

1 **BETTS, PATTERSON & MINES P.S.**
Christopher W. Tompkins (WSBA #11686)
2 CTompkins@bpmlaw.com
3 701 Pike Street, Suite 1400
Seattle, WA 98101-3927

4 **BLANK ROME LLP**
5 Henry F. Schuelke III (admitted *pro hac vice*)
6 HSchuelke@blankrome.com
7 600 New Hampshire Ave NW
Washington, DC 20037

8 James T. Smith (admitted *pro hac vice*)
9 Smith-jt@blankrome.com
10 Brian S. Paszamant (admitted *pro hac vice*)
11 Paszamant@blankrome.com
One Logan Square, 130 N. 18th Street
Philadelphia, PA 19103

12 **UNITED STATES DISTRICT COURT**
13 **FOR THE EASTERN DISTRICT OF WASHINGTON**
AT SPOKANE

14 SULEIMAN ABDULLAH SALIM,
15 MOHAMED AHMED BEN SOUD,
16 OBAID ULLAH (as personal
representative of GUL RAHMAN),

17 Plaintiffs,

18 vs.

19 JAMES ELMER MITCHELL and
20 JOHN "BRUCE" JESSEN,

21 Defendants.

NO. 2:15-CV-286-JLQ

**DEFENDANTS' MOTION FOR A
PROTECTIVE ORDER RE:
MANUSCRIPT AND
MANUSCRIPT DRAFTS**

NOVEMBER 10, 2016
WITHOUT ORAL ARGUMENT

22
DEFENDANTS' MOTION FOR
PROTECTIVE ORDER RE: MANUSCRIPT
AND MANUSCRIPT DRAFTS
NO. 2:15-CV-286-JLQ

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927

I. INTRODUCTION AND BACKGROUND

Defendants James Elmer Mitchell (“Dr. Mitchell”) and John “Bruce” Jessen (collectively, “Defendants”) request that the Court enter a very limited order protecting from disclosure: (1) the final manuscript of a book co-authored by Dr. Mitchell that is currently pending publication; and (2) non-final drafts of some or all of the aforementioned manuscript. Entry of such an Order is reasonable in light of the profound consequences to Dr. Mitchell and the manuscript’s publisher in the event that the manuscript, or some of its content, is made publicly available prior to the manuscript’s official publication. Plaintiffs oppose entry of such an Order due solely to their belief that the Court prefers to have matters of this variety addressed through agreement rather than order, thereby necessitating this Motion.¹

Dr. Mitchell began writing a manuscript (the “Manuscript”) about his work with the United States Central Intelligence Agency’s (“CIA”) Rendition, Detention and Interrogation Program (the “Program”) before Plaintiffs commenced the current action. *See* Declaration of Tina Constable (“Constable Decl.”) ¶ 3, submitted herewith. Dr. Mitchell sold all rights to the Manuscript’s publication to Crown Forum, an imprint of the Crown Publishing Group, a division of Crown Random House LLC (“Crown”), and has subsequently worked with Crown’s editors to finalize the Manuscript. *Id.* ¶¶ 3-4. The Manuscript has not yet been

¹ *See* Declaration of Brian S. Paszamant (“Paszamant Decl.”) ¶ 7, Ex. 2, submitted herewith; ECF No. 51 at 1.

1 published, and is scheduled to be published by Crown during the first quarter of
2 2017. *Id.* ¶ 7.

3 Plaintiffs seek production of the Manuscript and all drafts thereof in
4 discovery. And, although Defendants remain ready and willing to produce the
5 requested documents, they (and Crown) desire to ensure that such information is
6 adequately protected from disclosure to third parties, disclosure that would cause
7 potentially incalculable harm to Crown and Dr. Mitchell. *Id.* ¶¶ 8-12.

8 Pursuant to the Court’s June 15, 2016 Order re: Case Management
9 Procedures, Defendants and Plaintiffs worked diligently to achieve an agreement
10 governing the production of confidential information generally. Paszaman Decl.
11 ¶¶ 3-7. And, on September 26, 2016, the parties finalized this agreement (the
12 “Confidentiality Agreement”). *Id.* ¶ 3, Ex. 1.

