COMMONWEALTH OF MASSACHUSETTS

# Supreme Judicial Court

NO. SJC-10749

SUFFOLK COUNTY

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COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF-APPELLEE,

*v.*

FREMONT INVESTMENT & LOAN & OTHERS,
DEFENDANTS.

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ON CONSOLIDATED APPEALS FROM DENIAL OF APPELLANT'S MOTION FOR PRELIMINARY INJUNCTION, ALLOWANCE OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS, AND DENIAL OF APPELLANT'S MOTION TO INTERVENE BY THE SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT, SUFFOLK COUNTY

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**BRIEF OF *AMICUS CURIAE***
**THE NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS**

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# BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS

SUFFOLK COUNTY

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Shareholder and Consumer Attorneys ("NASCAT") is a nonprofit membership organization, founded in 1988, consisting of attorneys who litigate consumer, antitrust, environmental and securities fraud cases in federal and state courts. NASCAT's members are devoted to representing victims of corporate abuse, fraudulent schemes, and so-called "white collar" criminal activity in civil actions that have the potential for advancing the state of the law, educating the public, modifying corporate behavior, and improving the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent fraudulent, deceptive and manipulative business practices. NASCAT also has submitted briefs as *amicus curiae* in numerous cases over the past two decades in state and federal courts across the country, including the United States Supreme Court, on issues implicating consumer and shareholder rights.

NASCAT recognizes the key role of governmental and law enforcement agencies as, in many instances, the first line of defense for the public against

corporate wrongdoing. NASCAT also recognizes, however (as have many courts and judicial observers), that private enforcement of federal and state laws to protect consumers is a crucial component of our civil society. To put it plainly, our nation's public enforcement agencies cannot do it all, nor should this be expected of them.

Accordingly, NASCAT advocates a robust civil justice system to ensure vigorous enforcement of our nation's consumer protection and other laws through both public and private civil enforcement actions. Key to the success of this system is an educated and fully-informed citizenry that is able to evaluate the activities and performance of the government in pursuing its mandate to protect the public.

For these reasons and for those further discussed herein, NASCAT files this *amicus curiae* brief in support of Appellant Samuel J. Lieberman, and urges this Court to reverse the decision of the court below. The Commonwealth should not be permitted to rely solely on an adverse litigant's "confidentiality" designations pursuant to a stipulated blanket protective order to shield materials produced by that

litigant in a prior case from disclosure in response to a public records request.

## ISSUE PRESENTED

The Court has solicited *amicus* briefs in this case on the question of whether the Commonwealth may rely on a protective order, entered in a prior case that limited disclosure of a litigant's trade secrets and other business information, to shield those documents from disclosure in response to a public records request. NASCAT addresses this question herein.

## SUMMARY OF ARGUMENT

The Massachusetts Public Records Law ("MPRL"), G.L. c. 66, § 10, like many similar statutes across the country, is designed to provide broad public access to government documents in order to allow the public to evaluate, among other things, whether public servants are carrying out their duties in an efficient and law-abiding manner. Underlying these statutes is the idea that "greater access to information about the actions of public officers and institutions" is an "essential ingredient of public confidence in government." *New Bedford Standard-Times Publishing Co. v. Clerk of the Third Dist. Ct. of Bristol*, 377

Mass. 404, 417 (1979) (Abrams, J., concurring). For this reason, public records statutes are broadly enforced, and any exemptions thereto are strictly and narrowly construed. (pp. 6-8)

By invoking a stipulated blanket protective order with a litigant in a prior case in order to shield documents produced by that litigant from a public records request, the Commonwealth essentially seeks to write an exemption for "civil litigation" documents into the MPRL which previously has been considered and rejected by Massachusetts lawmakers. (pp. 8-13) Indeed, there is no common law or statutory basis for permitting the Commonwealth to shield otherwise public records from disclosure based on nothing other than an adverse litigant's "confidentiality" designation. (pp. 13-33)

The interpretation of the reach and power of a stipulated blanket protective order that the Commonwealth now advances amounts to the creation of an exemption that swallows the rule when it comes to public records. Essentially, it gives a party adverse to the Commonwealth in litigation the power, with the Commonwealth's assent, to potentially forever shield otherwise public records in the possession of the

