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KATE M. BUERER

The Sex-Trafficked Plaintiff's True Identity in Civil Suits: Pre-Trial Protective Orders

ABSTRACT

Congress passed the Trafficking Victims Protection Act of 2000 and its subsequent reauthorization acts to combat human trafficking, protect victims, and enable the civil prosecution of offenders. Under 18 U.S.C. § 1595, a sex-trafficking victim may bring a civil action against the trafficker or against any person who “knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged” in sex-trafficking. Almost two decades after this Act was passed, the first civil suit against the hospitality industry was filed by a sex-trafficking survivor requesting relief in the form of \$9,999,000 from ten different hotels under 18 U.S.C. § 1595. Since that first case was filed, sex-trafficking survivors have filed over a dozen civil suits in federal district courts across the United States by sex-trafficking survivors seeking recompense from corporations that allegedly profited from the trafficking.

A sex-trafficked plaintiff faces significant hurdles when attempting to gain recompense from a corporation. The plaintiff bears the burden of proving the corporation's complicity in her trafficking and has a distinct lack of financial and legal resources compared to the defendant corporations. The plaintiff faces another hurdle in the form of potential social, financial, or physical harm that may arise if her identity as a sex-trafficking survivor is disseminated throughout her community. Most of the sex-trafficking survivors that filed civil suits against corporations requested the courts allow them to proceed under pseudonyms in court documents. Many plaintiffs also requested a protective order restricting defendants' disclosure of the plaintiff's identity during discovery to the greatest extent possible without prejudicing the defendants' ability to litigate the case.

The federal district court decisions in response to these protective orders have varied. Most courts have allowed the plaintiff to proceed under a

pseudonym in court documents. One federal district court issued a protective order restricting the defendants' disclosure of the plaintiff's true identity to only those persons that had a genuine need for that knowledge during litigation of the case. However, a different federal district court denied the plaintiff's request for a modification that would restrict the defendants' disclosure of the plaintiff's true identity during discovery. The differences in the district court decisions can be attributed to differing types of protective orders, differing requests for protective orders, differing precedent within the circuits, and a lack of clear guidance from Congress or the Supreme Court on a civil plaintiff's right to access the courts to pursue a remedy made available by Congress. This Comment examines the cases underlying and guiding the various circuit precedents before proposing a model protective order.

The goal of the model protective order is to prevent the plaintiff's sex-trafficking perpetrators from obtaining current information about her identity, contact information, location of residence, or other private information while also safeguarding the defendants' right to present a full and fair defense by allowing defendants to disclose the plaintiff's identity when necessary. The defendants may prove necessity through agreement among the parties, a contested motion to the court, or a court-appointed master. This Comment recommends court appointment of a master willing to serve pro bono under Federal Rule of Civil Procedure 53 to further the just, speedy, and inexpensive resolution of the case under the restrictions of the model protective order while allowing both plaintiff and defendants to be fully heard by the court.

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COMMENT

THE SEX-TRAFFICKED PLAINTIFF'S TRUE IDENTITY IN CIVIL SUITS: PRE-TRIAL PROTECTIVE ORDERS

Kate M. Buerer[†]

I. INTRODUCTION

In recent years, the American people have become increasingly aware of the sex-trafficking epidemic across the nation. This rising awareness stems in part from increased reporting on sex-trafficking related crimes during and prior to large sporting and entertainment events and the resultant arrests.¹ The arrest of Jeffrey Epstein in 2019² and the recently concluded trial of his associate, Ghislaine Maxwell,³ have also increased public awareness. While increased public awareness, criminal investigations, and criminal prosecutions undoubtedly remove individual traffickers and trafficking rings from the streets, the sex-trafficking industry continues to be big business.⁴ The sex-trafficking industry allegedly uses and exploits legitimate businesses, such as online advertising sites and hotels or motels, to facilitate and conceal illegal trade in adults and children.⁵

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¹ Richard Lapchick, *The Super Bowl Remains Target for Human Trafficking*, ESPN (Jan. 31, 2020), https://www.espn.com/nfl/story/_/id/28607449/the-super-bowl-remains-target-human-trafficking (reporting consistent spike of sex-trafficking incidents in the U.S. during January and February—reported incidents in 2019 equaled 450 in January, 540 in February, but 140 in March).

² Jonathan Dienst, Sarah Fitzpatrick, & Tom Winter, *Billionaire Sex Offender Jeffrey Epstein Arrested for Alleged Sex Trafficking*, NBC NEWS, <https://www.nbcnews.com/news/us-news/billionaire-sex-offender-jeffrey-epstein-arrested-alleged-sex-trafficking-n1027126> (July 7, 2019, 8:33 AM).

³ Tom Winter, Erik Ortiz, & Sarah Fitzpatrick, *Ghislaine Maxwell Convicted of Federal Sex Trafficking Charges for Role in Jeffrey Epstein's Abuses*, NBC NEWS, <https://www.nbcnews.com/news/us-news/ghislaine-maxwell-trial-verdict-reached-ghislaine-maxwell-sex-traffick-rcna9479> (Dec. 30, 2021, 8:21 AM) (detailing Ms. Maxwell's conviction for five of six federal counts charged).

⁴ Lapchick, *supra* note 1 (stating human trafficking activity generated approximately \$150 billion dollars annually).

⁵ *See id.*

Congress has passed numerous acts and statutes creating civil remedies for sex-trafficked victims.⁶ However, sex-trafficking survivors only recently began to bring lawsuits against third-party corporations that profited from the sex-trafficking industry through the trafficker's use of the corporations' accommodations.⁷ Since 2019, sex-trafficking survivors have filed more than a dozen lawsuits in federal district courts across the nation against corporations that allegedly profited from sex-trafficking ventures being conducted through use of the corporations' legitimate businesses.⁸ Plaintiffs generally allege that the corporations knew or should have known the plaintiffs were being trafficked commercially for sex through use of the corporations' advertising websites or guest rooms.

These survivors of sex-trafficking relate heartbreaking stories in their complaints, including allegations of severe physical abuse, severe psychological abuse, and coercion to perform sex acts with strangers multiple times per day.⁹ They claim hotel employees witnessed beatings, dozens of men coming and going multiple times a day from one room, and rooms strewn with used condoms and empty liquor bottles.¹⁰ Yet the employees

⁶ See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. §§ 7101-7114) (requiring government action regarding trafficking and providing protection for trafficking victims); Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 22 U.S.C., 18 U.S.C., and 8 U.S.C.) (creating civil remedies for trafficking victims); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified as amended in scattered sections of 22 U.S.C., 18 U.S.C., and 8 U.S.C.) (creating private right of action for trafficking victims in 18 U.S.C. § 1595); Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (codified as amended in 18 U.S.C. §§ 1591, 1595, and 2421A and 47 U.S.C. § 230) (clarifying in 18 U.S.C. § 2421A that enforcement is permitted against providers and users of computer services engaged in the sexual exploitation of children or sex-trafficking).

⁷ Rachel Rothberg, *Risky Business: Holding Hotels Accountable for Sex Trafficking*, 38 YALE L. & POL'Y REV. 265, 285 (2019) (filing of first civil TVPA suit against the hospitality industry in March 2019 by a sex-trafficking survivor).

⁸ Emma Kennedy, *Levin Papantonio Rafferty Goes After Hotels, Porn Sites with Human Trafficking Lawsuits*, PENSACOLA NEWS J., <https://www.pnj.com/story/news/crime/2021/10/11/pensacola-law-firm-levin-papantonio-rafferty-hotels-porn-sites-human-trafficking-lawsuits/6041855001/> (Oct. 11, 2021, 6:08 AM).

⁹ Complaint at 4, 18, *M.A. v. Wyndham Hotels & Resorts, Inc.*, No. 2:19-cv-00849 (S.D. Ohio Mar. 8, 2019) [hereinafter *M.A. Complaint*]; Complaint at 2, 17-19, *A.D. v. Wyndham Hotels & Resorts, Inc.*, No. 4:19-CV-00120 (E.D. Va. dismissed Oct. 8, 2021) [hereinafter *A.D. Complaint*]; Second Amended Complaint for Damages at 4-5, 56, 67-69, *M.L. v. Craigslist, Inc.*, No. 3:19-cv-06153 (W.D. Wash. Apr. 30, 2021) [hereinafter *Craigslist Complaint*].

¹⁰ *M.A. Complaint*, *supra* note 9, at 18-19; *A.D. Complaint*, *supra* note 9, at 18-19; *Craigslist Complaint*, *supra* note 9, at 62, 67-69.

failed to report suspicions of trafficking to the authorities.¹¹ In pressing their suits, many of these sex-trafficking survivors have requested protective orders from the courts to allow them to proceed under a pseudonym and to limit disclosure of personal identifying information to the public and their alleged traffickers.¹²

In this Comment, Section II explains the legal background under which courts and parties operate while determining how best to reconcile the plaintiff's interest in accessing the court without fear of harm, the defendant's interest in presenting a full and fair defense, and the public's interest in open judicial proceedings. Section III provides context by examining how three federal districts courts in Ohio, Virginia, and Washington state have considered and ruled on protective orders shielding the plaintiff's identity during discovery. Finally, Section IV reconciles the standards used and proposes a model protective order shielding the plaintiff's identity while also allowing for the defendant's need to investigate the allegation. This proposed model protective order can be used as a template from which parties can craft a stipulated protective order or which a court can edit to fit the particular needs of the case before it.

II. BACKGROUND

A. *Federal Rules of Civil Procedure*

The Federal Rules of Civil Procedure (FRCP or Rules) define the parameters of civil litigation in the federal court system. Each Federal Rule of Civil Procedure (FRCP or Rule) serves a specific purpose in civil litigation, but parties and the court combine those individual Rules to resolve the complex problems that arise within a diverse range of civil cases. In the realm of discovery, FRCP 26 provides the general rules of discovery under which the parties must operate.¹³ Along with FRCP 37, FRCP 26 also provides guidelines for court orders issued to protect or compel discovery under certain circumstances.¹⁴ FRCP 1 defines the purpose of the Rules which guide

¹¹ M.A. Complaint, *supra* note 9, at 18–19; A.D. Complaint, *supra* note 9, at 18–19; Craigslist Complaint, *supra* note 9, at 62–65 (alleging that not only did employees not report suspicions of trafficking to police, but that the manager of one Motel 6 attempted to solicit commercial sex acts from M.L. while she was a minor); *id.* at 66 (alleging employees told a teenage M.L. to be more discrete in her sexual activities or she would be forced out of the premises); *id.* at 68.

¹² Plaintiff's Motion for Protective Order and Leave to Proceed Anonymously with Memorandum in Support at 1, *A.D. v. Wyndham*, No. 4:19-CV-00120 [hereinafter A.D. Protective Order Request].

¹³ FED. R. CIV. P. 26.

¹⁴ FED. R. CIV. P. 26(c); FED. R. CIV. P. 37(a).

the parties and the court in their use of the Rules.¹⁵ Congress granted the federal courts broad discretion to mediate discovery disputes between parties,¹⁶ and FRCP 53 provides a potential means of resolving these disputes—an appointed master.¹⁷ A court-appointed master may reconcile the demanding standards of FRCP 26 within the overarching purpose defined in FRCP 1.

1. FRCP 1: The Scope and Purpose of the Federal Rules of Civil Procedure

The Supreme Court of the United States declared that, in the pursuit of fulfilling the purpose of adequately informing the litigants in civil trials, deposition-discovery rules should “be accorded a broad and liberal treatment.”¹⁸ But those provisions must be read in light of FRCP 1 which declares the purpose of the entirety of the Rules.¹⁹ Rule 1 states that the parties and the court should “construe[], administer[], and employ[]” the Federal Rules of Civil Procedure to “secure the just, speedy, and inexpensive determination of every action and proceeding.”²⁰ Thus, both the parties and the court should work together towards the goal of acquiring the necessary information in the most efficient and efficacious manner possible to achieve the ultimate disposition of the action or proceeding.

