UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY, *Plaintiff,* v. LILLIAN MILLS, in her official capacity as Dean of the McCombs School of Business at the University of Texas at Austin; ETHAN BURRIS, in his official capacity as Senior Associate Dean for Academic Affairs of the McCombs School of Business at the University of Texas-Austin; and CLEMENS SIALM, in his official capacity as Finance Department Chair for the McCombs School of Business at the University of Texas-Austin, *Defendants.*	§	CIVIL ACTION NO. 1:23-cv-00129-DAE

DEFENDANTS' REPLY IN SUPPORT OF THEIR OPPOSED MOTION FOR ENTRY OF WESTERN DISTRICT STANDARD PROTECTIVE ORDER

Lillian Mills, Ethan Burris, and Clemens Sialm ("Defendants") request that the Court grant their motion (Dkt. 73) and enter the Standard Confidentiality and Protective Order (Dkt. 73-1).

INTRODUCTION

Plaintiff Richard Lowery's opposition to entry of the Western District's Standard Confidentiality and Protective Order essentially boils down to complaints that: (1) no one at the University—not even its in-house attorneys or others defending against this lawsuit—should be permitted access to Plaintiff's communications because they cannot be trusted to comply with the express requirement that any information obtained be used only for purposes of the litigation, (2) the Standard Protective Order should pre-determine the classification status of documents that Plaintiff would like to designate Attorney's Eyes Only, and (3) the Court should erase the distinctions between discovery disclosures and the Texas Public Information Act. *See generally* Dkt. 77 (Plaintiff's Brief in

Opposition, hereafter "Opposition"). Plaintiff's arguments do not warrant a departure from the Standard Protective Order. Moreover, despite refusing to agree to Defendants' proposal for the order, Plaintiff suggests he will wait to file a motion seeking entry of his proposed order only after the Court rules on pending discovery disputes. Opposition at 10. But discovery is ongoing and depositions of Defendants have begun, so prompt entry of a protective order is imperative to protect the rights of all parties.[1]

BACKGROUND

Plaintiff has propounded five separate sets of discovery requests. And he has recently deposed Defendant Burris and former-Defendant Titman. Both the written requests and the questions asked at the depositions have inquired into irrelevant topics that are confidential in nature (for example, non-party personnel matters and matters potentially raising issues under the Family Educational Rights and Privacy Act). Defendants ultimately believe these document requests are irrelevant, but they require a protective order should the Court require production. And Defendants need the capability to designate deposition testimony as confidential and maintain its confidential nature.

ARGUMENT AND AUTHORITIES

The Court may enter a protective order to protect "confidential, sensitive, or private information" from public disclosure and "from use for any purpose other than prosecuting this litigation[.]" *E.g. Angus v. Mayorkas*, No. 1:20-CV-00242-LY-SH, Dkt. 52 (W.D. Tex. Nov. 17, 2021); *see also* F.R.C.P. 26(c)(1) and Local Rule CV-26(c). Discovery sought, and deposition testimony given, has already involved "confidential, sensitive, and private information" warranting protection. And if Plaintiff's recent requests are any indication as to where he intends to take this litigation, future depositions and discovery requests will continue to pursue confidential information from Defendants

[1] In the event that Plaintiff files a cross-motion seeking entry of his proposed order, Defendants will timely and fully respond to any arguments made in the cross-motion.

and others. Accordingly, Defendants request that the Court enter its Standard Confidentiality and Protective Order without alteration for this case. Dkt. 73-1.

But Plaintiff opposes entry of the Standard Protective Order because he wants an order that: (1) precludes any University employee, including in-house counsel defending this case, from seeing documents that are plainly relevant to Defendants' defense in this case (as one example, communications that would help the Court determine whether and to what extent Lowery did self-chill his speech), (2) explicitly defines "Attorneys Eyes Only" to broadly cover communications by Lowery that are not typically considered to be AEO material (and of the type that that Lowery has already publicly disclosed when made by others), and (3) erases the distinctions between the parameters of the Texas Public Information Act and discovery under the Federal Rules. None of this is required in the Court's protective order—put another way, entry of the Western District's Standard Protective Order would not be improper due to its failure to meet Plaintiff's demands.