13 Although the Confidentiality Agreement affords adequate protection for
14 confidential information generally, Defendants and Crown believe that additional
15 protection – protection afforded by the entry of a very limited protective order – is
16 warranted for: (1) the Manuscript; and (2) drafts of the Manuscript or portions
17 thereof (collectively, the “Manuscript Items”). The Manuscript Items require
18 protection beyond the Confidentiality Agreement because they are not Dr.
19 Mitchell’s property, but rather the property of a third party, Crown which seeks the
20 additional protection provided by an order from this Court, in contrast to an
21 agreement between the parties. Constable Decl. ¶¶ 13-14. The Manuscript has not
22 yet been published and will not be published for several months. *Id.* ¶ 7. As such,

1 Crown and Dr. Mitchell have a significant interest in having the Manuscript Items
2 remain undisclosed until some point post-publication so that they may realize, *inter*
3 *alia*, the full monetary value inherent in the Manuscript's initial publication. *Id.* ¶

4 4. Moreover, Dr. Mitchell's and Crown's premature disclosure concerns are only
5 heightened by the significant interest that the media has shown in this action,
6 Plaintiffs' counsel's apparent intention to liaise with the media concerning
7 developments in this action through press releases and other communications with
8 the media, as well as the fact that certain items exchanged during discovery in this
9 action to date have already found their way to the media. *See* Paszamant Decl. ¶ 9.

10 Defendants request that the Court enter the Protective Order re: Manuscript
11 and Manuscript Drafts submitted herewith to protect the significant and unique
12 interests that Defendants and Crown have in ensuring that the Manuscript and its
13 contents not be prematurely disclosed.² The Proposed Order is narrowly tailored to
14 protect only these interests.

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20 ² Defendants note that the Proposed Confidentiality Order submitted with their
21 Motion tracks the parties' Confidentiality Agreement, differing only in its more
22 narrow scope and contemplated designation method. *Id.* ¶ 3 Ex. 1.

II. ISSUE PRESENTED

The Court should enter the Protective Order submitted herewith prohibiting the disclosure of the Manuscript Items to adequately protect Dr. Mitchell’s and Crown’s property interests.

III. EVIDENCED RELIED UPON

Defendants’ Motion is based on the Paszamant Decl. and the Constable Decl. and items affixed thereto, as well as the records and pleadings on file with the Court.

IV. ARGUMENT

A. Applicable Legal Standard

Federal Rule of Civil Procedure 26(c)(1) enables the Court to issue protective orders for good cause, “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]” The Ninth Circuit has instructed that “good cause” exists when “a specific prejudice or harm” will result absent entry of a protective order. *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210–11 (9th Cir. 2002).

Although it falls within the “broad discretion of the trial court to decide when a protective order is appropriate and what degree of protection is required”, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984), *see Cabell v. Zorro Prods., Inc.*, 294 F.R.D. 604, 610 (W.D. Wash. 2013), protective orders are routinely entered to prevent disclosure of trade secrets, confidential research, and

1 commercial information pursuant to Rule 26(c)(1)(G). *See, e.g., Takata v.*
2 *Hartford Comprehensive Employee Ben. Serv. Co.*, 283 F.R.D. 617, 621-22 (E.D.
3 Wash. 2012) (finding good cause for an order protecting the movant’s technical
4 reference tools and best practices because disclosure would dissolve the company’s
5 competitive advantage), *Algaier v. Bank of Am., N.A.*, No. 13-CV-0380-TOR, 2015
6 WL 3795909, at *2 (E.D. Wash. June 18, 2015) (finding without entry of a
7 protective order Defendant could be placed at a competitive disadvantage with
8 other loan servicers if certain information was disclosed), *K.S. ex rel. Isserlis v.*
9 *Ambassador Programs, Inc.*, No. CV-08-243-RMP, 2010 WL 605274, at *2 (E.D.
10 Wash. Feb. 18, 2010) (permitting the redaction of information that could damage
11 the defendants’ competitiveness in the market). Protection has also been afforded
12 to materials not specifically enumerated within Rule 26, such as medical and
13 psychiatric records, grand jury materials, and confidential settlement agreements.
14 *See Phillips*, 307 F.3d at 1212 (collecting cases).

