

NO. FBT CV 15 6048103 S : SUPERIOR COURT  
DONNA L. SOTO, ADMINISTRATRIX  
OF THE ESTATE OF  
VICTORIA L. SOTO, ET AL : JUDICIAL DISTRICT OF FAIRFIELD  
V. : AT BRIDGEPORT  
BUSHMASTER FIREARMS  
INTERNATIONAL, LLC, a/k/a, ET AL : JULY 12, 2016

**PLAINTIFFS' RESPONSE AND OBJECTION TO THE REMINGTON DEFENDANTS'  
MOTION FOR PROTECTIVE ORDER**

The cornerstone of our civil justice system is transparency. There is no exception for gun companies, or for that matter, for corporations in general. The United States Supreme Court recognized half a century ago that corporations have no special entitlement to secrecy in their business – the opposite is true:

[N]either incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret. . . . While they may and should have protection from unlawful demands made in the name of public investigation ... [c]orporations can claim no equality with individuals in the enjoyment of a right to privacy. . . . They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.

*United States v. Morton Salt Co.*, 338 U.S. 632, 638 (1950) (citations omitted).

The Remington Defendants ask the Court to order the plaintiffs to keep their secrets, in the name of preserving Remington's competitive advantage among sellers of AR-15s. For plaintiffs, such conditions are repugnant. Remington did not become the country's leading seller of military weaponry to civilians by accident. It ascended to that position through its calculated marketing and pursuit of profit above all else. Plaintiffs lost family members, including children, in the service of that bottom line. Now Remington wants them to do more to protect its profitability. Plaintiffs will of course abide

by whatever order the Court enters, but they will not by agreement help in a cover up of Remington's marketing strategies or profit margins.

While recognizing that the public interest in transparency becomes paramount in later stages of the proceedings, plaintiffs request that the Court weigh the public interest now. Preserving gun industry secrets and strategies is not in the public interest, because public health and safety are implicated. *See generally Brown & Williamson Tobacco Corp.*, 710 F.2d 1165, 1180-81 (6<sup>th</sup> Cir. 1983) (vacating district court's sealing of court records involving the content of tar and nicotine in cigarettes and emphasizing that the public had a particularly strong interest in the court records at issue because the "litigation potentially involves the health of citizens who have an interest in knowing the accurate 'tar' and nicotine content of the various brands of cigarettes on the market"); *United States v. Gen. Motors Corp.*, 99 F.R.D. 610, 612 (D.D.C. 1983) ("[L]itigation is, as a rule, supposed to be conducted in full view[.]")

Resolution of the Remington Defendants' Motion requires the Court first to consider the threshold question of whether the Remington Defendants have established good cause for the issuance of a protective order. To establish that a protective order should issue, the Remington Defendants bear the burden to make a particular and specific showing that plaintiffs are seeking proprietary information which, if revealed, would cause Remington *significant* injury. Since plaintiffs currently seek primarily business records created before December 14, 2012, it is not apparent how disclosure would give Remington's 2016 competitors an undue advantage. For example, the marketing and sales information plaintiffs seek is currently limited to materials developed before December 14, 2012. Mr. McCanna's affidavit makes a conclusory claim that the disclosure of this information "could be used to Remington's competitive disadvantage." That contention is facially implausible, since the conclusions the Remington Defendants drew from research done years ago have presumably been apparent in their marketing tactics since then.

Plaintiffs, moreover, are in a Catch-22 in challenging Mr. McCanna's affidavit. Such a challenge would require an evidentiary hearing to cross-examine him. And to conduct that cross-examination, plaintiffs would require samples of the very documents that Remington claims must not be disclosed publicly. And even if these difficulties were resolved, a further difficulty arises as an evidentiary hearing would delay discovery. This predicament should inform the Court's resolution of these issues. We dwell on these considerations – the weakness of the Remington Defendants' showing, and plaintiffs' disadvantage in challenging it at this time – for two reasons. First, the Court should determine that under the circumstances, the showing is insufficient. And second, if the Court determines that a protective order is warranted, these considerations require that the terms of the order be narrowly drawn, impose the burden on Remington to establish confidentiality at every stage, and under no circumstances impair plaintiffs' access to court or provide Remington tactical advantage.

Finally, the Remington Defendants' proposed protective order is not consistent with Connecticut law. Remington's order proposes to burden plaintiffs, when it is the Remington Defendants who desire secrecy. The proposed order would limit plaintiffs' use of confidential-designated information in court filings and give Remington a preview of plaintiffs' arguments. That is completely wrong: Remington should not gain tactical advantage through this process. In the event the Court determines that the entry of a protective order is warranted, plaintiffs have submitted a sample protective order which takes an approach more consistent with Connecticut law. *See* Ex. A, Sample Protective Order.

