it becomes both more likely that those documents will be released, and more difficult for the Court to enforce the terms of its protective order.”).

150. The Zyprexa leak is just one example of what happens when confidential information is disclosed. There are many more. *See generally* Amber M. Bishop, Note and Comment, *Remove the Muzzle and Give Rule 37(b) Teeth: Advocating for the Imposition of Sanctions for Rule 26(c) Protective Order Violations in the Eleventh Circuit*, 31 GA. ST. U. L. REV. 407 (2015) (discussing, *inter alia*, protective order violations). Whether that damage is caused inadvertently or maliciously may mean little to the protected party who suffers regardless.

151. Benham, *supra* note 10, at 2204–05.

152. *Id.* at 2205.

153. *Id.* at 2228.

These arguments are unpersuasive. First, the mere fact that no Zyprexa-like disaster has yet to result from a sharing order is not a sufficient reason to believe one never will. The fact that some repeat defendants have zealously defended their right to confidentiality against sharing orders might actually explain why no such disaster has occurred.<sup>154</sup> Further, it is possible that such disclosures have occurred but the victims are not yet aware.<sup>155</sup> If there is any inherent risk to sharing confidential information, reason would suggest that this risk is growing parallel to the “internet of things.”<sup>156</sup> An increasingly digitized and interconnected world seems more treacherous for confidential data than the bygone era of hard copies and certified mail.<sup>157</sup>

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154. Original equipment manufacturers (OEMs) and their suppliers, for example, have steadfastly resisted sharing orders. *See, e.g.*, *Clippard ex rel. Clippard v. Yamaha Motor Corp.*, No. 5:14-CV-83-R, 2015 WL 1208551, at \*1 (W.D. Ky. Mar. 17, 2015); *Steede v. Gen. Motors, LLC*, No. 11-2351-STA-DKV, 2012 WL 2089761, at \*1 (W.D. Tenn. June 8, 2012); *Idar v. Cooper Tire & Rubber Co.*, No. C-10-217, 2011 WL 688871, at \*1 (S.D. Tex. Feb. 17, 2011); *Long v. TRW Vehicle Safety Sys., Inc.*, No. CV-09-2209-PHX-DGC, 2010 WL 1740831, at \*1 (D. Ariz. Apr. 29, 2010); *Gil v. Ford Motor Co.*, No. 1:06CV122, 2007 WL 2580792, at \*1 (N.D. W. Va. Sept. 4, 2007).

155. *See* Keith Collins, *One in 10 Data Breaches Discovered in 2016 Had Gone Undetected for More Than a Year*, QUARTZ (May 9, 2017), <https://qz.com/978601/one-in-10-data-breaches-discovered-in-2016-had-gone-undetected-for-more-than-a-year/> [<http://web.archive.org/web/20170513130343/https://qz.com/978601/one-in-10-data-breaches-discovered-in-2016-had-gone-undetected-for-more-than-a-year/>] (“More than a quarter of data breach incidents in 2016 took at least one month for companies to discover, and one in 10 had gone unnoticed for at least a year.”).

156. The term “internet of things” refers to the vast and growing network of devices, including vehicles and electronics, that are capable of exchanging and collecting data through the internet. *See* Hillary Brill & Scott Jones, *Little Things and Big Challenges: Information Privacy and the Internet of Things*, 66 AM. U. L. REV. 1183 (2017) (discussing, generally, the relationship between the “internet of things” and data privacy).

157. *See* Victor Reklaitis, *How the Number of Data Breaches is Soaring—in One Chart*, MARKETWATCH (May 25, 2018, 2:25 AM), <https://www.marketwatch.com/story/how-the-number-of-data-breaches-is-soaring-in-one-chart-2018-02-26> [<http://web.archive.org/web/20190509195314/https://www.marketwatch.com/story/how-the-number-of-data-breaches-is-soaring-in-one-chart-2018-02-26>]. The dramatic effect that eDiscovery has had on litigation has been well-observed. *See, e.g.*, Ben Kerschberg, *What Technology-Assisted Electronic Discovery Teaches Us About The Role Of Humans In Technology*, FORBES (Oct. 8, 2018, 9:56 AM), <https://www.forbes.com/sites/benkerschberg/2018/10/08/what-technology-assisted-electronic-discovery-teaches-us-about-the-role-of-humans-in-technology/#65308ca154ea> [<http://web.archive.org/web/20190911150406/https://www.forbes.com/sites/benkerschberg/2018/10/08/what-technology-assisted-electronic-discovery-teaches-us-about-the-role-of-humans-in-technology/>]; Greg Herbers, *Federal Court Offers An Exemplar On Defusing The E-Discovery Litigation Weapon*, FORBES (May 28, 2018, 10:00 AM), <https://www.forbes.com/sites/wlf/2018/03/28/federal-court-offers-an-exemplar-on-defusing-the-e-discovery-litigation-weapon/#12348b907fb6>

Second, the fact that nonsharing orders may be violated is hardly a reason to prefer sharing orders. All this demonstrates is that producing confidential information entails an inherent and irreducible risk of disclosure that the producing party must bear.<sup>158</sup> In fact, the apparent irreducibility of this risk strongly cautions against the use of sharing orders because it suggests that the risk of disclosure marginally increases with each instance of sharing.<sup>159</sup>