Commonwealth from public disclosure based on little more than the adverse party's own wishes. The mandate of the public records statute – to educate and inform the public about the activities and performance of their government – cannot and should not be so easily cast aside. To do so would have far-reaching implications both for corporations that are subject to investigative actions by the Commonwealth and the citizenry whom the Commonwealth is supposed to serve. (pp. 24-33)

Contrary to the Commonwealth's exaggerated take on Appellant's public records-based arguments, no one in this case appears to be advocating for the elimination of the courts' ability to manage discovery involving public agencies. Nor does the application of the MPRL necessitate this result. It is simply the Commonwealth's and the courts' duty to balance the disclosure obligations of public agencies under the MPRL with concerns for expediency in litigation discovery. (pp. 27-33)

The Commonwealth's refusal to recognize this balance undermines the MPRL's mandate to permit broad public access to government records, as well as the Commonwealth's mandate to serve the public. (pp. 30-

33) By permitting the Commonwealth to rely exclusively on a stipulated blanket protective order for its refusal to disclose otherwise public records in response to a public records request, the trial court committed reversible error.

## ARGUMENT[1]

### I. Documents And Deposition Testimony Obtained By The Commonwealth In Litigation Are Public Records Unless A Specific Exemption To The MPRL Applies.

Before considering the question of whether a stipulated blanket protective order may shield from public disclosure certain documents and deposition testimony produced to the Commonwealth in litigation, it is helpful to examine whether such materials constitute "public records" under ordinary circumstances. A review of the caselaw and legislative history of the MPRL indicates that such materials unquestionably are public records unless they fall within a specifically enumerated exemption to the MPRL.

The MPRL provides that "[e]very person having custody of any public record . . . shall, at

[1] NASCAT relies on and incorporates by reference the Statement of the Case and Facts and Standards of Review set forth in the Brief of Appellant Samuel J. Lieberman, filed April 2, 2010 ("Appellant Br."), at 1-12, 20-22.

reasonable times and without unreasonable delay, permit it . . . to be inspected and examined by any person." G.L. c. 66, § 10. "Public records" are defined by statute as "all books, papers . . . or other documentary materials or data, regardless of physical form or characteristics, made *or received by* any officer or employee of any agency, executive office . . . division or authority of the commonwealth" unless such materials fall within one of eighteen categories of "exemptions." G.L. c. 4, § 7 cl. 26. (emphasis added); *see also Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 430-31 (1983) ("Public records" are broadly defined as those records and documents in possession of public officials).

The MPRL carries a "presumption in favor of disclosure" that is "in keeping with [the statute's] fundamental purpose to ensure public access to government documents." *General Electric Co. v. Dep't. of Envt'l. Protection*, 429 Mass. 798, 801-02 (1999). Accordingly, the eighteen enumerated exemptions to the statute "must be strictly and narrowly construed." *Id.* (citing cases).

In order to justify a refusal to produce public records, "the custodian carries the burden of proving

with specificity that the documents come within one of the statutory exemptions found in G.L. c. 4, § 7 cl. 26." *Globe Newspaper Co. v. Evans*, Civ. A. No. 97-4102-E, 1997 WL 448182, at *2 (Mass. Super. Ct. Aug. 5, 1997). "General and conclusory" assertions by a public agency that materials are exempt from disclosure are insufficient. *Globe Newspaper Co. v. Police Commissioner of Boston*, 419 Mass. 852, 857 n. 5 (1995). Moreover, the "applicability of an exemption to public disclosure must be determined on a case-by-case basis" involving "specific proof . . . that the documents sought are of a type for which an exemption has been provided." *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 436 Mass. 378, 383 (2002) (holding that there is "no blanket exemption" for law enforcement-related or "investigatory materials"); *see also Antell v. Attorney General*, 52 Mass. App. Ct. 244, 248 (2001) (same).

