

No.

IN THE
Supreme Court of the United States

FCA US LLC, F/K/A CHRYSLER GROUP LLC,

Petitioner,

v.

THE CENTER FOR AUTO SAFETY,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

KATHY A. WISNIEWSKI
JOHN W. ROGERS
STEPHEN A. D'AUNOY
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6000

THOMAS H. DUPREE, JR.
Counsel of Record
JACOB T. SPENCER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

ROWENA SANTOS
THOMPSON COBURN LLP
2029 Century Park East
19th Floor
Los Angeles, CA 90067
(310) 282-2500

Counsel for Petitioner

QUESTION PRESENTED

Chrysler produced documents containing confidential commercial information in reliance on a protective order issued under Federal Rule of Civil Procedure 26(c). That rule allows district courts to limit the dissemination of discovery documents based on a showing of “good cause.” Chrysler’s opponent then filed those documents—under seal—as attachments to a motion. The Center for Auto Safety moved to intervene and unseal the documents.

Although the district court held that there was “good cause” to keep the documents under seal, a split panel of the Ninth Circuit held that the Rule 26 “good cause” standard was no longer enough, given the public’s common law right of access to judicial records. Instead, the panel majority held—in direct conflict with three other circuits—that Chrysler must make a heightened and demanding showing of “compelling reasons” to keep the documents under seal.

The question presented is whether “good cause” is sufficient to maintain under seal discovery documents governed by a Rule 26 protective order and filed with the court.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

All parties to the proceeding in the court whose judgment is sought to be reviewed are named in the caption.

Jimmy Pat Carter, Elizabeth Dillon, Marcos Galvan, Donald Kendrick, Phillip Lightfoot, John Melville, Daphne Ray, Bradford Soule, and Jacqueline Young, on behalf of themselves and all others similarly situated, were plaintiffs in the district court but did not appeal the district court's rulings or participate in the case in the court of appeals.

FCA US LLC, formerly known as Chrysler Group LLC, is a wholly owned subsidiary of FCA North America Holdings LLC, formerly known as Fiat North America LLC, a Delaware limited liability company with its principal place of business in New York, New York. FCA North America Holdings LLC is wholly owned by Fiat Chrysler Automobiles N.V., a Dutch company whose equity is publicly traded on the New York Stock Exchange. No other publicly held company owns 10% or more of FCA US LLC's stock.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	9
I. THE NINTH CIRCUIT’S ERRONEOUS STANDARD CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.	11
A. The Decision Below Deepens A Conflict Among The Circuits Regarding The Proper Standard For Unsealing Discovery Documents Filed With A Court.	11
B. The “Compelling Reasons” Standard Undermines Rule 26(c) And Deprives Protective Orders Of Any Meaningful Effect.	18
II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO LITIGANTS AND TO THE JUDICIAL PROCESS.	22
CONCLUSION	24

TABLE OF APPENDICES

	Page
APPENDIX A: Court of Appeals' Opinion, 809 F.3d 1092 (9th Cir. Jan. 11, 2016)	1a
APPENDIX B: District Court's Opinion, 2014 WL 7404590 (C.D. Cal. Dec. 30, 2014).....	37a
APPENDIX C: Court of Appeals' Order Denying Rehearing (9th Cir. Feb. 18, 2016).....	51a

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Chicago Tribune Co. v. Bridgestone / Firestone, Inc.</i> , 263 F.3d 1304 (11th Cir. 2001).....	2, 13, 17, 18, 20
<i>Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.</i> , 178 F.3d 943 (7th Cir. 1999).....	2, 12, 13
<i>Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.</i> , 307 F.3d 1206 (9th Cir. 2002).....	7, 20
<i>Foltz v. State Farm Mut. Auto. Ins. Co.</i> , 331 F.3d 1122 (9th Cir. 2003).....	7
<i>FTC v. Standard Fin. Mgmt. Corp.</i> , 830 F.2d 404 (1st Cir. 1987)	3, 15
<i>Kamakana v. City & County of Honolulu</i> , 447 F.3d 1172 (9th Cir. 2006).....	8, 17
<i>In re Knoxville News-Sentinel Co.</i> , 723 F.2d 470 (6th Cir. 1983).....	3, 15
<i>Leucadia, Inc. v. Applied Extrusion Techs., Inc.</i> , 998 F.2d 157 (3d Cir. 1993)	2, 9, 12
<i>In re Midland Nat’l Life Ins. Co. Annuity Sales Practices Litig.</i> , 686 F.3d 1115 (9th Cir. 2012).....	8

TABLE OF AUTHORITIES (*continued*)

CASES (<i>continued</i>)	Page(s)
<i>Nixon v. Warner Commc'ns, Inc.</i> , 435 U.S. 589 (1978).....	9
<i>In re Perrigo Co.</i> , 128 F.3d 430 (6th Cir. 1997).....	15
<i>In re Providence Journal Co.</i> , 293 F.3d 1 (1st Cir. 2002)	15
<i>Romero v. Drummond Co.</i> , 480 F.3d 1234 (11th Cir. 2007).....	14
<i>Seattle Times Co. v. Rhinehart</i> , 467 U.S. 20 (1984).....	10, 19, 22, 23
<i>Stone v. Univ. of Md. Med. Sys. Corp.</i> , 855 F.2d 178 (4th Cir. 1988).....	9
STATUTE	
28 U.S.C. § 1254(1).....	1
RULES	
Fed. R. Civ. P. 1.....	20
Fed. R. Civ. P. 5.2(e).....	19
Fed. R. Civ. P. 26(c).....	<i>passim</i>

TABLE OF AUTHORITIES (*continued*)

TREATISE	Page(s)
8A Wright & Miller, Federal Practice and Procedure § 2044.1 (3d ed. 2015)	20

PETITION FOR A WRIT OF CERTIORARI

Petitioner FCA US LLC, formerly known as Chrysler Group LLC, respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-36a) is reported at 809 F.3d 1092. The district court's opinion (Pet. App. 37a-50a) is not reported but is available electronically at 2014 WL 7404590. The court of appeals' order denying rehearing (Pet. App. 51a-52a) is not reported.

JURISDICTION

The court of appeals entered its judgment on January 11, 2016. A timely rehearing petition was denied on February 18, 2016. Pet. App. 51a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 26(c) provides:

(c) PROTECTIVE ORDERS.

(1) *In General.* 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 court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

...

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.