**QUESTION #1: HAVE THE REMINGTON DEFENDANTS MADE THE REQUISITE SHOWING FOR THE ISSUANCE OF A PROTECTIVE ORDER?**

**I. STANDARD FOR ISSUANCE OF PROTECTIVE ORDER**

“[T]he [trial] court's inherent authority to issue protective orders is embodied in Practice Book § 13–5.” *Peatie v. Wal-Mart Stores, Inc.*, 112 Conn. App. 8, 14-15 (2009) (quoting *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 221 n. 59 (2005)). The decision is commended to the sound discretion of the trial court. *See* Prac. Bk. § 13-5; *Peatie*, 112 Conn. App. at 14-15; *Wilcox v. Webster Ins.*, 2008 WL 253054, at \*2 (Conn. Super. Jan. 11, 2008) (Bellis, J.).

[D]iscovery related protective orders . . . are injunctive in nature. Such orders have both the force and effect of an injunction, and serve a similar equitable purpose, namely, to regulate prospectively the conduct of the parties, either by restraining them from acting or by requiring them to act under circumstances that, if not so regulated, could lead to unduly harmful consequences. . . . [O]nce issued, protective orders, like injunctions, need not remain in place permanently and their terms are not immutable.

*Peatie*, 112 Conn. App. at 14-15.

Section 13-5 requires that a party seeking a protective order show good cause why that order should issue: “The party seeking a protective order under Practice Book § 13-5 bears the burden of establishing the contemplated ‘good cause.’” *Contreras v. Enerlume Energy Mgmt. Corp.*, 2008 WL 642968, at \*1 (Conn. Super. Feb. 22, 2008) (Scholl, J.). “The showing must involve a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.” *Langerman v. John Morganti & Sons, LLC*, 2003 WL 22234615, at \*1 (Conn. Super. Jan. 11, 2008) (Bellis, J.) (citation omitted); *Clarkson v. Greentree Toyota Corp.*, 8 CSCR 515 (May 24, 1993) (same). “‘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.” *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995).

Moreover, “the harm must be significant, not a mere trifle.” *Cippollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986).

**B. The Proposed Categories of Information to Be Protected**

The Remington Defendants propose that eight categories of information be protected. Remington Proposed Order, ¶ 2. Plaintiffs have no objection to the issuance of an order pertaining to categories (a) – personal identifying information as defined in Practice Book Section 4-7 and party and witness residential addresses; (g) – written agreements to which a defendant is a party containing non-disclosure or confidentiality provisions; and (h) – names, addresses and other identifying information of firearms purchasers.

It is the five remaining categories, (b)-(f), which are really in issue here. These categories encompass information which Mr. McCanna avers is proprietary, including market research, marketing strategies, the number of firearms sold by a defendant by model designation, non-retail product pricing information, and firearms design drawings and engineering specifications.

**C. The Remington Defendants’ Showing as to the Five Categories in Issue Is Weak**

In support of its Motion, the Remington Defendants submit the affidavit of Mr. Robert McCanna. Mr. McCanna avers that this information, if disclosed, could advantage Remington’s competitors in various ways. McCanna Aff. ¶¶ 5-8. Mr. McCanna does not explain why or how information developed before December 14, 2012, if released in 2016, could be used to Remington’s competitive disadvantage going forward. *Cf. Glenmede Trust Co.*, 56 F.3d at 483 (“Broad allegations of harm, unsubstantiated by specific examples, however, will not suffice.”); *Langerman*, 2003 WL 22234615, at \*1 (finding that the parties’ representation that confidentiality would protect their “legitimate business interests” failed to establish good cause to issue stipulated protective order); *O’Connell v. Purdue Frederick Co.*, 2002 WL 31943193, at \*2 (Conn. Super. Dec. 24, 2002) (Hodgson,

J.) (finding that the only marketing materials entitled to protection were those “that set forth a marketing strategy or marketing plan *that continues to be in use at the present time*”) (emphasis supplied); *Hyman v. Sabic Innovative Plastics US, LLC*, 2012 WL 3517595, at \*2 (Conn. Super. June 28, 2012) (Brazzel-Massaro, J.) (determining whether pricing and customer lists were protected from disclosure by assessing “[w]hether information merits protection in a particular case depends upon: 1) the extent to which the information is known outside the business; 2) the extent to which the information is known to those inside the business; 3) the measures taken to guard the secrecy of the information and 4) *the value of the information to business and its competitors.*”) (emphasis supplied); *Print Source, Ltd. v. Lighthouse Litho, LLC*, 2013 WL 1277176, at \*5 (Mar. 8, 2013) (Wilson, J.) (citing these same factors).<sup>1</sup>

Plaintiffs do not dispute that pricing information or marketing information may be deserving of some level of protection, if it is established to be proprietary, and if it is established that the disclosure of the information is likely to cause significant injury to a party’s legitimate business interests. The question is whether Mr. McCanna’s affidavit makes such a showing with sufficient particularity, especially given that Remington is not being asked to disclose current pricing, marketing or other information. It does not.