2. FRCP 26: General Provisions Governing Discovery

Courts throughout the United States “routinely issue protective orders to prevent litigants from disseminating pretrial discovery information.”²¹ Protective orders shield information that would otherwise fall within the scope of discovery under FRCP 26(b).²² The scope of discovery allowed under FRCP 26(b) is broad—“any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”²³ This protection may take the form of forbidding the discovery of the information altogether or forbidding the disclosure of the information discovered.²⁴

¹⁵ FED. R. CIV. P. 1.

¹⁶ FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

¹⁷ FED. R. CIV. P. 53.

¹⁸ *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

¹⁹ *Id.*

²⁰ FED. R. CIV. P. 1.

²¹ Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1782 (2014).

²² *See id.* at 1784.

²³ FED. R. CIV. P. 26(b)(1).

²⁴ FED. R. CIV. P. 26(c)(1)(A).

Many protective orders shield sensitive discovery information common to a specific type of case. Parties frequently present a stipulated protective order to the court based on the court's published model protective order. In corporate civil cases parties frequently agree on the labels and parameters for categories of information (such as Confidential or Highly Confidential), how to designate material as part of those categories, how to challenge designations by the opposing party, and what responsibility and liability attaches to each category.²⁵ These stipulated protective orders can be as specific and detailed as the parties believe necessary for the instant case.

When parties do not agree on the appropriate contours for discovery and a party wants to protect discovery information, the party desiring protection must petition the court for a protective order under FRCP 26(c). The motion must include certification that the moving party has conferred or attempted to confer in good faith with the other party or parties.²⁶ The court has the discretion, on a finding of good cause, to issue an order to protect that party "from annoyance, embarrassment, oppression, or undue burden or expense."²⁷ While FRCP 26(c)(1) enumerates a long list of prospective actions the court may order, it is an inclusive list that does not limit the creativity of the court in solving the specific issue or issues implicated by the instant case.²⁸

a. History of discovery

In 1970, the Advisory Committee (Committee) rearranged the discovery rules in order to establish FRCP 26 as the rule governing general discovery.²⁹ The Committee noted that the powers conferred under new Rule 26(c) to regulate or prevent discovery of otherwise discoverable information have "always been freely exercised" by courts in situations not susceptible to governance by precise rules.³⁰ Thus, the Committee explicitly recognized that a given case may have specific needs that require the court to craft discovery orders to address those specific needs.

The breadth of discovery allowed under FRCP 26(b) led to excessive discovery requests on the one hand and attempted evasion of or resistance to reasonable discovery requests on the other.³¹ The Committee expressed

²⁵ See N. DIST. OF CAL., *Model Protective Order for Litigation Involving Patents, Highly Sensitive Confidential Information and/or Trade Secrets*, <https://www.cand.uscourts.gov/forms/model-protective-orders/> (last visited Mar. 1, 2021).

²⁶ FED. R. CIV. P. 26(c)(1).

²⁷ *Id.*

²⁸ *Id.*

²⁹ FED. R. CIV. P. 26 advisory committee's note to 1970 amendment.

³⁰ *Id.*

³¹ FED. R. CIV. P. 26 advisory committee's note to 1983 amendment.

concern about the impact these practices were having on the judicial system, especially by frustrating the “fundamental goal of the ‘just, speedy, and inexpensive determination of every action.’”³² As part of the effort to encourage parties to make reasonable use of the discovery process and not overburden the court system with unnecessary requests to mediate discovery disputes, the Committee revised FRCP 26(c) to include the requirement that the moving party must certify the parties met and conferred in good faith prior to requesting court intervention.³³ In 2015, the Committee further attempted to restrict discovery abuse by revising the definition of the general scope of discovery in FRCP 26(b)(1) to “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”³⁴ Courts determine proportionality to the needs of the case by considering six enumerated factors—(1) “the importance of the issues at stake in the action,” (2) “the amount in controversy,” (3) “the parties’ relative access to relevant information,” (4) “the parties’ resources,” (5) “the importance of the discovery in resolving the issues,” and (6) “whether the burden or expense of the proposed discovery outweighs its likely benefit.”³⁵

b. Historical use of protective orders

All of these revisions, along with others, were made in an attempt “to deal with the problem of overdiscovery” and “to encourage judges to be more aggressive in identifying and discouraging discovery overuse.”³⁶ The Committee noted that many courts identify and discourage discovery overuse by issuing protective orders under Rule 26(c), but it also noted that “district judges have been reluctant to limit the use of the discovery devices.”³⁷ It remains the province of the district court to mediate discovery disputes between parties and carefully consider motions for protective orders to achieve the goal of the “just, speedy, and inexpensive determination” of the case.³⁸

³² *Id.* (quoting FED. R. CIV. P. 1).

³³ FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment.

³⁴ FED. R. CIV. P. 26(b)(1); *see* FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

³⁵ FED. R. CIV. P. 26(b)(1).

³⁶ FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment (quoting FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment).

³⁷ *Id.*

³⁸ FED. R. CIV. P. 1; *see* *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

3. FRCP 53: Providing for Masters to Resolve Specific Types of Disputes

FRCP 53 carefully describes the procedures a court must follow when appointing a master, the scope of a master's responsibility, and the responsibility of the court in response to the master's decisions.³⁹ The court may appoint a master to perform a specific list of tasks, one of which is to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."⁴⁰ When choosing to appoint a master, "the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay."⁴¹ Before the master is appointed, "the court must give the parties notice and an opportunity to be heard."⁴² Any party or the court may suggest candidates; however, any candidate that has a relationship to the parties must be disqualified unless the parties mutually consent to the appointment with the court's approval.⁴³ The court must follow the strictures laid out in FRCP 53(b)(2)–(3) as to the contents of the appointing order and the issuance procedures.⁴⁴

The master, once appointed, must follow the strictures of the appointing order and maintain prompt communication with the parties and the court.⁴⁵ The appointing court also has the responsibility to review party objections to findings of fact, conclusions of law, and procedural rulings made by the master.⁴⁶ By using an appointed master, the court can ensure the parties have access to a neutral decision-maker operating under the auspices of the court having jurisdiction over the case, but who has greater availability and time to carefully consider delicate and potentially convoluted discovery requests.

While the court is instructed to consider the expense to the parties when deciding to appoint a master,⁴⁷ a master may choose to serve pro bono for a good cause.⁴⁸ In cases such as these, where a traumatized complainant attempts to gain recompense from corporations which she alleges knew or should have known of the trafficking from which the corporations derived a

³⁹ FED. R. CIV. P. 53.

⁴⁰ FED. R. CIV. P. 53(a)(1)(C).

⁴¹ FED. R. CIV. P. 53(a)(3).

⁴² FED. R. CIV. P. 53(b)(1).

⁴³ *Id.*; FED. R. CIV. P. 53(a)(2).

⁴⁴ FED. R. CIV. P. 53(b)(2)–(3).

⁴⁵ FED. R. CIV. P. 53(c)–(e).

⁴⁶ FED. R. CIV. P. 53(f).

⁴⁷ FED. R. CIV. P. 53(a)(3).

⁴⁸ *See* FED. R. CIV. P. 53(g).

profit, a master could serve an important public interest. Thus, use of a master may conserve judicial resources, expedite resolution of discovery disputes, and reduce party costs while meeting the requirement of a “just, speedy, and inexpensive determination of the action [or] proceeding.”⁴⁹

B. *Supreme Court Cases Addressing Protective Orders*

The Supreme Court discussed the purpose of discovery, the authority of the court to restrict discovery, and the broad discretion of the court to guide discovery in *Seattle Times Co. v. Rhinehart*⁵⁰ and *Herbert v. Lando*.⁵¹ The Court stated the purpose of discovery is to assist in the preparation and resolution of litigated disputes and to adequately inform litigants in civil trials.⁵² The Court recognized both the trial court’s congressionally-granted authority to restrict abusive discovery practices⁵³ and the trial court’s resultant broad discretion in granting and crafting the orders to achieve that end.⁵⁴

A federal district court may use both protective orders and orders to compel discovery to guide, restrict, and enforce discovery.⁵⁵ Protective orders and orders to compel are two sides of the same coin. A motion for protective order by one party may result in the court granting that party a protective order or, if the motion for protective order is denied and the party refuses to respond to the discovery request at issue, the court may issue an order to compel the party to respond.⁵⁶ Alternatively, a court may respond to a motion to compel discovery by either granting or denying the motion.⁵⁷ Therefore, the Court’s discussion of both types of orders are valuable tools by which to evaluate the role of the trial court in guiding, restricting, and enforcing discovery during civil litigation.

1. *Protective Orders Applied: Seattle Times Co. v. Rhinehart*

In *Seattle Times Co.*, Rhinehart, the spiritual leader of the Aquarian Foundation, brought an action for damages due to “alleged defamation and

⁴⁹ FED. R. CIV. P. 1.

⁵⁰ See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

⁵¹ See *Herbert v. Lando*, 441 U.S. 153 (1979).

⁵² See *Seattle Times Co.*, 467 U.S. at 34; *Herbert*, 441 U.S. at 177.

⁵³ *Seattle Times Co.*, 467 U.S. at 34–35; *Herbert*, 441 U.S. at 176–77.

⁵⁴ *Seattle Times Co.*, 467 U.S. at 35–36; *Herbert*, 441 U.S. at 179–80.

⁵⁵ See FED. R. CIV. P. 26(b)–(c); FED. R. CIV. P. 37; FED. R. CIV. P. 26 advisory committee’s note to 2006 amendment.

⁵⁶ See FED. R. CIV. P. 26(b)–(c); FED. R. CIV. P. 37.

⁵⁷ See FED. R. CIV. P. 37.

invasions of privacy” against the Seattle Times.⁵⁸ The Seattle Times responded by engaging in extensive discovery, including requests for the Aquarian Foundation’s financial information, donor identity, and membership list.⁵⁹ When the Foundation refused to disclose certain financial information, the names of the Foundation’s members during the preceding ten years, and the identity of the Foundation’s donors from the last ten years, the Seattle Times moved for an order compelling discovery.⁶⁰ The Foundation not only opposed the motion to compel, but countered with a motion for a protective order that would prevent the Seattle Times “from disseminating any information gained through discovery.”⁶¹

Upon a specific description of the discoverable information in question and a factual showing of good cause for protection, the trial court issued a protective order covering “all information obtained through the discovery process” that related to the plaintiffs’ finances and the names and addresses of members or donors.⁶² “The order prohibited [the Seattle Times] from publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case.”⁶³ The trial court reasoned that the “restriction was necessary to avoid the ‘chilling effect’ that dissemination would have on ‘a party’s willingness to bring his case to court.’”⁶⁴

The Supreme Court of Washington affirmed this decision by reasoning that the judicial interest in the integrity of the discovery process is adequate to sustain the protection of “the confidentiality of information given for purposes of litigation.”⁶⁵ The court noted that the plaintiffs had a “recognizable privacy interest” in the information and that the dissemination of the information would “understandably result in annoyance, embarrassment and even oppression.”⁶⁶

When the Supreme Court of Washington decided the case, it also recognized a conflict among the holdings and standards of outside circuit courts.⁶⁷ The Supreme Court of the United States granted certiorari to resolve

⁵⁸ *Seattle Times Co.*, 467 U.S. at 22–23.

⁵⁹ *Id.* at 24.

⁶⁰ *Id.*

⁶¹ *Id.* at 25 (noting the Seattle Times intended to continue publishing articles—using information gained through discovery—about Rhinehart, the Foundation, and the litigation).

