No. 20-___

IN THE

Supreme Court of the United States

JOHN DOE 7, JANE DOE 7, JUANA DOE 11, MINOR DOE 11A, SEVEN SURVIVING CHILDREN OF JOSE LOPEZ 339, AND JUANA PEREZ 43A,

Petitioners,

v.

CHIQUITA BRANDS INTERNATIONAL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rule 26(c) of the Federal Rules of Civil Procedure allows courts to grant protective orders, for good cause shown, regarding information produced by a litigant or third party. Such orders may be granted where disclosure of that information could cause harm, *e.g.*, for confidential business information such as trade secrets. Here, the district court granted a protective order regarding the plaintiffs' identities and private information, to protect them from threats of violence. Although the defendants initially stipulated to this protection, on the eve of summary judgment, they moved to lift the protections so they could disclose plaintiffs' names and other identifying information to the public. The district court granted their motion to remove the protection, holding that plaintiffs bore, but did not sustain, the burden of proving the protections remained necessary.

Deepening a three-way circuit conflict, the Eleventh Circuit held that although movants ordinarily bear the burden to show good cause when they seek to modify a protective order, the opposite rule applies when the order was stipulated by the parties. In that circumstance, the court held, the party *opposing* modification must show good cause to continue the protection.

The question presented is:

Does a party seeking to modify a stipulated Rule 26(c) protective order bear the burden of showing good cause for the modification?

PARTIES TO THE PROCEEDING

Petitioners are listed in the caption.

Jane Doe 46 was also a plaintiff-appellant in the court of appeals. She is separately represented and is not participating in this petition.

The following are also listed as plaintiffs-appellants in the court of appeals; with the exception of the Petitioners listed in the caption, they were not subject to the district court order on appeal, and are not Petitioners here:

In district court No. 07-cv-60821:

Antonio Gonzalez Carrizosa, Julie Ester Durango Higita, Liliana Maria Cardona, Maria Patricia Rodriguez, Ana Francisca Palac Moreno, et al.

In district court No. 08-cv-80421:

John Doe I, individually and as representative of his deceased father John Doe 2, Jane Doe 1, individually and as representative of her deceased mother Jane Doe 2, John Doe 3, individually and as representative of his deceased brother John Doe 4, Jane Doe 3, individually and as representative of her deceased husband John Doe 5, Minor Does #1-4, by and through their guardian John Doe 6, individually and as representative of their deceased mother Jane Doe 4, Jane Doe 6, Jane Doe 5, et. al.

In district court No. 08-cv-80465:

Jane/John Does (1-144), as Legal Heirs to Peter Does 1-144, et. al.

In district court No. 08-cv-80508:

Jose Leonardo Lopez Valencia, et al.

In district court No. 17-cv-81285:

Does, 1-11

In district court No. 18-cv-80248:

John Doe #1, individually and as representative of his deceased father John Doe 2, et al.

Petitioners believe that the only Respondent is Chiquita Brands International, Inc. The opinion of the court of appeals also lists Chiquita Fresh North America LLC as a defendant-appellee, in district court No. 07-cv-60821 only. Petitioners who are plaintiffs in other district court actions have not sued Chiquita Fresh North America LLC. No counsel filed a notice of appearance for Chiquita Fresh North America LLC at the court of appeals.

RELATED PROCEEDINGS

Proceedings directly on review:

Carrizosa v. Chiquita Brands International Inc., No. 19-11494 (11th Cir. July 16, 2020)

In re: Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Derivative Litigation, No. 08-md-01916-KAM (S.D. Fla. April 11, 2019), a multi-district litigation including the following individual cases:

No. 07-cv-60821

No. 08-cv-80421

No. 08-cv-80465

No. 08-cv-80508

No. 17-cv-81285

No. 18-cv-80248

Other related proceedings:

Cardona v. Chiquita Brands Int'l, Inc., No. 12-14898 (11th Cir. July 24, 2014)

Doe v. Chiquita Brands Int'l, Inc., No. 19-13926 (11th Cir.)

Additional related cases in the *In re: Chiquita* multi-district litigation, No. 08-md-01916-KAM (S.D. Fla.):

No. 08-cv-80480

No. 10-cv-60573

No. 10-cv-80652

No. 11-cv-80404

No. 11-cv-80405

No. 13-cv-80146

No. 17-cv-80323
No. 17-cv-80475
No. 17-cv-80535
No. 17-cv-80547
No. 18-cv-80248
No. 18-cv-80800
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No. 21-cv-60058

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PETITION FOR A WRIT OF CERTIORARI

Petitioners John Doe 7, Jane Doe 7, Juana Doe 11, Minor Doe 11A, the Seven Surviving Children of Jose Lopez 339, and Juana Perez 43A respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit (Pet. App. 1a-24a) is reported at 965 F.3d 1238. The order of the district court (Pet. App. 25a-35a) modifying the protective order is not reported but available at 2019 U.S. Dist. LEXIS 62415.

JURISDICTION

The court of appeals issued its judgment on July 16, 2020, and denied a timely petition for rehearing on December 14, 2020. This petition is timely filed within 150 days of December 14. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Federal Rule of Civil Procedure 26(c) provides:

> A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . . The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]

INTRODUCTION

This Court should resolve a three-way circuit split over the standard for modifying a stipulated protective order. Stipulation to protective orders for discovery is extremely common in cases of even modest complexity, and the rules for modification bear directly on the degree to which parties will be able to rely on such orders to actually protect sensitive information – and whether they will be willing to stipulate at all. In some cases, a lack of confidence in the durability of protective orders may even lead plaintiffs with legitimate and important claims to forgo their vindication through litigation, or defendants to settle meritless claims rather than risk the disclosure of sensitive information.

The Eleventh Circuit's decision below, which held that a party who stipulates to a protective order can nonetheless later challenge that order – without bearing any burden to show a change in circumstances or other good cause, and regardless of whether the opposing party has relied on the order – deepened a three-way circuit conflict. While the Ninth Circuit has agreed with the Eleventh Circuit's approach, the Second and Seventh Circuits take the opposite position that the party seeking modification of a stipulated order bears the burden, and a heightened one at that. The Third Circuit, meanwhile, has charted a middle path; it rejected the Second and Seventh Circuits' standard as too stringent, but still puts the burden on the movant to identify why a modification is necessary and requires the district court to take reliance interests into account.

These multifarious rules create significant uncertainty among litigants and their counsel,

including in the circuits that have yet to announce a rule. A corporation that hands over trade secrets in discovery, relying on a protective order in which its adversary agreed to keep such information confidential, reasonably expects that removing such protection will not be easy – at a minimum, that the proponent of disclosure will then bear the burden of showing why modification is justified. But the current state of the law affords no such assurance. This split further threatens to wreak havoc in multi-district cases such as this one, involving suits filed in five different circuits. The outcome of the question here should not depend on where these cases happen to have been centralized.

In the case at bar, what is at stake is not confidential business information, but the Petitioners' very lives. Their lawsuit challenges the killings of their relatives by paramilitary death squads in Colombia. The district court previously recognized that "Colombia remains an extraordinarily dangerous place to conduct litigation involving human rights abuses." Order Den. Defs.' Joint Mot. to Dismiss 7 (DE 1194).[1] For this reason, the parties and the Court had agreed that the plaintiffs' names, addresses, phone numbers, medical, and other private information would be kept confidential. Pet. App. 36a-39a. Yet on the eve of summary judgment, after the plaintiffs had disclosed all of this information in discovery, the defendants (including Respondent) sought to revoke these protections, Defs.' Expedited Mot. to Modify

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[1] Unless otherwise noted, citations to "DE" refer to the multi-district litigation docket in the district court below, *In re: Chiquita Brands Int'l, Inc. Alien Tort Statute and Shareholder Derivative Litig.*, No. 08-01916-MD-MARRA (S.D. Fla.).

Protective Order (DE 2253); the district court granted their motion. Pet. App. 1a-24a. It did not do so because the order was impeding Respondent's ability to present its defense – Respondent knew Petitioners' true identities, their addresses, and other personal information; it was just prohibited from disclosing that information to the public. Pls.' Opp. to Defs.' "Expedited" Mot. to Preclude Continued Use of Pseudonym 16-17 (DE 2277). Instead, the district court ruled that Petitioners bore the burden of justifying continued protection, applying the same standard that would have applied if the order had been contested at the outset and disregarding the reliance interests that had accrued over the two years in which the stipulated order had been in place. Pet. App. 20a-23a. In affirming, the Eleventh Circuit not only deepened a circuit conflict, but put the lives of Petitioners and thousands of similarly situated plaintiffs in these consolidated cases at risk.

STATEMENT OF THE CASE

1. Liberal discovery serves a crucial function in the adversarial model of civil litigation, which requires parties to exchange information about their claims. Thus, many of the Federal Rules of Civil Procedure are designed to encourage the free flow of all relevant information between parties.

But parties sometimes risk financial, emotional, reputational, or even physical harm from sharing information – whether that harm is from a source code being distributed to competitors, a list of patients who visited a medical clinic being exposed to the public, or an informant's name being leaked to violent criminals. Recognizing this risk, Federal Rule of Civil Procedure 26(c) permits courts, for good cause shown, to "issue

an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]"

Protective orders are ubiquitous in all types of litigation, from trade secrets cases to employment disputes and personal injury claims. Indeed, without protective orders, plaintiffs in particularly sensitive cases might choose not to pursue their claims at all. For instance, a litigant in a corporate espionage case may prefer to tolerate a limited theft of a trade secret rather than risk public disclosure for the world to see. Likewise, a sexual harassment victim may prefer to allow her abuser to go unpunished over having her name plastered across the front pages. And discovery disputes in all manner of litigation would slow significantly as parties contest producing every piece of information that opposing counsel could disseminate widely.

Equally necessary is parties' ability to stipulate to part or all of a protective order. The court then typically "determine[s] if there is good cause to issue the order," and may enter the parties' order or modify it as it sees fit. Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. Davis L. Rev. 1249, 1259-60 (2020). These stipulated protective orders reduce the burden on the courts, encouraging the speedy and efficient resolution of discovery disputes. And parties rely on these stipulated protective orders to pursue litigation and defenses, share information, and resolve cases efficiently.

While Rule 26(c) provides guidance for the entry of protective orders, the rules do not specifically authorize modification or removal of such orders. With no instruction, courts look to judge-made doctrine to

guide their discretion in modifying these orders. Those doctrines have taken into account a variety of considerations, such as the public right of access to the courts, the fundamental rights to freedom of speech and privacy, and the policies underlying the Federal Rules of Civil Procedure, including facilitating disclosures, efficiency in litigation, and reaching just results.

The resulting law has been anything but consistent or uniform. *See, e.g.*, *H.L. Hayden Co. v. Siemens Med. Sys., Inc.*, 106 F.R.D. 551, 552 (S.D.N.Y. 1985) (decrying the "chaos" in this area of law). That inconsistency and unpredictability has endured for decades now, with no end in sight.

2. While protective orders are filed, and their modification sought, for important reasons in a wide variety of cases, the stakes in this case are particularly high.

Petitioners are the family members of victims of paramilitary death squads operating in the banana-growing regions of Colombia. Pls.' Opp. to Defs.' Mot. for Summ. J. 1 (DE 2345). They have sued Respondent Chiquita Brands International, Inc., a U.S. banana company, that pled guilty in 2007 to the federal crime of illegally financing those terrorist organizations. *Id.* at 16; Gov. Sentencing Mem. (DE 2346-2).

From at least 1997 through 2004, Respondent paid the Autodefensas Unidas de Colombia (AUC) over $1.7 million to provide "security" for its Colombian banana plantations. Factual Proffer 5 (DE 2346-1); Pls.' Opp. to Defs.' Mot. for Summ. J. 5 (DE 2345). In return, the AUC suppressed labor unions and other threats to business operations as part of a larger reign of terror that resulted in thousands of gruesome

murders, rapes, and other violent crimes. Pls.' Opp. to Defs.' Mot. for Summ. J. 6-8, 38-46 (DE 2345). The Government emphasized at Respondent's September 17, 2007, sentencing hearing:

> What makes this conduct so morally repugnant is that the company went forward month after month, year after year, to pay the same terrorists. It did so knowing full well that while its farms may have been protected, and while its workers may have been protected while they literally were on those farms, Chiquita was paying money to buy the bullets that killed innocent Colombians off of those farms.

Tr. of Sentencing 29, *United States v. Chiquita Brands Int'l, Inc.*, No. 07-55 (Sept. 17, 2007, D.D.C.).

3. Thousands of family members whose loved ones were murdered by the AUC with Chiquita's support filed actions in federal court in New York, New Jersey, the District of Columbia, and Florida. Pet. App. 26a-27a. Plaintiffs alleged that Chiquita and its high-ranking executives aided and abetted the AUC's reign of terror. In February 2008, the Judicial Panel on Multidistrict Litigation coordinated these complaints for pretrial purposes in the Southern District of Florida. Compl. (DE 1). Additional complaints, including several filed in Ohio, were added to the multidistrict litigation (MDL) over the years.[2]

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[2] *E.g.*, Compl., *Does 1-976 v. Chiquita Brands Int'l, Inc.*, No. 1:10-cv-00404 (D.D.C. Mar. 9, 2010); Compl., *Montes v. Chiquita Brands Int'l, Inc.*, No. 0:10-cv-60573 (S.D. Fla. Apr. 14, 2010);

4. At the time of filing, Colombia was still beset by paramilitary violence, and it continues today – including by the successors of the very groups Chiquita funded. *See* Decl. of Adam Isacson, *John Doe 1 et al. v. Chiquita Brands Int'l, Inc., et al.*, Case No. 2:07-cv-03406- JMV-JBC (D.N.J. July 17, 2007) (DE 1-1) (describing danger to Plaintiffs in 2007 and submitting 2006 State Department Human Rights Report on Colombia); Mem. Opp. Mot. to Dismiss 5 (DE 109) (arguing that rural Colombia "until recently, was an active conflict zone, in which [Plaintiffs] would have faced (and, indeed, may still face) reprisals" for filing). Given the ongoing risk, the majority of plaintiffs sought to proceed under pseudonym, which was permitted by the filing courts.[3] At various stages, the plaintiffs submitted substantial evidence of these risks, including expert witness statements, documentation from the United Nations and from human rights organizations, and statistics on deaths of human rights defenders in Colombia. *See* Decl. of Adam Isacson, *John Doe 1 et al. v. Chiquita Brands Int'l, Inc., et al.*, Case No. 2:07-cv-03406- JMV-JBC (D.N.J. July 17, 2007) (DE 1-1 and 1-2) (submitting reports from expert, State Department Organization of American States, Human Rights Watch, Amnesty International, and newspaper reports); Pls.' Opp. to Defs.' Mot. to Dismiss 6-11 (DE 832) (submitting

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Compl., *Does 1-677 v. Chiquita Brands Int'l, Inc.*, No. 9:11-cv-80404 (S.D. Fla. Mar. 22, 2011); Compl., *Does 1-254 v. Chiquita Brands Int'l, Inc.*, No. 9:11-cv-80405 (S.D. Fla. Mar. 22, 2011).