**D. The Court Should Also Weigh Plaintiffs’ Rights and Interests and the Public Interest**

The Remington Defendants describe their interest in secrecy to preserve competitive advantage as if that were the only consideration for the Court, but it is not. In the absence of such an order,

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<sup>1</sup> Because plaintiffs are not in a position yet to cross-examine Mr. McCanna – to do so, plaintiffs would need to see the documents that are being produced and claimed to be confidential, as well as some broader discovery on significance of the information being disclosed – plaintiffs do not request an evidentiary hearing to challenge Mr. McCanna’s affidavit at this time. We reserve the right to do so in the future.

litigants are generally free to use discovery materials as they see fit, and indeed the issuance of such an order implicates the First Amendment:

It is, of course, clear that information obtained through civil discovery authorized by modern rules of civil procedure would rarely, if ever, fall within the classes of unprotected speech [speech not entitled to First Amendment protection] identified by decisions of this Court. In this case, as petitioners argue, there certainly is a public interest in knowing more about respondents. This interest may well include most—and possibly all—of what has been discovered as a result of the court's order under Rule 26(b)(1).

*Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31 (1984); *id.* at 37 (Brennan, J., concurring) (“The Court today recognizes that pretrial protective orders, designed to limit the dissemination of information gained through the civil discovery process, are subject to scrutiny under the First Amendment.”) To be sure, the level of First Amendment protection for the dissemination of these materials is limited, because they are obtained through discovery, but it remains a consideration.

It is also appropriate for the Court to give some consideration to the public interest, especially as it implicates safety. *See, e.g., Shingara v. Skiles*, 420 F.3d 301, 308 (3d Cir. 2005) (“[A] court always must consider the public interest when deciding whether to impose a protective order.”); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (“[T]he analysis [of good cause] should always reflect a balancing of private versus public interests”).<sup>2</sup>

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<sup>2</sup> The analysis with regard to confidentiality of discovery documents is very different from that for sealing documents to be considered by the Court. In the latter circumstance, the public’s interest is a far greater consideration, and the constitutional right of access to the courts is implicated. *See, e.g.,* Prac. Bk. § 11-20A; *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1180-81 (vacating order sealing court records involving cigarette tar and nicotine content and emphasizing the public’s particularly strong interest in these records because the “litigation potentially involves the health of citizens who have an interest in knowing the accurate ‘tar’ and nicotine content of the various brands of cigarettes on the market”); *see also United States v. General Motors*, 99 F.R.D. 610, 612 (D.D.C. 1983) (the “greater the public’s interest in the case the less acceptable are restraints on the public’s access to the proceedings”); *In re Air Crash at Lexington, Ky., August 27, 2006*, 2009 WL 1683629, at \*8 (E.D. Ky. June 16, 2009) (the “public has an interest in ascertaining what evidence and records the . . . Court [has] relied upon in reaching [its] decisions,” and that “the public interest in a plane crash that resulted in the deaths of forty-nine people is quite strong, as is the public interest in air safety”).

**QUESTION #2: SHOULD THE REMINGTON DEFENDANTS' PROPOSED ORDER BE ENTERED?**

**I. STANDARD FOR DETERMINING APPROPRIATE TERMS IN A PROTECTIVE ORDER**

Connecticut's trial courts may craft the terms of a proposed protective order as justice requires. *Nolen-Hoeksema v. Maquet Cardiopulmonary AG*, 2015 WL 5314819, at \*1 (Conn. Super. Aug. 15, 2015) (Frechette, J.) (altering terms of proposed protective order); *Wendt v. Spyke, Inc.*, 2008 WL 732165, at \*1 (Conn. Super. Mar. 4, 2008) (Cosgrove, J.) (modifying terms of protective order that had been previously agreed on by the parties); *Langerman*, 2003 WL 22234615, at \*1 (declining to adopt order as stipulated because it was overbroad and parties failed to show good cause). The Court's authority to craft its own order is particularly clear here, because the parties have not agreed on terms.

**II. PROTECTIVE ORDER TERMS: REMINGTON'S PROPOSED ORDER IS UNACCEPTABLE**

**A. The Remington Defendants' Desire for Secrecy Cannot Be Allowed to Burden Plaintiffs' Access to Court and Right to Litigate the Case Fully**

The party seeking to keep materials secret always bears the burden to show that secrecy is warranted: if a protective order is to enter, it should place that burden squarely on the party seeking confidentiality. *See generally* Prac. Bk. §§ 13-5, 11-20A. The Court must not put plaintiffs, who favor transparency, in the position of arguing for the secrecy of documents, when plaintiffs believe it better serves the public interest for those documents to be open, nor may the Court burden plaintiffs' ability to press their case in order to serve Remington's interest in secrecy.<sup>3</sup>

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<sup>3</sup> Paragraph Seventeen of the Remington Defendants' proposed order properly puts the burden on Remington if a confidentiality challenge is raised. *See, e.g., In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 354-57 (11th Cir. 1987) (approving protective order that provides that once a notice of



Through its proposed order, Remington seeks to impose draconian burdens on plaintiffs' ability to litigate the case. Paragraph Sixteen of the Remington order, which concerns the use of documents in Court, would actually limit plaintiffs' right to prosecute their case. Paragraph Sixteen states, "No party shall file *any Confidential Information or information derived therefrom* with the Court *unless necessary to the resolution of a contested issue and then, only to the most limited extent possible regarding the amount of Confidential Information to be filed.*" This language is vague: how much background is "necessary" to the resolution of a contested issue? The answer is entirely dependent on one's perspective. And it is completely and utterly unfair – it requires to plaintiffs to use Remington's confidential information against it "only to the most limited extent possible."