STATEMENT

This case presents an important and recurring question of federal law that has divided the circuits: When may discovery documents that are subject to a protective order but filed with a court be maintained under seal? Federal Rule of Civil Procedure 26(c) authorizes district courts to enter protective orders shielding discovery documents from public disclosure based on a showing of “good cause”—such as where disclosure would jeopardize a trade secret or “confidential research, development, or commercial information.”

The question presented here is whether the Rule 26 “good cause” standard continues to govern when a document subject to the protective order is attached as an exhibit to a pleading—or whether the party seeking to maintain confidentiality must instead satisfy a more demanding test by demonstrating “compelling reasons” to keep the document under seal, in light of the presumption of public access to judicial records.

The Third, Seventh and Eleventh Circuits hold that the “good cause” standard continues to govern. See *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 166 (3d Cir. 1993); *Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999); *Chicago Tribune Co. v.*

Bridgestone/Firestone, Inc., 263 F.3d 1304, 1313 (11th Cir. 2001).

The First and Sixth Circuits, in contrast, reject the “good cause” standard and instead demand a heightened showing of “compelling reasons.” See *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987); *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983).

The Ninth Circuit has now deepened the conflict by adopting a *third* approach. It holds that the “compelling reasons” standard governs *if* the discovery documents are attached to a motion that is “more than tangentially related to the merits of a case.” Pet. App. 19a. Otherwise, the “good cause” standard governs. In adopting a “more than tangentially related to the merits” bifurcated standard, the Ninth Circuit stands alone. No other court has adopted this test.

As Judge Ikuta recognized in dissent, the Ninth Circuit’s rule “eviscerates Rule 26(c) and its benefits,” because it enables a party to effectively nullify a protective order simply by attaching a confidential discovery document to a pleading that is “more than tangentially related” to the merits. Pet. App. 33a, 35a.

The Court should grant certiorari and hold that the approach followed in the Third, Seventh and Eleventh Circuits is correct. Only a “good cause” standard that applies to *all* motions is consistent with the text of Rule 26 and maintains the integrity of district-court protective orders.

1. Certain Chrysler vehicles are equipped with a device known as a “Totally Integrated Power Mod-

ule-7.” The TIPM-7 controls and distributes electric power throughout the vehicle. Ninth Circuit Excerpts of Record (“ER”) 178. Chrysler devoted extensive resources to researching and developing the TIPM-7. ER 266.

For that reason, and because disclosure of design and engineering information could give Chrysler’s competitors an advantage in the marketplace, Chrysler is careful to avoid publicly disclosing confidential information about the TIPM-7. ER 266-68. Indeed, Chrysler internally restricts access to sensitive information concerning the TIPM-7 by granting its own employees limited access on a “need to know” basis. ER 269. Chrysler employees are required to protect confidential commercial information and, except as may be required in the course of their official duties, are prohibited from discussing such information with anyone. ER 269-70.

Plaintiffs—certain individuals who own Chrysler vehicles—filed a putative class action against Chrysler, alleging a design defect in the TIPM-7. Because the complaint’s allegations implicated sensitive commercial information, the district court entered a stipulated protective order. ER 71. The order authorized either party to “designate any document as ‘Confidential’ . . . if that party and its counsel in good faith believe that the designated restriction is appropriate because the document contains or reflects trade secrets or other confidential research and development, financial, commercial, or personal information.” ER 72. The parties agreed to limit their confidential designations to documents that the “disclosing party in good faith believes will, if disclosed, have the effect of causing harm to its business or

competitive position” or of “reveal[ing] personal information.” *Id.* The protective order set forth the procedure for challenging confidentiality designations, and it prohibited the parties from filing any documents that “contain[ed] ‘Confidential’ information” unless the documents were under seal. ER 72-75.

Chrysler produced more than 86,000 documents to Plaintiffs. ER 167. The vast majority of these documents were not designated confidential. However, a small number of these documents contained nonpublic commercial information, including information about the TIPM-7’s design. Chrysler produced these documents to Plaintiffs under a confidentiality designation, relying on the protective order entered by the district court. ER 265.

Plaintiffs moved for a preliminary injunction. Their motion asked the district court to order Chrysler to send a notice to its customers informing them that the TIPM-7 may need to be replaced. District Court Docket Entry (“D.E.”) 53, 54. Plaintiffs wished to attach as exhibits to their motion several of the confidential documents that they had obtained from Chrysler in discovery. In accordance with the protective order, Plaintiffs moved to file the documents under seal. ER 134-35, 227-28. Chrysler also sought leave to file under seal certain confidential documents that it wished to attach to its brief in opposition. D.E. 63.

The district court reviewed in camera the documents sought to be filed under seal. Based on its review, the district court concluded that while most of the documents could be filed under seal because they

contained confidential commercial information, some did not, and thus those documents could not be filed under seal. ER 139-40, 230-31.

The district court held a hearing on Plaintiffs' motion for a preliminary injunction and denied the motion from the bench. ER 249.

2. Several days before the preliminary injunction hearing, the Center for Auto Safety moved to permissively intervene for the purpose of seeking access to the documents that had been filed under seal. D.E. 81-1. The Center simultaneously moved to unseal the documents. D.E. 82-1, at 4-12.

In response, Chrysler submitted a declaration from James Bielenda, an electrical engineer and Manager of Product Investigations, Product Analysis for Chrysler. ER 261. Bielenda's declaration discussed (in general terms) the contents of the documents the Center sought to unseal. It explained why the documents needed to be kept confidential, and why disclosure of the information in the documents could harm Chrysler in the marketplace. ER 265-70.

The district court denied the Center's motion to unseal. Pet. App. 49a. It held that under well-settled Ninth Circuit precedent, discovery documents attached to a nondispositive motion could be sealed based on a finding of "good cause." *Id.* at 41a-45a.

The court identified the reasons supporting its finding of good cause, focusing on the sensitive commercial information in the documents and the danger that Chrysler could suffer competitive harm from disclosure. Pet. App. 45a-49a. The court cited evidence—the Bielenda declaration—that disclosure "could provide competitors with information about

[Chrysler’s] manufacturing and testing processes, specifications, and standards, as well as [its] ‘operational capacity.’” *Id.* at 45a. “Such information,” the court explained, “could provide competitors with specific guidance as to how to manufacture their own products more efficiently, without having to engage in the expensive research and development that [Chrysler] has already done.” *Id.* at 45a-46a.