⁶² *Id.* at 26–27.

⁶³ *Id.* at 27.

⁶⁴ *Seattle Times Co.*, 467 U.S. at 27.

⁶⁵ *Id.* at 28 (quoting *Rhinehart v. Seattle Times Co.*, 654 P.2d 673, 690 (1982)).

⁶⁶ *Id.*

⁶⁷ *Id.* at 28–29.

the conflict and affirmed the Supreme Court of Washington's decision.⁶⁸ In the process of addressing the First Amendment issues specific to the case, the Court made several important statements about protective orders, their purpose, and their use.

The Court began by recognizing the breadth of allowable discovery under the FRCP and the local rules based on them.⁶⁹ The Court stated that broad discovery "is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes."⁷⁰ Because discovery is so broad, a trial court needs to have the authority to issue protective orders in order to mitigate the potential for abuse.⁷¹ Parties may attempt to use discovery to delay trial, increase costs, or invade the privacy interests of parties and non-parties.⁷² The Court further stated that the government has a substantial interest in preventing abuse, oppression, and injustice through the implementation of court processes.⁷³ This potential for abuse and the need to prevent it justifies the court's use of protective orders.⁷⁴

The trial court has broad discretion to determine when to grant a protective order and how to craft that protective order to meet the needs of the specific case.⁷⁵ The court must have this discretion because it is in the "best position to weigh fairly the competing needs and interests of parties affected by discovery."⁷⁶ Without a protective order, parties may distribute or use information gained through discovery for any legal purpose.⁷⁷ Therefore, if good cause justifies the order, FRCP 26 allows the court to limit the uses of information exchanged during discovery.⁷⁸

2. Balancing the Various FRCPs: *Herbert v. Lando*

In *Herbert v. Lando*, the Supreme Court allowed the public-figure plaintiff to explore the state of mind of the journalist defendant in a defamation case for two reasons.⁷⁹ First, the plaintiff was faced with the heavy burden of

⁶⁸ *Id.* at 29.

⁶⁹ *Id.* at 30.

⁷⁰ *Seattle Times Co.*, 467 U.S. at 34.

⁷¹ *Id.*

⁷² *Id.* at 34–35.

⁷³ *Id.* at 35.

⁷⁴ *Id.* at 35–36.

⁷⁵ *Id.* at 36.

⁷⁶ *Seattle Times Co.*, 467 U.S. at 36.

⁷⁷ *Id.* at 35.

⁷⁸ *Id.* at 37.

⁷⁹ See *Herbert v. Lando*, 441 U.S. 153, 175–76 (1979).

proving “actual malice.”⁸⁰ Second, the requested discovery would “produce evidence material to the proof of [that] critical element of [the] cause of action.”⁸¹ Anthony Herbert, a retired Army officer and Vietnam veteran, had received significant attention from the press in 1969–1970 due to allegations of misconduct against his superior officers.⁸² Three years later, the defendants, including Lando, collaborated to create and broadcast a television report on Herbert and his allegations.⁸³ Lando also published a related article in a magazine.⁸⁴ Herbert alleged the report and article “falsely and maliciously portrayed him as a liar.”⁸⁵ In *Herbert*, the Court focused on the justice of allowing Herbert to obtain allegedly privileged discovery materials from Lando.⁸⁶ It did this by weighing Herbert’s evidentiary burden and the availability of evidence regarding Lando’s state of mind against Lando’s alleged privilege of the editorial process.⁸⁷

The *Herbert* Court declined to create the evidentiary privilege the defendants sought.⁸⁸ The Court reasoned that the purpose of the discovery rules is to adequately inform the litigants in civil trials.⁸⁹ Further, the Court acknowledged concerns about abuse of the discovery process and stated that district court judges should not neglect their power to restrict discovery as appropriate in accord with the discovery rules.⁹⁰

A district court must balance constitutional interests and the parties’ private interests.⁹¹ Justice Powell noted in his concurring opinion that “[a]lthough the process of weighing these interests is hardly an exact science, it is a function customarily carried out by judges in this and other areas of the law.”⁹² However, Justice Powell warned that the court should also be aware of the increasing use of discovery techniques and tactics as a “highly developed litigation art—one not infrequently exploited to the disadvantage of justice.”⁹³

⁸⁰ *Id.* at 156, 174.

⁸¹ *Id.* at 155.

⁸² *Id.* at 155–56.

⁸³ *Id.* at 156.

⁸⁴ *Id.* (stating Lando’s article was published in Atlantic Monthly magazine).

⁸⁵ *Herbert*, 441 U.S. at 156.

⁸⁶ *Id.* at 153.

⁸⁷ *Id.*

⁸⁸ *Id.* at 175.

⁸⁹ *Id.* at 177.

⁹⁰ *Id.*

⁹¹ *Herbert*, 441 U.S. at 178 (Powell, J., concurring).

⁹² *Id.* at 180.

⁹³ *Id.* at 179.

When parties, especially those with deeper pockets, attempt to exploit the discovery process as a means of harassment or to impose excessive labor or financial costs on the opposing party or parties, the court has the responsibility to step in and restrain that exploitation through the use of devices such as a protective order.⁹⁴ However, the court makes that decision after carefully weighing the various interests involved while also seeking a “just, speedy, and inexpensive determination”⁹⁵ and ensuring the parties are protected from “annoyance, embarrassment, oppression, or undue burden or expense.”⁹⁶

C. *The Interests to be Balanced*

The defendants’ interests addressed in *Seattle Times Co.* and *Herbert*, the freedom to disseminate information learned through discovery⁹⁷ and the protection of a journalist’s editorial process,⁹⁸ are rooted in the First Amendment. However, the rationale the Court used and the inclusion of the constitutional concerns in the court’s balancing of interests applies to other decisions in which the court is called upon to balance competing interests. In the context of a protective order issued to protect a sex-trafficked plaintiff’s true identity during pre-trial discovery, the district court balances the defendants’ right to put on a full and fair defense and the public’s right to open judicial proceedings against the plaintiff’s right to access the court without fear of harm.⁹⁹ Before coming to a decision, the district court should carefully consider the origin of those rights and the policies upon which they are based.

1. The Defendant’s Right to Put on a Full and Fair Defense

A party to a civil trial is afforded a “full and fair opportunity to litigate” its suit.¹⁰⁰ This opportunity arises from the “deep-rooted historic tradition that everyone should have his own day in court.”¹⁰¹ A defendant cannot have a day in court without being able to fully investigate the plaintiff’s claims. Thus,

⁹⁴ FED. R. CIV. P. 26(c)(1).

⁹⁵ FED. R. CIV. P. 1.

⁹⁶ FED. R. CIV. P. 26(c)(1).

⁹⁷ *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 24–25 (1984).

⁹⁸ *Herbert*, 441 U.S. at 155.

⁹⁹ *See Nixon v. Warner Commc’ns. Inc.*, 435 U.S. 589, 597–99 (1978).

¹⁰⁰ *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982) (stating that the Court’s “previous decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate”).

¹⁰¹ *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (quoting *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996)).

the defendant has the right to put on a full and fair defense by using the discovery process to fully investigate the claims brought by the plaintiff.

The courts zealously guard this right because a full and fair opportunity to litigate is a significant safeguard against re-litigation of the same claims in the future.¹⁰² As discussed above, the court is granted broad discretion to guide discovery within the strictures of FRCP 26.¹⁰³ The courts routinely consider whether a plaintiff's request to restrict a defendant's discovery through a protective order will unfairly prejudice the defendant's case.¹⁰⁴

2. The Public's Right to Open Judicial Proceedings in a Civil Case

Although the public's constitutional right of access to criminal proceedings is firmly established,¹⁰⁵ the Supreme Court has not directly addressed the public's right to open judicial proceedings in a civil case. However, inferences may be drawn from the Court's discussion of the common law right of access to judicial records in *Nixon v. Warner Communications, Inc.*¹⁰⁶ Even in *Nixon*, the Court did not "undertake to delineate precisely the contours of the common-law right" because they assumed the right applied to the evidence at issue in the case.¹⁰⁷ The Court discussed the historical context in which enforcement of the right of access to judicial records in American decisions has been grounded—the public's desire "to keep a watchful eye on the workings of public agencies and in a newspaper publisher's intention to publish information concerning the operation of government."¹⁰⁸ It logically follows that the public's common-

¹⁰² See *Montana v. United States*, 440 U.S. 147, 153–54 (1979); *Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971).

¹⁰³ See discussion *supra* Sections II.A.2.a., II.B.

¹⁰⁴ *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Ests.*, 596 F.3d 1036, 1038 (9th Cir. 2010); *James v. Jacobson*, 6 F.3d 233, 241 (4th Cir. 1993); *A.D. v. Wyndham Hotels & Resorts, Inc.*, 2020 U.S. Dist. LEXIS 250671, at *6–7 (E.D. Va. July 30, 2020); *M.L. v. Craigslist, Inc.*, 2020 U.S. Dist. LEXIS 250724, at *5–6 (W.D. Wash. July 8, 2020); see *Plaintiff B v. Francis*, 631 F.3d 1310, 1319 (11th Cir. 2011); see *id.* at 1320 (Moody, J., concurring in part and dissenting in part).

¹⁰⁵ *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (citing *Press-Enterprise Co. v. Superior Ct. of Cal., Cnty. of Riverside*, 478 U.S. 1 (1986)) (recognizing "that members of the public have a right of access to criminal proceedings secured by the First Amendment"); *Waller v. Georgia*, 467 U.S. 39, 44–45 (1984) (recognizing the public's qualified First Amendment right to attend a criminal trial and that trial's voir dire proceeding).

¹⁰⁶ *Nixon*, 435 U.S. at 597–99.

¹⁰⁷ *Id.* at 599.

¹⁰⁸ *Id.* at 598.

law right to open judicial proceedings similarly would be grounded in that same desire and intention.

However, the *Nixon* Court also stated that “[i]t is uncontested, however, that the right to inspect and copy judicial records is *not* absolute.”¹⁰⁹ Courts have denied access where access to judicial records may have been sought for improper purposes.¹¹⁰ These improper purposes include the use of the records to “gratify private spite or promote public scandal” by publishing “painful and sometimes disgusting details” of a case, to furnish libelous statements to the press, or to publish business information that may harm a litigant.¹¹¹ The Court determined that the decision to allow or disallow access to judicial records is “one best left to the sound discretion of the trial court.”¹¹² The trial court exercises that sound discretion “in light of the relevant facts and circumstances of the particular case.”¹¹³ Similarly, the public’s right to open judicial proceedings is not absolute. Where open judicial proceedings only serve to harm the party seeking protection, the court may restrict public access.¹¹⁴

Although the Supreme Court has not directly addressed the issue of the public’s common law right of access to open judicial proceedings in civil cases, the Court has indicated that the presumption of open judicial proceedings would logically apply to both civil and criminal proceedings.¹¹⁵ The circuit courts have diverged in their interpretation of Supreme Court precedent and commentary as applied when determining the scope of the public’s right of access to open judicial proceedings in civil cases. Two circuit courts of appeals have held that even if the public has a constitutional right of access to civil records in federal district courts, that constitutional right does not exceed the public’s common law right of access to those civil records

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Nixon*, 435 U.S. at 599.

¹¹³ *Id.*

¹¹⁴ A court exercises this same sound discretion to restrict public access when it chooses to close the courtroom during confidential medical testimony. See *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179–80 (6th Cir. 1983) (discussing the content-based, common-law exception to open judicial proceedings and finding the disclosure of prejudicial information insufficient “to overcome the strong common law presumption in favor of public access” to judicial proceedings).