Pro-sharing commentators correctly note, however, that sharing orders are subject to the same judicial protection as nonsharing orders.<sup>160</sup> They argue that this should relieve any fears that producing parties have about the fate of their confidential information.<sup>161</sup> However, the threat of repercussions for wrongdoing is no better an argument against nonsharing orders than against other basic securities measures, such as locking the doors after close. Further, this argument presumes that the primary risk of disclosure rests with the bad faith of parties receiving confidential discovery. But the greatest security risk for sensitive information is not opposing counsel—though selling information *has* become a lucrative business<sup>162</sup>—but third parties such as hackers and rogue employees.<sup>163</sup> As stated earlier, this risk grows each time the information is shared.<sup>164</sup>

Additionally, pro-sharing commentators would be incorrect to assume that if liability for an improper disclosure could be attributed to a single party, adequate sanctions would follow. Some research suggests that courts may be incapable of effectively punishing those who violate protective orders.<sup>165</sup> Generally, there are two reasons why this might be.

The first reason pertains to the state of the law in the relevant jurisdiction. In the Eleventh Circuit, for example, binding precedent forbids courts from exercising Rule 37 sanctions to punish the violation of a protective order.<sup>166</sup> Because Rule 37 empowers the courts to fashion

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[<http://web.archive.org/web/20191027154538/https://www.forbes.com/sites/wlf/2018/03/28/federal-court-offers-an-exemplar-on-defusing-the-e-discovery-litigation-weapon/>].

158. See Benham, *supra* note 10, at 2204.

159. See Williams v. Taser Int'l, Inc., No. 1:06-CV-0051, 2006 WL 1835437, at \*2 (N.D. Ga. June 30, 2006).

160. Benham, *supra* note 10, at 2228.

161. *Id.*

162. Campbell, *supra* note 38, at 822 (“Due to the growing trend of selling information, often at a profit, among members of the plaintiff’s bar, information marketing among plaintiffs’ attorneys has become big business.”).

163. See Ashford, *supra* note 3.

164. See Benham, *supra* note 10, at 2204.

165. See, e.g., Bishop, *supra* note 150, at 409, 415.

166. Lipscher v. LRP Publ’ns, Inc., 266 F.3d 1305, 1323 (11th Cir. 2001) (“[A] Rule 26(c) protective order is not ‘an order to provide or permit discovery,’ and therefore, such

a considerable variety of sanctions, some commentators have criticized this limitation as improperly weakening the ability of trial courts to guard the rights of protected parties.<sup>167</sup>

The second reason pertains to the inherent shortcomings of sanctions. Take, for instance, the *Zyprexa* court's refusal to issue an injunction that applied beyond the conspiring leakers.<sup>168</sup> By the time the court was able to issue an injunction, Eli Lilly's confidential information had been platformed by numerous host sites.<sup>169</sup> No remedy, legal or equitable, seems likely to rectify that sort of damage.<sup>170</sup> It follows that, though reform in the administration of sanctions appears needed, the lack of a reliable sanction is not the principal concern behind sharing orders. Ultimately, protected parties want to protect their confidential information. The difficulty of estimating the value of some confidential information to a reasonable degree means that liquidated damages will be, at least in some cases, inadequate.<sup>171</sup> Once a leak has occurred, the damage is done.<sup>172</sup>

### *B. The (Poor) Economics Behind Sharing*

Though pro-sharing authorities sometimes point to increased transparency and accountability as reasons to prefer sharing orders,<sup>173</sup>

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orders do not fall within the scope of Rule 37(b)(2)." (citation omitted)). Rule 37(b)(2) sanctions are only available when a party fails to obey an order "to provide or permit discovery," which, according to the Eleventh Circuit, does not include protective orders. *Id.*

167. Bishop, *supra* note 150, at 409 ("In jurisdictions where Rule 37 does not apply to protective orders, courts must deter and punish pursuant to other sources of authority. These other sources of power potentially limit judges in their punishments.").

168. *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 426 (E.D.N.Y. 2007). The *Zyprexa* court should not be blamed here. Eli Lilly & Company's confidential information was being widely shared throughout the internet. Calhoun & Womeldorf, *supra* note 21, at 2. There was little that any court could do.

169. Calhoun & Womeldorf, *supra* note 21, at 2.

170. *In re Remington Arms Co., Inc.*, 952 F.2d 1029, 1033 (8th Cir. 1991) ("Such an after-the-fact remedy is largely ineffectual in a trade secrets case, however, for once the information is wrongfully released, the trade secret is lost forever and no sanction imposed on the violator can retrieve it.").

171. See, e.g., *Zyprexa*, 474 F. Supp. 2d 385.

172. *Remington*, 952 F.2d at 1033.