[3] *E.g.* DE 2, *John Doe 1, et al. v. Chiquita Brands Int'l, Inc., et al.*, Case No. 2:07-cv-03406- JMV-JBC. (D.N.J.); DE 2, *Jane/John Does 1-144 v. Chiquita Brands Int'l, Inc., et al.*, Case No. 1:07-cv01048-PLF (D.D.C.).

reports from three experts, the Inter-American Commission on Human Rights, the State Department, non-governmental organizations, and newspapers); Pls.' Opp. to Defs.' "Expedited" Mot. to Preclude Continued Use of Pseudonym 4-6, 9-11 (DE 2277) (submitting reports from experts, the United Nations, Congress, the State Department, the Inter-American Human Rights Commission, newspapers, non-governmental organizations, and the Colombian government).

In November 2016, the district court acknowledged the perilous situation in Colombia. The court denied Chiquita's motion to dismiss on the basis of *forum non conveniens*, finding that the country "remains an extraordinarily dangerous place to conduct litigation involving human rights abuses," Order Den. Defs.' Joint Mot. to Dismiss 7 (DE 1194), and that "Plaintiffs' fears about retaliation from current or former members of paramilitary groups . . . are reasonably justified," *id.* at 11.

5. Shortly thereafter, in April 2017, the district court instructed the parties to submit proposed protective orders before discovery was to begin. Global Order Setting Tr. Dates and Discovery Deadlines 1 (DE 1361).

Against the backdrop of the Court's *forum non conveniens* order, both sides agreed that protections for plaintiffs' identities were warranted. The parties submitted competing orders, overlapping in material respects. Defs.' Version of Joint Proposed Protective Order (DE 1373); Pls.' Notice of Proposed Protective Order (DE 1374); Pet. App. 27a. The district court adopted portions of both parties' submissions, precluding among other things disclosure of

petitioners' names, addresses, phone numbers, email and employers, and providing specific protections for "the Pseudonymous Plaintiffs." Pet. App. 36a-39a. The order's scope was limited to "pretrial discovery," leaving for later the rules for disclosing such information at trial. Pet. App. 43a. But the order was not time-limited: unless protected information was allowed to be disclosed at trial, the protective order forbade disclosure of Petitioners' identity information indefinitely. Pet. App. 42a-43a.

6. For Petitioners, who were among a handful of "bellwether" plaintiffs, discovery proceeded under this protective order throughout 2017 and 2018. In reliance on the protective order, all plaintiffs disclosed their true identities and other private information to the defendants; no relevant information was withheld. Throughout this period, Respondent raised no concerns that the protective order was impairing its ability to defend itself. Where necessary, the parties submitted confidential information – both the plaintiffs' identities and defendants' confidential documents – under seal, without incident. *E.g.*, DE 2187; DE 2118; DE 2112; DE 2022; Pet. App. 27a.

7. In early 2019, following the close of discovery and immediately prior to summary judgment motions, defendants (including Respondent) moved to lift all protections for Petitioners' identities and private information, including their addresses and telephone numbers. Defs.' Expedited Mot. to Modify Protective Order 3 (DE 2253). They asked that their motion be considered on an expedited basis, asking the court to rule within eight days. *Id.* at 4.

The defendants did not claim that they had been denied any relevant discovery or argue that continuing

the order would prejudice their defense. Instead, they said they wanted to "publicly name their accusers" in order to "vindicate themselves in the eyes of the public." Defs.' Reply in Supp. of Expedited Mot. to Modify Protective Order 10 (DE 2292); Defs.' Expedited Mot. to Modify Protective Order 13 (DE 2253). They did not identify any change in their own circumstances justifying their abandonment of their stipulation, but cited a single document to suggest that conditions had changed in Colombia. Defs.' Expedited Mot. to Modify Protective Order 18 (DE 2253). Their only other justification was that the need for redaction was purportedly imposing a "severe" "administrative burden on the Court." *Id.* at 2, 11-12; Defs.' Reply in Supp. Of Expedited Mot. to Modify Protective Order 9 (DE 2292).

Alarmed by Respondent's plans to publicly disclose their private information, Petitioners provided voluminous evidence that the situation in Colombia had not changed since the *forum non conveniens* order in 2016 or the protective order in 2017, and that participants in human rights litigation – among other people considered "human rights defenders" – were targeted for violence. Pls.' Opp. to Defs.' "Expedited" Mot. to Preclude Continued Use of Pseudonym 3-6, 10-12 (DE 2277). In particular, Colombia led the world in killings of human rights defenders in 2017, *Id.* Ex. E (DE 2277-5); in May 2018, 73 members of the U.S. Congress noted that "a Colombian social leader is murdered every two and a half days." *Id.* Ex. D (DE 2277-4).

On April 10, 2019, the district court issued an order largely granting the defendants' motion. Pet. App. 25a-35a. The court did not find that the

defendants had met any burden to modify the protective order; it did not validate defendants' arguments as to changed conditions, administrative burdens, or their claimed need to defend themselves publicly. Instead, the court found that Petitioners had failed to show sufficient cause "to continue anonymously," placing the burden on Petitioners to justify the continuation of an existing court order. Pet. App. 32a-34a. The court then lifted all restrictions on Respondent's public disclosure of Petitioners' identities and use of "private facts," including their addresses and telephone numbers. Pet. App. 34a-35a. The district court subsequently denied a stay of its order, in which it again emphasized that in opposing modification, it was "incumbent upon the designated Plaintiffs . . . to meet their burden of proof on entitlement to anonymity." Order Den. Mot. to Stay Pending Appeal 4 (DE 2451).

The Eleventh Circuit granted a stay pending appeal, which prevented disclosure of petitioners' identities and private information for the time being. Order of USCA 4 (DE 2506).[4]

8. The Eleventh Circuit ultimately affirmed. Pet. App. 1a-24a. The court of appeals' decision rests in large part on its analysis of the burden. It accepted the district court's characterization of the order as based on a stipulation of the parties. Pet. App. 21a-22a. The court then drew a distinction between the standards for litigated and stipulated orders. The court acknowledged that it was settled that "the party moving to modify the protective order bears the

[4] The stay will remain in effect pending this Court's disposition of this petition. Order of USCA 4 (DE 2506).

burden to establish good cause for the modification" when the original order was disputed. Pet. App. 21a. However, the court held that when "faced with a motion to modify to a *stipulated* protective order," "the party seeking the stipulated order's protection must satisfy Rule 26(c)'s good cause standard." Pet. App. 20a-21a.

In applying that standard, like the district court, the Eleventh Circuit did not find that Respondent had shown good cause for modifying the protective order, or had substantiated any burdens or prejudice from continuing the protection. Instead, it held that the district court acted within its discretion in finding that Petitioners did not meet *their* burden because they did not provide compelling evidence that the risk from disclosing their identities outweighed the presumption of openness in judicial proceedings. Pet. App. 22a-24a. It gave no weight to the existence of the protective order or Petitioners' reliance on it. *Id*.[5]

The court of appeals denied Petitioners' petition for rehearing on December 14, 2020. Pet. App. 60a.

9. While the appeal was pending, the district court granted summary judgment against Petitioners in September 2019, dismissing their claims. Order on

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[5] The Eleventh Circuit considered Petitioners' ability to initially file their complaints using pseudonyms as a distinct issue from the protective order. Petitioners do not challenge that ruling here, because the protective order, which also protects the use of pseudonyms and further restricts the defendants' dissemination of identifying information, is the primary safeguard at issue.

Mot. for Sum. J. (DE 2551). Petitioners' appeal of the dismissal is pending.[6]

10. While the order at issue only directly concerns these Petitioners, it has far-reaching implications for many others in the Chiquita MDL. Earlier this year, Respondent sought to challenge anew hundreds of plaintiffs' ability to protect their identities. Mot. to Reactivate Briefing on Pseudonyms (DE 2816). The district court denied that motion only because this appeal was still pending. Order Den. Mot. to Reactivate Briefing 2 (DE 2819). These plaintiffs await this Court's decision on whether their identities should be exposed to the paramilitaries who killed their family members and continue to terrorize their country.

REASONS FOR GRANTING THE WRIT

Protective orders are entered in nearly every lawsuit of any complexity, usually based on stipulation. Requests to modify these orders arise frequently as well. But the courts of appeals are divided over who bears the burden on a modification motion and whether the protected parties' reliance on the stipulated protection matters. The result is an untenable three-way circuit split that only this Court can resolve. This case illustrates the stakes, with petitioners' very lives put at risk by the Eleventh

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[6] As the Eleventh Circuit held, the dismissal of the Petitioners' claims – even if upheld on appeal – does not render this issue moot, because protection of their identities is distinct from their substantive claims. Pet. App. 9a-13a. If this protection is removed, Respondent would still be free to publicize Petitioners' identities even though their claims are no longer pending. *Id.*

Circuits' unduly lenient modification standard. The Court should grant this petition and resolve the conflict.

I. The Decision Below Deepens A Three-Way Circuit Split.

All courts, including the Eleventh Circuit, agree that when a court has issued a protective order that the parties disputed, rather than stipulated, the moving party bears the burden of justifying modification. *See, e.g.*, *FTC v. Abbvie Prods. LLC*, 713 F.3d 54, 66 (11th Cir. 2013) (noting that "courts regularly impose the burden on the party seeking modification"). But the circuits are divided three ways over the standard to apply to stipulated orders. The Second and Seventh Circuits hold that the movant bears not only the burden, but a *heightened* burden to justify modification of a stipulated protective order. The Eleventh and Ninth Circuits, in contrast, put the burden on the protected party to justify retaining the stipulated order, without regard to reliance interests. The Third Circuit rejects the Second and Seventh Circuits' approach as too stringent, but still puts the burden on the movant to come forward with a reason for modification and for upsetting any reliance interests of the original parties to the stipulation.

A. The Second And Seventh Circuits Impose A Heightened Burden Of Proof On Those Seeking Modification Of Stipulated Protective Orders.

The Second and Seventh Circuits have held that when a party agrees to a protective order, and then seeks to modify it, the movant bears the burden of

showing *more* than the standard "good cause" to justify modification.

Specifically, the Seventh Circuit has held that "where a protective order is agreed to by the parties before its presentation to the court, there is a higher burden on the movant to justify the modification of the order." *Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 597 (7th Cir. 1978); *see also Heraeus Kulzer, GmbH v. Biomet, Inc.*, 881 F.3d 550, 566-67 (7th Cir. 2018) (same). This is true, in a case like this, where the movant "agreed to the protective orders at issue," *Heraues Kulzer*, 881 F.3d at 567, and when a non-party to the case seeks the modification, *Grady*, 594 F.2d at 597.

The Second Circuit likewise holds that even when a third party seeks modification of a stipulated protective order, the movant must make a showing that is "more substantial than the good cause needed to obtain a sealing order in the first instance." *Geller v. Branic Int'l Realty Corp.*, 212 F.3d 734, 738 (2d Cir. 2000) (citations and quotation marks omitted). "[A]bsent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need . . . a witness should be entitled to rely upon the enforceability of a protective order . . . ." *Id.* (quoting *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979); *SEC v. TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) (same).

It follows, *a fortiori*, that the same stringent standard applies when the movant is the party that agreed to the stipulated order in the first place. *See Kiobel v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 247 (2d Cir. 2018) (applying same standard where

party to stipulation sought to use discovery in related litigation before foreign tribunal); *see also, e.g.*, *Nielsen Co. (US), LLC v. Success Sys.*, 112 F. Supp. 3d 83, 120-22 (S.D.N.Y. 2015) (requiring moving party to overcome the "*Martindell* presumption" to modify a protective order that it agreed to); *N.J. Dep't of Envtl. Prot. v. Atl. Richfield Co. (In re Methyl Tertiary Butyl Ether "MTBE" Prods. Liab. Litig.)*, 60 F. Supp. 3d 399, 403-04 (S.D.N.Y. 2014) (same); *Bayer AG v. Barr Labs.*, 162 F.R.D. 456, 466 (S.D.N.Y. 1995) (same).

B. The Ninth And Eleventh Circuits Put The Burden On The Non-Movant.

The Eleventh Circuit's ruling below, in contrast, places the burden on the non-movant to prove that continued protection is necessary. Pet. App. 20a. Moreover, the Eleventh Circuit applies the same standard for modification as it does for the initial entry of a protective order, giving no weight to the non-movant's reliance on the order and imposing no obligation on the movant to explain why its prior stipulation should no longer bind it. Pet. App. 20a-24a.

The Ninth Circuit has also rejected the Second Circuit's "extraordinary circumstances" test as "incompatible with our circuit's law." *Beckman Indus. v. Int'l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992). Instead, like the Eleventh Circuit, the Ninth has held that "the party opposing disclosure has the burden of establishing that there is good cause to continue the protection of the discovery material." *Father M. v.*

Various Tort Claimants (In re Roman Catholic Archbishop), 661 F.3d 417, 424 (9th Cir. 2011).[7]

C. The Third Circuit Takes An Intermediate Approach.

In *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994), the Third Circuit acknowledged, but rejected the Second Circuit's standard as "too stringent." *Id.* at 790. It nonetheless agreed with the Second Circuit that the "party seeking to modify the order of confidentiality must come forward with a reason to modify the order." *Id.* In evaluating that showing, however, the court must "use the same balancing test that is used in determining whether to grant such orders in the first instance, with one difference: one of the factors the court should consider in determining whether to modify the order is the reliance by the original parties on the confidentiality order." *Id.*[8]

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[7] In *Father M.* a third party sought modification of a stipulated order. But the court's rationale did not turn on that fact. Instead, the court believed that the burden was appropriately placed on the party seeking protection because "when the protective order was a stipulated order . . . no party has made a 'good cause' showing." 661 F.3d at 424 (internal quotation marks omitted). The Eleventh Circuit applied the same rule, for the same reason, to the party motion in this case. *See* Pet. App. 20a.

[8] The Fourth Circuit also appears to require a showing of "good cause" to modify a stipulated protective order. *See E.I. DuPont De Nemours & Co. v. Kolon Indus. (In re Kolon Indus.)*, 479 Fed. Appx. 483, 485-86 (4th Cir. 2012) (citing *United States v. (Under Seal)*, 794 F.2d 920, 928 n.6 (4th Cir. 1986)); *Factory Mut. Ins. Co. v. Insteel Indus.*, 212 F.R.D. 301, 303-04 (M.D.N.C. 2002) (holding that a party who stipulated to a protective order

II. This Court Should Grant Certiorari To Resolve The Circuit Conflict.

The question presented is of undeniable recurring importance to litigants and the proper functioning of our judicial system.

A. The Petition Presents A Frequently Recurring And Important Issue In Civil Litigation.

1. The proper standard for modifying stipulated protective orders arises frequently in litigation.

Particularly with the increasing use of electronic discovery, litigation risks public disclosure of private information implicating rights and interests of the highest order, from the addresses and phone numbers of sexual assault victims and the intimate details of individuals' medical conditions to corporate trade secrets and confidential financial information. *See, e.g.*, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-36 (1984); Richard J. Vangelisti, *Proposed Amendment to Federal Rule of Civil Procedure 26(c) Concerning Protective Orders: A Critical Analysis of What It Means and How It Operates*, 48 Baylor L. Rev. 163, 178 (1996); Arthur Miller, *Confidentiality, Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 464-69 (1991). Failing to protect such information can lead to serious abuses. *Rhinehart*, 467 U.S. at 34-36.