¹¹⁵ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) (noting that “historically both civil and criminal trials have been presumptively open”); *Gannett Co., v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) (stating “no principled basis upon which a public right of access to judicial proceedings can be limited to criminal cases if the scope of the right is defined by the common law rather than the text and structure of the Constitution”).

as discussed in *Nixon*.¹¹⁶ However, four circuit courts of appeals have held or stated that the public has a constitutional right of access to civil proceedings secured by the First Amendment.¹¹⁷ A district court considering the public's right of access to civil proceedings has its decision complicated by the lack of clarity from the Supreme Court, the potential lack of guidance from its circuit court of appeals, and the disagreement among the circuit courts on the scope and applicability of both the public's constitutional and common law right of access to civil proceedings.

3. The Plaintiff's Right to Access the Court Without Fear of Harm

Unlike the criminal defendant's procedural due process right to be heard, a civil plaintiff's right to access the courts has not been established as a constitutional right. However, the Supreme Court has extended the due process right to be heard to civil litigants in a handful of specific circumstances where state action denied the plaintiff a meaningful opportunity to be heard. District courts uphold the policy underlying these decisions—that core principles of civil justice are undermined when plaintiffs do not have meaningful recourse to the courts—when determining whether to allow a plaintiff to proceed anonymously. Two Supreme Court cases, *Boddie v. Connecticut*¹¹⁸ and *M.L.B. v. S.L.J.*,¹¹⁹ illustrate the tension

¹¹⁶ See *In re Repts. Comm. for Freedom of the Press*, 773 F.2d 1325, 1338–39 (D.C. Cir. 1985) (holding that the public does not have a constitutional right of access to pre-judgment material before the court); *Newman v. Graddick*, 696 F.2d 796, 802–04 (11th Cir. 1983) (holding no constitutional right to copy post-judgment civil judicial records exists, but finding a common law right to inspect and copy those records).

¹¹⁷ *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066–71 (3d Cir. 1984) (noting the public's common law right of access to civil proceedings; providing a thorough review of the history and derivation of the public's constitutional right of access to civil proceedings; and holding that the public possesses a constitutional and common law right of access to civil proceedings which may be limited by the trial court under certain circumstances); *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (determining that denial of the public's constitutional right of access to civil proceedings requires a more rigorous standard than the common law rebuttable presumption standard and applying the constitutional standard to documents connected to a summary judgment motion in a civil case); see *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983) (applying justifications for public right of access to criminal proceedings to civil proceedings); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308–09 (7th Cir. 1984) (appearing to apply the presumption of a constitutional right of public access to civil proceedings and holding “that the presumption of access applies” to hearings and evidence connected to a party's motion to terminate).

¹¹⁸ See *Boddie v. Connecticut*, 401 U.S. 371 (1971).

¹¹⁹ See *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

underlying the question of whether to extend to civil plaintiffs a constitutional right of access to the court.

a. The court as the sole recourse to settle civil disputes

In *Boddie v. Connecticut*, although the Court specifically stated that it did “not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual,”¹²⁰ the Court reasoned that a divorcing couple’s need for recourse to the court precluded the state from barring access through imposition of a fee.¹²¹ The *Boddie* appellants, welfare recipients seeking to divorce, were denied a divorce due to their inability to pay a statutorily mandated fee.¹²² Their subsequent request for a judicial waiver of the fee requirement was also denied.¹²³ The *Boddie* Court decided that, because the appellants’ sole recourse for a divorce was through the courts, their plight was similar to that of “defendants faced with exclusion from the only forum effectively empowered to settle their disputes.”¹²⁴ The Court resolved the case under the due process right to be heard.¹²⁵

The Court acknowledged it had not had much opportunity to determine access to the courts as an element of due process in civil cases, because, in civil cases, resort to the courts is “not usually the only available, legitimate means” to resolve a dispute.¹²⁶ The Court reasoned that access to orderly dispute settlement is central to society, allowing for a level of social organization and cohesion impossible to achieve without the rule of law.¹²⁷ Ultimately, it is the courts that implement this regular, orderly process of dispute settlement in the American judicial system, and due process is central to this system.¹²⁸

The Justices disagreed on the grounds of the decision, with some justices advocating to also base the decision on the principle of equal protection.¹²⁹ However, the majority agreed that all persons should have access to the relief

¹²⁰ *Boddie*, 401 U.S. at 382.

¹²¹ *Id.* at 383.

¹²² *Id.* at 372.

¹²³ *Id.* at 373.

¹²⁴ *Id.* at 376.

¹²⁵ *See id.* at 377–81.

¹²⁶ *Boddie*, 401 U.S. at 375.

¹²⁷ *Id.* at 374.

¹²⁸ *Id.* at 375.

¹²⁹ *Id.* at 385–86 (Douglas, J., concurring); *id.* at 389 (Brennan, J., concurring).

accorded by the courts.¹³⁰ Justice Black, the sole voice of dissent, would have held that state legislatures may rightfully impose rules limiting or granting access to the courts.¹³¹

Justice Brennan, concurring in part, argued that “[t]he right to be heard in some way at some time extends to all proceedings entertained by the courts.”¹³² He reasoned that the “State has the ultimate monopoly of all judicial process,” not just procedures granting divorce and thus, if parties to civil suits cannot successfully settle their dispute out of court, the court system is the sole remaining recourse for all civil litigants.¹³³ He stated he “[saw] no constitutional distinction” between the current action “and an attempt to vindicate any other right arising under federal or state law.”¹³⁴ Therefore, the right to access the court without barriers should be available to all civil litigants. The Court did go on to extend the right of access to the court to civil litigants under similar circumstances.¹³⁵

The *Boddie* Court’s rationale—that orderly dispute settlement is central to society and allows for a level of social cohesion impossible to achieve without the rule of law—is equally applicable to cases in which a sex-trafficked plaintiff seeks to hold accountable third-party corporations which allegedly knew or should have known they were profiting from her trafficking. Because the third-party corporations did not act as the trafficker and are not natural persons, they cannot be held criminally responsible in the same manner as the individual traffickers. A third-party corporation, such as a hotel, may be held criminally liable for sex-trafficking either through vicarious liability for acts of its employees violative of federal law or by knowingly receiving financial benefit from participating in a venture violative of federal law.¹³⁶ However, federal law enforcement has rarely pursued criminal charges against third-party corporations.¹³⁷ The sex-trafficked plaintiff has no means other than recourse to civil courts by which to obtain restitution and

¹³⁰ *Id.* at 386 (Douglas, J., concurring) (agreeing with the majority that courts should not discriminate against persons based on their ability to pay).

¹³¹ *Id.* at 394 (Black, J., dissenting).

¹³² *Boddie*, 401 U.S. at 387–88 (Brennan, J., concurring).

¹³³ *Id.* at 387.

¹³⁴ *Id.*

¹³⁵ See *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (extending the right of civil access to the courts to a parent denied the opportunity to appeal the termination of her parental rights because she could not pay the state’s transcript cost).

¹³⁶ Rothberg, *supra* note 7, at 280.

¹³⁷ *Id.* at 284 (stating only two of 1,217 criminal defendants in federal human trafficking cases in 2018 were entities).

encourage third-party corporations to actively attempt to counter sex-trafficking occurring on corporate premises.¹³⁸

- b. The importance of the right that would be denied without access to the court

Twenty-five years later, in *M.L.B. v. S.L.J.*, the Court again addressed the a civil litigant's right to access the court—this time based on the importance of the right that would be denied.¹³⁹ In *M.L.B.*, the Court determined that a state may not restrict access to the court due to the litigant's inability to pay procedural fees.¹⁴⁰ The *M.L.B.* Court divided more sharply than the *Boddie* Court over the applicability of the criminal defendant's constitutional right to be heard to a civil litigant's right to access the court.¹⁴¹

In *M.L.B.*, a Mississippi Chancery Court terminated M.L.B.'s parental rights to her two minor children.¹⁴² M.L.B. attempted to exercise her state-granted right to appeal by timely filing the appeal and paying the one hundred dollar filing fee.¹⁴³ However, her appeal was not accepted because she was unable to pay substantial, additional state-mandated costs.¹⁴⁴ M.L.B. then requested permission to appeal *in forma pauperis*¹⁴⁵ from the Supreme Court of Mississippi.¹⁴⁶ The Supreme Court of Mississippi denied her request.¹⁴⁷ M.L.B. appealed to the Supreme Court of the United States, arguing that the state of Mississippi deprived her of a fundamental right—her parental relationship with her children—and that the constitutional ideals of basic fairness and equal protection under the law required she be allowed the right of appellate review regardless of her ability to pre-pay the associated costs.¹⁴⁸

¹³⁸ *Id.* at 285 (documenting that 43.8% of civil human trafficking defendants in 2018 were entities (171 entities)); 18 U.S.C. § 1595.

¹³⁹ See *M.L.B. v. S.L.J.*, 519 U.S. 102, 127–28 (1996).

¹⁴⁰ *Id.* at 107.

¹⁴¹ *Id.* at 105 (detailing that four justices joined in the Court's opinion, written by Justice Ginsburg; Justice Kennedy concurred only in the judgment; and Justice Thomas, joined by Justices Scalia and Rehnquist, dissented).

¹⁴² *Id.* at 106.

¹⁴³ *Id.* at 108.

¹⁴⁴ *Id.* at 108–09 (stating additional \$2,352.36 due to cover the costs of preparing and transmitting the record).

¹⁴⁵ *In Forma Pauperis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“In the manner of an indigent who is permitted to disregard filing fees and court costs.”).

¹⁴⁶ *M.L.B.*, 519 U.S. at 109.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

The Court held that Mississippi could not withhold the documents necessary to meet state-mandated requirements for an appellate claim due to M.L.B.'s inability to pay the associated costs.¹⁴⁹ The Court considered the applicability of the principle established in criminal cases: once a state has established an avenue of appellate review, that state may not then bar access to appellate review through "unreasoned distinctions that can only impede open and equal access to the courts."¹⁵⁰ The Court had initially applied this principle in cases in which loss of liberty was at stake.¹⁵¹ Later, it extended this principle to criminal cases which carried the threat of serious collateral consequences¹⁵² and to civil cases in which a fundamental interest was at stake.¹⁵³ The Court acknowledged the interest of parents in their relationship with their children as a sufficiently fundamental right to be protected by the Due Process Clause of the Fourteenth Amendment.¹⁵⁴

The Court did not clearly indicate the grounds upon which it decided *M.L.B.*;¹⁵⁵ however, Justice Kennedy would have decided the case based solely upon the Due Process Clause of the Fourteenth Amendment.¹⁵⁶ The Court reasoned that M.L.B.'s right of access to the court was barred solely by the cost of state-mandated requirements and not by any matter over which she had control.¹⁵⁷ Therefore, the extension of the principle that the state may not impede equal and open access to the courts through unreasoned distinctions to M.L.B.'s appeal of her parental rights termination decree would not "open [the] floodgates" to numerous other cases as the dissent and respondents alleged.¹⁵⁸

Justice Thomas criticized the majority opinion. He alleged that the inevitable consequence of the decision would be the extension of the right to access the court in civil cases to cases involving interests that rationally could not be distinguished, based on the majority's test, from M.L.B.'s important parental interest in maintaining her relationship with her children.¹⁵⁹ Justice

¹⁴⁹ *Id.* at 128.

¹⁵⁰ *Id.* at 110–11.

¹⁵¹ *Id.* at 111–12.

¹⁵² *M.L.B.*, 519 U.S. at 112.

¹⁵³ *Id.* at 113–16 (recognizing divorce and paternity issues as fundamental interests, but not bankruptcy or welfare benefits).

¹⁵⁴ *Id.* at 119.

¹⁵⁵ *See id.* at 120–21, 124.

¹⁵⁶ *Id.* at 129 (Kennedy, J., concurring).