173. See, e.g., *Garcia v. Peebles*, 734 S.W.2d 343 (Tex. 1987); Benham, *supra* note 10, at 2187. Given that judicial economy remains the principal argument behind sharing orders, a direct treatment of the transparency argument exceeds the scope of this Note. Nonetheless, a few observations could be made. First, courts can and *do* punish abusive discovery responses with severe sanctions—and, unlike with improper disclosures under a protective order, courts have no problem identifying the wrongdoer. See, e.g., *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1539 (11th Cir. 1993) (affirming the trial court's



their principal argument rests on the claim that discovery sharing enhances judicial economy.<sup>174</sup> Their reasoning is that if W, X, and Y are all involved in litigation against Z, and the same confidential information is material to all the suits, then, if W, X, and Y share the information they discover with one another, they will engage in less discovery overall.<sup>175</sup> Accordingly, the private expense of discovery and the related judicial expense of managing discovery would be reduced.<sup>176</sup> This argument, though plausible on its face, assumes a number of premises that deserve greater scrutiny.

First, the argument overlooks the economics of prosecuting a claim: the less expensive it is to bring a claim, the more often that claim will be brought.<sup>177</sup> Further, for any given claim, the pool of possible claimants exceeds the pool of *rational* claimants, and, every day, plaintiffs' counsel are looking to sort between the two.<sup>178</sup> What makes any given claim "rational" to pursue is an economic judgment that is intrinsically related to the cost of litigation.<sup>179</sup> Given that legal resources are finite, the most

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entry of default judgment and damages as sanctions for defendant's repeated misleading discovery responses). Further, producing parties may be *more likely* to withhold information if they know the information produced will be widely shared. See *Rhinehart v. Seattle Times Co.*, 654 P.2d 673, 689 (Wash. 1982). And even if discovery sharing results in greater transparency, it does not follow that any particular sharing order should be granted—other considerations may carry the day. See *Ramos v. Cooper Tire & Rubber Co.*, No. 10-CV-198 JAP/ACT, 2011 WL 13266815, at \*6 (D.N.M. Mar. 8, 2011).

174. See *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003) ("Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery."); see also Benham, *supra* note 10, at 2187; Miller, *supra* note 1, at 490.

175. See generally Benham, *supra* note 10, at 2202–05.

176. See *id.*

177. This central claim of microeconomics is well-recognized by legal scholars in the fields most saturated with discovery orders, such as products liability. See Keith N. Hylton, *The Law and Economics of Products Liability*, 88 NOTRE DAME L. REV. 2457, 2482 (2013) ("Some injured consumers will forgo their right to sue because the cost of litigation exceeds the value of their claim for compensation."); see also Steven Shavell, *The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement*, 19 INT'L REV. L. & ECON. 99 (1999) (discussing, inter alia, the relationship between the private and social cost of litigation).

178. See STEPHEN C. YEAZELL & JOANNA L. SCHWARTZ, CIVIL PROCEDURE 339 (9th ed. 2016) ("[O]ne of the first things the lawyer wants to know focuses on the remedy sought . . . . A system that depends on parties to bear the costs of developing the case requires lawyers to think about the amount at stake in relation to the costs of litigating the case.").

179. See Hylton, *supra* note 177; Shavell, *supra* note 177; see also A. Mitchell Polinsky & Yeon-Koo Che, *Decoupling Liability: Optimal Incentives for Care and Litigation*, 22 RAND J. ECON. 562 (1991), <http://www.columbia.edu/~yc2271/files/papers/decouple.pdf> [<http://web.archive.org/web/20180721071900/http://www.columbia.edu/~yc2271/files/pa>]

capable members of the plaintiffs' bar logically gravitate toward the most rational claims.<sup>180</sup> This process is necessary for the efficient administration of justice.<sup>181</sup> Sharing orders, then, threaten to irrationally broaden access to finite judicial resources, causing a rapid depletion of resources.<sup>182</sup> The likely result is less judicial resources for the most rational claims and an increase in the total cost of administering justice.

Importantly, there is more to this counterargument than abstract economic reasoning. The advent of class actions and, particularly, their effect on federal caseloads is a powerful testament to the relationship between the price of legal services and the allocation of judicial resources. Essentially, the class action exists so that a large set of claimants, alleging common injuries and other shared characteristics as required by law, may pool their individual claims and seek relief as a class.<sup>183</sup> The greatest innovation of the class action is its economy of scale.<sup>184</sup> The aggregation of claims, often too costly to bring individually, gives significant leverage to the injured class while also tempting courts and defendants with the prospect of a global settlement.<sup>185</sup>

However, the class action is not without its own inefficiencies. In economic terms, the substantial reduction in the cost of bringing a claim under a class action has made bringing otherwise unviable claims rather lucrative.<sup>186</sup> Accordingly, the class action has reallocated legal services

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pers/decouple.pdf] (proposing a solution to the apparent disconnect between private and social incentives in litigation).

180. See Hylton, *supra* note 177; Shavell, *supra* note 177; Polinsky & Che, *supra* note 179.

181. See YEAZELL & SCHWARTZ, *supra* note 178, at 339–40.

182. The scarcity of judicial resources is not just abstractly recognized but actively shapes the administration of justice. See *In re Tyler*, 839 F.2d 1290, 1292 (8th Cir. 1988). Indeed, courts regularly consider the preservation of judicial resources when crafting doctrines and procedures. See, e.g., *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966); *Am. Fin. Life Ins. & Annuity Co. v. Youn*, 7 F. App'x 913 (10th Cir. 2001); *N. Wind, Inc. v. Daley*, 200 F.3d 13, 18 (1st Cir. 1999); *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352, 1354 (J.P.M.L. 2005).