Paragraph Sixteen only gets worse, requiring plaintiffs to advise the Remington Defendants what information they intend to file, including information "derived from" confidential-designated information, *fourteen days* before plaintiffs file the information in Court. While we understand that the Remington Defendants wish to have notice so that they can file Section 11-20A motions, the approach they propose in Paragraph Sixteen gives them substantive advantages in litigation, both by restricting plaintiffs' use of confidential-designated information, and by giving them an advance look at plaintiffs' papers. To the extent that plaintiffs wish to file a motion based on confidential information on short notice, the provision would completely deprive plaintiffs of the opportunity to do so. Plaintiffs have submitted a sample protective order which addresses these issues by requiring plaintiffs simply to exercise good faith in using confidential-designated material, and by establishing a procedure whereby plaintiffs serve their papers on defendants on the deadline they are due, with a notice of filing to the Court. Ex. A, Sample Order, ¶ 10 (PROTECTED MATERIAL IN COURT). Plaintiffs' papers would

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objection to a confidentiality designation was received, the producing party had ten days to apply to the district court for a ruling to keep the material confidential).

then be filed in Court shortly afterward, unless defendants persuade the Court that some part of them would be sealed. *Id.*

### **B. Any Protective Order Should Contain a Sharing Term**

A sharing term in a protective order enables future litigants against the Remington Defendants who accept the terms of the protective order to share the discovery produced in this case. No one could hope more than plaintiffs in this case that there will be no need for future litigants to share in this discovery. But every indication is that there will be more American families like plaintiffs.

The Remington Defendants' proposed order does not contain a sharing term. Plaintiffs' sample order does. Ex. A, Sample Order, ¶ 7.1. Such a "sharing" provision is favored. Courts have explicitly authorized (and even encouraged) the sharing of discovery between litigants in different cases. *See, e.g., United Nuclear Corp. v. Cranford*, 905 F.2d 1424, 1428 (10th Cir. 1990) (agreeing with other appellate courts that information sharing should be permitted). Cooperation among similarly situated litigants "promotes the speedy and inexpensive determination of every action as well as conservation of judicial resources" and "comes squarely within the purposes of the Federal Rules of Civil Procedure." *United States v. Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421, 426 (W.D.N.Y. 1981); *Garcia v. Peeples*, 734 S.W.2d 343, 346-48 (Tex. 1987) ("Shared discovery is an effective means to insure full and fair disclosure."); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003) (providing access to discovery materials to parties engaged in collateral litigation is encouraged because "[a]llowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery.") (citations omitted); *see also United States v. Bryan*, 339 U.S. 323, 331 (1950) (any privilege is construed in relation to the principle that "the public ... has a right to every man's evidence.") (internal quotation marks and citation omitted); *accord Baker v. Liggett Group, Inc.*, 132 F.R.D. 123, 126 (D. Mass. 1990) ("[T]o routinely require every

plaintiff . . . to go through a comparable, prolonged and expensive discovery process would be inappropriate.”); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D.Tex.1980) (“The availability of the discovery information may reduce time and money which must be expended in similar proceedings, and may allow for effective, speedy, and efficient representation.”).

### **C. A Destruction of Documents Terms Is Inappropriate**

For the same reasons that sharing of documents is appropriate, a term requiring the plaintiffs to destroy or return protected information is not appropriate. Thus in 1992, the ABA counseled that “[n]o protective order should contain any provision that requires an attorney for a plaintiff in a tort action to destroy information or records furnished pursuant to such order.” ABA Blueprint for Improving the Civil Justice System; Report to the American Bar Association Working Group on Civil Justice System Proposal, 74 (American Bar Assn. 1992). The terms of the protective order, which would bind the parties even after the case tries, satisfy any need for secrecy, to the extent that any such need is ever established.

In addition to the terms pertaining to the use in court of confidential documents, the sharing term, and the non-destruction term, the sample order submitted by plaintiffs differs in a number of additional respects from the Remington Defendants’ proposed order. It emphasizes that its protections are limited in scope, and the importance of exercising restraint and good faith in the designation of protected material. Ex. A, Sample Order, ¶ 1 (PURPOSES AND LIMITATIONS); ¶ 5.1 (Exercise of Restraint and Care in Designating Materials for Protection). It also provides a very limited exception for non-party witnesses who refuse to agree to be bound by the protective order. *Id.* ¶ 7.2.h. Finally, it makes provision for the parties to apply to the Court if particular health and safety concerns arise. *Id.* ¶ 12.1 (Public Health and Safety).

Lastly, the Court should not equate plaintiffs' submission of the Sample Order with any indication that plaintiffs either accede to the imposition of a protective order, or believe that terms of the sample order will not be burdensome. The terms of the Sample Order are a significant improvement on those proposed by the Remington Defendants, but compliance even with the terms of the Sample Order would consume precious resources, in terms of the time of counsel, support personnel, and logistical complications in briefing, to name only a few difficulties.