¹⁵⁷ *Id.* at 127–28.

¹⁵⁸ *M.L.B.*, 519 U.S. at 127.

¹⁵⁹ *Id.* at 129–30 (Thomas, J., dissenting) (Justice Scalia fully joined Justice Thomas' dissent and the Chief Justice joined all but Part II).

Thomas would have held that *M.L.B.* was afforded her due process rights in her original trial before the Chancery Court.¹⁶⁰ He distinguished *Boddie* from *M.L.B.* by their respective access to a hearing.¹⁶¹

Justice Thomas, joined only by Justice Scalia, also expressed his doubts regarding the majority's assertion that its holding would not be extended beyond parental termination actions.¹⁶² He warned that the lack of clearly specified decisional grounds and the ease of discovering other important rights that could be equated to the parental rights threatened by the termination decision in *M.L.B.* may lead to excessive growth of new rights for civil litigants.¹⁶³

The *M.L.B.* Court made its decision to extend a constitutional right of access to the courts based on the importance of the appellant's right.¹⁶⁴ A sex-trafficked plaintiff seeking to hold accountable third-party corporations that allegedly knew or should have known they were profiting from the trafficking is seeking the civil remedy granted her by Congress. This plaintiff is also seeking to further the important public interest of reducing on-going sex-trafficking by incentivizing third-party corporate awareness and action. While it is unlikely that there will be a decision granting civil plaintiff's a constitutional right of access to civil courts, federal district courts face the challenge of determining whether specific barriers to a civil plaintiff's access to the court should be overcome by judicial action.

A federal district court determines how to balance the defendants' right to put on a full and fair defense and the public's right to open judicial proceedings against the plaintiff's right to access the court without fear of harm. While a plaintiff may be allowed to proceed under a pseudonym in most cases, it is not a guaranteed right based on the plaintiff meeting specific, consistent criteria. A district court bears the ultimate responsibility to determine whether to allow the plaintiff to proceed under a pseudonym in court documents and whether to extend the protection of the plaintiff's identity to the discovery process. The precedent under which a federal district court makes this determination varies depending on the circuit within which it sits.

¹⁶⁰ *Id.* at 132.

¹⁶¹ *Id.*

¹⁶² *Id.* at 143.

¹⁶³ *Id.* at 143–44.

¹⁶⁴ See *M.L.B.*, 519 U.S. at 127–28 (majority opinion).

III. THREE CASES, THREE OUTCOMES

The plaintiffs in the following cases all alleged they survived sex-trafficking and all brought their actions for damages against defendant third-party corporations under 18 U.S.C. § 1595 as enacted by the federal William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).¹⁶⁵ Each plaintiff alleged she was trafficked at hotels and two alleged they were advertised for commercial sex on public websites.¹⁶⁶ Although their specific allegations of abuse while being trafficked differ slightly and the duration of their trafficking varied from one month to fifteen years,¹⁶⁷ their allegations that the defendant corporations profited from sex-trafficking the defendant corporations knew or should have known was occurring on their property are the same.¹⁶⁸ Each suit necessarily has differences in how the complaints, motions, and replies were presented and argued, but the core question of how federal courts should evaluate whether and to what extent to grant a sex-trafficked plaintiff's request for a protective order to protect her true identity remains the same.

A. *Ohio*: M.A. v. Wyndham Hotels & Resorts, Inc.

In *M.A. v. Wyndham Hotels & Resorts, Inc.* (M.A. v. Wyndham)—the first civil suit filed by a sex-trafficked plaintiff against hotels under the Trafficking Victims Protection Act¹⁶⁹—the plaintiff, M.A., alleged that the hospitality industry defendants “knowingly benefited” for more than a year from her trafficker selling her for sex on defendants’ properties and thereby knowingly “participat[ed] in a venture . . . engaged in illegal sex trafficking” in violation of 18 U.S.C. § 1591(a)(2).¹⁷⁰ Shortly after filing the suit, M.A. filed a motion for a protective order requesting the court grant her permission to proceed under a pseudonym during the litigation and protect her identity by prohibiting the disclosure of her identity, requiring information regarding her identity be redacted from any filed documents, and requiring unredacted

¹⁶⁵ M.A. Complaint, *supra* note 9, at 4; A.D. Complaint, *supra* note 9, at 1; Craigslist Complaint, *supra* note 9, at 5–6 (bringing action under Washington state law as well).

¹⁶⁶ M.A. Complaint, *supra* note 9, at 3–4; A.D. Complaint, *supra* note 9, at 2; Craigslist Complaint, *supra* note 9, at 4.

¹⁶⁷ M.A. Complaint, *supra* note 9, at 4; A.D. Complaint, *supra* note 9, at 2; M.L. v. Craigslist Inc., No. 3:19-CV-06153, 2021 U.S. Dist. LEXIS 223297, at *3 (W.D. Wash. Sept. 16, 2021).

¹⁶⁸ M.A. Complaint, *supra* note 9, at 4; A.D. Complaint, *supra* note 9, at 2; Craigslist Complaint, *supra* note 9, at 20.

¹⁶⁹ Rothberg, *supra* note 7, at 285.

¹⁷⁰ M.A. Complaint, *supra* note 9, at 35; *id.* at 4.

documents to be filed under seal.¹⁷¹ M.A. argued that the court could excuse her from identifying herself publicly because her “privacy interests substantially outweigh[ed] the presumption of open judicial proceedings.”¹⁷² M.A. identified her privacy interest as the compelled disclosure during litigation of information “of the utmost intimacy” due to forced sexual encounters that occurred while she was trafficked.¹⁷³

M.A. compared her request for a protective order to orders granted to protect survivors of sex-trafficking in criminal cases and pseudonymous protection granted to survivors of sexual battery and rape.¹⁷⁴ She alleged that all of these cases share the common characteristic of requiring the disclosure of highly personal information that may expose the survivor to further trauma such as public ridicule, potential future harm, and online association with rape and torture.¹⁷⁵ M.A. asserted that her privacy rights could be protected without prejudicing the defendants because she would reveal her true identity to the defendants for the limited purpose of investigating her claims.¹⁷⁶

1. Stipulated Protective Order

Prior to the defendants’ court ordered response deadline,¹⁷⁷ the parties agreed to a stipulated protective order that the court approved.¹⁷⁸ The court then denied M.A.’s Motion for a Protective Order as moot.¹⁷⁹ The stipulated protective order provided that M.A. would provide her current identity and identifying information (collectively: true identity) to the defendants’ counsel, M.A. would be allowed to proceed under pseudonym for the duration of the litigation, all parties would keep M.A.’s true identity confidential during and after the litigation, and all parties would redact

¹⁷¹ Plaintiff’s Motion for a Protective Order at 2, *M.A. v. Wyndham*, No. 2:19-CV-00849 (S.D. Ohio May 7, 2019).

¹⁷² *Id.* at 3 (quoting *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004)).

¹⁷³ *Id.* at 3–4 (quoting *Porter*, 370 F.3d at 560).

¹⁷⁴ *Id.* at 4.

¹⁷⁵ *Id.* at 4–5.

¹⁷⁶ *Id.* at 5.

¹⁷⁷ Order at 1, *M.A. v. Wyndham Hotels & Resorts, Inc.*, No. 2:19-CV-00849 (S.D. Ohio May 28, 2019) (granting Wyndham until June 10, 2019, to respond to Plaintiff’s Motion for Protective Order).

¹⁷⁸ Stipulated Protective Order at 1, 7, *M.A. v. Wyndham*, No. 2:19-CV-00849 (S.D. Ohio June 4, 2019).

¹⁷⁹ Order at 1, *M.A. v. Wyndham Hotels & Resorts, Inc.*, No. 2:19-CV-00849 (S.D. Ohio June 11, 2019) (denying as moot Plaintiff’s Motion for Protective Order).

information about M.A.'s true identity from court filings.¹⁸⁰ The stipulated protective order further provided a list of persons to whom the parties could disclose M.A.'s true identity and the circumstances in which that information could be disclosed.¹⁸¹

2. Modification of the Stipulated Protective Order

A year later, M.A. again petitioned the court for a protective order—this time to prevent the defendants from voluntarily disclosing her true identity to her traffickers.¹⁸² In that motion, M.A. raised the question of whether a sex-trafficked plaintiff must sacrifice protections granted to crime victims under federal and state law and be exposed to potential endangerment due to a defendant's decision to disclose her true identity simply because she filed the civil suit.¹⁸³ She alleged that the issue of voluntary disclosure of her true identity to her traffickers or their associates arose after the entry of the stipulated protected order when “one or more of the Defendants proposed directly approaching the Plaintiff's trafficker(s) during the course of discovery.”¹⁸⁴

Because M.A. did not directly request a new protective order in her motion, the court characterized her request as a modification of the existing stipulated protective order.¹⁸⁵ The court described M.A.'s proposed modification as a request that her traffickers or the traffickers' affiliates be excluded from the fact witnesses to whom her true identity could be disclosed if her true identity would aid that witness in “recalling, relating, or explaining facts or in testifying.”¹⁸⁶ M.A. also requested the court to require that other persons or entities needed to litigate any claims or defenses sign an acknowledgment and agreement to be bound by the protective order before the defendant disclosed the plaintiff's true identity.¹⁸⁷

¹⁸⁰ Stipulated Protective Order at 1–3, *M.A. v. Wyndham*, No. 2:19-CV-00849 (S.D. Ohio June 5, 2019).

¹⁸¹ *Id.* at 2–3 (allowing disclosure to persons intimately involved or retained in connection with the suit, potential and actual fact witnesses as needed, custodian of records, government agencies and personnel if necessary, and other persons or parties upon consent of the parties).

¹⁸² Plaintiff M.A.'s Motion for a Protective Order to Prevent the Voluntary Disclosure of Plaintiff's Identity to her Trafficker(s) at 1, *M.A. v. Wyndham*, No. 2:19-CV-00849 (S.D. Ohio June 23, 2020).

¹⁸³ *Id.* at 3.

¹⁸⁴ *Id.* at 10.

¹⁸⁵ *M.A. v. Wyndham Hotels & Resorts, Inc.*, No. 2:19-CV-00849, 2020 U.S. Dist. LEXIS 165293, at *4 (S.D. Ohio Sept. 10, 2020).

¹⁸⁶ *Id.* at *5.

¹⁸⁷ *Id.*

The court framed the issue before it as a requested modification to an existing *stipulated* protective order approved by the court. The court cited Sixth Circuit precedent which required M.A. to show good cause for modification of the protective order by “articulat[ing] ‘specific facts’ showing the risk of a ‘clearly defined and serious injury.’”¹⁸⁸ These specific facts must be more than “mere speculation or unsubstantiated fears of prejudice” if the protective order would burden the defendants’ trial preparation.¹⁸⁹ The court then noted that other trial courts within the Sixth Circuit had applied a heightened burden to a party seeking modification of a protective order to which that party had previously agreed.¹⁹⁰

The court found that, regardless of the level of burden applied, M.A. failed to establish good cause for modification of the stipulated protective order entered into in June 2019.¹⁹¹ Therefore, the court denied M.A.’s motion for a protective order.¹⁹² The court stated that M.A. did not establish good cause because she did not show compelling circumstances or any specific risk from her trafficker during the past year that would militate for the requested increase in protection.¹⁹³ The court particularly noted that the plaintiff did not clearly request specific modifications to the protective order that would meet her safety needs and also meet the defendants’ need to engage in meaningful discovery.¹⁹⁴

B. *Virginia: A.D. v. Wyndham Hotels & Resorts, Inc.*

In *A.D. v. Wyndham Hotels & Resorts, Inc.* (*A.D. v. Wyndham*), filed just nine months after the first suit, A.D. alleged she was trafficked for sex on Wyndham Hotels and Resorts, Inc. (*Wyndham*) properties for one month in 2012 and that Wyndham “knowingly benefited from facilitating a venture that they knew, or . . . should have known, to be engag[ed] in sex trafficking.”¹⁹⁵ A.D. filed her motion for a protective order that same day.¹⁹⁶ In it, she requested that she be allowed to proceed under a pseudonym and that the defendant keep her identity confidential throughout the suit and

¹⁸⁸ *Id.* at *5–7 (quoting *Nix v. Sword*, 11 F. App’x 498, 500 (6th Cir. 2001)).