183. See *In re Tyler*, 839 F.2d at 1292; see also YEAZELL & SCHWARTZ, *supra* note 178, at 840 ("The underlying concept is simple: If many persons find themselves in the same situation, advantages may flow from aggregating their many lawsuits into one.").

184. See Developments in the Law, *The Paths of Civil Litigation*, 113 HARV. L. REV. 1827, 1831–32 (2000); Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343 (2005); see also YEAZELL & SCHWARTZ, *supra* note 178, at 840.

185. Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 845 (2016); see also YEAZELL & SCHWARTZ, *supra* note 178, at 864; Hantler & Norton, *supra* note 184, at 1343.

186. See Carroll, *supra* note 185, at 845; see also YEAZELL & SCHWARTZ, *supra* note 178, at 840.

on the plaintiffs' bar.<sup>187</sup> Many plaintiffs' attorneys, knowing the potential settlement value of a large set of otherwise unremarkable claims, are incentivized to assemble class actions that seem trivial.<sup>188</sup> As a result, many legal authorities—including judicial committees,<sup>189</sup> scholarly commentators,<sup>190</sup> and members of Congress<sup>191</sup>—have blamed the class action for the troubling growth of federal caseloads.

Imagine that the attorneys for the lone plaintiff in a products liability action are allowed to disseminate confidential information they have received to a number of plaintiffs' attorneys involved in similar litigation or considering similar litigation. The economic effect is likely to be similar to the class action. But, unlike the class action, discovery sharing makes more claims viable—and encourages attorneys to seek out such claims—*without* altering the basic structure of adjudication.<sup>192</sup> Each claimant benefitting from shared information will still have her rights adjudicated individually, unlike class claimants who, by operation of law, must give up their right to an individual judgment.<sup>193</sup> The likely

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187. Carroll, *supra* note 185, at 849 (“Incentivized by the promise of sizable contingency fees . . . plaintiffs’ lawyers turned their creative energies to the aggregated-damages class action.”).

188. *See id.* at 845; *see also* Hantler & Norton, *supra* note 184, at 1344 (describing the rise of “coupon settlements”).

189. *See, e.g.*, FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 5 (1990), <https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf> [<http://web.archive.org/web/20190908204627/https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf>] (“The number of cases filed in federal courts began to surge as the 1950s drew to a close, and the surge has continued without surcease to this day. The causes . . . certainly include . . . a variety of procedural developments such as expanded use of class actions . . .”).

190. *See, e.g.*, Hantler & Norton, *supra* note 184, at 1344.

191. *See, e.g.*, H.R. REP. NO. 115-25, at 2–4 (2017) (reporting on the proposed Fairness in Class Action Litigation Act of 2017 and describing the “fundamental problem” as there being “far too many class actions and mass actions” litigated by “opportunistic lawyers”). The Act, which proposed stricter rules for class certification, never left the House Judiciary Committee. Alison Frankel, *Class Action Reform Isn’t Dead. It’s Just Not Coming From Congress*, REUTERS (Dec. 28, 2018, 2:05 PM), <https://www.reuters.com/article/legal-us-otc-classaction/class-action-reform-isnt-dead-its-just-not-coming-from-congress-idUSKCN1OR1G1> [<http://web.archive.org/web/20190108010836/https://www.reuters.com/article/legal-us-otc-classaction/class-action-reform-isnt-dead-its-just-not-coming-from-congress-idUSKCN1OR1G1>].

192. Class actions reduce costs because they aggregate similar claims. Carroll, *supra* note 185, at 845. Discovery sharing, on the other hand, does not aggregate the claims into a single suit but reduces costs by, in some sense, spreading the cost of discovery. *See* Benham, *supra* note 10, at 2202–05.

193. *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940) (“It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment . . .”).

result is more litigation without the offsetting efficiency of class aggregation. One should be skeptical, then, that these extra costs would be recouped—let alone *outweighed*—by whatever savings would accrue from sharing.

Even assuming arguendo that the above economic account of sharing orders is inaccurate, there is still reason to be skeptical of the claim that sharing orders reduce the cost of litigation. First, it is well-recognized that protective orders enhance judicial economy by reducing collateral litigation related to the production of sensitive information.<sup>194</sup> When producing parties can rely on a protective order, they are less likely to resist the disclosure of confidential information.<sup>195</sup> Reason would suggest that the more parties that have access to the producing party's confidential information, the less the producing party can reasonably rely on the protective order, and, thus, the less likely that party is to produce information without a fight.<sup>196</sup> Therefore, any savings the use of sharing orders accrues are likely to be offset by the costs of contentious discovery disputes.<sup>197</sup>