Neither the Commonwealth nor Appellees Fremont Reorganizing Corporation (f/k/a Fremont Investment & Loan) ("FRC") and Fremont General Corporation (collectively, "Fremont") can validly point to a specific statutory provision exempting from the scope

of the MPRL all documents and deposition testimony received by the Commonwealth from a party adverse to the Commonwealth in litigation.[2] To the contrary, as was discussed in detail by the Court in *General Electric*, *supra*, Massachusetts lawmakers previously considered and rejected a proposed exemption ("Exemption (k)") that would have shielded from public disclosure all "records pertaining to any civil litigation in which an agency . . . is involved, except in response to a subpoena, and only prior to final judicial determination or settlement of such litigation." *General Electric*, 429 Mass. at 802-03.[3] It further bears noting that if exemption (k) *had* been adopted (which it was not), it would have shielded "civil litigation" materials from disclosure *only* until the final adjudication or settlement of the underlying litigation, which would have made the exemption inapplicable in the present case. As the Commonwealth itself notes, a Final Judgment by Consent

[2] The Commonwealth's one attempt at specifying an applicable exemption to the MPRL (concerning documents "specifically or by necessary implication exempted from disclosure by statute") is discussed further *infra*.

[3] G.L. c. 4, § 7 cl. 26 still lacks a subclause (k).

in the enforcement action brought by the Commonwealth against Fremont was entered on June 9, 2009. *See* Br. of the Commonwealth of Massachusetts ("Commonwealth Br.") at 3-4.

Accordingly, unless the materials requested by Appellant also include information that falls under one of the MPRL's specified exemptions, they must be considered public records subject to disclosure under the MPRL. To the extent these materials contain information that is exempt from disclosure, the proper course would be to redact the exempt portions of these materials and disclose the remainder. *See Worcester Telegram & Gazette Corp.*, 436 Mass. at 383 ("To the extent that only a portion of a public record may fall within an exemption to disclosure, the nonexempt 'segregable portion' of the record is subject to public access") (internal citations omitted); *Globe Newspaper Co.*, 1997 WL 448182 at *2 ("The existence of some exempt information does not justify the refusal to disclose all of the information in a document.").

Courts interpreting public records statutes in other states have similarly concluded that pre-trial discovery in the possession of a public agency, including deposition transcripts, are public records

and must be disclosed in response to a public records request, with redactions where necessary to shield information that is exempt from disclosure. *See, e.g., Memphis Pub. Co. v. City of Memphis*, 871 S.W. 2d 681, 689 (Tenn. 1994) ("we hold that . . . deposition transcripts are [public] records within the meaning of the [public records statute]")[4]; *City of Los Angeles v. Superior Court*, 41 Cal. App. 4th 1083, 1087-88 (1996) (same)[5]; *Yellowstone County v. Billings Gazette*, 333 Mont. 390, 396 (2006) (same).[6]

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[4] Although the Tennessee Supreme Court acknowledged that, as a general matter, a protective order might prevent an opposing party from disseminating information learned at a deposition, the Court did not discuss the potential impact of such a protective order on a public records request, or whether and when such a protective order to which a public agency is party may properly terminate or be modified. *Id.* at 689.

[5] California's public records statute includes an exemption concerning "records pertaining to pending litigation" that is similar to the proposed Exemption (k) that was rejected by Massachusetts lawmakers. *Id.* at 1087. The California provision has been interpreted by courts primarily to prevent a litigant opposing the government from using the statute's disclosure provisions "to accomplish earlier or greater access to records pertaining to pending litigation . . . than would otherwise be allowed under the rules of discovery," and, notably, only "*for a limited period while there is ongoing litigation*." *Id.* (emphasis added).

[6] Additionally, the fact that pre-trial discovery obtained by a public agency may not have been filed

As a final resort, and notwithstanding express law to the contrary, the Commonwealth argues that Exemption (a) to the MPRL (the "Statutory Exemption") applies to materials produced pursuant to the stipulated blanket protective order. Commonwealth Br. at 34-36. This argument lacks merit.

The Statutory Exemption concerns documents that "specifically or by necessary implication [are] exempted from disclosure by statute." G.L. ch. 4, § 7 cl. 26(a). As the Commonwealth itself is forced to concede, the mere fact that the Massachusetts Rules of Civil Procedure (including Rule 26(c), authorizing the use of protective orders) were "promulgated under statutory authority and in close cooperation with the Legislature, does not bring them within the term 'statute'" for purposes of triggering the Statutory Exemption. Commonwealth Br. at 35 (citing *General Electric*, 429 Mass. at 806). The Commonwealth then nonetheless proceeds to argue, essentially, that the

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with the Court (*e.g.*, in connection with a motion for summary judgment) is of no moment in determining whether such materials are considered public records. *See, e.g., Memphis Pub. Co. v. City of Memphis*, 871 S.W. 2d at 688 (holding that public records statute "does not require that a deposition [conducted by attorneys for a city and county] be filed in the court before the public has a right to inspect it").