¹⁸⁹ *M.A. v. Wyndham*, 2020 U.S. Dist. LEXIS 165293, at *6 (citing *Nemir v. Mitsubishi Motors Corp.*, 381 F.3d 540, 550–51 (6th Cir. 2004)).

¹⁹⁰ *Id.* at *7.

¹⁹¹ *Id.* at *13.

¹⁹² *Id.*

¹⁹³ *Id.* at *11–12.

¹⁹⁴ *Id.* at *12.

¹⁹⁵ A.D. Complaint, *supra* note 9, at 2.

¹⁹⁶ A.D. Protective Order Request, *supra* note 12, at 1.

thereafter.¹⁹⁷ She based her motion for a protective order on her fear of physical retaliation from her still at-large trafficker;¹⁹⁸ her fear of being stigmatized as a sex-trafficking survivor if her highly sensitive, personal, and private identifying information were disseminated;¹⁹⁹ her psychological vulnerability to being revictimized by being deprived of “her privacy, autonomy, and sense [of] normalcy” once again—this time through litigation.²⁰⁰

The court granted her leave to proceed anonymously and her motion for the protective order.²⁰¹ The court then ordered the parties to confer and agree upon a protective order consistent with its opinion.²⁰² In its opinion, the court specified that “[t]he protective order must allow Defendant full access to Plaintiffs identity and the identity of her alleged trafficker, and for Defendant to utilize this information in discovery.”²⁰³ Further, the court required the protective order to provide for redaction of that identifying information from publicly filed documents.²⁰⁴

The parties were unable to agree upon a protective order due to different interpretations of the scope of the provision stating the protective order must allow the “Defendant to utilize this information in discovery.”²⁰⁵ A.D. petitioned the court, requesting clarification of the court’s March 20, 2020 order.²⁰⁶ She also proposed a protective order that would prohibit disclosure of her identity to her alleged trafficker or associates at any time, restrict disclosure of her trafficker’s name during discovery, and restrict Wyndham’s

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 4.

¹⁹⁹ *Id.* at 1–2.

²⁰⁰ *Id.* at 5.

²⁰¹ A.D. v. Wyndham Hotels & Resorts, Inc., No. 4:19-CV-00120, 2020 U.S. Dist. LEXIS 163851, at *7 (E.D. Va. Mar. 20, 2020).

²⁰² *Id.* at *8.

²⁰³ *Id.* at *7.

²⁰⁴ *Id.*

²⁰⁵ *Id.*; see Plaintiff’s Motion for Clarification and Entry of Protective Order, A.D. v. Wyndham, No. 4:19-CV-00120 (E.D. Va. Apr. 17, 2020); Defendant Wyndham Hotels & Resorts, Inc.’s Response to Plaintiff’s Motion for Clarification, A.D. v. Wyndham, No. 4:19-CV-00120 (E.D. Va. Apr. 20, 2020).

²⁰⁶ Plaintiff’s Motion for Clarification and Entry of Protective Order, *supra* note 205, at 4.

ability to contact her alleged trafficker.²⁰⁷ After considering the parties' interests and needs, the court issued a protective order.²⁰⁸

Wyndham then requested the court reconsider the protective order because the protective order prejudiced its investigation during discovery.²⁰⁹ Wyndham objected to the restriction requiring it to request information about A.D. or her alleged traffickers from non-party witnesses only at a deposition.²¹⁰ Wyndham further objected to the requirement that it notify A.D. of its intention to contact her alleged traffickers, explain what information it sought, and why it needed to disclose her true identity.²¹¹ The court issued an amended protective order.²¹²

1. Fourth Circuit Standard: Granting Leave to Proceed Anonymously

The court weighed the interests of the parties and the public in granting and amending these protective orders. In granting A.D.'s Motion for Protective Order and Leave to Proceed Anonymously, the court determined that A.D.'s interest in proceeding anonymously outweighed the public's interest in open judicial proceedings and the risk of prejudice to Wyndham.²¹³ The court primarily based this decision on two cases. The first, a Fourth Circuit case—*James v. Jacobson*, grants courts the discretion to allow parties to proceed under pseudonyms despite the presumption of open judicial proceedings.²¹⁴

The court exercised this discretion based on the five considerations laid out in *Candidate No. 452207 v. CFA Inst.*, an Eastern District of Virginia case.²¹⁵ These considerations are as follows:

²⁰⁷ Plaintiff's Supplemental Brief for Protective Order and Leave to Withhold Identity of Her Traffickers or Limit the Use of Their Identities in Litigation at 2, *A.D. v. Wyndham*, No. 4:19-CV-00120 (E.D. Va. June 9, 2020).

²⁰⁸ *A.D. v. Wyndham Hotels & Resorts, Inc.*, No. 4:19-CV-00120, 2020 U.S. Dist. LEXIS 250671, at *5 (E.D. Va. July 30, 2020).

²⁰⁹ *A.D. v. Wyndham Hotels & Resorts, Inc.*, No. 4:19-CV-00120, 2020 U.S. Dist. LEXIS 250685, at *3-4 (E.D. Va. Sept. 21, 2020).

²¹⁰ *Id.* at *4.

²¹¹ *Id.*

²¹² *Id.* at *2.

²¹³ *A.D. v. Wyndham Hotels & Resorts, Inc.*, No. 4:19-CV-00120, 2020 U.S. Dist. LEXIS 163851, at *4 (E.D. Va. Mar. 20, 2020) (granting Plaintiff's Motion for Protective Order and Leave to Proceed Anonymously).

²¹⁴ *Id.* at *3 (citing *Candidate No. 452207 v. CFA Inst.*, 42 F. Supp. 3d 804, 806 (E.D. Va. 2012); *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993)).

²¹⁵ *A.D. v. Wyndham*, 2020 U.S. Dist. LEXIS 163851, at *2-4.

(1) “whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature;” (2) “whether identification poses a risk of retaliatory physical or mental harm to the requesting party or . . . innocent non-parties;” (3) “the ages of the persons whose privacy interests are sought to be protected;” (4) “whether the action is against a governmental or private party;” and (5) “the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.”²¹⁶

The court concluded that there was very little risk of prejudice to Wyndham in allowing A.D. to proceed under a pseudonym because A.D.’s identity would only be concealed from the public.²¹⁷

2. Court Issued Protective Order and Amended Protective Order

After the parties failed to agree on a stipulated protective order that would meet the guidelines the court laid out in its March 20, 2020 order, the court’s opinion which accompanied its first protective order recognized A.D.’s privacy and safety concerns while also clarifying that A.D. must give Wyndham enough information to investigate the alleged trafficking that occurred on its properties.²¹⁸ Wyndham contested three provisions of the first protective order.²¹⁹ The court addressed each provision separately and chose to amend two provisions.²²⁰

The court acknowledged that the first protective order may have restricted Wyndham’s ability to adequately investigate and defend against the instant claims.²²¹ Therefore, it amended the protective order to allow Wyndham to disclose A.D.’s identity to fact witnesses other than A.D.’s alleged traffickers or their associates as needed.²²² The court also acknowledged that requiring

²¹⁶ *Id.* at *3–4 (quoting *Candidate No. 452207*, 42 F. Supp. 3d at 807 (quoting *James*, 6 F.3d at 238)).

²¹⁷ *Id.* at *5–6.

²¹⁸ *A.D. v. Wyndham Hotels & Resorts, Inc.*, No. 4:19-CV-00120, 2020 U.S. Dist. LEXIS 250671, at *2–5 (E.D. Va. July 30, 2020).

²¹⁹ *See A.D. v. Wyndham Hotels & Resorts, Inc.*, No. 4:19-CV-00120, 2020 U.S. Dist. LEXIS 250685, at *4–7 (E.D. Va. Sept. 21, 2020).

²²⁰ *Id.* at *4–8.

²²¹ *Id.* at *5.

²²² Amended Protective Order, *A.D. v. Wyndham Hotels & Resorts, Inc.*, No. 4:19-CV-00120, 2020 U.S. Dist. LEXIS 250687, at *3 (E.D. Va. Sept. 21, 2020).

Wyndham to notify A.D. to explain what information it was seeking and why it was seeking that information might infringe on Wyndham's privileged work product and require Wyndham to disclose pre-trial strategy to A.D.²²³ Therefore, the court amended the protective order to require Wyndham to inform the court if it intended to contact A.D.'s alleged traffickers and disclose her identity to them, to explain to the court what information it sought and why it was necessary, and to refrain from disclosing A.D.'s identifying information unless necessary for discovery and then only at the time of the interview, deposition, or testimony.²²⁴

However, the court refused to modify the provision requiring Wyndham to acquire a witness's signature on a written agreement indicating the witness had reviewed the protective order and agreed to keep the protected information confidential.²²⁵ The court reasoned that the importance of protecting A.D.'s identity balanced against Wyndham's need to investigate justified the requirement of a witness's signature.²²⁶ Indeed, the court noted that a witness's refusal to sign such an agreement would be an indication that the witness intended to disclose the protected information to others.²²⁷

The court emphasized that the amended protective order was its final decision on these matters, citing the significant effort it put forth to balance A.D.'s "serious and significant risk of harm" against Wyndham's need to fully investigate A.D.'s claims in order to put forth a full and fair defense.²²⁸ The parties and the court expended significant time and energy as shown by the over two dozen documents, orders, and memorandums produced before the amended protective order was finalized.²²⁹ The parties later settled.²³⁰ The amount of time and effort expended by parties and the court illustrates the grave importance of the ongoing litigation regarding the protection of a sex-trafficked plaintiff's true identity in court filings and discovery.

²²³ *A.D. v. Wyndham*, 2020 U.S. Dist. LEXIS 250685, at *8.

²²⁴ See Amended Protective Order, *A.D. v. Wyndham*, 2020 U.S. Dist. LEXIS 250687.

²²⁵ *A.D. v. Wyndham*, 2020 U.S. Dist. LEXIS 250685, at *6.

²²⁶ *Id.* at *6-7.

²²⁷ *Id.* at *7.

²²⁸ *Id.* at *9.

²²⁹ U.S. District Court Docket, *A.D. v. Wyndham Hotels & Resorts, Inc.*, No. 4:19-CV-00120 (E.D. Va. dismissed Oct. 8, 2021).

²³⁰ Final Order, *A.D. v. Wyndham*, No. 4:19-CV-00120 (E.D. Va. Oct. 8, 2021) (stating the court dismissed the action with prejudice upon the parties "Joint Notice of Stipulated Dismissal With Prejudice").