Second, the pro-sharing argument incorrectly assumes that a world where W, X, and Y share information produces less *net discovery* than a world where W, X, and Y do not share information. Pro-sharing authorities seem to adopt this premise without the support of *any* statistical data.<sup>198</sup> The problem is that there are more economic and noneconomic incentives to inflate discovery in the sharing world than in the nonsharing world. On the economic side, plaintiffs' counsel have been known to sell confidential information to collateral litigants.<sup>199</sup> It follows that discovery sharing may financially reward counsel for requesting as much relevant" information as possible, even if doing so would not be economically rational absent discovery sharing. Further, limitations on how confidential information may be shared, such as prohibiting the sale of information, would not address all the incentives at work. Plaintiffs' and defendants' counsel coordinate their efforts along their respective sides of the docket.<sup>200</sup> Even without a financial motive,

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194. See Campbell, *supra* note 38, at 772.

195. *Id.*

196. See *id.* at 788 ("Protective orders clearly are of little value if the parties cannot rely on them.").

197. See *id.*

198. As of writing this Note, the author is not aware of any peer-reviewed statistical research demonstrating a correlation between the use of sharing orders and reduced discovery costs.

199. See Miller, *supra* note 1, at 497–98.

200. See Benham, *supra* note 10, at 2206. This seems to be a central (and noncontroversial) premise behind discovery sharing.

plaintiffs' counsel would have an incentive to discover and share as much information in their networks as possible to build goodwill with their colleagues.

Not all of these economic arguments are entirely coherent. For example, one cannot logically defend the notion that sharing orders will overburden the courts by making more claims viable while at the same time arguing that sharing orders would not reduce net discovery enough to enhance judicial economy. This apparent incoherence is intentional—and not *truly* incoherent. Reasonable policy discourse should take account of all plausible arguments. This is especially true when the motivation behind a proposed policy is economic in nature, as is the case with sharing orders.<sup>201</sup>

### C. Modifying Under a Revised Martindell Standard

There is, however, one solution to the sharing-nonsharing debate that respects privacy interests, avoids the complex economics behind sharing, and provides relief to nonparties who need it: modification of the protective order. As discussed earlier, courts following the “third position” endorse this solution<sup>202</sup> According to the third position, sharing orders should be rejected as improper absent some showing of special need by the requesting party.<sup>203</sup> Before explaining why courts should prefer this position, it is important to understand the reasoning behind the position itself.

Consider, for example, two leading cases applying the third position, *Steede v. General Motors, LLC* and *Clippard ex rel. Clippard v. Yamaha Motors Corp.* The *Steede* court observed that, generally, a court's task in contemplating a protective order is to balance the parties' competing interests for and against the disclosure of information.<sup>204</sup> Decisive for the *Steede* court's analysis was the defendant's “protectable privacy interest” in its information, the evidence that disclosure of such information would result in competitive harm, and the plaintiff's failure to articulate how a nonsharing order would “prejudic[e] her ability to obtain discovery in support of her own claims.”<sup>205</sup>

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201. See Benham, *supra* note 10, at 2198–99.

202. See *supra* Part II.E.

203. See Miller, *supra* note 1, at 490.

204. *Steede v. General Motors*, No. 11-2351-STA-DKV, 2012 WL 2089761, at \*4 (W.D. Tenn. June 8, 2012).

205. *Id.*

The *Clippard* court, relying on *Steede*, inter alia, rejected a similar sharing order proposed by the plaintiff.<sup>206</sup> In doing so, however, the court provided considerable substance to *Steede*'s prejudice requirement.<sup>207</sup> Specifically, the *Clippard* court noted that the plaintiff failed to identify (1) any substantially similar case—or even any attorneys engaged in substantially similar litigation—and (2) how a sharing provision would benefit her case or how its absence would be prejudicial.<sup>208</sup>

Both prongs of the *Clippard* test are valuable. The first prong imposes at least some minimal screening for improper motives.<sup>209</sup> If the requesting party cannot even identify a proper beneficiary of the proposed sharing, then it seems likely that the sharing is being proposed for the pecuniary gain of the requesting party or its counsel.<sup>210</sup> The second prong ensures that the “protectable privacy interests” of the producing party are given due weight.<sup>211</sup> If this second prong is met, then, presumably, the particular needs of the requesting party outweigh the privacy interests of the producing party.<sup>212</sup>

The second prong seems to imply the critical premise behind the third position: when weighing the interests for and against the disclosure of information, courts should prefer the producing party's interest in confidentiality over the public's interest in disclosure.<sup>213</sup> The basis for this premise is readily apparent. Parties have protectable privacy interests in their confidential information—interests that deserve protection both for their inherent and instrumental value.<sup>214</sup> The alleged benefits of sharing orders (such as enhanced judicial economy) are speculative and insubstantial in comparison. We are, thus, led to the central holding of

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206. *Clippard ex rel. Clippard v. Yamaha Motors Corp.*, No. 5:14-CV-83-R, 2015 WL 1208551, at \*1 (W.D. Ky. Mar. 17, 2015).

207. *See id.* at \*2.

208. *Id.*

209. *See id.*

210. *Id.*

211. *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987).