Courts and the Federal Rules encourage parties to address this problem by stipulating to protective

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"has the burden of showing good cause to modify the order because good cause was at least implicitly acknowledged when the order was initiated"); *Smithkline Beecham Corp. v. Synthon Pharm., Ltd.*, 210 F.R.D. 163, 168 (M.D.N.C. 2002) (same).

orders whenever possible. *See* Fed. R. Civ. P. 26(c)(1) (precluding parties from requesting protective order from the court until they have "in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action"). As a result, the majority of protective orders are stipulated to, at least in part.[9]

Given the frequency with which protective orders are issued, it is not surprising that requests to modify protective orders, including stipulated orders, "are relatively common," too. Miller, *supra*, at 499-500 & n.346. And as the depth of the circuit conflict suggests, the question of which party bears the burden on modification is frequently litigated in the courts of appeals and, even more frequently, in the district courts. *See, e.g.*, *Alfandary v. Nikko Asset Mgmt.*, 2021 U.S. Dist. LEXIS 77701, at *6-7, 8-10 (S.D.N.Y. Apr. 22, 2021); *Scanlan v. Town of Greenwich*, No. 3:18CV01322(KAD), 2021 U.S. Dist. LEXIS 70126, at *8 (D. Conn. Apr. 12, 2021); *Choi v. 8th Bridge Capital, Inc.*, No. 2:17-cv-08958-CAS-AFMx, 2021 U.S. Dist. LEXIS 63540, at *6 (C.D. Cal. Mar. 30, 2021); *Modern Font Applications v. Alaska Airlines*, No. 2:19-cv-00561, 2021 U.S. Dist. LEXIS 21563, at *13-18 (D. Utah Feb. 3, 2021); *Premier Dealer Servs. v. Allegiance Adm'rs, LLC*, No. 2:18-cv-735, 2021 U.S. Dist. LEXIS 14978, at *4-5 (S.D. Ohio Jan. 27, 2021); *In re Marriott Int'l Customer Data Sec. Breach Litig.*, MDL 19-md-

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[9] *See* Vangelisti, *supra*, at 164-65 (noting "courts routinely enter protective orders when parties agree that an order is necessary"); Endo, *supra*, at 1258-59; *Brigham Young Univ. v. Pfizer, Inc.*, 281 F.R.D. 507, 510 (D. Utah 2012) ("stipulated protective orders have become standard practice in complex cases").

2879, 2020 U.S. Dist. LEXIS 235764, at *62-64 (D. Md. Dec. 2, 2020); *Allscripts Healthcare, LLC v. DR/Decision Res., LLC*, 440 F. Supp. 3d 71, 78 (D. Mass. 2020); *FurnitureDealer.net, Inc. v. Amazon.com, Inc.*, No. 18-cv-0232, 2019 U.S. Dist. LEXIS 234307, at *4-5 (D. Minn. Nov. 7, 2019); *Rotex Global, LLC v. Gerard Daniel Worldwide, Inc.*, No. 1:17-CV-2118, 2019 U.S. Dist. LEXIS 177017, at *15-16, 18 (M.D. Pa. Oct. 11, 2019); *Hawkins v. City of Cave Springs*, No. 5:17-CV-5048, 2019 U.S. Dist. LEXIS 7491, *3 (W.D. Ark. Jan. 8, 2019); *Jacobson v. Metro. St. Louis Sewer Dist.*, No. 4:14-cv-01333-AGF, 2018 U.S. Dist. LEXIS 11297, at *3-4 (E.D. Mo. Jan. 24, 2018); *Royal v. Boykin*, No. 1:16-CV-176-GHD-RP, 2018 U.S. Dist. LEXIS 211089, at *4-8 (N.D. Miss. Dec. 14, 2018); *Doe v. Anderson*, No. 15-cv-13852, 2017 U.S. Dist. LEXIS 152770, at *10-15 (E.D. Mich. Sep. 20, 2017); *Diamond Consortium, Inc. v. Manookian*, No. 4:16-CV-00094, 2017 U.S. Dist. LEXIS 82692, at *4-5 (E.D. Tex. May 31, 2017); *Santiago v. Honeywell Int'l, Inc.*, No. 16-Civ-25359-COOKE/TORRES, 2017 U.S. Dist. LEXIS 184483, at *7-9 (S.D. Fla. Apr. 6, 2017); *Bobrick Washroom Equip., Inc. v. Scranton Prods.*, No. 3:14-CV-00853, 2017 U.S. Dist. LEXIS 32894, at *2-13 (M.D. Pa. Mar. 8, 2017); *United States v. Aetna Inc.*, No. 1:16-cv-1494, 2016 U.S. Dist. LEXIS 189139, at *7-10 (D.D.C. Sep. 22, 2016); *Birden v. City of Waterloo*, No. 15-CV-2062-LRR, 2016 U.S. Dist. LEXIS 73868, at *3-5 (N.D. Iowa June 7, 2016); *Blount v. Major*, No. 4:15 CV 322 DDN, 2016 U.S. Dist. LEXIS 66545, at *3-4 (E.D. Mo. May 20, 2016); *Rio Tinto PLC v. Vale S.A.*, 2016 U.S. Dist. LEXIS 30524, at *6-9 (S.D.N.Y. Mar. 9, 2016); *United States ex rel. Fisher v. Ocwen Loan Servicing, LLC*, No. 4:12-CV-543, 2016 U.S. Dist. LEXIS 7475, at *5 (E.D. Tex. Jan. 22, 2016); *Münchener*

Rückversicherungs-Gesellschaft Aktiengesellschaft in München v. Northrop Grumman Risk Mgmt., 312 F.R.D. 686, 690-91 (D.D.C. 2015); *United States CFTC v. U.S. Bank, N.A.*, No. C13-2041, 2015 U.S. Dist. LEXIS 12509, at *6-7 (N.D. Iowa Feb. 2, 2015); *Brightedge Techs., Inc. v. Searchmetrics*, No. 14-cv-01009-WHO, 2015 U.S. Dist. LEXIS 3994, at *5-7 (N.D. Cal. Jan. 13, 2015); *Tama Plastic Indus. v. Pritchett Twine & Net Wrap, LLC*, No. 8:12CV324, 2014 U.S. Dist. LEXIS 136196, at *4-7 (D. Neb. Sept. 26, 2014); *Inventio AG v. Thyssenkrupp Elevator Ams. Corp.*, No. 1:08-cv-00874-RGA, 2013 U.S. Dist. LEXIS 120452, at *12-14 (D. Del. Jan. 22, 2013); *Oracle USA, Inc. v. Rimini St., Inc.*, No. 2:10-cv-00106-LRH-PAL, 2012 U.S. Dist. LEXIS 174441, at *30-31 (D. Nev. Dec. 6, 2012); *Apeldyn Corp. v. AU Optronics Corp.*, No. 08-568-SLR, 2012 U.S. Dist. LEXIS 85692, at *6-8 (D. Del. June 13, 2012); *Brigham Young Univ. v. Pfizer, Inc.*, 281 F.R.D. 507, 510 (D. Utah 2012); *Romary Assocs. v. Kibbi, LLC*, No. 1:10-cv-376, 2012 U.S. Dist. LEXIS 1757, at *3-7 (N.D. Ind. Jan. 6, 2012); *Braun Corp. v. Vantage Mobility Int'l, LLC*, 265 F.R.D. 330, 332-34 (N.D. Ind. 2009); *In re Southeastern Milk Antitrust Litig.*, 666 F. Supp. 2d 908, 914-15 (E.D. Tenn. 2009); *Murata Mfg. Co. v. Bel Fuse, Inc.*, 234 F.R.D. 175, 179 (N.D. Ill. 2006); *Infineon Techs. AG v. Green Power Techs. Ltd.*, 247 F.R.D. 1, 2 (D.D.C. 2005).

2. The question presented is frequently litigated because, as discussed, the stakes in modification disputes are high.

In addition to the harm that disclosure could cause, the *prospect* of disclosure through the modification of a protective order is equally damaging. For example, plaintiffs like the Petitioners here – who

originally decided to proceed with this litigation with the understanding that their identities and personal information would be protected – may forgo meritorious lawsuits out of fear that years after disclosing sensitive information under a protective order, they may find their identities revealed and their lives put in danger. Similarly, a company like Coca-Cola, which relies heavily on trade secrets protections, may forgo meritorious litigation if it cannot rely on protective orders. *See* Miller, *supra*, at 469-70 (describing how Coca-Cola settled claims rather than sharing its propriety formula).

The standard for modification is also important to the proper functioning of the courts. If modification is too easy, parties may resist discovery of sensitive information they would be willing to turn over without a fight, if they could be sure its privacy would be maintained. *See, e.g.*, Vangelisti, *supra*, at 178 (explaining that without confidence in protective orders "parties would have to spend hundreds or thousands of hours combing through millions of documents to find relevant material because of the potential for inadvertent production of private information or trade secrets"). And if stipulated orders are easier to modify than litigated decrees, parties may refuse to stipulate in the first place, burdening courts with crafting protective orders the parties could have agreed to among themselves.

3. Finally, as this case shows, the placement of the burden of proof often is outcome determinative. Neither the district court nor the Eleventh Circuit credited Respondent's arguments regarding changed circumstances in Colombia or any burdens or prejudice. The only issue the courts below gave weight

to – the importance of public access to court records – was present all along, no different from when Respondent had originally stipulated to the protective order. It was the courts' conclusion that Petitioners had failed to meet *their* burden, rather than the strength of Respondent's showing, that led to the removal of protections here.

B. The Circuit Split Is Intolerable And Requires Action By The Court.

The current situation, with at least three different tests applied in different circuits, is untenable. The disparate treatment of similarly situated parties, based on nothing more than the location of their lawsuit, is intolerable in a system intended to be governed by a uniform set of civil procedure rules.

The diversity of rules is particularly undesirable in the context of multidistrict litigation such as this. The *Chiquita* MDL involves cases originally filed in the Second, Third, Sixth, Eleventh, and D.C. Circuits.[10] In some of those courts, a protective order carries greater weight than the opinion below afforded it; the proponent of modifying an order would be required to show good cause, and the parties' reliance on the order would be taken into consideration.

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[10] Other ongoing MDLs have also faced efforts by parties to modify stipulated protective orders. For example, the *In re Marriott International Customer Data Security Breach Litigation* MDL includes cases from the First, Second, Fourth, Seventh, and Ninth Circuits. *See* 363 F. Supp. 3d 1372 (J.P.M.L. 2019). Marriott has recently sought to modify its stipulated protective order; although there is no binding circuit authority, the District of Maryland ruled that "the burden of establishing a modification of a stipulated protective falls on the party who seeks it." *In re Marriott Int'l,* 2020 U.S. Dist. LEXIS 235764, at *62.

In a case where protection of information is important – such as this one – differences among the circuits might distort MDL practice. Concerned parties will seek centralization in a court where their agreements will be honored, or potentially resist coordination entirely if they are uncertain about such protections. Indeed, the result here would have been different if the protective order had been challenged after the various cases had been remanded to the transferee courts. And such a situation could just as easily be reversed – parties in an MDL in a jurisdiction with a strong presumption against modification, such as the Second Circuit, might obtain discovery pursuant to a protective order in the MDL and then later, after remand to a court in the Eleventh Circuit, seek the unfettered ability to disseminate that information – thus undermining the parties' expectations. Such gamesmanship should be foreclosed.

The circuit split is unlikely to be resolved without action by this Court. As noted above, several of the opinions at issue expressly acknowledged the split while contributing to it; the courts of appeals will not resolve this on their own. And while it might be theoretically possible for an amendment to Rule 26 to settle the issue, that too is unlikely – because it has already failed. In 1995, the Advisory Committee on the Civil Rules drafted an amendment to Rule 26(c) that would have provided some guidance but was unable to reach a consensus, leaving the issue to the courts. *See* Civ. R. Advisory Committee, Meeting Mins. 23 (Mar. 16-17, 1998) (noting that the committee "voted unanimously to terminate consideration of the 1995 Rule 26(c) proposal"); Civ. R. Advisory Committee, Meeting Mins. 9-10 (Apr. 20, 1995) (discussing

proposed amendment); *see also* Vangelisti, *supra*, at 179-82 (describing substance of proposed amendment and challenges in reaching consensus). There is no indication that the Committee ever intends to revisit the issue.

III. This Court Should Grant Certiorari Because The Eleventh Circuit's Decision Is Wrong, And Puts Petitioners' Lives At Risk.

Certiorari is further warranted because the Eleventh Circuit's ruling is wrong. Giving less weight to stipulated protective orders, when the party seeking modification has agreed to the stipulation, is contrary to basic legal principles, creates perverse incentives, and undermines the purpose of Rule 26.

A. The Burden Of Proof Ordinarily Falls On The Party Seeking Relief.

Rule 26 was drafted against the background of "[p]erhaps the broadest and most accepted idea" in the law, which "is that the person who seeks court action should justify the request." Christopher Mueller & Laird Kirkpatrick, Evidence § 3.3 (4th ed. 2020); *see, e.g.*, *Horne v. Flores*, 557 U.S. 433, 447 (2009) (holding, in context of Rule 60(b) motion for relief from judgment, the "party seeking relief bears the burden of establishing that changed circumstances warrant relief"); *Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005) (finding that the burden of persuasion generally falls on the "party seeking relief" when establishing a claim or affirmative defense); *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) (noting burden falls on the petitioner "as the party seeking relief from the status quo of the appellate judgment"); *Educ. Assistance Corp. v. Zellner*, 827 F.2d 1222, 1226

(8th Cir. 1987) (holding burden normally falls on "the party seeking to change the status quo" in civil litigation); Kenneth S. Broun et al., McCormick on Evidence § 337 (8th ed. 2020) ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs").

For example, Rule 16 of the Federal Rules of Civil Procedure provides that scheduling orders "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). It strains logic to suggest that an order on which the parties have relied to safeguard significant privacy and property interests can be modified on a lesser showing than an order on which they have relied to plan their vacations.[11]

B. Parties Who Stipulate To A Protective Order Upon Which Others Have Relied Should Be Held To Their Agreement Unless They Can Show Good Cause For Modification.

The Eleventh Circuit's rule also disregards that Respondent stipulated to the relevant language in the first place. Stipulations in litigation are analogous to contracts, and one of the bedrock principles of contract law is that "[c]ontracting parties . . . are generally held to the terms for which they bargained." *Authentic Apparel Grp., LLC v. United States*, 989 F.3d 1008, 1015 (Fed. Cir. 2021). A party who produces evidence in reliance on the stipulation "is entitled to the benefit of its bargain," and a party who receives evidence as a

[11] It is no answer that Rule 16 expressly puts the burden on the movant, while Rule 26 is silent on the question – the text of Rule 26 does not expressly permit modification at all.

benefit of the stipulation should be held to its promise. *Jochims v. Isuzu Motors*, 145 F.R.D. 499, 501-02 (S.D. Iowa 1992).

Of course, changed or unforeseen circumstances may justify a departure from the original agreement. But it should be the movants' burden to show those changed circumstances. *See Heraeus Kulzer*, 881 F.3d at 568 (observing that a movant's "failure to show . . . changed circumstances also weighs against modification"). This is particularly so because by stipulating to a protective order, a party invites other litigants to rely on the continued protection of the order as they decide whether to comply with or dispute discovery requests (or even whether to continue the litigation). As the Second Circuit has explained, where a party has "reasonably relied" on the protective order, modification is "presumptively unfair." *TheStreet.com*, 273 F.3d at 230.

Indeed, allowing parties to simply renege on their stipulations creates opportunities for gamesmanship, allowing parties to strategically stipulate to protective orders early in cases and, after obtaining sensitive information, move to strip confidentiality protections from the protective order.