3. The Ninth Circuit vacated and remanded, concluding that “the district court applied the incorrect standard when evaluating the motion to unseal these documents.” Pet. App. 4a. The court held that the “compelling reasons” standard applies when “the motion [to which the discovery documents are attached] is more than tangentially related to the merits of a case.” *Id.* at 19a. The court found that, in this case, “plaintiffs’ motion for preliminary injunction is more than tangentially related to the merits.” *Id.* at 20a. Thus, “[d]ue to the strong presumption for public access and the nature of the instant motion for a preliminary injunction, Chrysler must demonstrate compelling reasons to keep the documents under seal.” *Id.* at 22a. The court emphasized that, unlike the “good cause” standard, the “compelling reasons” standard was a “stringent standard” that respected “the real world intersection of Rule 26(c) and the right to public access.” *Id.* at 8a, 19a.¹

¹ In reaching this result, the panel majority distinguished a line of Ninth Circuit precedent that had drawn the line in a different place. These prior cases had held that the “compelling reasons” standard applies to “dispositive motions,” and the “good cause” standard applies to “non-dispositive motions.” Pet. App. 9a-11a (discussing *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206 (9th Cir. 2002); *Foltz v. State Farm*

Judge Ikuta dissented. She stated that the majority’s rejection of the “good cause” standard “eviscerates Rule 26(c) and its benefits” by “depriv[ing] protective orders . . . of any force or effect.” Pet. App. 35a. She explained that “the majority’s rule upsets the balance between the common law right of access and Rule 26,” noting that “it makes little sense to render the district court’s protective order useless simply because the plaintiffs attached a sealed discovery document to a . . . motion filed with the court.” *Id.* at 34a-35a (quotation marks omitted). “Any member of the public,” she explained, “will be able to obtain these documents filed under seal unless Chrysler can meet the intentionally stringent ‘compelling reasons’ standard, which generally requires proof that the documents are being intentionally used for an improper purpose.” *Id.* at 36a. In short, under the majority’s approach, “it is clear that no future litigant can rely on a protective order and will have to chart its course through discovery cautiously and belligerently, to the detriment of the legal system.” *Id.*²

Mut. Auto. Ins. Co., 331 F.3d 1122 (9th Cir. 2003); *Kamakana v. City & County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006)). The panel majority acknowledged the “language in our cases,” but reasoned that “[w]hen using the words ‘dispositive’ and ‘nondispositive,’ we do not believe our court intended for these descriptions to morph into mechanical classifications.” *Id.* at 5a, 12a.

² On January 27, 2016, the district court granted final approval of the settlement between the class plaintiffs and Chrysler. D.E. 167. Of course, there still remains a live case or controversy whether the district court properly denied the Center’s motion to unseal. *See, e.g., In re Midland Nat’l Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115, 1117-18 (9th Cir. 2012) (third party filed motion to intervene and unseal docu-

REASONS FOR GRANTING THE PETITION

Federal Rule of Civil Procedure 26 protects litigants by allowing a district court—upon a showing of “good cause”—to prohibit the public disclosure of confidential commercial information that could harm the litigant’s competitive standing. On the other hand, there is a general common law right “to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (footnote omitted). This right “is not absolute” and public access may be denied “where court files might . . . become a vehicle for improper purposes,” or where they could be used “as sources of business information that might harm a litigant’s competitive standing.” *Id.* at 598.

These principles intersect when documents subject to a protective order are filed under seal with a court. This Court has not determined whether discovery documents may be kept confidential upon a showing of “good cause” under Rule 26, or whether the common law right of public access requires a heightened showing.

ments after parties settled underlying dispute); *see also Leucadia*, 998 F.2d at 161 n.5 (“[A] district court may properly consider a motion to intervene permissively for the limited purpose of modifying a protective order even after the underlying dispute between the parties has long been settled.”); *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 n.* (4th Cir. 1988) (“The affirmance of the summary judgment order in this case does not moot the [third party’s] motion to unseal, because the right of access to judicial records and documents is independent of the disposition of the merits of the case.”).

In the decision below, the Ninth Circuit required a showing of “compelling reasons” to maintain discovery documents under seal whenever they are attached to a motion more than tangentially related to the merits of a case. The Ninth Circuit’s approach deepens an entrenched conflict among the circuits: Some courts of appeals continue to apply Rule 26’s “good cause” standard to confidential documents filed with a court, while others dispense with the good cause standard and demand a heightened showing of “compelling reasons.” By imposing a heightened standard, the Ninth Circuit’s decision eviscerates Rule 26’s protections because it allows a party to effectively nullify a protective order by attaching confidential discovery documents to a pleading.

As this Court has recognized, “[i]t is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984) (footnote omitted). Discovery permits litigants to obtain information that “if publicly released could be damaging to reputation and privacy.” *Id.* at 35. “[T]he liberality of pretrial discovery permitted” by the Federal Rules thus renders it “necessary for the trial court to have the authority to issue protective orders.” *Id.* at 34. If parties cannot rely with confidence on protective orders, the result will be less cooperation in discovery, and more battles over what documents must be turned over. This Court’s review is required to resolve the entrenched conflict among

the circuits and to maintain the integrity of protective orders.

I. THE NINTH CIRCUIT’S ERRONEOUS STANDARD CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The Ninth Circuit adopted a two-tiered approach for determining whether discovery documents filed with a court may be maintained under seal: the “compelling reasons” standard applies to motions that are more than tangentially related to the merits; the “good cause” standard applies to motions that are not. The Ninth Circuit’s approach conflicts with decisions of the Third, Seventh, and Eleventh Circuits, which apply a “good cause” standard, regardless of the nature of the motion. It also conflicts with decisions of the First and Sixth Circuits, which apply a “compelling reasons” standard to motions other than discovery motions. This Court should grant review and hold that the “good cause” standard—the only standard that is faithful to the text and purpose of Rule 26(c)—applies to all motions.

A. The Decision Below Deepens A Conflict Among The Circuits Regarding The Proper Standard For Unsealing Discovery Documents Filed With A Court.

The courts of appeals are sharply divided over the proper standard for determining when discovery documents governed by a protective order and filed with a court may be maintained under seal.

1. **Good Cause.** The Third, Seventh, and Eleventh Circuits have each held that documents subject to a protective order and filed with a court may be maintained under seal if there is “good cause” for keeping them confidential.