1. *The Court's protective order should not hinder Defendants' ability to defend this case by keeping crucial discovery materials from UT counsel, Defendants, or other employees involved in defending against this lawsuit.*

The Court's Standard Protective Order recognizes the need for certain party employees to see confidential information. "Qualified Persons" includes "officers or employees of the party who are actively involved in the prosecution or defense of this case who . . . are bound by the terms of this Protective Order." Dkt. 73-1 at § 2. And those terms specifically safeguard the review and use of that confidential information: "[a]ll confidential information provided by any party or nonparty in the course of this litigation shall be used solely for the purpose of preparation, trial and appeal of this litigation and for no other purpose, and shall not be disclosed except in accordance with the terms of this Order." *Id.* at §4. Plaintiff's concern that UT counsel (or, for that matter, Defendants or other UT personnel "actively involved" in defending this lawsuit) will violate the terms of a protective order and use what they learn to retaliate against him has no basis in fact. And any party could shield confidential

information from litigation opponents if bare assertion of that purported fear was sufficient. Moreover, if someone did retaliate against him for his speech through the use of such disclosed materials in violation of the order, Plaintiff could then have the retaliation claim that the Court previously dismissed without prejudice, in addition to the remedies for violating the order. Plaintiff will be protected by the Standard Protective Order.

But Plaintiff wants more. He seeks to shield potentially case-dispositive documents[2] from UT's counsel, Defendants, and other University officials actively involved in defending against this case. *See* Dkt. 77-5 at 1, 4 (Lowery wants to exclude every University employee from the list of persons qualified to view information that would typically be given only a confidential designation, at most).[3] For support, Plaintiff points only to patent cases, Opposition at 6, a particular area where the risk of inadvertent future disclosure of a competitor's patent information (such as during competitive decision-making) is deemed high. *See, e.g.*, *Gen. Elec. Co. v. Mitsubishi Heavy Indus., Ltd.*, Case No. 3:10-cv-276-F, 2011 WL 13202057, *4–*5 (N.D. Tex. Feb. 1, 2012) (cited in Opposition at 6). No such unique risk of inadvertent disclosure by in-house counsel (or others) is posed here. Moreover, the cases Plaintiff cites don't otherwise move the ball in his favor: one doesn't seem to address in-house counsel and AEO materials, *VideoShare, LLC v. Google, LLC*, Case No. 6-19-CV-00663, 2001 WL 4712692 (W.D. Tex. Oct. 8, 2021), and another involved a protective order that did allow for two in-house counsel to view even AEO materials, *Indus. Print Techs. v. O'Neil Data Sys.*, Case No. 3:15-cv-01100, Case No. 3:15-cv-01101, 2016 WL 11786998, *1 (N.D. Tex. June 23, 2016).

[2] Potentially case-dispositive because they could show that Lowery hasn't actually self-chilled at all, or that any reduction in speech was due to causes other than a fear that the named Defendants would retaliate against him for speaking out, etc.

[3] Plaintiff's proposed order would do this through a two-step process: first, by elevating to AEO materials that would normally be Confidential, and second by excluding all University personnel, including its in-house counsel, from the list of persons qualified to view such discovery materials. Dkt. 77-5 at 1–4.

2. The Court should not redefine Attorney's Eyes Only material.

The Standard Protective Order appropriately draws the line between Confidential and AEO information. And in doing so, it ensures that appropriate persons can see what they need to see to enable the parties to litigate their case. But Plaintiff wants to add to the AEO category *only Plaintiff's* "private First Amendment speech and associational activities that all participants had a good-faith belief would remain private," Dkt. 77-5 at 4. This not the sort of business-competition-related information typically designated AEO, *see generally* the Standard Order with AEO provision's description of "*For Counsel or Attorneys Only*" in § 3.b, so it should be rejected outright. Moreover, Plaintiff wants the provision only for himself—he has already outed in this litigation a speaker who engaged in "private First Amendment speech . . . that all participants had a good-faith belief would remain private." *Compare* Dkt. 77-5 at 4 (Plaintiff's description of his desired protection), *with* Dkt. 69 at 1 (Plaintiff acknowledging he exposed the name of the anonymous emailer).

3. The Court should not conflate the Standard Protective Order's "generally available to the public" concept with the Texas Public Information Act's provisions.

The Texas Public Information Act (chapter 552 of the Government Code), cases interpreting the Act, and the Attorney General's Public Information determinations (*see, e.g.*, Tex. Gov't Code §§ 552.301–.306) are a completely distinct body of law from the federal discovery rules, and they serve distinct purposes. *See*, *e.g.*, Attorney General Opinion JM-1048 at 2 (1989). Plaintiff can seek public information through the provisions of Texas's PIA if he chooses, but the Court's protective order should not be used to evade compliance with the PIA's procedures, or the proper avenue for seeking and obtaining a determination whether particular information meets an exception to the PIA's disclosure requirements if Plaintiff and the University disagree as to a particular document's status. Adding the Texas PIA to the Standard Protective Order will create, rather than alleviate, confusion and potential conflict.

CONCLUSION

The Court should grant Defendants' Motion (Dkt. 73) and enter the Western District's Standard Confidentiality and Protective Order (Dkt. 73-1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2024, I caused a copy of the foregoing pleading to be served upon counsel of record for all parties via the Court's ECF system.

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