212. This seems to be why both *Steede* and *Clippard* asked whether the plaintiff would suffer any prejudice from the lack of a sharing provision. *Steede v. Gen. Motors, LLC*, No. 11-2351-STA-DKV, 2012 WL 2089761, at \*4 (W.D. Tenn. June 8, 2012); *Clippard*, 2015 WL 1208551, at \*2. As *Steede* notes, the ultimate task of the trial court is to weigh the competing interests in disclosure. *Steede*, 2012 WL 2089761, at \*4. A party's privacy interest is “protectable” but not “unapproachable.” *See Alexander*, 820 F.2d at 355.

213. *See Steede*, 2012 WL 2089761, at \*4 (placing the burden on the requesting party to demonstrate need); *see also Clippard*, 2015 WL 1208551, at \*3 n.3 (“A party who produces information in discovery continues to hold ‘protectable privacy interests . . .’ It follows that the Court may limit any party's ability to release documents obtained in discovery *whether or not a public interest attaches* to the information contained in the discovery responses.” (emphasis added) (citations omitted)).

214. *See supra* Part II.D.

the third position: only a requesting party's *demonstrable need* for sharing can overcome a producing party's privacy interest.<sup>215</sup> This conclusion is consistent with the rules of discovery<sup>216</sup> and with the Supreme Court's maxim that "[l]iberal discovery is provided for the *sole* purpose of assisting in the preparation and trial, or the settlement, of litigated disputes."<sup>217</sup>

Given the discussion thus far, there is little left to be said about the other two positions. The first position, as embodied in *Garcia v. Peebles*,<sup>218</sup> undermines the Federal Rules,<sup>219</sup> distorts the value of confidentiality,<sup>220</sup> and subverts the spirit of discovery by applying a presumption in favor of sharing orders.<sup>221</sup> The *Garcia* court, like other pro-sharing authorities, seemed motivated largely by economic reasoning that is unpersuasive at best.<sup>222</sup> Further, subsequent case law recognizing *Garcia*'s excess has steadily eroded whatever persuasive force *Garcia* once held.<sup>223</sup> The second position, though more persuasive than the first, fails largely for its lack of guidance. For example, in *Raymond Handling v. Superior Court*, the court gave no real guidance for weighing the competing interests for and against disclosure—it simply emphasized the

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215. See *Ramos v. Cooper Tire & Rubber Co.*, No. 10-CV-198 JAP/ACT, 2011 WL 13266815, at \*6 (D.N.M. Mar. 8, 2011) ("Plaintiffs correctly argue that courts should favor discovery sharing to promote the search for the truth, judicial economy, and justice, but these concerns should not override a good faith showing that dissemination of certain information would put Cooper at a competitive disadvantage.").

216. See *Long v. TRW Vehicle Safety Sys., Inc.*, No. CV-09-2209-PHX-DGC, 2010 WL 1740831, at \*1 (D. Ariz. Apr. 29, 2010).

217. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (emphasis added).

218. See *supra* Section II.E.1.

219. See *Long*, 2010 WL 1740831, at \*1 ("[C]ollateral litigants desiring any discovery produced pursuant to the protective order will simply have to go through the appropriate steps to obtain that discovery . . .").

220. See *supra* Part II.D.

221. Compare *Seattle Times*, 467 U.S. at 34 ("[J]udicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment. . . . Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c)."), with *Garcia v. Peebles*, 734 S.W.2d 343, 348 (Tex. 1987) ("The public policies favoring shared information require that any protective order be carefully tailored to protect GMC's proprietary interests while allowing an exchange of discovered documents.").

222. See *supra* Part III.A.

223. See, e.g., *In re Cooper Tire & Rubber Co.*, No. 04-18-00005-CV, 2018 WL 1511774, at \*7 (Tex. App. Mar. 28, 2018) ("We conclude *Garcia* is still good law but is limited by *Continental General Tire*. . . . Therefore, we hold the sharing provision must be more limited in scope.").

trial court's wide discretion and deferred to precedent.<sup>224</sup> However, the confidentiality of producing parties deserves deference, not neutrality.<sup>225</sup> It is not enough that courts should generally weigh the interests at stake. Given the value of confidentiality and the weak reasoning in support of sharing, only a special showing should justify a sharing order.<sup>226</sup> Further, the second position, like the first, ignores the clear Rule-provided remedy: protective order modification.<sup>227</sup> Therefore, this Note recommends that courts examining sharing orders adopt the third position as exemplified by *Steede* and *Clippard*.<sup>228</sup>

The question thus becomes: which standard of modification should the courts employ? As discussed previously, the majority of federal courts rely on the *Wilk* standard.<sup>229</sup> According to the *Wilk* standard, the party opposing modification must show (1) that it has some substantial right at stake, and (2) that modification would "tangibly prejudice" that right.<sup>230</sup> However, after the party opposing modification meets this burden, the court must still determine whether the "tangibl[e] prejudice" to the opposing party outweighs the possible benefits of modification.<sup>231</sup>

There is substantial case law among the federal circuit courts giving substance to the *Wilk* standard.<sup>232</sup> However, an analysis of that case law is outside the scope of this Note. Instead, it is sufficient to note that by shifting the burden to the protected party to demonstrate a "substantial right" and "tangibl[e] prejudice," the *Wilk* standard assumes that not every protective order shields information to which a legitimate privacy

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224. See *Raymond Handling Concepts Corp. v. Superior Court*, 45 Cal. Rptr. 2d 885 (Cal. Ct. App 1995).