In *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157 (3d Cir. 1993), a third party “moved to intervene permissively in a settled lawsuit for the limited purpose of modifying a court-imposed protective order to gain access to material that had been filed with the court under seal pursuant to that order.” *Id.* at 158. The Third Circuit recognized the presumptive right to public access to judicial records. But that right “is not absolute.” *Id.* at 165 (quotation marks omitted). “To overcome the presumption, the party seeking the protective order *must show good cause* by demonstrating a particular need for protection.” *Id.* at 166 (emphasis added; quotation marks omitted). The good cause standard, derived from Rule 26(c), applies “when a non-party moves to intervene in a pending or settled lawsuit for the limited purpose of modifying a protective order and inspecting documents filed under seal.” *Id.*

Similarly, in *Citizens First National Bank of Princeton v. Cincinnati Insurance Co.*, 178 F.3d 943 (7th Cir. 1999), the district court entered a protective order permitting the parties “to designate as confidential, and thus keep out of the public record of the litigation, any document ‘believed to contain trade secrets or other confidential . . . information.’” *Id.* at 945 (citation omitted). The Seventh Circuit noted that because “the public at large pays for the courts,” there is a presumption of public access to the “record compiled in a legal proceeding.” *Id.* at 944-45. But

that “interest does not always trump the property and privacy interests of the litigants,” and “it can be overridden . . . *only if there is good cause* for sealing a part or the whole of the record in that case.” *Id.* at 945 (emphasis added) (applying Rule 26(c)); *see also id.* at 946 (“Most cases endorse a presumption of public access to discovery materials, and therefore require the district court to make a determination of *good cause* before he may enter the order.” (emphasis added; citations omitted)).

The Eleventh Circuit’s decision in *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001), makes the conflict in the circuits particularly stark. That case arose on very similar facts—yet the Eleventh Circuit adopted a different legal rule than the Ninth Circuit adopted here.

In *Chicago Tribune*, the court considered “an appeal of the district court’s order unsealing documents previously filed pursuant to a protective order.” 263 F.3d at 1307. During discovery, the parties “stipulated to a protective order allowing each other to designate particular documents as confidential and subject to protection under [Rule 26].” *Id.* Under the terms of the protective order, 15 of the 300 documents filed with the court were placed under seal, and remained under seal after the litigation settled. *Id.* at 1308. Members of the press “sought leave to intervene for the purpose of unsealing [the] documents.” *Id.* (footnote omitted). The district court unsealed the documents, concluding that the party seeking to keep them confidential had failed to show a “compelling interest” in doing so. *Id.* at 1309.

The Eleventh Circuit vacated the order, holding that the district court should have applied “Rule 26’s ‘good cause’ standard.” 263 F.3d at 1309, 1315. The court noted that the “common-law right of access to judicial proceedings” “is not absolute.” *Id.* at 1311. That right “demands heightened scrutiny” only in “narrow circumstances” where “the trial court conceals the record of an entire case, making no distinction between those documents that are sensitive or privileged and those that are not.” *Id.* Heightened scrutiny is *not* appropriate, however, where the court seals “particular documents” that had been “submitted to support summary judgment motions.” *Id.* at 1312. Instead, the right of access to “documents filed in connection with [a] motion for summary judgment,” the court held, “may be resolved by *the Rule 26 good cause balancing test.*” *Id.* at 1313 (emphasis added); accord *Romero v. Drummond Co.*, 480 F.3d 1234, 1246 (11th Cir. 2007) (“The common law right of access may be overcome by a *showing of good cause*, which requires balancing the asserted right of access against the other party’s interest in keeping the information confidential.” (emphasis added; quotation marks and alteration omitted)).

2. *Compelling Reasons.* The First and Sixth Circuits, in contrast, hold that documents subject to a protective order and filed with a court may be maintained under seal only if there are “compelling reasons” for keeping them confidential.³

³ These courts make an exception for “discovery motions,” holding that documents attached to those motions are not subject to the public right of access.

In *FTC v. Standard Financial Management Corp.*, 830 F.2d 404 (1st Cir. 1987), the Boston Globe sought access to sealed attachments to court filings. The First Circuit held that the documents must be unsealed because “only the *most compelling reasons* can justify non-disclosure of judicial records.” *Id.* at 410 (emphasis added; alteration and citation omitted) (noting agreement with Sixth Circuit’s approach). A “good cause” standard would not be sufficient because “[t]he citizens’ right to know is not lightly to be deflected.” *Id.*; accord *In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002) (“[O]nly the most compelling reasons can justify non-disclosure of judicial records that come within the scope of the common law right of access.” (quotation marks omitted)).

Likewise, in *In re Knoxville News-Sentinel Co.*, 723 F.2d 470 (6th Cir. 1983), two newspapers intervened in a lawsuit between a bank and the Federal Deposit Insurance Corporation, seeking access to exhibits containing sensitive consumer and commercial information that had been sealed under a protective order. *Id.* at 472. The Sixth Circuit held that, in light of “the presumptive right of the public to inspect and copy judicial documents and files,” “[o]nly the *most compelling reasons* can justify non-disclosure of judicial records.” *Id.* at 474, 476 (emphasis added); accord *In re Perrigo Co.*, 128 F.3d 430, 446 (6th Cir. 1997) (Moore, J., dissenting) (under Sixth Circuit precedent, “only the most compelling reasons should ever justify non-disclosure of judicial records”).

3. *Two-Tiered Approach.* The Ninth Circuit applies two different standards for determining whether documents subject to a protective order and filed under seal may be kept confidential—a “compelling reasons” standard if they are filed with motions “more than tangentially related to the merits of a case,” but a “good cause” standard otherwise. Pet. App. 19a.

The Ninth Circuit has articulated “a strong presumption in favor of access to court records.” Pet. App. 8a (quotation marks omitted). Where the presumption of access applies, “[a] party seeking to seal a judicial record” must demonstrate “compelling reasons” for doing so. *Id.* (alteration in original; quotation marks omitted). But the court has “carved out an exception for sealed materials attached to a discovery motion unrelated to the merits of a case.” *Id.* at 9a (quotation marks and citation omitted). “Under this exception, a party need only satisfy the less exacting ‘good cause’ standard,” stemming from Rule 26(c). *Id.*

The Ninth Circuit noted that its approach was purportedly consistent with other circuits in recognizing that a presumptive public right of access attached to the documents in question. *See* Pet. App. 15a-16a. But that is beside the point. The circuit split implicated here does *not* involve the threshold question whether a presumptive public right of access attaches to the documents in the first place. Rather, the circuit split involves the legal standard necessary to unseal documents that are *subject to* the presumptive right of public access—that is, the showing that must be made to rebut the presumption of public access.

* * *

Before the district court and the court of appeals, Chrysler and the Center for Auto Safety disputed whether the discovery documents attached to a preliminary injunction motion could be sealed upon a showing of “good cause,” or whether a “compelling reasons” standard applied. *See* Pet. App. 5a, 11a. The difference between the two standards is substantial. *See, e.g., Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1180 & n.4 (9th Cir. 2006) (“It is important to emphasize the difference between the ‘compelling reasons’ standard and the ‘good cause’ standard A ‘good cause’ showing will not, without more, satisfy a ‘compelling reasons’ test.”).