Statutory Exemption applies because the Massachusetts Rules of Civil Procedure were promulgated under statutory authority and in close cooperation with the Legislature. Commonwealth Br. at 35-36. The Commonwealth's position is no different from that specifically rejected by the Court in *General Electric*, and must fail.

## II. The Commonwealth Inappropriately Relies On A Stipulated Blanket Protective Order To Shield Otherwise Public Records From Disclosure.

For the reasons explained above, the Commonwealth cannot meaningfully dispute that pre-trial discovery materials produced to the Commonwealth, as a general matter, fit the definition of "public records" under G.L. ch. 66, § 10. The Commonwealth is thus compelled to argue that the materials Appellant seeks are beyond the purview of the MPRL because (i) the Commonwealth came to possess Fremont's documents and testimony "*only* subject to the limitations of" a stipulated blanket protective order (Commonwealth Br. at 23) (emphasis in original), (ii) such documents and testimony were and are "confidential" (solely because Fremont unilaterally designated them as such pursuant to the protective order) (*id.*), (iii) absent the

protective order, the Commonwealth would not have been permitted access to Fremont's "confidential information," (*id.* at 23-24), and (iv) requiring the Commonwealth to disclose the materials Appellant has requested would amount to an "abrogation" of the court's inherent authority to govern court proceedings. *Id.* at 8-9. These arguments lack merit for the following reasons.

### A. Documents are not rendered "confidential" simply by virtue of their having been designated as such by a producing party pursuant to a protective order.

First, and most fundamentally, the Commonwealth's arguments presuppose, based on nothing more than Fremont's own assertions, that the information supplied by Fremont was and remains "confidential" or "protected" under Massachusetts law. This contention would lack merit even if the MPRL was not at issue.

Rule 26(c) provides for confidential treatment, for "good cause shown," only as to "trade secret or other confidential research, development, or commercial information." Mass. R. Civ. P. 26(c)(7). "Good cause" requires that a party seeking a protective order meet its "burden of demonstrating a particular need for protection." *Thomas v. Sarfaty*,

Civ. A. No. 9901361B, 2001 WL 417280, at *4 (Mass. Super. Ct. Feb. 2, 2001). "Broad allegations of harm, unsubstantiated by specific examples, cannot support the issuance of a protective order." *Id.* As the First Circuit observed in interpreting the analogous federal rule, it is "implicit in Rule 26(c)'s 'good cause' requirement that ordinarily (in the absence of good cause) a party receiving discovery materials might make them public." *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988).

A "blanket protective order," such as the one at issue here, permits a party to produce documents marked "confidential" without a showing of good cause for confidentiality as to any individual documents at the time of production. *Id.* In such instances, the "good cause" showing is postponed until only such time as a receiving party challenges a "confidentiality" designation. A party's "confidential" designation does not, by itself, create a presumption that the produced materials are entitled to confidentiality – it remains the producing party's burden, consistent with Rule 26(c), to establish "good cause" for continued confidential treatment of the documents in question. Indeed, this is entirely consistent with

the language to which the Commonwealth and Fremont consented in the blanket stipulated protective order at issue here, which states as follows:

> *Designation of any material as 'Confidential' shall not create any presumption that documents and transcripts so designated are Confidential;* and shall not shift the burden of establishing entitlement to confidential treatment from the Producing Party.

Appendix ("App.") at 420 (emphasis added).

Throughout its briefing, the Commonwealth consistently and unquestioningly refers to the documents produced by Fremont as "confidential" and/or "protected" information, notwithstanding the facts that (i) the Commonwealth admits never having challenged any of Fremont's confidentiality designations, which were attached to almost the entirety of Fremont's production (roughly 5.5 million pages of documents and deposition testimony) (Commonwealth Br. at 5,) (ii) "good cause" accordingly has never been established for the confidential treatment of *any* of the limited materials sought by Appellant, and (iii) the blanket stipulated protective order explicitly provides that a "confidential" designation "shall *not* create any presumption" that documents so-designated are confidential. App. at

420. By the terms of the blanket stipulated protective order itself, the Commonwealth has little basis on which to continually tout the "confidential" or "protected" nature of the materials at issue here.