**D. Additional Objections to the Remington Defendants' Proposed Order**

The Remington Defendants' proposed protective order contains a number of additional terms which ignore Connecticut law, by skewing the terms of the order and the burden it imposes in favor of secrecy. As is not very workable to capture and fix every one of these issues, the Court should refuse to enter the Remington Defendants' proposed order. It should instead craft its own order, drawing as it determines appropriate on the sample provided by plaintiffs.

**Remington Proposed Order, Paragraph 1:** Paragraph One as drafted misstates the rationale for the entry of the order: only information which is legally entitled to protection should be protected by the Order. The following would be consonant with Connecticut law: "This order does not confer blanket protections on all disclosures or responses to discovery, and the protections it affords extend only to items that are, under applicable legal principles, entitled to treatment as confidential."

**Remington Proposed Order, Paragraph 2:**

a) **The first sentence:** The first sentence of Paragraph 2 is overbroad. For example, much of the information described in Paragraph 2 may be in the public domain. If that is so, it is not entitled to protection. The better approach is to identify categories of documents which *may* be confidential and then leave it to counsel to determine which documents in those categories they contend merit protection. The following would be consonant with Connecticut law:

“Information, documents and material in the following categories *may* be designated as Confidential Information under the terms of the Protective Order.”

b) **The last sentence:** The last sentence of Paragraph 2 contemplates expansion but not deletion of protected categories. The following would be consonant with Connecticut law: “The parties retain the right to move the Court to alter these categories, by adding materials which may be designated confidential or by deleting or narrowing such categories.”

**Remington Proposed Order, Paragraph 4:** Paragraph 4 does not put sufficient burden on the designating party to exercise case in designating materials for protection. The following would be consonant with Connecticut law: “The designation of any information, document or material as “Confidential Information” shall represent a good faith representation by counsel so designating to the Court that there is good cause for the material so designated to receive the protections of this Order.

**Remington Proposed Order, Paragraph 5:** Paragraph 5 is unclear in the following respects: 1) It suggests that an entity (either a non-party or a third party) may designate information produced by another entity as Confidential Information. If this is the intent, it is overbroad. 2) It is ambiguous whether Paragraph 5 is intended to apply to materials provided for inspection but not yet copied, or to some broader category.

**Remington Proposed Order, Paragraph 7:** Paragraph 7 is overbroad. If a document is responsive to a discovery request, it should be produced in full. There is no special allowance for redacting confidential-designated information. After all, the whole point of entering such a protective order is to facilitate the liberal exchange of information in discovery.

**Remington Proposed Order, Paragraph 9:** The last sentence of Paragraph 9 is unnecessary and overbroad.

**Remington Proposed Order, Paragraph 11:** Paragraphs 11(d) is confusing and leaves far too much control over whether a witness can be shown documents with the Designating Party, because the Designating Party possesses greater information about a witness' historic access to documents. And what happens if a non-party witness must be shown documents? Plaintiffs' sample order provides a better approach.

These are simply representative objections and are in addition to the points raised earlier in this brief.

## **CONCLUSION**

For these reasons, the Court should find that the Remington Defendants have not met their burden to show good cause for the issuance of a protective order. If the Court determines a protective order is warranted, it should craft an order emphasizing and preserving transparency, and imposing on Remington any burdens associated with secrecy.

## **THE PLAINTIFFS,**

**By**

/s/

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**CERTIFICATION**

This is to certify that a copy of the foregoing has been mailed, postage prepaid, and emailed this day to all counsel of record, to wit:

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# **EXHIBIT A**

NO. FBT CV 15 6048103 S : SUPERIOR COURT  
DONNA L. SOTO, ADMINISTRATRIX  
OF THE ESTATE OF  
VICTORIA L. SOTO, ET AL : JUDICIAL DISTRICT OF FAIRFIELD  
V. : AT BRIDGEPORT  
BUSHMASTER FIREARMS  
INTERNATIONAL, LLC, a/k/a, ET AL :

**PROTECTIVE ORDER [SAMPLE]**

IT IS HEREBY ORDERED as follows:

**1. PURPOSES AND LIMITATIONS**

Disclosure and discovery activity in this action may involve production of confidential, proprietary, or private information for which special protection from public disclosure may be warranted. This Order does not confer blanket protections on all disclosures or responses to discovery and the protection it affords extends only to the limited information or items that are entitled, under applicable legal principles, to treatment as confidential.

**2. CONFIDENTIAL INFORMATION**

“Confidential Information” shall mean [Social Security or taxpayer-identification numbers; dates of birth; names of minor children, except those of plaintiffs’ decedents; financial account numbers; home addresses; sensitive information involving personal financial, medical, matrimonial, or family matters;] **ADDITIONAL CATEGORIES TO THE EXTENT GOOD CAUSE IS ESTABLISHED**].