That risk and unfairness are aptly illustrated by this case. Respondent agreed to keep private information that Petitioners reasonably believed could pose a risk to themselves or their families if publicly disclosed. Defs.' Version of Joint Proposed Protective Order 3 (DE 1373). Their stipulation promised to keep that information confidential indefinitely, leaving the decision of whether and when to disclose that information publicly to Petitioners' discretion. Pet. App. 43a. In reliance on that promise, Petitioners

provided Respondent that confidential information, only to have Respondent turn around and, having obtained the benefit of that discovery, claim that their promise to keep the information confidential indefinitely was improvident and unnecessary. Defs.' Expedited Mot. to Modify Protective Order 1 (DE 2253).

In countenancing that behavior, the district court did not find an unforeseen change in circumstances that justified modifying the order or ask whether Petitioners had relied on their information remaining confidential in disclosing private information to Respondent. Instead, the district court and the court of appeals asked only whether a protective order would issue if Petitioners had sought one over Respondent's objection today. Pet. App. 20a-21a, 32a-34a.

If Petitioners had known that the protective order provided very little enduring protection, they may well have made different choices. Some Petitioners probably would have proceeded, much like some of their fellow plaintiffs who chose to publicly identify themselves from the beginning – but plaintiffs facing greater threats might have concluded that the benefits of litigation were not worth the risk. In either case, they would have had the opportunity to make that decision, fully aware of its consequences.

C. The Eleventh Circuit's Rule Will Discourage Discovery In Reliance On Protective Orders, And Stipulation To Those Orders.

In addition to being unfair, the Eleventh Circuit's rule will undermine the efficient administration of justice.

To start, the rule will predictably lead to avoidable discovery disputes. If "protective orders were easily modified," the Second Circuit has explained, "parties would be less forthcoming in giving testimony and less willing to settle their disputes." *TheStreet.com*, 273 F.3d at 230.

In this case, for example, if Petitioners knew they could not rely on the protective order to keep their names, addresses, and other contact information, they would have fought discovery of every document disclosing that information as irrelevant or otherwise impermissible, lest Respondent be permitted a year or two later to freely disseminate the information to those who might intend to do Petitioners harm.

Second, if stipulated protective orders are given less protection, the incentive to stipulate is significantly undermined. Indeed, entering into a stipulation would often be irresponsible for counsel, especially since nothing in the law requires a party to stipulate. In this case, for instance, if Petitioners thought that agreeing to protective order provisions would result in *less* protection, they would have insisted on fully litigating the matter.

D. The Eleventh Circuits' Reasons For Its Counterproductive Rule Are Unpersuasive.

The Eleventh Circuit justified its rule principally on the assumption that stipulated orders are issued (seemingly in violation of Rule 26) without any finding of good cause. Pet. App. 19a; *see also Father M.*, 661 F.3d at 424 (same). But that justification is unconvincing.

To start, it makes no sense to *assume* that because an order was stipulated, its good cause is suspect. In this case, for example, the notion that there was no good cause for protection is fanciful; a few months before issuing the protective order, the district court had observed that "Plaintiffs' fears about retaliation from current or former members of paramilitary groups . . . are reasonably justified." Order Denying Defs.' Joint Mot. to Dismiss 11 (DE 1194). Moreover, the protective order specifically indicated that it was issued "[p]ursuant to . . . Rule 26(c)," Pet. App. 36a, implying that the rule's requirements had been met.[12]

More generally, in treating every stipulated order as having been issued without good cause, the Eleventh Circuit's rule arbitrarily denies durability to orders a district court would have been compelled to enter on good cause had the other party opposed the order. And that would have the perverse effect of giving the least protection in the cases where good

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[12] To the extent the Eleventh Circuit suggested that it is *proper* for a district court to issue a stipulated protected order without finding good cause, that holding conflicts with the law of multiple other circuits. *E.g.*, *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) ("In deciding whether to issue a stipulated protective order, the district court must independently determine if 'good cause' exists."); *see also Pansy*, 23 F.3d at 785 (decrying the "disturbing[]" practice of some courts of signing stipulated orders "without considering the propriety of such orders"); *Procter & Gamble Co. v. Bankers Tr. Co.,* 78 F.3d 219, 227 (6th Cir. 1996) ("Rule 26(c) allows the sealing of court papers only 'for good cause shown' to the court"); *see also id.* at 229 n.1 (Brown, J., dissenting) (agreeing with the panel that although "it is common practice for parties to stipulate to" protective orders, "'[g]ood cause' must, however, still be shown for the court to issue a stipulated order").

cause was the most obvious – *i.e.*, where no one was willing to dispute its existence.

The rule also completely disregards the legitimate reliance interests that accrue to an order once issued, even if a court might later decide the good cause question differently upon a party's objections. It is one thing to deny a stipulation for lack of good cause; it is quite another to grant it, encourage a party to disclose sensitive information in reliance on the order, and then retroactively revoke the order's protection.

If there are concerns about the standards district courts employ in accepting Rule 26 stipulations, the Eleventh Circuit (and other courts) should address that problem directly by dictating the standards for issuing stipulated orders.

E. The Application Of The Eleventh Circuit's Rule In This Case Puts The Petitioners' Lives At Risk.

This case provides a stark example of the problems described above. Respondent agreed to keep Petitioners' names, addresses, and other personal information confidential, proposing such provisions in their proposed protective order, Defs.' Version of Joint Proposed Protective Order 3 (DE 1373), which the district court adopted. Pet. App. 36a-39a. The reason for this was clear: to protect the plaintiffs from the very real threat of murder at the hands of paramilitaries, including successors to the same groups that Chiquita funded for years.

Relying on Respondent's promises, Petitioners turned over a wealth of personal information. They proceeded all through discovery, making the journey to the United States to sit for deposition. Only after it

had obtained all this information did Respondent seek to modify the protective order.

The district court did not credit any of Respondent's reasons for seeking modification. It did not find that the protective order worked any prejudice against Respondent, or that it was especially burdensome. Indeed, Respondent's lead argument for modification was that the conditions in Colombia had changed since the protective order had been issued, Defs.' Expedited Mot. to Modify Protective Order 17-18 (DE 2253), but the district court made no findings to this effect. Instead, the district court simply found that Petitioners had failed to meet *their* burden to show that the protections the Court had ordered – including ones Respondent themselves had agreed to – were warranted. Pet. App. 31a-34a.

Respondent claimed the need to "publicly name their accusers." Defs.' Reply in Supp. Of Expedited Mot. to Modify Protective Order 10 (DE 2292). But this "need," even if credited, was surely foreseeable; Respondent knew, when it agreed to these provisions, that it was giving up the right to expose Petitioners' identities. Chiquita, a sophisticated corporate actor, knew what it was bargaining away when it stipulated to that agreement. Rather than hold them to their bargain, however, the district court and then the Eleventh Circuit allowed defendants to challenge the protective order even after accepting its benefits, without showing good cause or any changed circumstances.

This inequitable decision will harm the Petitioners here, and it will harm all litigants who hope to use protective orders to facilitate discovery. It cannot be allowed to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 13, 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11494

D.C. Docket No. 0:08-md-01916-KAM; 0:08-cv-60821-KAM
In Re: Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Derivative Litigation

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0:07-cv-60821-KAM

ANTONIO GONZALEZ CARRIZOSA,
JULIE ESTER DURANGO HIGITA,
LILIANA MARIA CARDONA,
MARIA PATRICIA RODRIGUEZ,
ANA FRANCISCA PALAC MORENO, et. Al.,
Plaintiffs-Appellants,

versus

CHIQUITA BRANDS INTERNATIONAL, INC., an Ohio corporation,
CHIQUITA FRESH NORTH AMERICA LLC, a Delaware corporation,
Defendants-Appellees,
RODERICK HILLS, et. Al.,
Defendants.

9:08-cv-80421-KAM

JOHN DOE I, individually and as representative of his deceased father JOHN DOE 2,
JANE DOE 1, individually and as representative of her deceased mother JANE DOE 2,
JOHN DOE 3, individually and as representative of his deceased brother JOHN DOE 4,
JANE DOE 3, individually and as representative of her deceased husband JOHN DOE 5,
MINOR DOES #1-4, by and through their guardian JOHN DOE 6, individually and as representative of their deceased mother JANE DOE 4,
JOHN DOE 7, individually and as representative of his deceased son JOHN DOE 8,
JANE DOE 6,
JANE DOE 5,
JANE DOE 7, et. Al.,
Plaintiffs-Appellants,

versus

CHIQUITA BRANDS INTERNATIONAL, INC.,
Defendant-Appellee,
MOE CORPORATIONS 1-10, et. Al.,
Defendants.

9:08-cv-80465-KAM

JANE/JOHN DOES (1-144), as Legal Heirs to Peter Does 1-144, et. Al.,
Plaintiffs-Appellants,

versus

CHIQUITA BRANDS INTERNATIONAL, INC.,
Defendant-Appellee,
DAVID DOES 1-10, et. Al.,
Defendants.

9:08-cv-80508-KAM

JOSE LEONARDO LOPEZ VALENCIA, et. Al.
Plaintiffs-Appellants,

versus

CHIQUITA BRANDS INTERNATIONAL, INC., a New Jersey corporation,
Defendant-Appellee,
MOE CORPORATIONS 1-10, et. Al.,
Defendants.

9:17-cv-81285-KAM

DOES, 1-11,
Plaintiffs-Appellants,

versus

CARLA A. HILLS, Personal Representative of the Estate of Roderick M. Hills,
Defendant.

9:18-cv-80248-KAM

JOHN DOE #1, et. Al., individually and as representative of his deceased father JOHN DOE 2,
Plaintiffs-Appellants,

versus

CHIQUITA BRANDS INTERNATIONAL, INC. a New Jersey corporation,
Defendant-Appellee,
MOE CORPORATIONS 1-10, et. Al.,
Defendants.

Filed July 16, 2020

ORDER AND JUDGMENT

Before **WILSON**, **MARCUS**, and **BUSH***, Circuit Judges.

Per curiam:

A lawsuit is a public event. Parties who ask a court to resolve a dispute must typically walk in the public eye. District courts, acting within their discretion, can grant exception from this rule. But it is rare for a district court to grant privacy protections for a party. It is even rarer for a district court to abuse its

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* Honorable John K. Bush, United States Circuit Judge for the Sixth Circuit, sitting by designation.

discretion when denying privacy protections for a party.

The appellants here claim that this is one of those rarer cases. In this multidistrict litigation (MDL), they contend that a Colombian paramilitary group killed their family members. They also assert that appellee Chiquita Brands International, Inc.—along with affiliated entities and directors, but we will call them all Chiquita for short—paid the paramilitary group over $1.7 million to quell labor unrest and drive other guerilla groups out of the banana-growing regions of Colombia. This financial support, say the appellants, contributed to the deaths of their family members.

Some appellants, fearing paramilitary retaliation, filed their claims under pseudonyms. All appellants—named and pseudonymous—obtained a protective order prohibiting the disclosure of "private facts"—facts that could reveal their identities or other personal information (addresses, telephone numbers, and so on).

After over a decade of litigation, Chiquita challenged the privacy protections as difficult and unnecessary. The district court agreed and revoked the protections. The appellants appealed under the collateral-order doctrine. Because the district court acted within its discretion when it held that the appellants failed to meet their necessary burdens, we affirm.

I.

First, some background. Over a decade ago, Chiquita admitted to financing paramilitaries in

Colombia.[1] The United States filed an information against Chiquita, outlining the company's involvement. Chiquita ultimately entered a guilty plea and paid a $25 million fine.

A bevy of related civil suits followed. The appellants, then proceeding in separate cases, generally claimed that Chiquita bankrolled a paramilitary group called the Autodefensas Unidas de Colombia (AUC). They also alleged that Chiquita's money helped the AUC murder their family members. Fearing reprisal from the AUC or its affiliates, some appellants sought to proceed anonymously (the pseudonymous appellants). Others did not (the named appellants).[2] Alongside the named appellants, hundreds of other plaintiffs chose to proceed under their true names.

Of the pseudonymous appellants, some received court approval to use pseudonyms. Others did so without court approval. Eventually, their cases—along with the cases of the named appellants and other related plaintiffs—were merged into an MDL in the Southern District of Florida.

In the MDL, Chiquita moved to dismiss the case for *forum non conveniens*. It argued that Colombia was the proper forum. In November 2016, the district court denied the motion. Taking the plaintiffs' allegations as true and viewing the evidence in their favor, the court noted that "participation in human rights litigation

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[1] S*ee generally United States v. Chiquita Brands Int'l*, 1:07–cr–00055 (D.D.C.).

[2] When referring to these groups collectively, we will call them the appellants.

involving paramilitary abuses in Colombia . . . is currently a very dangerous proposition."

The case then moved to discovery. During this process, the district court recognized that the pseudonymous appellants were proceeding anonymously. It did not, however, consider the propriety of their pseudonyms.

Meanwhile, the parties grappled over what protections to include in a proposed protective order. Both sides generally agreed that the appellants needed protection to combat the disclosure of their "private facts"—facts that could publicly reveal their identities or personal information. They volleyed draft protective orders back and forth. When the dust settled, the district court issued a protective order under Federal Rule of Civil Procedure 26(c) that largely entered all the requested private fact protections. The order did not shield these facts from Chiquita, though. Chiquita knows the pseudonymous appellants' identities and has received private fact discovery.

These protections stood for about two years. During this time, the parties picked the appellants to serve as bellwether plaintiffs for dispositive motions and bellwether trials.[3] As the parties inched toward summary judgment, though, the administrative cost of anonymous litigation took its toll. Seeing no need for the privacy protections, Chiquita moved to preclude the pseudonymous appellants' use of pseudonyms and to modify the protective order to lift the appellants' protections for private facts. In April 2019, the court

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[3] This meant that the appellants would serve as representatives for initial trials and dispositive motions.

granted both requests in a joint order. It held that the pseudonymous appellants failed to establish that their risk of physical harm outweighed the general presumption of judicial openness. The court thus ordered the pseudonymous appellants to reveal their identities. And for the same reasons, it lifted the private fact protections for all appellants—named and pseudonymous. The appellants then appealed the court's order under the collateral-order doctrine. We stayed the court's rulings pending our decision.

After the appellants filed their notice of appeal, the district court entered summary judgment on the merits against all the appellants save for one (Jane Doe 46). The district court then certified the summary judgment ruling as a final judgment under Federal Rule of Civil Procedure 54(b). The appellants (Jane Doe 46 excluded) also appealed that ruling. The summary judgment appeal remains pending in a separate proceeding.

II.

Before we reach the merits, we'll first explain why this appeal is not moot for the appellants who have sustained summary judgment. Then we will analyze both the district court's denial of pseudonym protection and its decision to modify its order protecting private facts.

A.

A federal court cannot decide a "moot" controversy. *See Fla. Pub. Interest Research Grp. Citizen Lobby, Inc. v. E.P.A.*, 386 F.3d 1070, 1086 (11th Cir. 2004). We thus have an independent duty to ensure that this case is not moot. *See id.* at 1083, 1086. "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable

interest in the outcome." *Id.* at 1086. This can happen when events after the filing of the appeal "deprive the court of the ability" to provide "meaningful relief." *Id.*

We can provide meaningful relief here. If we were to let the court's order stand, the pseudonymous appellants would have to reveal their identities and the appellants would have no protection for their private information. But if we were to vacate the district court's order, the pseudonymous appellants would remain anonymous and the appellants' private facts would remain protected. Given the seriousness of the subject matter, that is no doubt "meaningful relief." *See id.*

But there is a slight wrinkle: The district court entered summary judgment against most of the appellants and certified the ruling as a final judgment. Those appellants are challenging the summary judgment ruling in a different appeal. We have held, at least in the preliminary injunction context, that "[o]nce a final judgment is rendered, the appeal is properly taken from the final judgment." *Burton v. Georgia*, 953 F.2d 1266, 1272 n.9 (11th Cir. 1992). If that rule also applies to collateral orders, then we could not grant meaningful relief here. The appellants would instead need to raise their anonymity and private fact issues in the summary judgment appeal.