225. See *Steede v. Gen. Motors, LLC*, No. 11-2351-STA-DKV, 2012 WL 2089761, at \*4 (W.D. Tenn. June 8, 2012) (placing the burden on the requesting party to demonstrate need); see also *supra* Part II.D.

226. See, e.g., *Steede*, 2012 WL 2089761, at \*4 (requiring a showing of prejudice).

227. See *Long v. TRW Vehicle Safety Sys., Inc.*, No. CV-09-2209-PHX-DGC, 2010 WL 1740831, at \*1 (D. Ariz. Apr. 29, 2010).

228. See *supra* Part III.C.

229. See *supra* Section II.E.2.

230. *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980); *Cox v. Sherman Capital LLC*, No. 1:12-CV-01654-TWP-MJD, 2016 U.S. Dist. LEXIS 183144, at \*10 (S.D. Ind. May 24, 2016) ("When evaluating a motion to intervene to modify a protective order, the court must determine: (1) whether the party opposing intervention has any substantial right at stake, and (2) whether the proposed modification would 'tangibly prejudice' that right." (citing *Wilk*, 635 F.2d at 1299)).

231. *Cox*, 2016 U.S. Dist. LEXIS 183144, at \*10 ("If tangible prejudice is established, the court must decide 'whether that injury outweighs the benefits of any possible modification of the protective order.'" (quoting *Wilk*, 635 F.2d at 1299)).

232. See, e.g., *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003); *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854 (7th Cir. 1994); *In re Film Recovery Sys., Inc.*, 804 F.2d 386 (7th Cir. 1986).



interest attaches.<sup>233</sup> This is a reasonable assumption given that some protective orders may shield information that is no longer sensitive but still material to some question of law or fact.<sup>234</sup> *Wilk*'s shifting of the burden, however, is needlessly detrimental to parties' privacy interests.

The more appropriate standard is one that originates from the Second Circuit's opinion in *Martindell v. International Telephone*. Under *Martindell*, parties seeking to modify a protective order must demonstrate "extraordinary circumstances" or "compelling need."<sup>235</sup> Subsequent case law has further refined the *Martindell* standard so that it addresses the concerns motivating the *Wilk* decision while still affording due deference to parties' privacy interests.<sup>236</sup>

The most important refinement of the *Martindell* standard has been the introduction of a four-factor reasonable reliance test.<sup>237</sup> This reasonable reliance test, first outlined by *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation*, is intended to limit the number of protective orders to which *Martindell*'s strong presumption against modification applies.<sup>238</sup> According to *EPDM*, only those protective orders that are reasonably relied upon deserve application of the "compelling need" standard.<sup>239</sup> If the court does not find reasonable reliance, then it cannot apply the *Martindell* standard and must weigh the competing interests of the parties with respect to modification.<sup>240</sup>

*EPDM* gives substance to "reasonable reliance" by reference to four factors: (1) the protective order's scope (e.g., umbrella or specific);<sup>241</sup> (2) the protective order's express language;<sup>242</sup> (3) the level of inquiry behind the protective order (i.e., whether good cause was shown);<sup>243</sup> and (4) the

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233. See *Wilk*, 635 F.2d at 1299.

234. See *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 230–31 (2d Cir. 2001) (speculating that a presumption against modification may not apply in some cases because "some protective orders may not merit a strong presumption against modification").

235. *Martindell v. Int'l Tel.*, 594 F.2d 291, 296 (2d Cir. 1979).

236. See, e.g., *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308 (D. Conn. 2009).

237. See *id.* at 318–19.

238. *Id.* at 318 ("[T]hough the *Martindell* standard is admittedly a stringent one, it does not apply uniformly to *all* protective orders. Rather, the application of the strong presumption against modification is dependent upon a protective order's particular characteristics and whether it invites reasonable reliance on the permanence of the order.") (citations omitted).

239. *Id.*

240. *Id.* (holding that "[a]bsent such [reasonable] reliance" the *Martindell* standard does not "[come] into play" and courts must balance the competing interests of the parties).

241. *Id.* at 319–20.

242. *Id.* at 320–21.

243. *Id.* at 321–22.

nature of the reliance.<sup>244</sup> As the *EPDM* court explained, the ultimate inquiry is whether a protective order is sufficiently definite and factually supported as to invite reliance on its permanence.<sup>245</sup> The result is that stipulated and umbrella protective orders are treated as not inviting reasonable reliance, or at least *not as much* reasonable reliance as specific protective orders.<sup>246</sup>

One should question whether umbrella and stipulated protective orders, by virtue of their scope and limited judicial inquiry, are less reasonably relied upon than other protective orders.<sup>247</sup> It seems reasonable that most parties that go through the effort of negotiating a protective order, and then producing and designating documents *pursuant* to the order, should have the right to *rely* on that order.<sup>248</sup> It also seems imprudent as a matter of policy to devalue umbrella and stipulated protective orders, given their enormous popularity in complex and commercial litigation.<sup>249</sup>

Nevertheless, *EPDM*'s reasonable reliance test is a substantial improvement over both the *Wilk* standard and the original *Martindell* standard. Specifically, the reasonable reliance test provides a principled means for courts to identify information no longer deserving of close protection without abandoning the presumption in favor of confidentiality.<sup>250</sup> Further, despite the skepticism toward them, parties relying on umbrella orders are far from defenseless under the reasonable reliance test. Courts applying the test have proven to be sensitive to the

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244. *Id.* at 322–24.