“Confidential Information” does not include information that:

- a. is in the public domain at the time of disclosure;
- b. becomes part of the public domain through no fault of the Receiving Party

(defined below);

c. the Receiving Party can show was in its rightful and lawful possession at the time of disclosure; or

d. the Receiving Party lawfully receives at a later date from a third party without restriction as to disclosure.

Parties may designate any Confidential Information supplied in any form, or any portion thereof, as Protected Material (defined below) for purposes of these proceedings. Such designation shall constitute a representation to the Court that counsel believes in good faith that the information (1) constitutes Confidential Information and (2) that there is good cause for the Confidential Information to be protected from public disclosure. The parties shall make a good faith effort to designate information so as to provide the greatest level of disclosure possible.

### **3. ADDITIONAL DEFINITIONS**

3.1. Party: any party to this action, including all of its officers, directors, consultants, retained experts, and outside counsel (and their support staff).

3.2. Non-party: any individual, corporation, association, or other natural person or entity other than a party.

3.3. Disclosure or Discovery Material: all items or information, regardless of the medium or manner generated, stored, or maintained (including, among other things, testimony, transcripts, or tangible things) that are produced or generated in disclosures or responses to discovery in this matter.

3.4. Protected Material: any Disclosure or Discovery Material that is designated by a Party as “confidential” according to paragraphs 1 and 5, unless the Receiving Party challenges the confidentiality designation and (a) the Court decides such material is not entitled to protection as confidential; (b) the Designating Party fails to apply to the Court for an order

designating the material confidential within the time period specified below; or (c) the Designating Party withdraws its confidentiality designation in writing.

3.5. Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.

3.6. Producing Party: a Party that produces Disclosure or Discovery Material in this action.

3.7. Designating Party: a Party that designates information or items that it produces in disclosures or in responses to discovery as Protected Material. The Party designating information or items as Protected Material bears the burden of establishing good cause for the confidentiality of all such information or items.

3.8. Challenging Party: a Party that elects to initiate a challenge to a Designating Party's confidentiality designation.

3.9. Outside Counsel: attorneys who are not employees of a Party but who are retained to represent or advise a Party in this action.

3.10. House Counsel: attorneys who are employees of a Party.

3.11. Counsel (without qualifier): Outside Counsel and House Counsel (as well as their support staffs).

3.12. Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its/her/his counsel to serve as an expert witness or as a consultant in this action and who is not: (a) a past or a current employee of a Party; (b) a past or a current employee of a competitor of a Party; or (c) at the time of retention, anticipated to become an employee of a Party or a competitor of a Party. This definition includes a professional jury or trial consultant retained in connection with this litigation.

3.13. Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing, storing, retrieving data in any form or medium; *etc.*) and their employees and subcontractors.

#### **4. DURATION**

Even after the termination of this litigation, the confidentiality obligations imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise directs.

#### **5. DESIGNATING PROTECTED MATERIAL**

5.1. Exercise of Restraint and Care in Designating Material for Protection. Each Party that designates information or items for protection under this Order must use good faith efforts to limit any such designation to specific material that qualifies under the appropriate standards. A Designating Party must use good faith efforts to designate for protection only those parts of material, documents, items, or oral or written communications that qualify – so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Order.

Mass, indiscriminate, or routine designations are strictly prohibited. Designations that are shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to unnecessarily encumber or retard the case development process, or to impose unnecessary expenses and burdens on other parties), may subject the Designating Party to sanctions upon appropriate motion to the Court.

If it comes to a Party's attention that information or items that it designated for protection do not qualify for protection, that Party must promptly notify all other parties that it is withdrawing the mistaken designation.

5.2. Manner and Timing of Designations. Except as otherwise provided in this Order (*see, e.g.*, second paragraph of section 6.2(a), below), or as otherwise ordered, material that qualifies for protection under this Order must be clearly so designated before the material is disclosed or produced.

Designation in conformity with this Order requires:

a. For information in documentary form (apart from transcripts of depositions or other pretrial or trial proceedings), the Producing Party must affix the legend “CONFIDENTIAL” at the bottom of each page that contains protected material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (*e.g.*, by making appropriate markings in the margins, but not over text).

A Party that makes original documents or materials available for inspection need not designate them for protection until after the inspecting Party has indicated which material it would like copied and produced. During the inspection and before the designation, all of the material made available for inspection shall be deemed confidential. After the inspecting Party has identified the documents it wants copied and produced, the Producing Party must determine which documents, or portions thereof, qualify for protection under this Order, then, before producing the specified documents, the Producing Party must affix the legend “CONFIDENTIAL” at the bottom of each page that contains Protected Material. If only a portion of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (*e.g.*, by making appropriate markings in the margins, but not over text).

b. For testimony given in deposition or in other pretrial or trial proceedings, the Party offering or sponsoring the testimony must identify on the record, before the close of the deposition, hearing, or other proceeding, all protected testimony. When it is impractical to identify separately each portion of testimony that is entitled to protection, and when it appears that substantial portions of the testimony may qualify for protection, the Party that sponsors, offers, or gives the testimony may invoke on the record (before the deposition or proceeding is concluded) a right to have up to 20 days to identify the specific portions of the testimony as to which protection is sought. Only those portions of the testimony that are appropriately designated for protection within the 20 days shall be covered by the provisions of this Protective Order.