But having reviewed *Burton* and its predecessors, we feel confident that its rule does not apply to collateral orders. *Burton* merely restated a commonsense principle: A permanent injunction order moots interlocutory review of a corresponding preliminary injunction order because the preliminary injunction order inherently "merge[s]" with the permanent injunction order. *See Sec. & Exch. Comm'n*

v. First Fin. Grp. of Tex., 645 F.2d 429, 433 (5th Cir. Unit A May 1981)[4]; *Birmingham Fire Fighters Ass'n 117 v. City of Birmingham*, 603 F.3d 1248, 1254 (11th Cir. 2010) (explaining that "when a final injunction incorporates the same relief as an interlocutory injunction, an appeal is properly taken only from the final order" and the interlocutory appeal is moot).

This rule makes sense. The standard for entering a preliminary injunction echoes the standard for entering a permanent injunction. *Compare Chavez v. Fla. SP Warden*, 742 F.3d 1267, 1271 (11th Cir. 2014) (outlining the preliminary injunction standard), *cert. denied*, 571 U.S. 1188 (2014), *with Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200, 1208 (11th Cir. 2008) (outlining the permanent injunction standard). When a permanent injunction order and a preliminary injunction order raise the same questions, it makes little sense to have parallel panels deliver disjointed answers. Rather, the preliminary order is best viewed as merging with the final order, as both orders speak to the merits of whether the requested injunctive relief is appropriate. *See Birmingham Fire Fighters*, 603 F.3d at 1254.

But that's not true of collateral orders. Those orders, per the Supreme Court, do "not make any step toward final disposition of the merits" and "will not . . . merge[] in a final judgment." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). We dub an order collateral only if it "(1) conclusively

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[4] In *Bonner v. City of Prichard*, we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

determines an important issue that is both (2) completely separate from the merits of the case and (3) effectively unreviewable on appeal from a final judgment." *Parker v. Am. Traffic Solutions, Inc.*, 835 F.3d 1363, 1367 (11th Cir. 2016). Those traits differ from that of a merged preliminary injunction—an order that both speaks to the merits of whether injunctive relief is appropriate and can be adequately reviewed on appeal from the final injunctive order. *See Birmingham Fire Fighters*, 603 F.3d at 1254.

Because the key aspects of a collateral order and a preliminary injunction do not line up, we hold that *Burton*'s rule does not apply to collateral orders. The only question, then, is whether the rulings at issue qualify as collateral orders.

The pseudonym ruling is easy. "A district court's order denying anonymity for a party is a final appealable order under the collateral order doctrine." *Plaintiff B v. Francis*, 631 F.3d 1310, 1314 (11th Cir. 2011).

Next is the private fact ruling. Though we have never considered whether a ruling that modifies a protective order to revoke protections that conceal a party's identity and private information from allegedly dangerous actors qualifies as a collateral order, we conclude that it does. As said before, a collateral order is one that "(1) conclusively determines an important issue that is both (2) completely separate from the merits of the case and (3) effectively unreviewable on appeal from a final judgment." *Parker*, 835 F.3d at 1367. The private fact ruling meets each criterion.

First up is the important-issue prong. An issue is "important" enough to justify collateral review when it involves a "particular value of a high order." *See*

Royalty Network, Inc. v. Harris, 756 F.3d 1351, 1356 (11th Cir. 2014). The issue must usually touch on a "substantial public interest." *See id.* at 1357. As the Ninth Circuit has explained, "[f]ew tenets of the United States justice system rank above the conflicting principles presented" when a party seeks to shield information in a judicial proceeding from public view. *See Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 596 F.3d 1036, 1038 (9th Cir. 2010). In these situations, courts must weigh "the transparency and openness of this nation's court proceedings" against "the ability of private individuals to seek redress in the courts without fear for their safety." *Id.* And as we explained in *Doe v. Frank*, there are "exceptional cases" in which a plaintiff may face so great a "danger of physical harm" that the plaintiff's interest in access to the judicial system outweighs the public's interest in judicial openness. 951 F.2d 320, 324 (11th Cir. 1992) (per curiam).

The district court's order conclusively denied protections intended to shield the appellants' sensitive information from paramilitaries. Given the serious "danger of physical harm" alleged here, we conclude that protecting the appellants' access to the judicial system is an important issue touching on substantial public interests. *See id.*; *Royalty Network*, 756 F.3d at 1356–57.

We make quick work of the latter two prongs. Whether the appellants should have these protections is distinct from whether they should recover against Chiquita. *See Parker*, 835 F.3d at 1367. And once the public (or a paramilitary group) learns the appellants' private facts, they cannot be concealed again. *See S. Methodist Univ. Ass'n of Women Law Students v.*

Wynne & Jaffe, 599 F.2d 707, 712 (5th Cir. 1979) (*SMU*). This information, without a protective order, may come out at summary judgment or in other court filings. So the order is effectively unreviewable on appeal from the final judgment. *See Parker*, 835 F.3d at 1367.

Because both rulings are valid collateral orders, they do not merge into the final judgment. *Burton* therefore does not apply. And since this appeal remains live, we now turn to the merits.

B.

First is the ruling denying the pseudonymous appellants leave to proceed under pseudonyms. We review a district court's ruling on a party's use of a pseudonym for abuse of discretion. *Plaintiff B*, 631 F.3d at 1315; *Doe v. Stegall*, 653 F.2d 180, 184 (5th Cir. Unit A Aug. 1981). This is an "extremely limited and highly deferential" standard of review. *In re Clerici,* 481 F.3d 1324, 1331 (11th Cir. 2007). It allows "a zone of choice within which" the district court "may go either way." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc). We must affirm the district court's choice "unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *Id.* This is so "even if we would have gone the other way had the choice been ours to make." *S.E.C. v. ETS Payphones, Inc.*, 408 F.3d 727, 733 (11th Cir. 2005) (per curiam).

"Generally, parties to a lawsuit must identify themselves" in the pleadings. *Frank*, 951 F.2d at 322. Federal Rule of Civil Procedure 10(a) provides that "every pleading" in federal court "must name all the parties." The rule does not merely further administrative convenience—"[i]t protects the public's

legitimate interest in knowing all of the facts involved, including the identities of the parties." *Plaintiff B*, 631 F.3d at 1315.

Yet the rule is not absolute. A party may proceed anonymously in federal court by establishing "a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings." *Id.* at 1315–16 (internal quotation mark omitted). This is, however, a narrow exception. Parties may use "fictitious name[s]" only in "exceptional case[s]." *Frank*, 951 F.2d at 323.

We have said that the "first step" in deciding whether privacy trumps publicity is to apply the "three factors analyzed" in *SMU*. *Plaintiff B*, 631 F.3d at 1316. Those factors include whether the party seeking anonymity (1) is challenging government activity; (2) would be compelled, absent anonymity, to disclose information of utmost intimacy; or (3) would be compelled, absent anonymity, to admit an intent to engage in illegal conduct and thus risk criminal prosecution. *See id.*

But we have made clear that this is only the first step. Along with these factors, a court "should carefully review *all* the circumstances of a given case and then decide whether the customary practice of disclosing the plaintiff's identity should yield to the plaintiff's privacy concerns." *Id.*[5] Other factors to

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[5] Given this rule, we note that, in reality, the *SMU* factors do not constitute a "first" step in the sense that either party can win at that step alone. Though a court must consider the *SMU* factors (and may well decide to consider them first), our mandate that a

consider include whether the party seeking anonymity is a minor or faces a real threat of physical harm absent anonymity. *See id.*; *see also Stegall*, 653 F.2d at 186. The court should also analyze whether the party's requested anonymity poses a unique threat of fundamental unfairness to the defendant. *See SMU*, 599 F.2d at 713 (listing examples). Indeed, a defendant's "general plea for 'openness' is not convincing" when stacked against "strong evidence" supporting a need for anonymity. *Plaintiff B*, 631 F.3d at 1318.

Turning to the analysis, we start with the pseudonymous appellants' claim that the district court erred when it gave them the burden of justifying their pseudonyms. In their eyes, the district court granted them leave to proceed under pseudonyms in its protective order granting private fact protections. The pseudonymous appellants thus claim that Chiquita—as the party seeking to modify the protective order—bore the burden of establishing good cause for the modification. *See F.T.C. v. AbbVie Prods. LLC*, 713 F.3d 54, 66 (11th Cir. 2013).

We disagree. Nowhere in the protective order did the district court grant the pseudonymous appellants leave to proceed anonymously. As the district court recognized in a later order, it never considered the propriety of pseudonyms until Chiquita moved to preclude the use of pseudonyms. Thus, the

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court must consider "*all* the circumstances of a given case" makes clear that the *SMU* factors are merely a few of many factors that a court must consider. *See Plaintiff B*, 631 F.3d at 1316. In practice, then, whether a party's right to privacy overcomes the presumption of judicial openness is a totality-of-the-circumstances question.

pseudonymous appellants bore the burden to establish, in the first instance, that their privacy rights outweigh the presumption of judicial openness. *See Plaintiff B*, 631 F.3d at 1315–16.

Because the district court did not make an error of law, we can vacate only if the district court made a clear error of judgment. Given this record, we hold that the district court acted within its "zone of choice" when it held that the pseudonymous appellants failed to show that their privacy rights outweigh the presumption of judicial openness. *See Frazier*, 387 F.3d at 1259.

To start, the district court had ample comparator evidence to support its ruling. For over a decade, hundreds of plaintiffs have litigated this case under their true names, and yet nothing in the record suggests that they have faced paramilitary retaliation. We of course know that different litigants may face different risks of harm; the pseudonymous appellants could face a greater risk of paramilitary retribution than their named co-plaintiffs. But the pseudonymous appellants gave no evidence to establish that they in fact face a greater risk of harm. So the district court was free to consider the named plaintiffs as comparators when weighing the pseudonymous appellants' risk of harm against the presumption of judicial openness.

To be sure, the pseudonymous appellants claim that there is specific evidence of harm here: Paramilitaries allegedly threatened and attacked a named bellwether plaintiff and her family four months after her deposition. Yet the district court reasonably rejected this inference. True, no one seems to dispute that someone threatened and attacked the bellwether

plaintiff and her family. But the only credible evidence to suggest that paramilitaries assaulted her and her family for her role here is temporal proximity. A four-month connection, however, is shaky support standing alone. And there is evidence pointing the other way. For example, the bellwether plaintiff's deposition was privileged and highly confidential, suggesting that paramilitaries could not have known about the deposition. There is also evidence showing that the alleged incidents were part of a domestic dispute unrelated to this litigation. So the district court acted within its discretion when it held that there was "insufficient evidence of a causal connection between the . . . attack and litigation activity in this MDL proceeding to justify continued use of pseudonyms."[6]

Lacking specific evidence, the pseudonymous appellants cite general evidence showing that those who oppose paramilitary groups or paramilitary-affiliated entities face risks of paramilitary violence. But this evidence does not compel the conclusion that the MDL plaintiffs face those risks. Indeed, their evidence focuses on human rights defenders who protest paramilitary activity in Colombia, seek land restitution in Colombia, or oppose paramilitary-

[6] We reject the claim that an affidavit filed by the bellwether plaintiff's counsel compelled the district court to find that paramilitaries threatened and attacked the plaintiff and her family. The attorney admitted in the affidavit that he has no firsthand knowledge of the incidents; he drew his statements solely from the secondhand accounts of nameless investigators in Colombia. The attorney also asserted that paramilitaries were presumably to blame, yet he gave no meaningful support for this presumption. Given these deficiencies, the district court was free to give the affidavit little weight.

affiliated entities in Colombia. The evidence does not compel the finding that litigants pursuing tort claims against a paramilitary-affiliated entity in the United States face similar risks of harm.[7]

Last, we reject the idea that the court's pseudonym ruling conflicts with its *forum non conveniens* ruling. We do so for a few reasons. For one, a *forum non conveniens* analysis differs from a pseudonym analysis. *Compare Ford v. Brown*, 319 F.3d 1302, 1306–07 (11th Cir. 2003) (outlining the *forum non conveniens* analysis), *with Plaintiff B*, 631 F.3d at 1313–18 (outlining the pseudonym analysis). For another, the court's statements there were not factual findings; because the *forum non conveniens* order came on a motion to dismiss, the court took the plaintiffs' allegations as true and construed all the evidence in their favor. *See* Doc. 1194 at 4. That plaintiff-friendly standard diverges from the defendant-friendly pseudonym standard. Finally, the court entered the *forum non conveniens* order over two years before it entered its pseudonym order. During that time, hundreds of plaintiffs continued to litigate under their true names, yet none—as far as this record shows—suffered paramilitary retribution. As a result,

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[7] The pseudonymous appellants also contend that the district court erred in failing to consider the heightened publicity they will face as the case moves toward trial. We're not convinced that the district court failed to consider this argument, as the court said in its order that it had considered all the proffered arguments. But at any rate, the pseudonymous appellants failed to support this argument with evidence. On this record, their publicity claim is speculative and is not enough to justify vacatur for abuse of discretion.

the district court's *forum non conveniens* ruling did not compel a different pseudonym ruling.[8]

C.

We now turn to the modification of the protective order, which lifted the appellants' protections for private facts. We review a district court's decision to modify a protective order for abuse of discretion. *AbbVie*, 713 F.3d at 61. The district court did not abuse its discretion here.

We begin with a review of the law. Federal Rule of Civil Procedure 26(c) allows a court to issue a protective order upon a finding of good cause. *See* Fed. R. Civ. P. 26(c) ("The court may, for good cause, issue [a protective order]."). The plain text of the rule suggests that a district court must find good cause to issue a protective order. *See id.* But as we've recognized, district courts often issue stipulated protective orders without finding good cause. *See Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1307 (11th Cir. 2001) (per curiam).

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[8] We also dismiss the pseudonymous appellants' claim that the district court erred because it identified no "unique threat" that their anonymity poses to Chiquita. Though we agree that their anonymity does not prejudice Chiquita since it knows the pseudonymous appellants' identities, prejudice is just one of many factors that a court should consider. *See Plaintiff B*, 631 F.3d at 1316. Given the wealth of evidence undercutting the pseudonymous appellants' risk of harm, the little evidence establishing it, and the presumption of judicial openness, the court acted within its discretion when it denied anonymity, even without a showing of prejudice.