Indeed, if Fremont's confidentiality designations *were* to be challenged now, Fremont would have difficulty establishing "good cause" for continuing confidential treatment as to virtually any of the limited materials Appellant seeks. "Confidential Materials" are defined in the stipulated blanket protective order as those "entitled to confidential treatment pursuant to Rule 26(c) of the Massachusetts Rules of Civil Procedure *and* which the Producing Party . . . designates as confidential." *See* App. at 414 (emphasis added). In other words, merely designating material "confidential" pursuant to the protective order was not sufficient, by itself, to protect that material from disclosure to other than "Qualified Persons"; such designated material also needed to satisfy Rule 26(c). *Id.*

As stated above, Rule 26(c) provides for confidential treatment, for "good cause shown," only as to "trade secret or other confidential research, development, or commercial information." Mass. R.

Civ. P. 26(c)(7). As Appellant explains, "trade secrets" and "confidential information" are essentially identical concepts under Massachusetts law. *See* Appellant Br. at 36. A trade secret consists of information that is in "continuous use in the operation of a business." *Id.* Since Fremont is out of the subprime mortgage origination business entirely, there are no "trade secrets" of Fremont's left to protect.[7] And as another state's highest court has noted, "a party . . . cannot meet the statutory trade secret definition by stating that documents for which trade secret status is claimed are protected merely by reference to them in an agreement of confidentiality." *State ex rel. The Plain Dealer v. Ohio Dep't. of Insurance*, 80 Ohio St. 3d 513, 527 (1997).

Additionally, to the (unlikely) extent that any of the materials that Appellant seeks contain information "the disclosure of which may constitute an unwarranted invasion of personal privacy," such

[7] Although the Commonwealth contends that the stipulated blanket protective order with Fremont "reaches confidential information that may not qualify as trade secrets," (Commonwealth Br. at 33), it offers no explanation nor any legal support for this contention.

information may be redacted prior to disclosure. *Attorney General v. Assistant Commissioner of the Real Property Dep't. of Boston*, 380 Mass. 623, 625-26 (1980) (discussing Exemption (c) to the MPRL). The types of personal information that "privacy exemptions" in public records statutes generally are designed to protect "include marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights (and) reputation." *Id.* at 626 n.2 (discussing analogous federal law).

Moreover, while blanket or umbrella orders "may be useful in expediting the flow of pretrial discovery materials," they "are by nature overinclusive and are, therefore, peculiarly subject to later modification," even in cases not involving public agencies. *Public Citizen*, 858 F.2d at 790.[8] This applies with even more

[8] Although the protective order at issue here purports to be modifiable "*only* by a writing executed by the parties and approved by the Court," App. at 421 (emphasis added), this does not limit the trial court's ability to modify the order *sua sponte* or otherwise on motion. *Public Citizen*, 858 F.2d at 782 ("If the reservation [of the court's power to modify a protective order] had been omitted, power there still would be by force of principles inherent in the

force to "injunctions entered by consent of the parties," as is the case here. *Id.* at 782; *see also In re Ethylene Propylene Diene Monomer Antitrust Litig. ("EPDM")*, 255 F.R.D. 308, 319 (D. Conn. 2009) ("*stipulated* blanket [protective] orders are even less resistant to a reasonable request for modification") (emphasis in original). This is so because while it is difficult to argue that a party can "reasonably rely" on a "blanket protective order" to forever remain in place as to any documents produced, it is progressively harder for a party to reasonably rely on a blanket protective order that was not even contested or entered after a hearing to show good cause. *Public Citizen*, 858 F.2d at 782, 790-91; *EPDM*, 255 F.R.D. at 318-22.[9] It is even *less* reasonable for a party to contend that it relied on a stipulated blanket protective order's protection in producing all

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jurisdiction of chancery") (citing *United States v. Swift & Co.*, 286 U.S. 106 (1932)).

[9] *See also Beckman Indus., Inc. v. Internat'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (modifying stipulated blanket protective order to permit public access to deposition transcripts, holding that "reliance" on the protective order was necessarily "less with a blanket order, because it is by nature overinclusive" and, by stipulating to the order, defendant "never had to make a 'good cause' showing" under Fed. R. Civ. P. 26(c)).

discovery materials when that party "would have been compelled to produce [the discovery] even in the absence of such an order."[10] *EPDM*, 255 F.R.D. at 322; *see also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 101 F.R.D. 34, 44 (C.D. Cal. 1984) (same).