The district court held that a “good cause” standard applied; conducted a careful document-by-document review; and found good cause to keep the documents sealed, focusing on the sensitive commercial information in the documents and the danger that Chrysler could suffer competitive harm from disclosure. *See* Pet. App. 41a-49a. The Ninth Circuit vacated and remanded for the district court “to consider the documents under the compelling reasons standard.” *Id.* at 22a.

If this case had been litigated in the Third, Seventh, or Eleventh Circuits, the district court’s choice of legal rule would have been upheld. In the First and Sixth Circuit, however, it would have been overturned, as it was here.

The circuit conflict is especially clear when this case is compared to the Eleventh Circuit’s decision in *Chicago Tribune*. Both cases are automobile-related alleged defect cases where a third-party intervenor

moved to unseal discovery documents subject to a protective order and attached to a motion. In this case, the district court applied a “good cause” standard, and the Ninth Circuit vacated and remanded, holding that the district court should have applied a “compelling reasons” standard. In *Chicago Tribune*, the district court applied a “compelling reasons” standard, and the Eleventh Circuit vacated and remanded, holding that the district court should have applied a “good cause” standard. The cases are mirror images of one another—virtually identical facts and procedural postures—yet the circuits have adopted conflicting legal standards.

B. The “Compelling Reasons” Standard Undermines Rule 26(c) And Deprives Protective Orders Of Any Meaningful Effect.

The Ninth Circuit erred by rejecting a “good cause” standard and holding that Chrysler “must demonstrate compelling reasons to keep the documents under seal.” Pet. App. 22a.

Rule 26(c) secures the right of litigants “to protect certain documents disclosed in discovery from release to the public,” by authorizing district courts to “grant a protective order ‘to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.’” Pet. App. 25a (Ikuta, J., dissenting) (quoting Fed. R. Civ. P. 26(c)). This includes “requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.” Fed. R. Civ. P. 26(c)(1)(G). Under Rule 26(c), district courts have discretion to issue protec-

tive orders for “good cause.” Fed. R. Civ. P. 26(c)(1); *see also* Fed. R. Civ. P. 5.2(e) (allowing district courts to enter protective orders requiring redactions, or limiting access to the electronic docket based on a showing of “good cause”).

The Ninth Circuit’s ruling is in substantial tension with *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). In that case, the Court held that where “a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.” *Id.* at 37. In reaching this conclusion, the Court rejected the argument that limiting the public dissemination of discovery documents required a “compelling governmental interest” showing. *Id.* at 31. A “good cause” standard was appropriate, the Court held, because a “compelling interest” standard “would impose an unwarranted restriction on the duty and discretion of a trial court to oversee the discovery process.” *Id.* Although the Court acknowledged that “there certainly is a public interest” in the discovery documents, “[i]t does not necessarily follow . . . that a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery.” *Id.* And with regard to discovery documents filed with a court, the Court noted that “to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court.” *Id.* at 33 n.19.

Protective orders are essential for securing “the just, speedy, and inexpensive determination of every

action and proceeding.” Fed. R. Civ. P. 1. “Among the goals furthered by protective orders is reducing conflict over discovery and facilitating the flow of information through discovery.” 8A Wright & Miller, *Federal Practice and Procedure* § 2044.1 (3d ed. 2015).

The Ninth Circuit’s approach undermines those goals and “vitiates Rule 26(c).” Pet. App. 25a (Ikuta, J., dissenting). Nothing on the face of the rule limits the discretion accorded to a district court to protect discovery documents from public dissemination simply because those documents happen to be filed with the court. As the Eleventh Circuit has held, “where a party has sought the protection of Rule 26,” the mere “fact that sealed material is subsequently submitted in connection with a substantive motion does *not* mean that the confidentiality imposed by Rule 26 is automatically forgone.” *Chicago Tribune*, 263 F.3d at 1313 (emphasis added). It would make “little sense to render [a] district court’s protective order useless” merely because a party’s litigation opponent—having obtained a confidential document in discovery pursuant to a protective order—decided to attach it as an exhibit to a pleading. *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002). Where a district court has entered a protective order, “changing the ground rules later is to be avoided because protective orders that cannot be relied upon will not foster cooperation through discovery.” Wright & Miller, *supra*, § 2044.1.

As the panel majority itself acknowledged, “[a]pplying a strong presumption of access to documents a court has already decided should be shielded

from the public would surely undermine, and possibly eviscerate, the broad power of the district court to fashion protective orders, and thereby undermine Rule 26(c).” Pet. App. 9a (quotation marks omitted). Nonetheless, the Ninth Circuit’s decision changed the ground rules of discovery, subjecting any party that produces confidential information to risk of public disclosure at the whim of the other party. Indeed, the court’s approach “effectively holds that *all* sealed documents attached to *any* filing that has *any* relation to the merits of the case are subject to the public’s presumed right of access, and therefore deprives protective orders issued under Rule 26(c) of any force or effect.” *Id.* at 35a (Ikuta, J., dissenting).

The panel majority asserted that under a “good-cause” standard, “the public would not be presumed to have regular access to much (if not most) of the litigation in federal court.” Pet. App. 11a. That statement is obviously wrong: the “good cause” standard only comes into play in the context of documents filed under seal, and the vast majority of documents filed in federal court are *not* filed under seal. Moreover, applying a “good cause” standard for *rebutting* the presumption of public access does not *eliminate* that presumption. Instead, it appropriately balances the public’s right of access with the privacy rights of litigants. Accordingly, the common law right to access judicial records does not require displacing the protection provided by Rule 26(c).

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO LITIGANTS AND TO THE JUDICIAL PROCESS.

The Ninth Circuit’s imposition of a heightened standard for maintaining discovery documents under seal—and the deep divide among the courts of appeals over the proper legal standard—has significant consequences for litigants and the just, speedy, and inexpensive resolution of lawsuits.

Protective orders are a common feature of modern civil litigation. Particularly in cases involving trade secrets or other sensitive business information, parties often seek a protective order to ensure that any confidential commercial information they produce in discovery is not shared with the general public. Protective orders facilitate discovery by enabling parties to disclose sensitive documents to their opponent, under the assurance that those documents will not be publicly disseminated.

Rule 26(c) “confers broad discretion on the [district] court to decide when a protective order is appropriate and what degree of protection is required.” *Seattle Times*, 467 U.S. at 36. The Ninth Circuit’s approach substantially limits that discretion—and “deprives protective orders issued under Rule 26(c) of any force or effect,” Pet. App. 35a (Ikuta, J., dissenting)—by allowing protective orders to be circumvented simply by attaching the discovery documents to a motion.