Some say that these stipulated orders violate Rule 26(c)'s good cause mandate.[9] But it seems that we, at least, have acknowledged the practice. *See id.* In *Chicago Tribune*, we considered a motion to modify a stipulated protective order. *Id.* at 1308–09. In the motion, a post-settlement intervenor sought to remove protections that the original parties had agreed to in a stipulated order. *Id.* at 1308–10. Noting the difference between a protective order entered for good cause and a stipulated order, we expressed no issue with the stipulated order. *See id.* at 1307. Instead, we recognized that the party seeking continued protection from the stipulated order (i.e., the party opposing the modification) had never established good cause for the protection in the first place. *See id.* For this reason, we placed the burden of establishing good cause in the first instance on the party seeking the protection. *See id.* at 1313. *Chicago Tribune* thus creates a bright-line rule: When faced with a motion to modify to a *stipulated* protective order, the party seeking the stipulated order's protection must satisfy Rule 26(c)'s good cause standard. The burden differs, though, when a court enters a *disputed* protective order after

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[9] *See, e.g.*, *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) ("In deciding whether to issue a stipulated protective order, the district court must independently determine if 'good cause' exists."); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994) (noting that, "[d]isturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders"); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 229 n.1 (6th Cir. 1996) (Brown, J., dissenting on other grounds) ("'Good cause' must, however, still be shown for the court to issue a stipulated order [under Fed. R. Civ. P. 26(c)].").

finding good cause. When a party disputes a protective order, the plain language of Rule 26(c) applies—the party seeking the protection must establish good cause for the protection. *See* Fed. R. Civ. P. 26(c). And once a party has established good cause under Rule 26(c), the party moving to modify the protective order bears the burden to establish good cause for the modification. *See AbbVie*, 713 F.3d at 66 (holding that "[a] party who has already shown good cause . . . in the first instance should not bear the burden of showing good cause once again if the same opposing party seeks modification of the original protective order").

Applying these principles, we can discern no abuse of the district court's considerable discretion in modifying its protective order, which lifted the appellants' protection of "private facts." For starters, the district court interpreted its protective order to have been stipulated by the parties. Indeed, it said so at least six times in its order.[10] And our case law has repeatedly held that "[a] district court's interpretation of its own order is properly accorded deference on appeal when its interpretation is reasonable." *In re Managed Care*, 756 F.3d 1222, 1234 (11th Cir. 2014) (quoting *Cave v. Singletary*, 84 F.3d 1350, 1354 (11th Cir. 1996)); *see also Foudy v. Indian River Cty. Sheriff's Office*, 845 F.3d 1117, 1122 (11th Cir. 2017)

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[10] The order is captioned "Order . . . Granting in Part and Denying in Part Motion to Modify Stipulated Protective Order's Prohibition . . . ." (emphasis added) The district court later referred to the order as the parties' "stipulated Protective Order" twice, the "agreed-upon Protective Order" the parties submitted, and a "stipulated agreement" and characterized Chiquita's motion as withdrawing its "initial consent" to the protective order (all emphases added).

("[W]e review a district court's interpretation of its *own* orders for an abuse of discretion . . . ."). The district court's interpretation of its own order was entirely reasonable—the record shows that neither party ever disputed, challenged, or litigated the protective order's restrictions on the disclosure of information about the appellants in any way. Thus, in order to be entitled to the continued protection of "private facts," the burden plainly fell on the appellants to establish "good cause." The district court found that the appellants failed to do so for the same reasons that they were not entitled to continue proceeding under pseudonyms. The problem with their showing remained the same: in neither instance did the appellants establish a sufficient nexus between the claimed threats and the disclosure of their identities; the proffered facts were neither specific nor concrete, and the appellants gave no other justification for their private fact protections. Although the district court did not specifically cite the governing standard for "good cause" found in Rule 26(c), we cannot find an abuse of discretion in its analysis. Two reasons yield this result: in the first place, it made sense to read these issues together here because they were factually and logically intertwined; and second, the district court's analysis satisfied the most critical Rule 26(c) factor—balancing the potential harm to the appellants against the interests of the other parties in the case.

For one thing, it was entirely reasonable for the district court to consider jointly whether to modify the order protecting private facts together with allowing the pseudonymous appellants to continue under pseudonyms. Indeed, these issues, at least in this case, were so tightly woven together that there was little logical reason to consider them separately. The

appellants gave only one justification for their pseudonyms and their private fact protections: Fear of harm from paramilitaries. Once the district court rejected this reason as unfounded and denied leave to proceed under pseudonym, the appellants no longer had a justification to satisfy good cause, and so there was little reason not to also modify the protective order.

The district court's analysis also focused on the most critical elements governing the application of Rule 26(c). Among other things, we have asked the district courts to look at "[1] the severity and the likelihood of the perceived harm; [2] the precision with which the order is drawn; [3] the availability of a less onerous alternative; and [4] the duration of the order," *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987) (per curiam) (quotation omitted), but, notably, these factors are not exhaustive, *see id.* ("[T]he sole criterion for determining the validity of a protective order is the statutory requirement of 'good cause' . . . . [Which is] difficult to define in absolute terms [but] generally signifies a sound basis or legitimate need to take judicial action."). Furthermore, we have required the trial courts to engage in the "balancing of interests" under Rule 26(c). *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985).

The district court engaged in balancing sufficient to satisfy Rule 26(c), as it weighed the appellants' safety interests against Chiquita's interests in administrative feasibility. Further, when we review the entire record, including the protective order and the district court's order dissolving part of it, there can be no question that the court's order was drawn with

precision, effectively reviewed less onerous alternatives, and precisely delimited the duration of the order.

Indeed, the trial court found that the evidence presented by the appellants supported only "a vague fear [of] retaliation or bias against 'human right[s] defenders' . . . but [did] not explain how their role in this lawsuit . . . would implicate the same interests as those triggered by 'human right[s] defenders' in present-day Colombia." The appellants' "generalized, subjective assertions of fear" were simply not "the kind of risk of physical or other injury" required to treat them differently than other plaintiffs. Much the same analysis was applicable in determining "good cause" under Rule 26(c). *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981) ("To establish 'good cause' for a protective order under Federal Rule of Civil Procedure 26(c), the courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." (quotation omitted and alterations adopted)). And without a distinct concrete harm justifying good cause, the appellants were no more entitled to protection from disclosure of their identities than they were to file pleadings under pseudonyms.

In sum, then, we see little reason to remand this issue back to the district court, since the district court weighed the critical factors and did not abuse its discretion in finding no basis to protect either the pseudonyms or the appellants' private facts. Accordingly, we **AFFIRM**.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 08-md-01916-MARRA

In Re: Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Derivative Litigation

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This Document Relates to:

ATS ACTIONS

07-60821-CIV-MARRA (Carrizosa)

08-80421-CIV-MARRA (N.J. Action) (Does 1-11)

08-80465-CIV-MARRA (D.C. Action) (Does 1-144)

08-80508-CIV-MARRA (Valencia)

08-80480-CIV-MARRA (N.Y. Action) (Manjarres)

10-60573-CIV-MARRA (Montes)

10-80652-CIV-MARRA (D.C. Action) (Does 1-976)

17-81285-CIV-MARRA (D.C. Action) (Does v. Hills)

18-80248-CIV-MARRA (John Doe 1)

ORDER GRANTING DEFENDANTS' MOTION TO PRECLUDE CONTINUED USE OF PSEUDONYMS BY ATS PLAINTIFFS SELECTED FOR BELLWETHER TRIALS AND GRANTING IN PART AND DENYING IN PART MOTION TO MODIFY STIPULATED PROTECTIVE ORDER'S PROHIBITION

AGAINST DISCLOSURE OF PRIVATE FACTS CONCERNING BELLWETHER PLAINTIFFS [DE 2253]

This matter is before the Court upon Defendants' Motion to Preclude Continued Use of Pseudonyms by those ATS Plaintiffs selected for summary judgment briefing and bellwether trials, and to further eliminate the prohibition against disclosure of "private facts," as broadly defined in the parties' stipulated Protective Order as to these ATS Plaintiff groups [DE 2253]. Having considered the Motion, in conjunction with the Oppositions of the non-Wolf Plaintiffs [DE 2277] and Wolf Plaintiffs [DE 2273], and Defendants' Reply [DE 2292], the Court has determined to grant the motion and to modify the protective order accordingly.

I. Procedural History and Facts

Certain ATS Plaintiff groups now subsumed in this MDL proceeding successfully applied for permission to file their initial complaints under pseudonyms based on perceived concerns for their physical safety and fear of violent reprisal from Colombian terror groups allegedly involved in the torture and murder of their family members ("Pseudonymous Plaintiffs"). The Pseudonymous Plaintiffs are drawn from various member cases in this MDL proceeding, and include the New Jersey Plaintiffs represented by Attorney Marco Simons,[1] as

[1] *John Doe 1 et al. v. Chiquita Brands Int'l, Inc., et al.*, Case 07-03406-JMV-JBC (D. N.J.); Case No. 08-80421- CIV-MARRA (N.J. Action (Does 1-11).

well as certain D.C. Plaintiffs represented by Attorney Paul Wolf.[2]

Previously, at the commencement of discovery proceedings, the parties submitted an agreed-upon Protective Order [DE 1389] which recognized the need for protection against disclosure of private data regarding the ATS Plaintiff groups and banned the public disclosure of any "private facts" relating to those ATS Plaintiffs, regardless of whether the Plaintiff proceeded under a pseudonym or under his or her true name in this litigation. Since that time, the Court has not had occasion to revisit the justification for use of pseudonyms in this proceeding, although it has consistently permitted the rather cumbersome process of filing heavily-redacted documents and parallel unredacted documents (under seal) in keeping with the parties' stipulated agreement to eliminate identifying data, as a security measure, from the public portion of the court file.

At this juncture, Defendants have withdrawn their initial consent to these procedures, and to Plaintiffs' continued use of anonymity, at least as to those Plaintiffs selected for summary judgment briefing and bellwether trials. Defendants specifically ask the Court to now revisit the question of whether these Plaintiffs may continue to proceed under pseudonyms in light of (1) the comparative experiences of the named and unnamed ATS plaintiffs, given that hundreds of other ATS Plaintiffs from the *Montes*, *Carrizosa*, and *Manjarres* groups

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[2] *Jane/John Does 1-144 v. Chiquita Brands International Inc.*, Case No. 07-CV01048-PLF (D.D.C.); Case NO. 08- 80465-CIV-MARRA (D. C. Action) (Does 1-144).

have prosecuted their claims under their true names since their Complaints were filed over ten years ago without incident; (2) the evolving and near complete demobilization of the AUC in Colombia; and (3) the lack of any concrete evidence of specific threats or episodes of violent retaliation experienced by any ATS Plaintiff asserting a need to continue to proceed anonymously.

In a related vein, Defendants seek to modify the terms of the previously-entered Protective Order [DE 1389, Protective Order, para. 1(a)(ii)], by eliminating its sweeping prohibition against public disclosure of "private facts" regarding *any* ATS Plaintiff (including named ATS Plaintiffs), a requirement which has resulted in heavily-redacted briefing and evidentiary filings in order to remove any potentially identifying information from public view, including all financial, medical, psychological, employment, and educational information relating to Plaintiffs, as well as interpersonal relationship data.

Opposing the motion, the Wolf Plaintiffs do not come forward with any specific evidence of threatened or actual physical harm visited on any of the Pseudonymous Plaintiffs as a result of their participation in this litigation. Instead, these Plaintiffs focus on the particularly heinous nature of the underlying abductions and killings of their family members, observing with understandable alarm that in most of the pseudonymous Plaintiff groups, and in all of the bellwether pseudonymous groups, the perpetrators (alleged AUC operatives) have never been punished and presumably remain at large. Further, they contend that violence against social leaders and human rights defenders in Colombia has

become worse, not better, since the inception of the litigation, and supply hearsay data to this effect, apparently operating on the theory that their status as victims of AUC abuses during the Colombian civil war is comparable to that of "human rights defenders," rendering them equally attractive targets for reprisal by former or neoparamilitary groups still existing in Colombia.

The non-Wolf ATS Plaintiffs offer similar arguments, contending that the same dangerous social conditions in Colombia which prompted the court to deny the Defendant's *forum non conveniens* motion still exist and justify the continued protection of Plaintiff's identities as parties to this litigation, even in the context of this U.S. federal district court-based litigation. Also likening their litigant status to that of "human rights defenders" and "social leaders" in Colombia who have recently been under attack for speaking out against new groups or gangs allegedly comprised of former paramilitaries and guerillas, the non-Wolf ATS Plaintiffs also contend it is unsafe for them to proceed publicly with their claims against Chiquita in this MDL proceeding, noting that Chiquita is accused of funding the dangerous paramilitaries who harmed their family members and who may sense a threat against a common interest posed by the claims against Chiquita.

Notably, this ATS Plaintiff group also adduces evidence of one instance, involving a named ATS Plaintiff in the *Manjarres* suit, whose family was attacked in Colombia several months after the

conclusion of her Florida deposition in this lawsuit.[3] Plaintiffs acknowledge that the investigation into those attacks is ongoing, and do not suggest any premise for drawing a causal connection other than the temporal proximity of the two events.

Chiquita counters that Plaintiffs' assertions regarding heightened dangers for human right defenders in Colombia is pure hearsay, and that in any event, this data is entirely irrelevant to the current discussion because there is no evidence that Plaintiffs' claims against Chiquita and former Chiquita executives in the United States implicates the same threat to the interests of paramilitary or neo-paramilitary groups in Colombia as that posed by human rights defenders in Colombia. Defendants note, in this regard, that Plaintiffs have not sued the AUC as an organization, any front of the AUC, any former commander of the AUC, or even any former member of the AUC whom they believe killed their decedents. Without an AUC-related defendant or common AUC interest implicated by the claims

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[3] The family of Nancy Mora Lemus, a named bellwether Plaintiff in the *Manjarres* action, 08-80480-CIV-MARRA, (New York Action) was allegedly the subject of a series of attacks in Colombia in July 2018, a few months after Ms. Lemus' March 2018 deposition in Florida. Due to the temporal proximity of these events, Plaintiffs posit a suspected causal connection, although Ms. Lemus' attorney, Jonathan Reiter, has relayed these facts in a declaration based on his "current understanding of the facts surrounding these attacks, as they have been communicated to me by my investigators in Colombia.") [DE 2277-34, para. 3). Chiquita argues that the entire deposition transcript was designated as "highly confidential," and that there is no reason to believe that any participant in the deposition failed to maintain the required confidentiality, rendering it unlikely that the litigation event had any connection with the subsequent attacks.

against Chiquita in this litigation, Defendants contend there is simply no logical reason for former AUC members or any new AUC-like-groups to sense any threat to their interests or to retaliate against any ATS Plaintiff *because of* their participation in this suit and pursuit of claims against Chiquita.

The Court agrees with the essential logic underpinning Defendants' position and finds no continued justification for the use of pseudonyms by the select Plaintiffs groups who initially elected to proceed anonymously in this litigation. This is not to say that these Plaintiffs or their families, sadly and most unfortunately, may yet be targets of ongoing paramilitary or neoparamilitary abuses in Colombia, but without some evidence logically connecting their status as litigants in this MDL proceeding with a heightened risk of physical danger from such attacks, there is simply no legal basis to permit their continued use of pseudonyms in derogation of the constitutionally-premised presumption of openness in judicial proceedings in place in our federal system.

II. Discussion

Parties to a lawsuit must generally identify themselves in their respective pleadings. *Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992) (citing *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712 (5th Cir. 1979)).[4] This rule serves to protect the public's legitimate interest in knowing all of the facts surrounding court proceedings, including the identities of the parties,

[4] The Federal Rules of Civil Procedure require that complaints state the names of parties and make no provision for pseudonymous litigation. Fed. R. Civ. P. 10(a).