Factors that favor modification of a blanket protective order to permit public disclosure include, *inter alia*: (i) a settlement or dismissal of the underlying action, (ii) the passage of time, (iii) public interest concerns, (iv) a low level of court inquiry prior to granting the order, (v) an unreasonableness in presuming that the protective order could remain in force forever, and (vi) whether the producing party could have been compelled to produce information absent the protective order. *See*

[10] It should be noted that, in *EPDM*, the District of Connecticut applied the Second Circuit's standard for modifying a protective order, which the court acknowledged is stricter and leans more heavily against modification than that which holds true in other circuits, including the First Circuit. *EPDM*, 255 F.R.D. at 317-18 (citing *Public Citizen*, 858 F.2d at 791). However, even the tougher Second Circuit standard, which calls for "extraordinary circumstances" when modifying a protective order, "*is not appropriate in cases with stipulated protective orders that grant parties open-ended and unilateral deference to protect whichever discovery materials they choose.*" *Id.* at 321 (emphasis added, internal citations omitted).

*Public Citizen*, 858 F.2d at 790-92; *EPDM*, 255 F.R.D. at 318, 323.[11]

Each of these factors would counsel in favor of modification of the blanket protective order at issue here to permit public disclosure, even if the MPRL did not apply. Fremont entered into a stipulated blanket protective order with the Commonwealth, which required little or no court inquiry prior to being entered. Pursuant to that order, Fremont designated virtually its entire production and the deposition testimony of its employees "confidential," without a single showing of good cause. Additionally, there can be little dispute that Fremont would have been required to produce most, of not all, of these materials – particularly the deposition testimony and exhibits, which is all that Appellant seeks - in the Commonwealth's civil enforcement action even without the stipulated protective order.[12] That civil

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[11] *See also State of Minnesota v. Philip Morris Inc., et al.*, 606 N.W. 2d 676 (Minn. App. 2000) (modifying blanket protective order after weighing factors).

[12] Indeed, Fremont could not simply have refused to produce documents and deposition testimony in response to the Commonwealth's subpoenas. At most, Fremont could have moved for a protective order pursuant to Rule 26(c), which would have required

enforcement action is now settled, and any confidential "trade secret" concerns that could have attached to the materials Fremont produced have been eliminated with the passage of time.[13] Finally, the interests of the public in the subject matter of the underlying litigation have been clear and, indeed, invoked repeatedly by both the Commonwealth and the lower courts from the outset. Appellant Br. at 2-3.

Accordingly, even if the underlying litigation had not pitted Fremont against a public agency, it would be unreasonable for Fremont to presume that the materials it produced pursuant to the stipulated blanket protective order should remain forever shielded from the public. The fact that the underlying litigation *did* involve a public agency, with well-known public disclosure obligations pursuant to the MPRL, makes any claimed "reliance" on the

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Fremont to show good cause, and ultimately would have resulted in the same materials being produced, much of it without the "confidential" designations that the Commonwealth now accepts - and expects the public to accept - at face value.

[13] *See, e.g., In re Parmalat Sec. Litig.*, 258 F.R.D. 236, 250 (S.D.N.Y. 2009) (modifying blanket protective order where defendant could not explain "why the seven-year-old information concerning its marketing strategy has any continued value" to defendant or "why the information might otherwise cause [defendant] harm if it was disclosed").

protective order at issue in this case even more untenable.

### B. There is no adequate basis on which to imply an exemption to the MPRL for materials produced pursuant to a protective order.

Additionally, there is no adequate basis on which to "imply" an exemption to the MPRL for materials produced pursuant to a protective order. As stated above, Massachusetts lawmakers previously considered and rejected an exemption (Exemption (k)) which would have applied to documents made or received by the Commonwealth in the course of civil litigation. *General Electric*, 429 Mass. at 802-03. Additionally, the MPRL is *not* silent as to the treatment of materials that might ordinarily be accorded confidential treatment pursuant to Rule 26(c). Exemption (g) specifically provides for the confidential treatment of "trade secret" information, and clearly outlines the limited circumstances under which such confidential treatment is appropriate. G.L. ch. 4, § 7 cl. 26(g). *See* Appellant Br. at 22-25.