If commercially sensitive documents produced in discovery can no longer be kept confidential through a “good cause” protective order—but may become public absent a showing of “compelling reasons”—the

result will be less cooperation in discovery, and more battles over what documents must be turned over. Indeed, in this case Chrysler produced more than 86,000 documents during discovery—and designated only a minute fraction as “confidential.” Chrysler relied on the district court’s protective order, which had determined that those documents should not be made public. If Chrysler had known that the protective order could be so easily circumvented, it may well have taken a very different approach to discovery.

This Court’s review is warranted to resolve the deep divide in the circuits and preserve the integrity of Rule 26 protective orders. This Court should grant review and confirm—consistent with the approach of the Third, Seventh and Eleventh Circuits—that Rule 26’s “good cause” standard continues to apply even where discovery documents are attached to a motion filed with a court. *Cf. Seattle Times*, 467 U.S. at 28-29 (granting certiorari to resolve a conflict regarding the proper standard for issuing protective orders, and holding that “good cause” was enough). That approach is the best way to balance the public’s right to access judicial records with the privacy interests of litigants and the need to protect trade secrets and other sensitive commercial information.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KATHY A. WISNIEWSKI
JOHN W. ROGERS
STEPHEN A. D'AUNOY
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6000

ROWENA SANTOS
THOMPSON COBURN LLP
2029 Century Park East
19th Floor
Los Angeles, CA 90067
(310) 282-2500

THOMAS H. DUPREE, JR.
Counsel of Record
JACOB T. SPENCER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Petitioner

March 24, 2016

APPENDIX

APPENDIX A

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE CENTER FOR AUTO SAFETY, <i>Intervenor-Appellant,</i> v. CHRYSLER GROUP, LLC, <i>Defendant-Appellee.</i>

No. 15-55084

D.C. No.
2:13-cv-08080-
DDP-VBK

OPINION

Appeal from the United States District Court for the
Central District of California

Dean D. Pregerson, District Judge, Presiding

Argued and Submitted
October 20, 2015—Pasadena, California

Filed January 11, 2016

Before: Sandra S. Ikuta and John B. Owens, Circuit
Judges and William K. Sessions, * District Judge.

Opinion by Judge Owens;
Concurrence by Judge Sessions
Dissent by Judge Ikuta

* The Honorable William K. Sessions III, District Judge for the U.S. District Court for the District of Vermont, sitting by designation.

SUMMARY****Sealed Documents**

The panel vacated the district court’s order denying The Center for Auto Safety’s motions to intervene and unseal documents filed to support and oppose a motion for preliminary injunction in a putative class action between Chrysler Group, LLC and certain named plaintiffs, and remanded for further proceedings.

A party seeking to seal a judicial record bears the burden of overcoming a strong presumption in favor of access to court records by showing “compelling reasons,” and the court must then balance the compelling interests of the public and the party seeking to keep the judicial record secret. Under an exception for sealed materials attached to a discovery motion unrelated to the merits of a case, a party seeking to seal the record need only satisfy a less exacting “good cause” standard. When deciding what test to apply to a motion to unseal a particular court filing – the presumptive “compelling reasons” standard or the “good cause” exception – the court has often deployed the terms “dispositive” and “non-dispositive.”

The panel presumed that the instant motion for preliminary injunction was technically non-dispositive. The panel held that public access to filed motions and their attachments did not depend on whether the motion was technically “dispositive;” but

**This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

rather, public access turned on whether the motion was more than tangentially related to the merits of the case. The panel concluded that plaintiffs' motion for preliminary injunction was more than tangentially related to the merits. The panel remanded for the district court to consider the documents under the compelling reasons standard.

Concurring, District Judge Sessions wrote separately to express his belief that reversal was warranted even under the binary approach endorsed by the dissent because the preliminary injunction at issue was literally "dispositive" of plaintiffs' request that Chrysler issue notice to its customers.

Judge Ikuta dissented because she believed that the majority opinion overruled circuit precedent and vitiated Fed. R. Civ. P. 26(c). Judge Ikuta would employ the "binary approach" which holds that the public's presumed right of access applied to sealed discovery documents attached to a dispositive motion, but did not apply to sealed discovery documents attached to a nondispositive motion.

COUNSEL

Jennifer D. Bennett (argued) and Leslie A. Bailey, Public Justice PC, Oakland, California, for Intervenor-Appellant.

Thomas H. Dupree, Jr. (argued) and Sarah G. Boyce, Gibson, Dunn & Crutcher LLP, Washington, D.C.; Kathy A. Wisniewski, John W. Rogers, and Stephen A. D'Aunoy, Thompson Coburn LLP, St. Louis, Missouri; Rowena Santos, Thompson Coburn LLP, Los Angeles, California, for Defendant-Appellee.

OPINION

OWENS, Circuit Judge:

The Center for Auto Safety (CAS) appeals from the district court's order denying CAS's motions to intervene and unseal documents filed in a putative class action lawsuit between Chrysler Group, LLC (Chrysler) and certain named plaintiffs. Because the district court applied the incorrect standard when evaluating the motion to unseal these documents, we vacate and remand for further proceedings.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2013, plaintiffs filed a putative class action alleging defects in a part found in certain Chrysler vehicles.¹ As part of the discovery process, the parties entered into a stipulated protective order. The protective order permitted each party to designate certain documents as "confidential," and required any party that later wished to attach a "confidential" document to a court pleading to apply to do so under seal.

In 2014, plaintiffs moved for a preliminary injunction to require Chrysler to notify the proposed class of the alleged risks its vehicles presented. Plaintiffs and Chrysler attached "confidential" discovery documents to their memoranda supporting and opposing the motion. Consistent with the stipulated protective order, both parties applied to the

¹ We express no opinion on the merits of the underlying lawsuit, including whether the part in question was defective.

district court to file the documents under seal, and the district court granted the motions. The district court eventually denied the motion for preliminary injunction.

Shortly before the district court denied plaintiffs' motion for preliminary injunction, CAS filed motions to intervene and unseal the "confidential" documents filed to support and oppose the motion for preliminary injunction. CAS argued that only "compelling reasons" could justify keeping these documents under seal, while Chrysler contended that it need only show "good cause" to keep them from the public's view.