C. *Washington: M.L. v. Craigslist, Inc.*

On the same day A.D. filed her complaint in Virginia, M.L. filed her complaint in Washington state against Craigslist, Inc., Wyndham Hotels & Resorts, Inc., and various Seattle-Tacoma area hotels.²³¹ One of M.L.'s traffickers was already convicted and imprisoned at the time the lawsuit was filed, but at least one trafficker was still at large.²³² M.L. "was trafficked continually between the ages of 12 and 18 years of age, and beyond" until she was 26 years old.²³³ M.L. alleged the defendants knew sex-traffickers used their legitimate businesses, profited by facilitating that sex-trafficking, and chose not to take "timely and effective measures to thwart [the] epidemic" of sex-trafficking.²³⁴ The parties raised the issue of a protective order at the March 10, 2020 status conference and were directed to meet and confer regarding the possible protective order.²³⁵ In the meantime, the parties agreed not to contact M.L.'s trafficker during the pendency of the protective order.²³⁶

After two more status conferences between the parties and the court regarding the protective order, defendants and M.L. filed separate motions for protective orders with the court.²³⁷ In her brief accompanied by her proposed protective order, M.L. requested her identity be kept confidential during and after the prosecution of the lawsuit so that she would not be exposed to an "unreasonable risk of embarrassment, humiliation, or danger."²³⁸ She proposed that confidentiality could be maintained by procedures for and limitations on disclosure during discovery that would prohibit defendants from disclosing M.L.'s true identity to her traffickers or

²³¹ Craigslist Complaint, *supra* note 9, at 1–2.

²³² *Id.* at 36; Plaintiff's Protective Order Brief at 7, M.L. v. Craigslist, Inc., No. 3:19-cv-06153 (W.D. Wash. May 15, 2020).

²³³ First Amended Complaint for Damages at 20, M.L. v. Craigslist, Inc., No. 3:19-cv-06153 (W.D. Wash. Dec. 2, 2019); Craigslist Complaint, *supra* note 9, at 21.

²³⁴ Craigslist Complaint, *supra* note 9, at 1–2.

²³⁵ Minute Entry, *Craigslist*, No. 3:19-cv-06153 (W.D. Wash. Mar. 10, 2020) (PACER), ECF No. 55.

²³⁶ *Id.*

²³⁷ Minute Entry, *Craigslist*, No. 3:19-cv-06153 (W.D. Wash. Apr. 07, 2020) (PACER), ECF No. 60; Minute Entry, *Craigslist*, No. 3:19-cv-06153 (W.D. Wash. Apr. 28, 2020) (PACER), ECF No. 84; Defendant Craigslist, Inc. Motion for Protective Order, *Craigslist*, No. 3:19-cv-06153 (W.D. Wash. May 15, 2020); Defendant Wyndham Hotels & Resorts, Inc. Motion for Protective Order, *Craigslist*, No. 3:19-cv-06153 (W.D. Wash. May 15, 2020); Defendant G6 Hospitality, LLC Motion for Protective Order, *Craigslist*, No. 3:19-cv-06153 (W.D. Wash. May 15, 2020); Plaintiff M.L. Motion for Protective Order, *Craigslist*, No. 3:19-cv-06153 (W.D. Wash. May 15, 2020).

²³⁸ Plaintiff's Protective Order Brief, *supra* note 232, at 1.

their affiliates.²³⁹ M.L. expressed particular concern about being harassed, intimidated, or physically or psychologically harmed if any of her traffickers who were not incarcerated discovered her current identity and location.²⁴⁰

1. Protective Order

The court allowed M.L. to proceed under a pseudonym in filings and public court proceedings and ordered the parties to seek an order from the court to safeguard M.L.'s identity by seal or redaction if they encountered a legitimate need to identify her.²⁴¹ Further, the court protected M.L.'s identity during discovery by ordering that information comprising her true identity could only be disclosed to a limited number of persons as required for discovery.²⁴² Specifically, Section 3(c)(11) allowed parties to disclose M.L.'s true identity to "any potential, anticipated, or actual fact witness, and their counsel, but only to the extent plaintiff's true identity will assist the witness in recalling, relating, or explaining facts."²⁴³

The court decided to allow M.L. to proceed pseudonymously because the balance of factors under Ninth Circuit precedent "show[ed] the plaintiff's need for protection of her identity outweigh[ed] the potential prejudice to the defendants."²⁴⁴ The federal district court balanced the following five factors:

- (1) the severity of the threatened harm,
- (2) the reasonableness of the anonymous party's fears, . . .
- (3) the anonymous party's vulnerability to such retaliation,
- (4) the prejudice to the opposing party, and
- (5) the public interest.²⁴⁵

The court found that M.L.'s allegations in her Amended Complaint were "sufficient to show the severity of the potential harm is immense, and M.L.'s fear of harm if these individuals find out who she is, or where she works, or where she resides, is reasonable."²⁴⁶ Further, M.L. established her particular

²³⁹ *Id.* at 3, 9.

²⁴⁰ *Id.* at 9.

²⁴¹ Protective Order, *Craigslist*, No. 3:19-cv-06153, 2020 U.S. Dist. LEXIS 250732, at *3-4 (W.D. Wash. July 8, 2020).

²⁴² *Id.* at *5-7 (allowing disclosure to persons intimately involved or retained in connection with the suit, potential and actual fact witnesses as needed, custodian of records, and government agencies and personnel if necessary).

²⁴³ *Id.* at *7.

²⁴⁴ *M.L. v. Craigslist, Inc.*, No. 3:19-cv-06153, 2020 U.S. Dist. LEXIS 250724, at *7 (W.D. Wash. July 8, 2020) (citing *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Ests.*, 596 F.3d 1036, 1042-45 (9th Cir. 2010)).

²⁴⁵ *Id.* at *4 (quoting *Kamehameha*, 596 F.3d at 1042-45).

²⁴⁶ *Id.* at *5.

vulnerability to retaliation through stigmatization, social or employment discrimination, or direct harm from her traffickers or their associates by alleging she was involuntarily sex-trafficked for many years, both as a child and as an adult.²⁴⁷

In order to reduce prejudice to the defendants, the court narrowly tailored its protective order to address specific privacy concerns regarding disclosure of M.L.'s true identity.²⁴⁸ To further address any potential prejudice, the court also specifically allowed for modification of the protective order by agreement or court order and also considered appointing a Special Master.²⁴⁹ The court considered the public's interest, both in open judicial proceedings and in the defendants' ability to present a full and fair defense.²⁵⁰ However, the court found the need to protect sex-trafficked victims from further harm during the course of discovery and litigation was "also an extraordinarily strong public interest."²⁵¹

2. Modified Protective Order

M.L. objected to the specifics of Section 3(c)(11), alleging that allowing unlimited disclosure of her true identity to "any potential, anticipated, or actual fact witness, and their counsel, . . ." conflicted with the stated goal to balance the parties' competing interests while also providing her with meaningful protection.²⁵² She requested stronger protections such as requiring consent of the parties, a witness's signature on an acknowledgement to be bound from dissemination of disclosed information, and a specific exception regarding disclosure to her traffickers or their affiliates.²⁵³

²⁴⁷ See *id.*

²⁴⁸ *Id.* at *5–6.

²⁴⁹ *Id.* at *6.

²⁵⁰ *Craigslist*, 2020 U.S. Dist. LEXIS 250724, at *6–7.

²⁵¹ *Id.* (citing Plaintiff B. v. Francis, 631 F.3d 1310, 1315–19 (11th Cir. 2011) (recognizing privacy interests regarding identity of juvenile plaintiffs because of coerced and recorded graphic sexual activity); *Roe v. United States*, No. 1:19-cv-00270-DAD-BAM, 2020 WL 869153 (E.D. Cal. Feb. 20, 2020) (recognizing privacy of mental health information)).

²⁵² Plaintiff's Motion for Modification or Objection to the Protective Order at 1–2, *Craigslist*, No. 3:19-cv-06153 (W.D. Wash. July 22, 2020) (quoting Protective Order, *Craigslist*, No. 3:19-cv-06153, 2020 U.S. Dist. LEXIS 250732, at *7 (W.D. Wash. July 8, 2020)).

²⁵³ *Id.* at 4.

The court considered M.L.'s request and the defendants' responses before modifying the protective order.²⁵⁴ The court specifically described the goal of the protective order as

preventing plaintiff's "sex trafficking perpetrator(s) [from] obtain[ing] information about her identity, contact information, location of her residence, or other private information" while also allowing defendants a meaningful recourse to disclose plaintiff's identity to plaintiff's known traffickers or traffickers' known affiliates, if necessary, through either an agreement of the parties, a contested motion to the Court, or resort to a Special Master under Fed. R. Civ. P. 53.²⁵⁵

Therefore, the court modified Section 3(c)(11) to include an exception for M.L.'s known traffickers or their affiliates (traffickers).²⁵⁶ The court required the party seeking to disclose M.L.'s true identity to her traffickers to submit a request and obtain a court order before making any disclosure.²⁵⁷ That request could be submitted either as a stipulated motion or a contested motion that described the circumstances surrounding the proposed disclosure to the court.²⁵⁸ The court clarified that the modified protective order prohibited the parties from disclosing M.L.'s true identity to anyone not listed in the protective order without an order allowing such disclosure.²⁵⁹ The court reasoned that these modifications fulfilled the goal of protecting M.L. while also allowing defendants reasonable recourse to disclose her true identity if necessary.²⁶⁰

The defendants raised various objections to these modifications, but the court denied those objections.²⁶¹ They challenged the modifications as contrary to law based on impairment of discovery, forced disclosure of work product, and allegations that M.L. did not show sufficient, specific good cause.²⁶² The district court found that the modifications were not clearly

²⁵⁴ See *M.L. v. Craigslist, Inc.*, No. 3:19-cv-06153, 2020 U.S. Dist. Lexis 250723 (W.D. Wash. Aug. 3, 2020).

²⁵⁵ *Id.* at *7.

²⁵⁶ *Id.* at *7-8.

²⁵⁷ *Id.* at *8.

²⁵⁸ *Id.* at *7-8.

²⁵⁹ *Id.*

²⁶⁰ *Craigslist*, 2020 U.S. Dist. Lexis 250723, at *6-7.

²⁶¹ *M.L. v. Craigslist, Inc.*, No. 3:19-cv-06153, 2020 U.S. Dist. LEXIS 175472, at *6-9 (W.D. Wash. Sept. 24, 2020).

²⁶² *Id.*

erroneous or contrary to law by impairing discovery or forcing disclosure of work product because the magistrate judge had “carefully and thoughtfully balanced the concerns of all parties in the modification.”²⁶³ The district court also found that the modifications were not contrary to law because M.L. had articulated her reasoning in her request for modification of the protective order.²⁶⁴ This articulated reasoning was sufficient to support the modification because Ninth Circuit precedent requires substantiation of allegations of harm by either specific examples or articulated reasoning.²⁶⁵

IV. PROPOSED RECONCILIATION OF STANDARDS FOR PLAINTIFF IDENTITY PROTECTIVE ORDERS

The District Court for the Western District of Washington noted that district court judges in similar cases acted within their discretion by balancing their parties’ competing interests and issuing case-specific protective orders.²⁶⁶ This directly addressed Craigslist’s arguments, similar to those raised by other parties in other cases, that there should be some consistency in the requirements of protective orders regarding the disclosure of the plaintiff’s true identity across federal district courts hearing similar cases.²⁶⁷ This expectation or desire for consistency becomes particularly meaningful upon realization that Wyndham is a defendant in all three of the cases considered here.²⁶⁸ Therefore, Wyndham is being required to litigate at least three ongoing lawsuits in three different federal district courts under three different protective orders.²⁶⁹

It is important to remember that each protective order is based on the discretion of the court and is responsive to the specific parameters of the case.²⁷⁰ However, many of the variations between the protective orders can be ascribed to differences in procedure; the basis of the request; and the specific order or timing of the requests, modifications, or amendments to the protective order. A Model Protective Order²⁷¹ would provide plaintiffs and

²⁶³ *Id.* at *9.

²⁶⁴ *Id.* at *7–8 (citing *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992)).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at *10.

²⁶⁷ See *Craigslist*, 2020 U.S. Dist. LEXIS 175472, at *10.

²⁶⁸ M.A. Complaint, *supra* note 9, at 1; A.D. Complaint, *supra* note 9, at 1; Craigslist Complaint, *supra* note 9, at 2.