Taken together, these factors signal a clear legislative intent not to exempt pre-trial discovery

materials in the possession of public agencies from public disclosure to the extraordinary degree which the Commonwealth and Fremont now advocate, and which the trial court erroneously endorsed. It is inappropriate, under the circumstances present here, to imply such a broad-based exemption to the MPRL based on purportedly common law concerns. *See General Electric*, 429 Mass. at 805-06 (refusing to imply common law-based exemption where a case did "not concern an ambiguity" in the MPRL that "invites differing interpretations, and the Legislature clearly considered, but rejected, the exemption sought by the defendant.").

The Commonwealth argues that an exemption to the MPRL for materials produced pursuant to a protective order must be implied, because to do otherwise would impermissibly abrogate the courts' common law authority to control litigation and discovery. Commonwealth Br. at 14-33. The trial court endorsed this view, observing that "[t]he authority of the judicial branch to enter orders necessary for the conducting of its business is a principle of long-standing," the "abrogation" of which "cannot be imputed as a necessary by-product of the legislature's

failure to have inserted in the statute" an express exemption concerning documents produced pursuant to protective orders. App. at 774.

In reaching this conclusion, both the Commonwealth and the trial court analogize a court's ability to enter a protective order, considered an important tool of "judicial administration," to the attorney-client privilege, which "has deep roots in the common law and is firmly established as a critical component of the rule of law in our democratic society." App. at 774 (citing *Suffolk Construction Co. v. Division of Capital Asset Management*, 449 Mass. 444, 456 (2007)). This analogy is insupportable.

In *Suffolk Construction*, the Court held that the MPRL did not preclude the protection of the attorney-client privilege from records made or received by a public agency. 449 Mass. at 445. In so holding, the Court observed that the "attorney-client privilege is a fundamental component of the administration of justice" whose "social utility is virtually unchallenged." *Id.* at 446. "Dating at least from the age of Shakespeare," the Court observed, "the attorney-client privilege is the oldest of the privileges for confidential communications known to

the common law." *Id.* at 448-49 (internal citations omitted). Although the attorney-client privilege "may impede access to relevant facts," the Court noted, "that is the price that society must pay for the availability of justice to every citizen, which is the value that the privilege is designed to secure." *Id.* at 449 (internal citations omitted). Accordingly, the Court held that documents to which the attorney-client privilege attaches under the common law must not be considered public records under the MPRL, notwithstanding the absence of a specific statutory exemption concerning such materials. *Id.* at 460-61.

Unlike the attorney-client privilege, protective orders - much less stipulated blanket protective orders - simply cannot be considered a "fundamental component of the administration of justice" with a "social utility" that is "virtually unchallenged." *Id.* at 446. Rather, Rule 26(c) protective orders are more properly considered as tools of judicial administration. They are designed to protect a party (for good cause) from annoyance, embarrassment, or undue burden or expense, while permitting the exchange of relevant information among litigants in order to speed the discovery process. *See Public Citizen*, 858

F. 2d at 790. Unlike the attorney-client privilege, which survives even a client's death,[14] however, a protective order is not inviolable; indeed, as discussed above, a protective order is "always modifiable," even "peculiarly" so, depending on the circumstances and timing of the entry of the protective order and any request to so modify it. *Id.* at 782, 790.

In this manner, materials subject to a protective order are more analogous to work product than attorney-client privileged information. Like the ability to enter protective orders, the work product doctrine is a "tool of judicial administration, borne out of concerns over fairness and convenience and designed to safeguard the adversarial system, but not having an intrinsic value in itself outside the litigation arena." *Suffolk Construction*, 449 Mass. at 456 (internal citation omitted). Like protective orders, the work product doctrine is not inviolable; work product may be discoverable on a showing of need. *Id.* at 457. For that reason, as well as the legislature's express rejection of Exemption (k) (concerning "civil litigation" materials), the Court

[14] *See Suffolk Construction*, 449 Mass. at 456.

has declined to imply an exemption under the MPRL for documents in the possession of a public agency that may, under the common law, constitute attorney work product, unless those materials also fall within the scope of an express statutory exemption. *General Electric*, 429 Mass. at 801. The same result should attach here with respect to documents marked "confidential" pursuant to a protective order.