15 Following a finding of good cause, public and private needs must be
16 balanced to determine whether a protective order is necessary. *See Foltz v. State*
17 *Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). Relevant factors
18 used in conducting this assessment include the “public interest in understanding the
19 judicial process and whether disclosure of the material could result in improper use
20 of the material for scandalous or libelous purposes or infringement upon trade
21 secrets.” *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995).

1 **B. Entry of a Limited Protective Order Is Needed to Properly Safeguard**
2 **the Unpublished Manuscript Items**

3 “It is well established that the fruits of pretrial discovery are, in the absence
4 of a court order to the contrary, presumptively public.” *San Jose Mercury News,*
5 *Inc. v. U.S. District Court*, 187 F.3d 1096, 1103 (9th Cir. 1999). Here, Dr.
6 Mitchell’s and Crown’s significant interests in preventing the dissemination of the
7 Manuscript Items to third-parties prior to the Manuscript’s publication justify the
8 Court’s entry of the limited Protective Order submitted herewith.

9 As detailed above, Crown paid Dr. Mitchell for the property rights in the
10 Manuscript so that it would have the exclusive right to publish the Manuscript
11 when and as it sees fit. Constable Decl. ¶ 4. Crown has also worked extensively
12 with Dr. Mitchell to edit and finalize the Manuscript, preparing it for publication
13 during the first quarter of 2017 with sales anticipated to occur in bookstores
14 throughout the United States, as well as online. *Id.* ¶¶ 3-4, 7.

15 If the Manuscript Items become publicly available, it will undeniably cause
16 significant monetary harm to both Dr. Mitchell and Crown, harm that will be
17 difficult, if not impossible, to properly or fully calculate. *Id.* ¶¶ 9-12. Simply put,
18 if the Manuscript—or drafts thereof—are made publicly available at no cost far
19 fewer consumers will purchase the Manuscript containing the same or similar
20 content. *Id.* ¶ 9. Consequently, sales of the Manuscript will suffer and Crown and
21 Dr. Mitchell will be significantly harmed. *Id.* ¶¶ 9-10.

1 Even more, this harm will be difficult, at best, to calculate and cannot be
2 undone. Specifically, because the Manuscript has not yet been published, it will be
3 difficult to determine the lost sales directly attributable to the public release of the
4 Manuscript—or any draft or portion thereof. *Id.* ¶ 10. And once the Manuscript
5 becomes publicly available, it will likely be impossible to prevent its unauthorized
6 dissemination, especially over the Internet. *Id.* ¶ 12. Furthermore, the early
7 release of the Manuscript Items will likely disrupt publicity and marketing plans
8 that Crown strategically schedules to coincide with the release of the Manuscript,
9 which could result in the cancelation of television and media appearances intended
10 to launch the publication—efforts that are critical to the successful promotion and
11 sale of the Manuscript. *Id.* ¶ 11. This significant harm to Dr. Mitchell and Crown
12 can be easily addressed, and hopefully avoided, through entry of the narrow
13 protective order submitted herewith that covers only the Manuscript Items. *See In*
14 *re NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. 12-mc-
15 00508, 2012 WL 4856968, at *4 (E.D. Miss. Oct. 12, 2012) (entering protective
16 order to govern production of an unpublished article).

17 The Confidentiality Agreement is insufficient to adequately protect the
18 Manuscript Items. Given the significant public interest in this action to date, a
19 protective order is needed. *See generally* Paszamant Decl. ¶¶ 9-10 (identifying
20 media coverage of this action and Plaintiffs’ counsels’ participation in such
21 coverage). If the Manuscript or any portion thereof is leaked to the media or
22 another third-party, the power and authority of a protective order will be more

1 likely to prevent further dissemination. *See* Constable Decl. ¶ 14. A
2 confidentiality agreement between the parties, however, will not likely have the
3 same effect because it does not carry the same weight as this Court’s order and
4 may not be binding on third-parties. Indeed, other documents disclosed during
5 discovery in this action have quickly been obtained by the media and publicly
6 disclosed. Paszamant Decl. ¶ 9. Were this to occur with regard to the Manuscript
7 Items, Crown and Dr. Mitchell will incur significant, and potentially incalculable,
8 harm. Constable Decl. ¶¶ 8-12. It is this harm, the possibility of which can be
9 lessened, if not be avoided altogether, that justifies entry of the protective order
10 submitted herewith to govern production of the Manuscript Items.