Transcript pages containing Protected Material must be separately bound by the court reporter, who must affix to the bottom of each such page the legend “CONFIDENTIAL,” as instructed by the Party or nonparty offering or sponsoring the witness or presenting the testimony. If only a portion of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (*e.g.*, by making appropriate markings in the margins, but not over text).

c. For information produced in some form other than documentary, and for any other tangible items, the Producing Party must affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend “CONFIDENTIAL.” If only portions of the information or item warrant protection, the Producing Party, shall also identify the protected portions in such a way that does not interfere with the viewing of the evidence.

5.3. Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items as “confidential” does not, standing alone, waive the Designating Party’s right to secure protection under this Order for such material. If material is appropriately designated as “confidential” after the material was initially produced, the Receiving Party, on timely notification of the designation, must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

5.4. Inadvertent Production of Privileged Information. If a party, through inadvertence, produces or provides material that it believes is subject to a claim or attorney-client privilege, work product immunity, or any other privilege or immunity, the Producing Party may give written notice to the Receiving Party that the material is subject to a specific privilege or immunity and request that the material be returned to the Producing Party. The Receiving Party shall return the material. Return of the material shall not constitute an admission or concession, or permit any inference that the returned material is, in fact, properly subject to a claim of any privilege or immunity, nor shall it foreclose any party from moving the Court for an order that such document or thing has been improperly designated or should be producible for any reason, including a waiver caused by the inadvertent production.



## **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

6.1. Timing of Challenges. Unless a prompt challenge to a Designating Party's confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary economic burdens, or a later significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2. Meet and Confer. A Party that elects to initiate a challenge to a Designating Party's confidentiality designation must do so in good faith and must begin the process by conferring directly with counsel for the Designating Party. In conferring, the Challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party ten (10) days to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation.

6.3. Formal Challenge to Designation. If, after engaging in the meet and confer process, a Challenging Party still contends that a confidentiality designation was not proper, the Challenging Party may at any time give written notice by way of a letter to the Designating Party stating its objection to the confidentiality designation. The Designating Party has fourteen (14) days from receipt of such written notice to apply to the Court for an order specifically designating the Disclosure or Discovery Material at issue as confidential. The Designating Party has the burden of establishing good cause for the Disclosure or Discovery Material to be treated as confidential.

6.4. Treatment of Information While Challenge is Pending. Notwithstanding any challenge to the designation of Disclosure or Discovery Material as Confidential, all materials

designated as such must be treated as such and subject to this order until one of the following occurs:

- a. the Designating Party withdraws its confidentiality designation in writing;
- b. the Designating Party fails to apply to the Court for an order designating the material confidential within the time period specified above after receipt of a written challenge to such designation; or
- c. the Court decides the material at issue is not subject to protection as confidential.

#### 6.5 Effect of Designating Party's Inaction in Face of Challenge

If a Designating Party fails to apply to the Court for an order designating challenged material confidential within the period specified above after receipt of a written challenge to such designation, then such material shall no longer qualify as Protected Material. The Designating Party shall forthwith produce new copies of such material with the confidentiality designation removed.

### 7. ACCESS TO AND USE OF PROTECTED MATERIAL

7.1. Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by another Party in connection with this case only for prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to the categories of persons and under the conditions as are described herein. When the litigation has been terminated, a Receiving Party must comply with the provisions of paragraph 11, below.

Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

7.2. Disclosure of Protected Material. Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated CONFIDENTIAL only to:

a. Outside Counsel of record of any Party in this action, including associated personnel necessary to assist Outside Counsel in these proceedings, such as litigation assistants, paralegals, and secretarial and other clerical personnel;

b. Parties to this litigation and their officers, directors, and employees (including House Counsel) to whom disclosure is reasonably necessary for this litigation;

c. Experts (as defined in this Order) of the Receiving Party, including associated personnel necessary to assist Experts in these proceedings, such as litigation assistants, paralegals, and secretarial and other clerical personnel, so long as such Expert has signed the “Acknowledgment and Agreement to Be Bound by Protective Order” (Exhibit A);

d. the Court, including associated personnel necessary to assist the Court in its functions, and the jury;

e. litigation support services, including outside copying services, court reporters, stenographers, videographers, or companies engaged in the business of supporting computerized or electronic litigation discovery or trial preparation, retained by a Party or its counsel for the purpose of assisting that Party in these proceedings, for whom a company representative has signed the “Acknowledgment and Agreement to Be Bound by Protective Order” (Exhibit A);

f. other professional vendors to whom disclosure is reasonably necessary for this litigation and for whom a company representative has signed the “Acknowledgment and Agreement to Be Bound by Protective Order” (Exhibit A);

g. any actual or potential witness in the action who has signed the “Acknowledgment and Agreement to Be Bound by Protective Order” (Exhibit A), provided that counsel believes, in good faith, that such disclosure is reasonably necessary for the prosecution or defense of these proceedings. Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted herein;