A broad-based "implied" exemption to the MPRL for documents produced pursuant to a Rule 26(c) protective order runs a substantial risk of rendering the MPRL toothless when it comes to litigation involving the Commonwealth. Corporate defendants will invariably insist on blanket protective orders such as the one entered here, to which the Commonwealth is likely agree rather than expend the resources to enforce a subpoena. Such defendants will then label all of their produced documents "confidential," regardless of whether they meet that definition under Rule 26(c) (much less the MPRL). If such cases settle, Massachusetts citizens will be notified (as they were here)[15] that they can apply for benefits from the

[15] According to the Massachusetts Attorney General's website, the deadline for submitting claim

settlement, but they will have no right to examine any of the otherwise public records on which the Commonwealth based its decision to settle, and thus no ability to evaluate the settlement or the performance of the Attorney General's office.

The mandate of the MPRL cannot so easily be overridden by the will of private litigants – nor, indeed, by the Commonwealth itself. *See Attorney General v. Collector of Lynn*, 377 Mass. 151, 158 (1979) ("The public has an interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner"). Indeed, as the Court has previously observed, permitting public officials "to decide unilaterally, without any oversight, what documents are subject to disclosure and what documents are exempt is wholly inconsistent with the purpose of G.L. c. 66, § 10." *Worcester Telegram & Gazette Corp.*, 436 Mass. at 385. Consistent with this principle, ample Massachusetts authority provides that (i) there is "no blanket exemption" to public disclosure for records relating

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forms to receive cash benefits under the Commonwealth's settlement with Fremont was August 10, 2007. *See* "How Do I File a Claim?" at http://www.massagfremontsettlement.com/faqs.htm.

to law enforcement or "for investigatory materials," and (ii) the potential prejudicial effect of disclosure on "effective law enforcement" is to be considered on a case-by-case basis. *Worcester Telegram & Gazette Corp.*, 436 Mass. at 383 (internal citations omitted); *Globe Newspaper Co.*, 419 Mass. at 859 (same).

In arguing for an implied, broad-based exemption to the MPRL for any documents marked "confidential" pursuant to a stipulated blanket protective order, however, the Commonwealth seeks what this Court has refused to grant prior to now: "unilateral" authority - if not solely for the Commonwealth, then for the Commonwealth and whatever corporate litigant it finds itself up against – to determine what documents are exempt under the MPRL, based on a generalized, rather than case-specific, concern over the Attorney General's ability to pursue its law enforcement mandate. Such an exemption "would swallow up the rule." *Globe Newspaper Co.*, 1997 WL 448182 at *5.[16]

[16] *See also City of Los Angeles*, 41 Cal. App. 4th at 1090 (rejecting argument that public disclosure of discovery from closed cases would "create a chilling effect upon the manner in which a public entity prepares its cases and would severely undermine the adversarial system.").

Finally, contrary to the Commonwealth's mischaracterization, Appellant does not appear to contend, nor would NASCAT argue, that the MPRL "abrogates" a court's inherent power to manage discovery in litigation involving public agencies generally. Commonwealth Br. at 31-32. All that Appellant appears to seek here are public records, not "confidential information" as the Commonwealth contends. *Id.* at 23. And the Commonwealth ought not be permitted to decide in concert with an adverse litigant what is, and may forever remain, "confidential" and protected from disclosure to the public without regard to the Commonwealth's obligations under the MPRL. *See, e.g., The Plain Dealer*, 80 Ohio St. 3d at 527 ("we do not agree that the mere existence of a confidentiality agreement between [parties] can prevent disclosure of records that are not determined to be trade secrets and are otherwise subject to disclosure under the Public Records Act"); *cf. Anchorage School Dist. v. Anchorage Daily News*, 779 P.2d 1191, 1193 (Alaska 1989) ("a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential"); *Tribune-*

*Review Publishing Co. v. Westmoreland County Housing Authority*, 574 Pa. 661, 676-77 (2003) (same); *Central Kentucky News-Journal v. Hon. Doughlas M. George, et al.*, 306 S.W. 3d 41, 46 (Ky 2010) (same).

## CONCLUSION

For the reasons set forth herein, NASCAT respectfully submits that the order of the trial court below granting Appellee's motion for judgment on the pleadings and denying with prejudice Appellant's motion for preliminary injunction should be reversed and remanded, with instructions that the Commonwealth should not be permitted to rely solely on the protective order stipulated to with Fremont in denying Appellant's public records request.

Respectfully submitted,

NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS, as *Amicus Curiae*

By their counsel,

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

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