Frank, 951 F.2d at 322, and it is, accordingly, the exceptional case in which a plaintiff may proceed under a fictitious name. *Roe v. Aware Woman Cntr. for Choice, Inc.*, 253 F.3d 678, 688 (11th Cir. 2001) (citing *Frank*, 951 F.2d at 323). In exercising its discretion to allow a plaintiff to proceed anonymously, the district court is charged with determining whether the plaintiff has a substantial privacy right which outweighs the "customary and constitutionally-embedded presumption of openness in judicial proceedings." *Frank*, 951 F.2d at 322. Examples of situations justifying the use of pseudonyms include (1) cases involving matters of a highly sensitive and personal nature; (2) cases where plaintiffs would be at risk of real physical danger should they disclose their identity; (3) cases where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity. *Id.* at 324. Where, as here, a plaintiff's desire to proceed anonymously is based on the second category, fear of retaliation, the court's review properly focuses on (1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears and (3) the anonymous party's vulnerability to such retaliation. *Does I through XXIII v Advanced Textile Corp*, 214 F.3d 1058 (9th Cir. 2000).

The Pseudonymous Plaintiffs in this case argue that their identities should remain confidential because they believe they or their families are still being targeted by the AUC or new AUC-like groups in Colombia, and they fear they will experience violent reprisal if the AUC or their allies discovery they are participating in this lawsuit which arises out of paramilitary abuses, allegedly fueled by Chiquita, which occurred during the Colombian civil war. These

assertions, and the deposition testimony cited as support, however, do not show the kind of risk of physical or other injury to the Pseudonymous Plaintiffs that is required to permit them to continue to proceed under pseudonyms. Plaintiffs generally allege a vague fear or retaliation or bias against "human right defenders" and community social leaders based on the current persecution of such groups in Colombia, but they do not explain how their role in this lawsuit, as victims of AUC abuses dating back to the Colombian civil war, would implicate the same interests as those triggered by "human right defenders" in present-day Colombia.

With the exception of a single (named) *Manjarres* Plaintiff,[5] Plaintiffs advance generalized, subjective assertions of fear at the hands of former or neo-paramilitary groups in Colombia. While the Court is most sympathetic to these concerns, it finds that the presumption of openness in judicial proceedings outweighs the interests presented by Plaintiffs in support of their request to continue anonymously and shall grant Defendantsd' motion to require public disclosure of the Plaintiffs' identities. *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992). *See e.g. Doe v. Drummond Co.* ,2010 WL 9450757 (N.D. Ala. 2010) (disallowing continued use of pseudonyms by victims

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[5] The Court does not find sufficient evidence of a causal connection between the Mora attack and litigation activity in this MDL proceeding to justify continued use of pseudonyms by the Pseudonymous In an abundance of caution, the Court will, however, leave the protective order provisions banning disclosure of "private facts" intact as to this Manjarres plaintiff, without prejudice for the defendant to renew the issue after presentation of a more developed evidentiary record concerning the attacks.

of AUC abuses, finding generalized and always present fears of violent reprisal or death -- applicable regardless of plaintiffs' participation in the suit – insufficient to outweigh customary presumption of openness); *Qualls v. Rumsfeld*, 228 F.R.D. 8 (D. D.C. 2005) (soldiers serving in Iraq would not be allowed to proceed pseudonymously in litigation challenging validity of Stop Loss program); *Sandberg v. Vincent*, 319 F Supp.2d 422 (Cal. 2018)(defendant, an alleged perpetrator of sexual assault, did not show that he or any non-parties were subject to any plausible risk of retaliatory physical or mental harm so as to justify grant of motion to proceed under pseudonym in negligence action arising from assault).

It is accordingly **ORDERED AND ADJUDGED**:

1. Defendants' motion to preclude the continued use of pseudonyms, and to eliminate the restriction against disclosure of "private facts," as to those categories of ATS Plaintiffs selected for summary judgment briefing and bellwether trial, is **GRANTED.**

   Persons falling into these categories shall identify themselves in the public portion of the Court file within **FORTY-FIVE (45) DAYS** from the date of this order, failing which the Court shall dismiss their claims with prejudice and without further notice.

2. Further, as to these categories of ATS Plaintiffs, the stipulated Protective Order [DE 1389] is here modified to eliminate the against disclosure of "private facts."

3. As to the named ATS *Manjarres* Plaintiff Nancy Mora Lemus *only*, the Defendants'

motion to modify the prohibition in the Protective Order against public disclosure of private facts relating to ATS Plaintiffs is **DENIED.**

4. In light of the foregoing, the Wolf Plaintiffs' motion to strike Defendants' motion to preclude continued use of pseudonyms [DE 2253] is **DENIED AS MOOT**.

DONE and ORDERED in Chambers at West Palm Beach, Florida, this 10th day of April, 2019.

/s/ Kenneth A. Marra

KENNETH A. MARRA
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 08-md-01916-MARRA

In Re: Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Derivative Litigation

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This case pertains to:

All ATS ACTIONS

PROTECTIVE ORDER

Pursuant to proposed protective orders submitted by the parties [DE 1373, 1374], and Rule 26(c) of the Federal Rules of Civil Procedure, the Court enters the following Protective Order ("Order") limiting the disclosure and use of certain discovered information in this proceeding.

IT IS ORDERED AND ADJUDGED:

1. Designation of Confidentiality:

(a) All documents and information produced in this litigation either prior to or after the entry of this Order that:

(i) contain, reveal, or are derived from trade secrets, proprietary information, or confidential commercial or financial information;

(ii) contain, reveal, or are derived from private

facts of a personal or family nature, including, but not limited to, plaintiffs' names, financial, medical, psychological, interpersonal relationships, employment, or educational information, current and past home or business addresses, telephone numbers, and email addresses; or

(iii) contain, reveal, or are derived from domestic or foreign government sources that are not in the public domain nor publicly accessible, including, but not limited to, documents and information produced by the Department of Justice, Federal Bureau of Investigation, Securities and Exchange Commission, and United States Department of State, and their foreign equivalents or counterparts, may be designated "CONFIDENTIAL" under the procedures and standards set forth by this Order by the person or party producing such documents or information in this litigation or a party to this litigation ("Producing Party"). The person or party seeking production of such documents and information will be referred to in this Order as the "Receiving Party." Information described in sub-sections (i)-(iii) will be referred to in this Order as "Confidential Information."

(b) All Confidential Information that a Producing Party believes to be of such a highly sensitive nature that disclosure of such information may result in substantial personal, commercial or financial harm to a party or its employees, family members, customers, vendors, consultants, or contractors, or where a Producing Party believes to be of such a highly personal nature that disclosure of such information may expose a party or non-party to risk of any significant commercial, financial, physical or emotional harm, may be marked by the Producing

Party as "HIGHLY CONFIDENTIAL" under the procedures and standards set forth in this Order. Information described in this sub-section will be referred to in this Order as "Highly Confidential Material."

(c) "Highly confidential" materials shall also include any Materials, which relate to, include or can be used to ascertain the true names of the Pseudonymous Plaintiffs, the decedents, or other third parties with a reasonable fear of retaliation, including but not limited any documents disclosing:

(i) The name, identity, or Colombian National Document number for any Pseudonymous Plaintiff, or their decedents;

(ii) The name, identity, or Colombian National Document number for a Third Party covered by paragraph 1(e) of this Order;

(iii) The present address – including the name of the village, neighborhood, city, municipality, or administrative territorial division – or location of the Pseudonymous Plaintiffs, their family members, or any Third Party seeking protection pursuant to 1(e) of this Order.

(iv) Any other information that may be used to identify and/or threaten the Pseudonymous Plaintiffs, or other third Parties protected by paragraph 1(e), including but not limited to any photographic or pictorial depiction of the physical likeness, or any voice recording of any such person.

(d) Except for the disclosures required by the Order Setting Trial Dates and Discovery Deadlines (D.E. 1361), a Producing Party may redact all but the last four digits of the social security numbers, drivers'

license numbers, passport identification numbers, other government issued identification numbers, and bank account numbers for any individuals from all documents that it produces.

(e)The Producing Party must have a good faith basis for designating information as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL."

(f) A person receiving Confidential Information or Highly Confidential Information will not use or disclose the information except for the purposes set forth in section 3 of this Order.

(g) The provisions of this Order extend to all Confidential Information and Highly Confidential Information regardless of the manner in which it is or was disclosed, including, but not limited to, documents, disclosure as electronically stored information, interrogatory answers, responses to requests for admissions, deposition testimony and transcripts, deposition exhibits, any other discovery materials produced by a party in response to or in connection with any discovery or other proceedings in this litigation, or any copies, notes, abstracts, or summaries of the foregoing.

(h) The inadvertent failure to designate information as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" at the time of production is not a waiver of the Producing Party's right to later designate such information as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL." At the time of making the later designation, the Producing Party will provide to the Receiving Party a replacement copy of the information or materials properly marked and designated in accordance with this Order. No party will have violated this Order if, prior to notification of

a later designation, information or materials are disclosed or used in a manner inconsistent with this Order. If the information or materials are filed with a court in the public record prior to the later designation, the Producing Party may move the Court for appropriate relief.

(i) A Producing Party may withdraw a "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" designation by providing written notice to all other parties. A Producing Party may change a designation from "CONFIDENTIAL" to "HIGHLY CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" to "CONFIDENTIAL" by providing written notice to all other parties.

2. Means of Designating Materials or Documents as Confidential or Highly Confidential: Documents or information may be designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" within the meaning of this Order in the following ways:

(a) For documents, the Producing Party must place "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in the header or footer of each page of any designated document.

(b) For answers to interrogatories and responses to requests for admissions, the Producing Party will place a statement in each specific confidential or highly confidential answer or response that the answer or response or specific parts thereof are designated either "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL." In addition the Producing Party will place on the front page of any set of interrogatory answers or responses to requests for admissions contained or revealing Confidential Information or Highly Confidential Information the following:

"CONTAINS CONFIDENTIAL INFORMATION" or "CONTAINS HIGHLY CONFIDENTIAL INFORMATION"; and "DESIGNATED PARTS NOT TO BE USED, COPIED, OR DISCLOSED EXCEPT AS AUTHORIZED BY COURT ORDER."

(c) For depositions, counsel for a witness who provides deposition testimony, or a party participating in a deposition will identify on the record the portions of the deposition transcript (including exhibits) that contain or reveal Confidential Information or Highly Confidential Information, or will submit a letter within 14 days of receipt of the final deposition transcript. All deposition or other testimony will be treated as "HIGHLY CONFIDENTIAL" until the time within which it may be designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" has passed. If all or part of a deposition transcript contains Confidential Information or Highly Confidential Information, the following will be placed on the front of the original deposition transcript and all copies, or in the case of a videotaped deposition, on the videocassette, videotape container, or DVD: "CONTAINS CONFIDENTIAL INFORMATION" or "CONTAINS HIGHLY CONFIDENTIAL INFORMATION"; and "DESIGNATED PARTS NOT TO BE USED, COPIED, OR DISCLOSED EXCEPT AS AUTHORIZED BY COURT ORDER."

(d) For Electronically Stored Information ("ESI"), defined as information stored or recorded in any form of electronic or magnetic media (including information, data, files, images, audio or video recordings, databases or programs stored on any digital or analog machine-readable device, computer, optical or magnetic disc, chip, network, or tape), the

Producing Party will designate the ESI as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in a cover letter identifying the information generally. When feasible the Producing Party will mark the individual electronic or magnetic media or device with the appropriate designation. Whenever a party receives ESI designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and reduces the material to hardcopy form, such party will mark the hardcopy with the appropriate designations. Whenever any ESI designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" is copied into another file, device, or storage media, all copies must be marked as such in a manner reasonably calculated to protect the information from disclosure to persons not authorized to receive such information pursuant to this Order.

(e) To the extent that any party or counsel creates, develops, or otherwise establishes any digital or analog machine-readable device, recording media, computers, discs, networks, tapes, or any other digital storage system which contains any information, files, databases, or programs that contain or reveal information designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," that party and counsel must take all necessary steps to ensure that access to such information is properly restricted to those persons who may access Confidential Information and Highly Confidential Information pursuant to this Order.

3. Use of Confidential Information and Highly Confidential Information:

(a) All Confidential Information and Highly Confidential Information can be used only for the

purposes of prosecuting, defending, or settling this litigation, or any other related claim against any of the defendants subsumed within the In Re Chiquita Brands International Multi-District Litigation, or for disclosures that are required to be made by law or in the course of legal process, but will not be used for any other purpose. Any party may move the Court to modify these purposes as necessary (for example to expand use of Confidential and Highly Confidential Information in any subsequent related litigation).

(b) This Order applies to pretrial discovery and does not prevent the parties from introducing or using Confidential Information or Highly Confidential Information into evidence at trial, subject to any pretrial order issued by this Court.

(c) This Order does not restrict the disclosure or use of information that is public record, that is known or becomes known through means or sources outside of this litigation, or which has already been obtained from third-parties prior to entry of this Order; provided, however, that the parties shall treat publicly available information relating to the names, addresses and other identifying or contact information of plaintiffs residing in Colombia as Highly Confidential within the meaning of this Confidentiality Agreement, given the potential risk to the personal safety of plaintiffs residing in Colombia.

(d) No person, other than those identified in sections 3 or 4 or those who have executed a Confidentiality Agreement pursuant to section 7, will have access to Confidential or Highly Confidential Information without the approval of the Producing Party or the Court, nor will any other person be informed of Confidential Information or Highly

Confidential Information by any person having access to said information.

4. Disclosure of Confidential Information: Access to documents or information designated as "CONFIDENTIAL" pursuant to this Order is limited to:

(a) Attorneys for the parties, including members, associates, counsel, and any other attorneys in private law firms or nonprofit organizations representing the parties in this or any other related claim, and their law firms' paralegal, investigative, technical, secretarial, and clerical personnel engaged in assisting in the litigation, provided that at least one representative of each private law firm or nonprofit organization assumes responsibility for the compliance of all such personnel with the provisions of this Order by complying with Section 7 of this Order;

(b) Outside photocopying, document storage, data processing, translation, or graphic production service providers employed or retained by the parties or their counsel to assist in this litigation, provided that section 7 of this Order is complied with;

(c) Any expert, consultant, or investigator retained by counsel or whom counsel considers retaining for the purposes of consulting or testifying in this litigation, and any assistants retained by said experts, consultants, or investigators for purposes of the consulting or testifying work in connection with this litigation, provided that section 7 of this Order is complied with;

(d) Any translator or interpreter retained by Counsel for this litigation, provided that Section 7 of this Order is complied with;

(e)The parties, including any director, officer, or employee of Chiquita Brands International, Inc. ("Chiquita") involved in the defense or resolution of this litigation provided that Section 7 of this Order is complied with by any Chiquita employee who is not an Officer or Director of Chiquita;

(f) Any consultant or independent contractor of Chiquita involved in this litigation, provided that section 7 of this Order is complied with;

(g) The Producing Party, any current employee or agent of the Producing Party, or any other person who, as appears on the face of the document, authored, received, or otherwise has been provided access to, in the ordinary course, the Confidential Information or Highly Confidential Information sought to be disclosed to said person;

(h) This Court, the Court's personnel, court reporters, transcriptionists, translators, and interpreters, and other qualified persons including the Court's clerical personnel for recording, transcribing, or translating testimony or argument at any deposition, hearing, trial, or appeal in this litigation provided that Section 7 is complied with by anyone described in this subsection who is not employed by the Court;

(i) Third-party witnesses and counsel representing said witnesses, when used in good-faith preparation for, during the course of, or in review of deposition or trial testimony, provided that section 7 is complied with;

(j) Any other person to whom the Producing Party agrees in writing or on the record in advance of the disclosure upon the request of another party, provided that section 7 of this Order is complied with; and

(k) Any other person to whom the Producing Party chooses to disclose the information.