The district court reviewed the relevant Ninth Circuit case law and other district courts' attempts to apply it to a motion for preliminary injunction. While ordinarily a party must show "compelling reasons" to keep a court document under seal, *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006), the district court relied on language in our cases which provides that when a party is attempting to keep records attached to a "non-dispositive" motion under seal, it need only show "good cause," *id.* at 1180. While recognizing that "[t]here is little clarity as to what, exactly, constitutes a 'dispositive' motion," and that our circuit has not articulated the difference between a dispositive

and nondispositive motion,² the district court decided to read “dispositive” to mean that unless the motion could literally lead to the “*final* determination on some issue,” a party need show only good cause to keep attached documents under seal. That was especially true in this case, the district court believed,

² District courts have understandably struggled with our use of the term “dispositive” in these circumstances. Many courts have applied the compelling reasons standard to motions for preliminary injunctions or temporary restraining orders. See *United Tactical Sys., LLC v. Real Action Paintball, Inc.*, 2015 WL 295584, at *2 (N.D. Cal. Jan. 21, 2015); *Gamez v. Gonzalez*, 2013 WL 127648, at *2 (E.D. Cal. Jan 9, 2013); *Melaluca Inc. v. Bartholomew*, 2012 WL 5931690, at *2 (D. Idaho Nov. 27, 2012); *FTC v. AMG Servs., Inc.*, 2012 WL 3562027, at *2 (D. Nev. Aug 15, 2012); *Apple, Inc. v. Samsung Elecs. Co.*, 2012 WL 2936432, at *3 (N.D. Cal. July 18, 2012); *Selling Source, LLC v. Red Rivers Ventures, LLC*, 2011 WL 1630338, at *4–5 (D. Nev. Apr. 29, 2011); *B2B CFO Partners, LLC v. Kaufman*, 2010 WL 2104257, at *1 (D. Ariz. May 25, 2010); *Dish Network LLC v. Sonicview USA, Inc.*, 2009 WL 2224596, at *6 (S.D. Cal. July 23, 2009); *Yountville Investors, LLC v. Bank of Am.*, 2009 WL 411089, at *2 (W.D. Wash. Feb. 17, 2009).

Others, like the district court here, *Velasco v. Chrysler Grp., LLC*, 2014 WL 7404590, at *6 (C.D. Cal. Dec. 30, 2014), have applied the good cause standard. See *Hanginout, Inc. v. Google, Inc.*, 2014 WL 1234499, at *1 (S.D. Cal. Mar. 24, 2014); *In re Nat’l Sec. Telecomm. Records Litig.*, 2007 WL 549854, at *3–4 (N.D. Cal. Feb. 20, 2007); *Reilly v. MediaNews Grp. Inc.*, 2007 WL 196682, at *1–2 (N.D. Cal. Jan. 24, 2007).

The dissent argues that our decision is unfair to Chrysler, as Chrysler should have been able to “confidently rely on the district court’s protective order” to shield these documents from public scrutiny. Dissent at 33. The sharp disagreement in our district courts about the application of our precedent to motions for preliminary injunction suggests that the result here is neither unfair nor unexpected.

as the motion for preliminary injunction here sought “notice of potential problems . . . to thousands of purchasers,” and “was not a motion to temporarily grant the relief ultimately sought in [the] underlying suit.” Accordingly, the district court found that the motion for preliminary injunction here was nondispositive, applied the good cause standard to the documents filed under seal, and concluded that good cause existed to keep them from the public’s view.³

II. STANDARD OF REVIEW

We review a district court’s decision to unseal court records for an abuse of discretion. *Blum v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 712 F.3d 1349, 1352 (9th Cir. 2013). Where “the district court’s decision turns on a legal question, however, its underlying legal determination is subject to *de novo* review.” *San Jose Mercury News, Inc. v. U.S. Dist. Court—N.D. Cal. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999).

“We have jurisdiction because an order denying a motion to unseal or seal documents is appealable either as a final order under 28 U.S.C. § 1291 or as a collateral order.” *Oliner v. Kontrabecki*, 745 F.3d 1024, 1025 (9th Cir. 2014) (internal quotation marks and citation omitted).

³ Because we are vacating the order denying the motion to unseal the documents and remanding this case so the district court can apply the “compelling reasons” standard, we also vacate the district court’s order denying the motion to intervene, and remand this question to the district court to examine anew.

III. ANALYSIS

A. Standard to File Documents Under Seal

“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Commc’ns Inc.*, 435 U.S. 589, 597 (1978). Following the Supreme Court’s lead, “we start with a strong presumption in favor of access to court records.” *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). The presumption of access is “based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice.” *United States v. Amodeo (Amodeo II)*, 71 F.3d 1044, 1048 (2d Cir. 1995); *see also Valley Broad. Co. v. U.S. Dist. Court—D. Nev.*, 798 F.2d 1289, 1294 (9th Cir. 1986) (explaining that the presumption of public access “promot[es] the public’s understanding of the judicial process and of significant public events”).

Accordingly, “[a] party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the ‘compelling reasons’ standard.” *Kamakana*, 447 F.3d at 1178. Under this stringent standard, a court may seal records only when it finds “a compelling reason and articulate[s] the factual basis for its ruling, without relying on hypothesis or conjecture.” *Id.* at 1179. The court must then “conscientiously balance[] the competing interests of the public and the party who seeks to keep certain judicial records secret.” *Id.* (quoting *Foltz*, 331 F.3d at 1135) (alteration in original) (in-

ternal quotation marks omitted). What constitutes a “compelling reason” is “best left to the sound discretion of the trial court.” *Nixon*, 435 U.S. at 599. Examples include when a court record might be used to “gratify private spite or promote public scandal,” to circulate “libelous” statements, or “as sources of business information that might harm a litigant’s competitive standing.” *Id.* at 598–99.

Despite this strong preference for public access, we have “carved out an exception,” *Foltz*, 331 F.3d at 1135, for sealed materials attached to a discovery motion unrelated to the merits of a case, *see Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213–14 (9th Cir. 2002). Under this exception, a party need only satisfy the less exacting “good cause” standard. *Foltz*, 331 F.3d at 1135. The “good cause” language comes from Rule 26(c)(1), which governs the issuance of protective orders in the discovery process: “The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” Fed. R. Civ. P. 26(c). “Applying a strong presumption of access to documents a court has already decided should be shielded from the public would surely undermine, and possibly eviscerate, the broad power of the district court to fashion protective orders,” and thereby undermine Rule 26(c). *Phillips*, 307 F.3d at 1213; *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (explaining that discovery is largely “conducted in private as a matter of modern practice,” so the public is not presumed to have a right of access to it); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (“There is no tradition of public access to discovery, and requiring a

trial court to scrutinize carefully public claims of access would be incongruous with the goals of the discovery process.”).