11 Plaintiffs oppose the entry of the requested Protective Order solely based on
12 their understanding that the Court generally prefers not to incorporate parties’
13 discovery agreements into orders. Plaintiffs point to this Court’s decision in *P.D.*
14 *v. United States*, No. CV-11-192-JLQ, 2011 U.S. Dist. LEXIS 146334 (E.D. Wash.
15 Dec. 7, 2011) (J. Quackenbush), to contend that the Court is not amenable to
16 entering a protective order to govern the Manuscript Items. *See* Paszamant Decl. ¶
17 4, Ex. 3. But, *P.D.* is inapposite to the present situation. Unlike the situation
18 confronting the Court in *P.D.*, Defendants are not requesting entry of a broad
19 protective order covering materials that the moving party had not yet reviewed. *Id.*
20 at *5-7. Moreover, while the Court refused to enter a protective order in *P.D.*, the
21 Court nevertheless established procedures to protect and “expedite the flow of
22 discovery material...” *Id.* at *7.

1 Here, Defendants seek entry of a very narrowly-tailored protective order
2 covering only the Manuscript Items. It is only these very specific items which if
3 disclosed to third parties will cause specific and significant, and potentially
4 incalculable harm such that they warrant protection by order of the Court—beyond
5 an agreement between the parties—to ensure they are not released.

6 **V. CONCLUSION**

7 For the foregoing reasons, Defendants’ Motion should be granted.

8 DATED this 11th day of October, 2016.

9 BETTS, PATTERSON & MINES P.S.

10 By: s/ Christopher W. Tompkins

11 Christopher W. Tompkins, WSBA #11686

12 ctompkins@bpmlaw.com

13 Betts, Patterson & Mines, P.S.

14 701 Pike Street, Suite 1400

15 Seattle WA 98101-3927

16 Henry F. Schuelke III, admitted *pro hac vice*

17 hschuelke@blankrome.com

18 Blank Rome LLP

19 600 New Hampshire Ave NW

20 Washington, DC 20037

21 James T. Smith, admitted *pro hac vice*

22 smith-jt@blankrome.com

Brian S. Paszamant, admitted *pro hac vice*

paszamant@blankrome.com

Blank Rome LLP

One Logan Square, 130 N 18th Street

Philadelphia, PA 19103

Attorneys for Defendants Mitchell and Jessen

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

<p>Emily Chiang echiang@aclu-wa.org ACLU of Washington Foundation 901 Fifth Ave, Suite 630 Seattle, WA 98164</p>	<p>Paul Hoffman hoffpaul@aol.com Schonbrun Seplow Harris & Hoffman, LLP 723 Ocean Front Walk, Suite 100 Venice, CA 90291</p>
<p>Andrew L. Warden Andrew.Warden@usdoj.gov Senior Trial Counsel United States Department of Justice Civil Division, Federal Programs Branch 20 Massachusetts Ave NW Washington, DC 20530</p>	<p>Steven M. Watt, admitted <i>pro hac vice</i> swatt@aclu.org Dror Ladin, admitted <i>pro hac vice</i> dladin@aclu.org Hina Shamsi, admitted <i>pro hac vice</i> hshamsi@aclu.org ACLU Foundation 125 Broad Street, 18th Floor New York, NY 10007</p>
<p>Avram D. Frey, admitted <i>pro hac vice</i> afrey@gibbonslaw.com Daniel J. McGrady, admitted <i>pro hac vice</i> dmcgrady@gibbonslaw.com Kate E. Janukowicz, admitted <i>pro hac vice</i> kjanukowicz@gibbonslaw.com Lawrence S. Lustberg, admitted <i>pro hac vice</i> llustberg@gibbonslaw.com Gibbons PC One Gateway Center Newark, NJ 07102</p>	

By s/ Shane Kangas
Shane Kangas
skangas@bpmlaw.com
Betts, Patterson & Mines, P.S.