²⁶⁹ See M.A. Complaint, *supra* note 9, at 1; A.D. Complaint, *supra* note 9, at 1; Craigslist Complaint, *supra* note 9, at 2.

²⁷⁰ See discussion *supra* Sections II.A.2, II.B.

²⁷¹ See *infra* Appendix A.

defendants with common ground from which to begin during their required FRCP 26 conference.²⁷²

A. *Allowing Sex-Trafficked Plaintiff to Proceed Under a Pseudonym*

All the courts above allowed the plaintiff to proceed under a pseudonym during the litigation. This protected the confidentiality of plaintiff's true identity during and after litigation, in court filings, and public court proceedings. In each case the plaintiff recognized and agreed that choosing to file suit meant she must disclose her true identity and that of any traffickers to the defendants. The court's decision to allow the sex-trafficked plaintiff to proceed under a pseudonym is a necessary, but not sufficient, step towards providing increased safety from retaliation to the sex-trafficked plaintiff.²⁷³

B. *Protecting Plaintiff Identity and Identifying Information in Discovery*

The real conflict is occurring in the question of how and to what extent the plaintiff's true identity should be protected during discovery. Plaintiffs are understandably wary of potential misuse of their identifying information during discovery as a means for the defendant to annoy, embarrass, oppress, or unduly burden them by disclosing their identity or sufficient identifying information to third parties. Sex-trafficked plaintiffs fear they may be socially or economically stigmatized by their community if that community learns of their status as formerly sex-trafficked persons. They also fear physical harm to themselves or their loved ones from their trafficker, their trafficker's friends, or their trafficker's gang.²⁷⁴ Further, unnecessary confrontation with persons associated with the plaintiffs' time being trafficked may cause further psychological trauma when they are already vulnerable and traumatized.²⁷⁵

²⁷² FED. R. CIV. P. 26(c)(1) (requiring certification that the moving party has conferred or attempted to confer in good faith with other affected parties before moving for a protective order).

²⁷³ See Rachel J. Wechsler, *Deliberating at a Crossroads: Sex Trafficking Victims' Decisions About Participating in the Criminal Justice Process*, 43 *FORDHAM INT'L L.J.* 1033, 1062 (2020) (recognizing the risk of potential retaliation against victims identified by name in official documents in the Netherlands).

²⁷⁴ *Id.* at 1049–50 (relating fear of violent retaliation as an important concern due to past violence, weapons possession, or past threats of future violence).

²⁷⁵ Elizabeth M. Donovan, *Fight Online Sex Trafficking Act and Stop Enabling Sex Traffickers Act: A Shield for Jane Doe*, 52 *CONN. L. REV.* 85, 94–97 (2020) (citing a 2014 study of health consequences of female domestic sex-trafficking victims where almost all study participants reported at least one psychological issue while trafficked and high rates of attempted suicide).

C. *Utilizing a Master*

A potential solution to resolve party disputes regarding disclosure of the plaintiff's true identity during discovery is a court appointed master under FRCP 53. A master would benefit the parties and the court through the increased, focused time the master could spend examining and considering the parties arguments regarding the necessity of a particular disclosure. This attention to detail would ensure the parties' and public's interests were carefully balanced in each decision by a neutral specialist. While a master could significantly increase discovery costs for the parties,²⁷⁶ the master may choose to serve pro bono because of the importance of protecting a sex-trafficked victim from further harm during discovery while protecting the defendant's right to fully investigate the allegations in order to prepare a full and fair defense. The option of a master serving pro bono makes utilization of a master a viable and attractive choice for managing these complex discovery issues.

V. CONCLUSION

As the court in *M.L. v. Wyndham* so astutely noted, the need to protect a sex-trafficked survivor from further harm during litigation is not just the sex-trafficked plaintiff's interest but is also an "extraordinarily strong public interest."²⁷⁷ Congress could declare that sex-trafficked victims that seek civil remedies under the current version of the TVPRA have the right to specific protections related to disclosure of their true identities during discovery. Short of that specific congressional action, until the Supreme Court or Congress declares that civil plaintiffs have a right to access the courts without fear of harm and enact protections, the district and circuit courts must continue to determine which barriers to litigation are unreasonable.

It is possible to balance the plaintiff's interest in safely accessing the court to press her claim, the defendant's interest in thoroughly investigating the plaintiff's claim through discovery, the public's interest in open judicial proceedings, and the public's interest in protecting vulnerable plaintiffs from further harm during litigation. The resulting model protective order is not simple and fully pleases neither the sex-trafficked plaintiff nor the defendant corporations, but it does maximize protection for the sex-trafficked plaintiff while allowing the corporate defendants recourse to the courts by motion or court-appointed master to facilitate needed discovery.

²⁷⁶ See FED. R. CIV. P. 53(g).

²⁷⁷ *M.L. v. Craigslist, Inc.*, No. 3:19-cv-06153, 2020 U.S. Dist. LEXIS 250724, at *7 (W.D. Wash. July 8, 2020).

It is time for the judicial system to recognize the significant barriers that restrict access to the courts for sex-trafficked individuals, regardless of age; and its need to facilitate, to the best of their ability, a method of discovery that protects the identity and future of the sex-trafficked plaintiff while also providing the defendant corporation with sufficient opportunity to investigate the claims against them.

APPENDIX A

*Proposed Model Protective Order*²⁷⁸

1. Protection of Plaintiff's Identity in Public Court Records and Public Proceedings

The Court finds a compelling interest in plaintiff's privacy and safety, and that a protective order is necessary for plaintiff to avoid having the sex-trafficking perpetrator(s) obtain information about her identity, contact information, location of her residence, or other private information. The Court will allow plaintiff to proceed pseudonymously under the initials "[X.X.]" or "plaintiff" in all filings and all public Court proceedings.

The parties shall refer to plaintiff's alleged trafficker as "Alleged Trafficker" in all public filings. In the case of multiple alleged traffickers, the parties shall refer to them as "Alleged Trafficker A," "Alleged Trafficker B," etc., and these designations shall remain consistent throughout all filings in these proceedings.

If any party or third-party has access to information about plaintiff's identity and asserts a need to identify the plaintiff during a public Court proceeding or in a public filing, that Party or third-party is required, before making any identifying communication, to seek an order from the Court to seal the proceeding, and/or file a redacted document, or file a motion to seal the record. If any party or third-party has questions about whether any forthcoming filing or communication in connection with a Court proceeding is in compliance with the requirements of this Protective Order, they should move the Court for a determination of compliance prior to submitting any such filing or making any such communication. The parties, as well as their agents, employees, and assigns, shall not disclose plaintiff's true identity during or after the conclusion of this matter.

²⁷⁸ All material contained in this section is copied, compiled, and edited from language used in various protective orders and proposed protective orders. *See generally* Proposed Protective Order, *M.A. v. Wyndham Hotels & Resorts, Inc.*, No. 2:19-cv-00849 (S.D. Ohio May 7, 2019), ECF No. 44-1; Stipulated Protective Order, *M.A.*, No. 2:19-cv-00849 (S.D. Ohio June 5, 2019), ECF No. 60-1; Protective Order, *A.D. v. Wyndham Hotels & Resorts, Inc.*, No. 4:19-cv-120 (E.D. Va. July 30, 2020); Amended Protective Order, *A.D.*, No. 4:19-cv-120 (E.D. Va. Sept. 21, 2020); Protective Order, *M.L. v. Craigslist, Inc.*, No. 3:19-cv-06153 (W.D. Wash. July 8, 2020); Order Modifying Protective Order Concerning Plaintiff's Identity, *M.L.*, No. 3:19-cv-06153 (W.D. Wash. Aug. 3, 2020).

2. Protection for Plaintiff's Identity During Discovery and Case Preparation

Counsel for plaintiff shall provide to the respective counsel for the defendants the plaintiff's true identity and identifying information upon the entry of this Protective Order by the Court. As used in this Protective Order, the term "true identity" includes:

- (A) Name and any alias names used at any time;
- (B) Date of birth;
- (C) Social Security Number;
- (D) Current address and any prior addresses of residence from [year] to present; and

(E) Information, data, or tangible items that would physically or electronically allow direct or indirect access to: plaintiff's name, alias name(s), date of birth, Social Security Number, identifying physical attributes such as biometric data or photographs showing unique physical attributes of plaintiff, physical address of residence or workplace, or other personal private identification information which by a reasonable probability could be used to identify or locate plaintiff.

Plaintiff shall clearly mark any materials or information that contain plaintiff's true identity with the term "TRUE IDENTITY" and the parties shall follow the procedures and requirements of this Protective Order concerning any materials or information containing references to plaintiff's true identity.

The parties are prohibited from disclosing plaintiff's true identity to any person or entity other than those listed in this Protective Order. If the parties believe they have good cause to make a disclosure that is not authorized under the terms of this Protective Order, they may bring a motion to the Court for an order allowing disclosure.

Parties may disclose plaintiff's true identity to the following:

- (1) the parties to this litigation, including any employees, agents, and representatives of the parties as needed to litigate any claims or defenses;
- (2) counsel for the parties and employees, agents, and representatives of counsel as needed to litigate any claims or defenses;
- (3) the Court, court personnel, and members of the jury;

(4) court reporters, recorders, and videographers engaged for depositions, but before any disclosure to such persons, the person must sign the acknowledgement and agreement to be bound;

(5) any mediator appointed by the Court or jointly selected by the parties;

(6) any expert witness, outside consultant, or investigator, retained by counsel for a party specifically in connection with this litigation, but plaintiff's true identity may be disclosed to such individual(s) only to the extent that plaintiff's true identity will assist the individual(s) in the scope of their work with counsel in connection with this case;

(7) any custodian of records, but only to the extent that plaintiff's true identity will assist the custodian in obtaining and producing records;

(8) independent providers of document reproduction, electronic discovery, or other litigation services retained or employed specifically in connection with this litigation, but before any disclosure to such individual(s), the individual must sign the acknowledgement and agreement to be bound;

(9) government agencies and agency personnel, but only to the extent that the disclosure of plaintiff's true identity is necessary to litigate any claims or defenses or to comply with any obligations or requirements;

(10) insurers for any of the parties, including coverage counsel for the insurers, who may provide indemnity or other coverage in connection with claims asserted in this case, but before any disclosure to such individual(s), the individual must sign the acknowledgement and agreement to be bound; and

(11) any potential, anticipated, or actual fact witness, and their counsel, but only to the extent plaintiff's true identity will assist the witness in recalling, relating, or explaining facts or in testifying— except that plaintiff's true identity must not be disclosed to plaintiff's known trafficker(s) or plaintiff's traffickers' known affiliate(s), unless the parties follow the procedures in sub-paragraph (12) below;

(12) plaintiff's known trafficker(s) or plaintiff's traffickers' known affiliate(s) and their counsel, but only to the extent plaintiff's true identity will assist the witness in recalling, relating, or explaining facts or testifying; disclosure shall not be made prior to the time of the interview, deposition, or testimony; such disclosure is authorized only if the party requests and obtains a Court order before making any disclosure. The moving party must file a motion describing the circumstances to the Court. Before filing a contested

motion, the parties must first meet and confer, and if they reach agreement, they may submit a stipulated motion to the Court requesting such an order.

Notwithstanding the provisions of this Protective Order concerning plaintiff's true identity, the defendants may request from plaintiff during the course of discovery any other information that is linked (or linkable) to the true identity of plaintiff—such as, but not limited to: medical, educational, financial, employment, or other information. Nothing in this Protective Order relieves plaintiff of the obligation to produce discoverable documents or information that plaintiff would otherwise be required to produce in the normal course of discovery.

The protections conferred by this Protective Order do not cover information that is in the public domain or becomes part of the public domain through trial or otherwise.