5. Disclosure of Highly Confidential Information: Access to documents or materials designated as "HIGHLY CONFIDENTIAL" is limited to:

(a) Attorneys for the parties, including members, associates, counsel, and any other attorneys in private law firms (including nonprofit organizations) representing the parties in this or any other related claim, and their law firms' paralegal, investigative, technical, secretarial, and clerical personnel engaged in assisting in the litigation provided that at least one representative of each private law firm (or nonprofit) assumes responsibility for the compliance of all such personnel with the provisions of this Order by complying with Section 7 of this Order;

(b) Outside photocopying, document storage, data processing, translation, deposition stenography or videography, or graphic production service providers employed or retained by the parties or their counsel to assist in this litigation, provided that section 7 of this Order is complied with;

(c) Any expert, consultant, or investigator retained by counsel or whom counsel considers retaining for the purposes of consulting or testifying in this litigation, and any assistants retained by said experts, consultants, or investigators for purposes of the consulting or testifying work in connection with this litigation, provided that section 7 of this Order is complied with;

(d) The Producing Party, any current employee or agent of the Producing Party, or any other person who, as appears on the face of the document, authored, received, or otherwise has been provided access to, in

the ordinary course, the Confidential Information or Highly Confidential Information sought to be disclosed to said person;

(e)This Court, the Court's personnel, and other qualified persons including the Court's clerical personnel recording, transcribing, or translating testimony or argument at any deposition, hearing, trial, or appeal in this litigation;

(f) Third-party witnesses and counsel representing said witnesses when used in good-faith preparation for, during the course of, or in review of deposition or trial testimony, provided that section 7 of this Order is complied with; such access is permitted only to the extent that the Highly Confidential Information is relevant to the anticipated testimony of the witness. No copies of any document containing Highly confidential information may be retained by the witness or counsel and the party taking the deposition shall notify the Producing Party in advance of the Highly Confidential Information to be used at the deposition so that the Producing Party may seek an order restricting such use;

(g) Any other person to whom the Producing Party agrees in writing or on the record in advance of the disclosure upon the request of another party, provided that section 7 of this Order is complied with; and

(h) Any other person to whom the Producing Party elects to disclose the information.

6.Attendance at Depositions: Only those individuals authorized to receive or have access to Highly Confidential Information are permitted to attend depositions in this matter, unless otherwise agreed upon by the parties and deponent in advance.

7. Notification of the Order and Confidentiality Agreement:

(a) Unless otherwise agreed in writing by all parties, all persons who are authorized to receive or access Confidential Information or Highly Confidential Information, other than the court personnel identified in sections 4 and 5 as exempt from this requirement must be provided a copy of this Order prior to the receipt of Confidential Information or Highly Confidential Information. Prior to disclosure of this information, such person is required to execute a Confidentiality Agreement the same or substantially similar to that attached as Exhibit A.

(b) The originals of executed Confidentiality Agreements will be maintained by the counsel who obtained them at least until final resolution of this litigation. Confidentiality Agreements and the names of the persons who signed them will not be subject to discovery except on agreement of the parties or order of the Court after application upon notice and good cause shown.

8. Objections to Designations: A failure to object to a designation of documents or material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" at the time the material is produced and designated does not preclude a subsequent challenge to said designation.

(a) If a party challenges the designation of any material under this Order, the parties will use their best efforts to resolve the objections between themselves. If the parties are unable to reach an agreement, the objecting party may, with notice to the Producing Party and within 10 days after providing the Producing Party with notice of the impasse, apply

to the Court for a ruling that the material should not be designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL."

(b) If such application is made, the Producing Party bears the burden of establishing that the designation is proper. If no such application is made, the designation remains.

(c) Any documents or materials designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" will be treated as such until the Court rules on the designation and a 21-day period to move the Court to reconsider or appeal the ruling has expired and no motion or appeal has been filed.

(d) This Order does not limit the right of a party to petition the Court for an in camera review of the material with the disputed designation.

9. Preservation of Rights and Privileges: Nothing in this Order affects the right of any party or witness to make any other objection or other response to discovery requests. Nothing in this Order requires the production of information or documents that are privileged or otherwise protected from disclosure. The parties expressly preserve any and all objections, privileges and exemptions. Inadvertent disclosure of such protected materials will not be deemed a waiver of the rights of any party to raise or challenge any objection or claim of privilege or protection from disclosure.

10. Compliance Not An Admission: A party's compliance with this Order is not an admission that any particular documents or material are or are not confidential, privileged, or admissible at trial.

11. Subpoenas, Other Discovery, or Other Process:

(a) Any Receiving Party in possession of Confidential Information or Highly Confidential Information who receives a subpoena, discovery request, or other process from any person or entity not a party to this Order, which subpoena or other demand seeks production or disclosure of Confidential Information or Highly Confidential Information, will promptly notify counsel for the Producing Party by phone and by written notice identifying the Confidential Information or Highly Confidential Information sought and including a copy of the subpoena, discovery request, or other process.

(b) The Receiving Party will inform the person or entity seeking the Confidential Information or Highly Confidential Information that the documents or materials sought are subject to this Order and will take all reasonable steps to protect the confidentiality of such information or materials.

(c) The Receiving Party will not produce or disclose the Confidential Information or Highly Confidential Information until the last day on which it must be produced under the terms of the subpoena, discovery request, or other process, unless the Receiving Party has been served with written notice, through email or facsimile, from the Producing Party that the Producing Party does not object to production of the Confidential Information or Highly Confidential Information, that an agreement has been reached between the party seeking production and the Producing Party, or that an order has been issued by a court of competent jurisdiction relieving the Receiving Party, temporarily or permanently, from its obligation to produce the Confidential Information or Highly Confidential Information. If the Producing

Party timely objects to the production of responsive information, then the Party served with the subpoena agrees to not produce any documents or information designated as Confidential or Highly Confidential until the designating party's objections to production have been resolved by agreement or order of a court or other competent authority.

12. Application to Non-Parties: This Order applies to any non-party obligated to provide discovery in this litigation, if that non-party requests the protection of this Order as to its Confidential Information or Highly Confidential Information and executes a Confidentiality Agreement in the same form or substantially the same form as the example agreement attached hereto as Exhibit A.

13. Modification: If any party finds that any term of this Order impedes its ability to prepare or present its case or is otherwise objectionable, that party may apply to the Court for modification of and relief from any of the terms of this Order. Stipulations may be made between counsel for the parties as to the application of this Order to specific situations, provided that such stipulations are recorded in writing or contained in the record of any oral proceeding.

14. Objections: Nothing in this Order prevents non-parties from submitting objections to the Court.

15. Inadvertent Disclosure to a Party:

(a) If a Producing Party inadvertently discloses information subject to a claim of privilege or immunity from disclosure, the disclosure of said information will not constitute or be deemed a waiver or forfeiture of any claim of privilege or immunity from disclosure which the Producing Party would otherwise be entitled to assert.

(b) If a Producing Party inadvertently discloses information subject to a claim of privilege or immunity from disclosure, the Producing Party must notify the Receiving Party in writing within 7 days of discovering the inadvertent disclosure. If a Receiving Party receives materials or information that reasonably appear to be subject to a claim of privilege or immunity from disclosure, and it is reasonably apparent that the materials or information was inadvertently disclosed, the Receiving Party must refrain from further examination of the materials and must notify the Producing Party immediately.

(c) If a Producing Party inadvertently discloses information subject to a claim of privilege or immunity from disclosure, the Receiving Party must, unless it contests the claim of privilege or immunity from disclosure, within 7 days of receipt of the notice described in section 15(b), return or destroy all copies of the documents or materials identified by the Producing Party as inadvertently disclosed, and provide a certification from counsel that all materials or information identified by the Producing Party as inadvertently disclosed has been returned or destroyed.

(d) If the Receiving Party contests the claim of privilege or immunity from disclosure, the Receiving Party must notify the Producing Party within 3 days after the Receiving Party receives the notice described in Paragraph 15(b), and move the Court for an order compelling disclosure of the inadvertently disclosed documents or materials within 7 days, after the Receiving Party notifies the Producing Party that it contests claim of privilege. Such motion must be filed under seal pursuant to Local Rule 5.4 and must not

assert the facts or circumstances surrounding the inadvertent disclosure as grounds for compelling disclosure. Pending resolution of this motion, the Receiving Party may not use the materials or information or disclose it to any person other than those required by law to be served with a copy of the sealed motion. Within 7 days of receipt of the notice that all inadvertently disclosed information has been returned or destroyed, the Producing Party must create a privilege log with respect to the information.

(e)The parties may stipulate to extend the time periods set forth in sections 18(c) and 18(d).

(f) The Producing Party bears the burden of establishing the privileged or protected nature of the disclosed information or materials.

16. Inadvertent Disclosure to Third Parties:

(a) If a person bound by this Order or an executed Confidentiality Agreement inadvertently discloses Confidential Information or Highly Confidential Information to a person not authorized to receive such information, or if a person authorized to receive such information breaches any of the obligations set forth in this Order, that person must immediately give notice to the Producing Party of the disclosure or breach. A person disclosing the Confidential Information or Highly Confidential Information must make every reasonable effort to retrieve the information and to limit the dissemination or disclosure of such information.

(b) If a person bound by this Order or an executed Confidentiality Agreement becomes aware of the unauthorized disclosure of Confidential Information or Highly Confidential Information to a non-party, that person must immediately give notice to the

Producing Party of such disclosure.

(c) Notice given under section 16(a) or (b) must include a full description of all facts pertaining to the wrongful disclosure.

(d) Persons who violate this provision of the Order may be subject to sanctions as provided by statute, rule, or the inherent power of the Court.

17. Return of Materials:

(a) Within 30 months after the final disposition of this action, including any appeals or settlements, and unless otherwise extended by further Court Order, all documents or materials containing Confidential Information or Highly Confidential Information will be returned to counsel for the Producing Party at the Producing Party's expense and discretion, or destroyed. If destroyed, the party undertaking destruction will certify in writing to the manner, time, and place of their destruction. The Producing Party shall provide written notice to the Receiving Party of its election to require return or destruction of such information no more than 90 days and no less than 30 days in advance of the required return or destruction. Failure to give such notice shall be considered an abandonment of any interest in the information. Preservation of the documents or materials described herein beyond the final disposition of this action is for the express purpose of allowing for the defense of any possible post litigation disputes.

(b) As to materials that contain or reveal Confidential Information or Highly Confidential Information but that constitute or reveal counsel's work product, counsel of record will be entitled to retain such work product in their files, so long as such files are clearly marked to reflect that they contain or

reveal information subject to this Order. Any such materials will be maintained in a way that is reasonably calculated to restrict access to the materials to the individuals authorized pursuant to Paragraph 7.

(c) Counsel for all parties will be entitled to retain pleadings, affidavits, motions, briefs, or other papers filed with the Court, deposition transcripts, and the trial record, including exhibits, even if such materials contain Confidential Information or Highly Confidential Information, so long as files containing such documents are clearly marked to reflect that they contain or reveal information subject to this Order. Any such materials will be maintained in a way that is reasonably calculated to restrict access to the materials to the individuals authorized pursuant to Paragraph 7.

18. Documents and Materials Filed with the Court: Nothing in this Order shall be construed to affect the admissibility of any document, material or information at any trial or hearing. Prior to offering any Confidential or Highly Confidential information in evidence at trial or any court hearing, or prior to filing any such information in support of any motion or other court filing, the party seeking to present the information shall inform the Court of the Confidential designation of the document or information and shall seek a determination by the Court as to whether the document or information should be received by the Court under seal. No party will disclose designated confidential documents or information in open Court without prior approval of the Court The procedures for the use of designated CONFIDENTIAL or HIGHLY CONFIDENTIAL documents, materials, or

information in any filing, during any hearing or during the trial of this matter will be determined by the parties and the Court in advance of the filing, hearing or trial.

19. Binding: The terms of this Order will remain in effect until the parties agree or the Court orders otherwise. Any person or entity that has executed a Confidentiality Agreement pursuant to this Order will continue to be bound by said Confidentiality Agreement and this Order until the parties agree or the Court orders otherwise.

20. Time: All time periods set forth in this Order will be calculated according to Rule 6 of the Federal Rules of Civil Procedure as then in effect.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 26th day of April, 2017.

/s/ Kenneth A. Marra
KENNETH A. MARRA
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11494-CC

D.C. Docket Nos. 0:08-md-01916-KAM; 0:08-cv-60821-KAM

In Re: Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Derivative Litigation

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0:07-cv-60821-KAM

ANTONIO GONZALEZ CARRIZOSA,
JULIE ESTER DURANGO HIGITA,
LILIANA MARIA CARDONA,
MARIA PATRICIA RODRIGUEZ,
ANA FRANCISCA PALAC MORENO, et. Al.,
Plaintiffs-Appellants,

versus

CHIQUITA BRANDS INTERNATIONAL, INC., an Ohio corporation,
CHIQUITA FRESH NORTH AMERICA LLC, a Delaware corporation,
Defendants-Appellees,
RODERICK HILLS, et. Al.,
Defendants.

9:08-cv-80421-KAM

JOHN DOE I, individually and as representative of his deceased father JOHN DOE 2,
JANE DOE 1, individually and as representative of her deceased mother JANE DOE 2,
JOHN DOE 3, individually and as representative of his deceased brother JOHN DOE 4,
JANE DOE 3, individually and as representative of her deceased husband JOHN DOE 5,
MINOR DOES #1-4, by and through their guardian JOHN DOE 6, individually and as representative of their deceased mother JANE DOE 4,
JOHN DOE 7, individually and as representative of his deceased son JOHN DOE 8,
JANE DOE 6,
JANE DOE 5,
JANE DOE 7, et. Al.,
Plaintiffs-Appellants,

versus

CHIQUITA BRANDS INTERNATIONAL, INC.,
Defendant-Appellee,
MOE CORPORATIONS 1-10, et. Al.,
Defendants.

9:08-cv-80465-KAM

JANE/JOHN DOES (1-144), as Legal Heirs to Peter Does 1-144, et. Al.,
Plaintiffs-Appellants,

versus

CHIQUITA BRANDS INTERNATIONAL, INC.,
Defendant-Appellee,
DAVID DOES 1-10, et. Al.,
Defendants.

9:08-cv-80508-KAM

JOSE LEONARDO LOPEZ VALENCIA, et. Al.
Plaintiffs-Appellants,

versus

CHIQUITA BRANDS INTERNATIONAL, INC., a New Jersey corporation,
Defendant-Appellee,
MOE CORPORATIONS 1-10, et. Al.,
Defendants.

9:17-cv-81285-KAM

DOES, 1-11,
Plaintiffs-Appellants,

versus

CARLA A. HILLS, Personal Representative of the Estate of Roderick M. Hills,
Defendant.

9:18-cv-80248-KAM

JOHN DOE #1, et. Al., individually and as representative of his deceased father JOHN DOE 2,
Plaintiffs-Appellants,

versus

CHIQUITA BRANDS INTERNATIONAL, INC. a New Jersey corporation,
Defendant-Appellee,
MOE CORPORATIONS 1-10, et. Al.,
Defendants.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before **WILSON**, **MARCUS**, and **BUSH***, Circuit Judges.

Per curiam:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en

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* Honorable John K. Bush, United States Circuit Judge for the Sixth Circuit, sitting by designation.

banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

Date filed: 12/14/2020