h. any Non-Party witness who is being deposed in this action and who refuses to sign the “Acknowledgment and Agreement to Be Bound by Protective Order (Exhibit A), provided that counsel believes, in good faith, that such disclosure is reasonably necessary for the prosecution or defense of these proceedings and such confidential materials are shown to such Non-Party witness only for the time reasonably necessary to question the witness on them;

i. the author of the document or the original source of the information;

j. Counsel for issuers of insurance policies under which any issuer may be liable to satisfy part or all of a judgment that may be entered in these proceedings or to indemnify or reimburse payments or costs associated with these proceedings and who has signed the “Acknowledgment and Agreement to Be Bound by Protective Order” (Exhibit A);

k. any private mediator and the mediator's secretarial and clerical personnel, provided that a company representative for the mediator or arbitrator has signed the “Acknowledgment and Agreement to Be Bound by Protective Order” (Exhibit A);

l. Counsel representing clients with present or future cases against the same defendant that arise out of the same or similar set of facts, transactions, or occurrences, provided that before disclosing any Protected Material to any such counsel, the Receiving Party must notify the Designating Party ten (10) days before disclosing such material in order to give the

Designating Party an opportunity to move for a protective order preventing or limiting such disclosure; and

m. any other person as to whom the Producing Party has consented to disclosure in advance and in writing, on notice to each Party hereto.

**8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION**

If a Receiving Party is served with a subpoena or an order issued in other litigation that would compel disclosure of any information or items designated in this action as “confidential,” the Receiving Party must so notify the Designating Party, in writing (by e-mail or fax, if possible) within three (3) court days after receiving the subpoena or order. Such notification must include a copy of the subpoena or court order.

The Receiving Party also must immediately inform in writing the Party who caused the subpoena or order to issue in the other litigation that some or all the material covered by the subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must deliver a copy of this Protective Order promptly to the Party in the other action that caused the subpoena or order to issue.

**9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order,

and (d) request such person or persons to execute the “Acknowledgment and Agreement to Be Bound by Protective Order” that is attached hereto as Exhibit A.

**10. PROTECTED MATERIAL IN COURT**

This Order does not seal court records in this case or apply to the disclosure of Protected Material at trial or in any court proceeding. The Order is only intended to facilitate the prompt production of Discovery Materials. A Party that seeks to file under seal any Protected Material, seal the court record, or close trial proceedings must comply with applicable law. The fact that Discovery Material has been designated as “Confidential” shall not be admissible as evidence that the Material in fact contains confidential information entitled to protection from disclosure under the law.

When a party submits discovery materials designated “Confidential” in connection with any court filing, the party shall do so in good faith. On the deadline for filing any brief or pleading which includes Protected Material, in lieu of filing such brief or pleading, the party shall file a Notice of Service of such brief or pleading with the Court and shall serve the full brief or pleading on opposing counsel but shall not file it at that time. Any party may then, within five days, seek to seal Protected Materials contained in the brief or pleading or as exhibits thereto pursuant to Connecticut Practice Book Section 11-20A. The brief or pleading shall be filed once the Court has ruled on any Section 11-20A motion or, if none are raised, on the sixth day following the deadline.

**11. FINAL DISPOSITION**

After the final termination of this action, each Receiving Party must destroy all but one archival copy of any Protected Material. Counsel are entitled to retain archival copies of all pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney work product, even if such materials contain Protected Material. Counsel are also entitled to retain one archival copy of all materials produced in discovery, including Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in paragraph 4 (DURATION), above.

**12. MISCELLANEOUS**

12.1. Public Health and Safety. Nothing in this Order is intended to prevent any party from raising with the Court any concern that the non-disclosure of certain Protected Material may have a possible adverse effect upon the general public health or safety, or the administration or operation of government or public office.

12.2. Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the Court in the future.

12.3. Right to Assert Other Objections. No Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.



SO ORDERED, this the \_\_\_\_\_ day of \_\_\_\_\_, 2016.

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The Honorable Barbara N. Bellis

**EXHIBIT A**

**NO. FBT CV 15 6048103 S : SUPERIOR COURT**  
**DONNA L. SOTO, ADMINISTRATRIX**  
**OF THE ESTATE OF**  
**VICTORIA L. SOTO, ET AL : JUDICIAL DISTRICT OF FAIRFIELD**  
**V. : AT BRIDGEPORT**  
**BUSHMASTER FIREARMS**  
**INTERNATIONAL, LLC, a/k/a, ET AL :**

**ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND**  
**BY PROTECTIVE ORDER**

I acknowledge that I have read and understand the Protective Order entered in this action on \_\_\_\_\_, 20\_\_, and agree to abide by its terms and conditions. Because it is necessary for me to have access to Confidential Matter and information contained therein that are the subject of said Protective Order, I understand and agree to adhere to the terms and provisions of said Order.

Witness my signature this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

\_\_\_\_\_  
Signature

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Email address: \_\_\_\_\_