245. *Id.* at 319.

246. *Id.* at 319–20.

247. It seems counterintuitive to suppose that parties cannot reasonably rely on a device that is not only commonplace but also encouraged by the bench. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981) (“The propriety and desirability of protective orders . . . is too well established to belabor here. We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties and approved by the court.”); Campbell, *supra* note 38, at 787 (“The use of umbrella orders in complex litigation has become commonplace.”).

248. See Campbell, *supra* note 38, at 785–88 (describing the ordinary use of umbrella protective orders). “[E]very day, in countless courts throughout the nation, millions of documents are being produced in reliance on the binding force of stipulated umbrella protective orders.” *Id.* at 787.

249. *Id.*

250. See *EPDM*, 255 F.R.D. at 318 (“[T]he application of the strong presumption against modification is dependent upon a protective order’s particular characteristics and whether it invites reasonable reliance on the permanence of the order.”).

improper motives of parties and have demonstrated a willingness to protect umbrella orders from unwarranted modification.<sup>251</sup>

Additionally, the risks posed by a permissive modification standard are far less significant than a permissive standard for granting sharing orders. Parties requesting to modify a protective order must first intervene under Rule 24(b), which imposes various requirements for intervention.<sup>252</sup> Accordingly, discovery sharing achieved by modification tends to be more reasonable in scope and more fair to the protected party who can choose to contest the modification.<sup>253</sup> Therefore, *EPDM*'s reasonable reliance test, though not without its faults, is the most appropriate standard for courts to apply when contemplating a modification.

#### IV. CONCLUSION

The costly and inefficient state of discovery requires that courts and practitioners make reasonable efforts to streamline the exchange of information. This is uncontroversial. The notion that parties must sometimes disclose trade secrets and other sensitive information to their adversaries is also uncontroversial. What is controversial, and rightfully so, is the notion that protected parties should be subject to unique risks of a devastating disclosure solely because of a speculative public interest in their confidential information.

As this Note has shown, the most common argument in favor of sharing orders, enhanced judicial economy, does not survive close scrutiny. The basic premise that more discovery sharing equates to more discovery savings is devoid of support—both in terms of analytic reasoning and statistical data. While the exact effects that widespread use of sharing orders would have on judicial economy remains uncertain, this Note has shown that pro-sharing authorities have yet to seriously

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251. *Int'l Equity Invs., Inc. v. Opportunity Equity Partners Ltd.*, No. 05 CIV. 2745(JGK)(RLE), 2010 WL 779314, at \*9 (S.D.N.Y. Mar. 2, 2010) ("Unlike the intervenor in *EPDM*, Demarco's purposes for seeking modification are too attenuated and dissimilar from the underlying claims in this case to justify modifying this confidentiality order.").

252. *See E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) ("[D]espite the lack of a clear fit with the literal terms of Rule 24(b), 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."); *see also* FED. R. CIV. P. 24.

253. *See EPDM*, 255 F.R.D. at 316, 325 (observing the common issue requirement and granting a modification with respect to a limited amount of information).

interrogate the premises of their principal argument and have instead relied primarily on its intuitive force.

Further, this Note has shown that even if there is some merit to the judicial economy argument, it cannot bear the weight of a party's protectable privacy interest. In this age of increased digitalization and data insecurity, every instance of sharing is another opportunity for some sensitive information to meet a Zyprexa-like fate. The value of confidentiality, both as a right possessed by protected parties and instrumentally as a social convention, is far more significant than whatever judicial economy interest arises out of the proliferation of sharing orders. The necessary conclusion, then, is that the protected party should have a presumption in its favor that the requesting party can rebut only by a special showing of need. Naturally, a similar deference should be shown to protected parties when a nonparty seeks to obtain confidential information by means of protective order modification. For these reasons, this Note recommends that courts adopt (1) the third position in the sharing order split, allowing sharing orders only when the requesting party satisfies the *Clippard* test, and (2) the reasonable reliance test for modification as provided in *EPDM*.

Importantly, courts and practitioners should not abandon sharing orders as a matter of law or generally disregard the benefits of discovery sharing. All procedural devices have their place, and sharing orders are no exception. Litigation, nevertheless, is more than a sprint toward the truth; litigants, courts, and even the general public have more at stake in a courtroom than the efficient resolution of a dispute. Skepticism of sharing orders and the logic behind them, thus, promotes a healthy fear of economizing procedure at the expense of the rights such procedure is supposed to protect.