When deciding what test to apply to a motion to unseal a particular court filing—the presumptive “compelling reasons” standard or the “good cause” exception—we have sometimes deployed the terms “dispositive” and “non-dispositive.” For example, in *Phillips*, the Los Angeles Times moved to unseal confidential settlement information that General Motors produced in discovery under a protective order and was subsequently attached to a discovery sanctions motion. 307 F.3d at 1208–10. The district court granted the motion to unseal. *Id.* at 1208–09. In reversing that decision, we stressed the special role that protective orders play, that “[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action,” and reasoned that it made “little sense to render the district court’s protective order useless simply because the plaintiffs attached a sealed discovery document to a nondispositive sanctions motion filed with the court.” *Id.* at 1212–13 (quoting in part *Seattle Times Co.*, 467 U.S. at 33); see also *Kamakana*, 447 F.3d at 1179–80 (explaining that the sealed records in *Phillips* were “not directly relevant to the merits of the case”). Applying the good cause standard from Rule 26(c) as an exception for discovery-related motions makes sense, as the private interests of litigants are “the only weights on the scale.” *Kamakana*, 447 F.3d at 1180.

In *Foltz*, we again discussed “dispositive” and “nondispositive” motions. We recognized that “[t]here are good reasons to distinguish between dis-

positive and nondispositive motions,” as while discovery-related motions are often unrelated to the merits of a case, “[t]he same cannot be said for materials attached to a summary judgment motion because ‘summary judgment adjudicates substantive rights and serves as a substitute for trial.’” 331 F.3d at 1135–36 (quoting *Rushford v. New Yorker Magazine*, 846 F.2d 249, 252 (4th Cir. 1988)). Accordingly, we applied the “compelling reasons” standard to documents attached to a motion for summary judgment. *Id.*; see also *Kamakana*, 447 F.3d at 1178–80 (reviewing *Phillips* and *Foltz*).

Like the district court, Chrysler urges us to read our case law to limit the “compelling reasons” test to only those cases in which the motion at issue is literally dispositive, meaning that it “bring[s] about a final determination.” Black’s Law Dictionary 540 (10th ed. 2014). This would include motions to dismiss, for summary judgment, and judgment on the pleadings, but would not include other motions that go to the heart of a case, such as a motion for preliminary injunction or a motion in limine. In other words, the public would not be presumed to have regular access to much (if not most) of the litigation in federal court, as that litigation rarely falls into the narrow category of “dispositive.”

Although the apparent simplicity of the district court’s binary approach is appealing, we do not read our case law to support such a limited reading of

public access.⁴ Most litigation in a case is not literally “dispositive,” but nevertheless involves important issues and information to which our case law demands the public should have access. To only apply the compelling reasons test to the narrow category of “dispositive motions” goes against the long held interest “in ensuring the public’s understanding of the judicial process and of significant public events.” *Kamakana*, 447 F.3d at 1179 (quoting *Valley Broad Co.*, 798 F.2d at 1295) (internal quotation marks omitted). Such a reading also contradicts our precedent, which presumes that the “compelling reasons” standard applies to *most* judicial records.” *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 677–78 (9th Cir. 2009) (emphasis added).

When using the words “dispositive” and “nondispositive,” we do not believe our court intended for these descriptions to morph into mechanical classifications. Rather, these descriptive terms are indicative of when a certain test should apply. For example, in *Kamakana*, we wrote that there is a “good reason[]” why the public interest in accessing nondispositive motions is not as strong as dispositive motions: because nondispositive motions “are *often* ‘unrelated, or only tangentially related, to the underlying cause of action.’” 447 F.3d at 1179 (emphasis added) (quoting *Seattle Times Co.*, 467 U.S. at 33). This statement implicitly acknowledges that nondispositive motions are not *always* unrelated to the un-

⁴ Moreover, as previously noted, district courts have sometimes struggled with this binary approach, and therefore it is not as simple as it first appears. *See supra* note 2.

derlying cause of action. The nondispositive discovery motion in *Phillips* was unlikely to be related to the merits, while the motions for summary judgment in *Foltz* and *Kamakana* obviously were. Nothing in *Phillips* (or any other case cited by Chrysler or the dissent) contemplates that the right of public access would be limited solely to literally dispositive motions, as none of those cases address the situation in which a nondispositive motion may be directly related to the merits of the case and where the “good reason” identified for treating nondispositive motions differently no longer applies.

The focus in all of our cases is on whether the motion at issue is more than tangentially related to the underlying cause of action. See *Phillips*, 307 F.3d at 1212–13; *Foltz*, 331 F.3d at 1134–36; *Kamakana*, 447 F.3d at 1179; *Pintos*, 605 F.3d at 678; *Oliner*, 745 F.3d at 1026. It is true that nondispositive motions are sometimes not related, or only tangentially related, to the merits of a case, as in *Phillips*. But plenty of technically nondispositive motions—including routine motions in limine—are strongly correlative to the merits of a case.⁵

Particularly relevant here, a motion for preliminary injunction frequently requires the court to address the merits of a case, which often includes the presentation of substantial evidence. *Stormans v.*

⁵ For example, a motion in limine to admit statements in furtherance of a conspiracy under Federal Rule of Evidence 801(d)(2)(E) will often spell out the very conspiracy alleged in a civil RICO complaint. See *Kaley v. United States*, 134 S. Ct. 1090, 1111–12 (2014) (Roberts, C.J., dissenting).

Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009). A motion for preliminary injunction may even, as a practical matter, determine the outcome of a case. *See, e.g., Miller v. Rich*, 845 F.2d 190, 191 (9th Cir. 1988) (explaining how “in this case, the denial of the preliminary injunction effectively decided the merits of the case” (citation omitted)). In fact, because motions for preliminary injunctions are so significant, they are one of the few categories of motions that may be heard as interlocutory appeals. *See id.*; *see also* 28 U.S.C. § 1292. In certain circumstances, an appellate court may even choose to decide the merits of the case on an appeal from a motion for preliminary injunction as to the applicable rule of law. *Thornburgh v. Am. Coll. Of Obstetricians & Gynecologists*, 476 U.S. 747, 756–57 (1986) (*overruled in part on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)); *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc). For the purposes of this opinion, however, we assume that the instant motion for preliminary injunction was technically nondispositive.⁶

Under Chrysler’s view, the strong presumption of public access does not apply to any of the prior examples, but it would apply to a motion for summary judgment, which may contain the exact same materials. A motion for discovery sanctions that requests dismissal as a remedy would be “dispositive” under Chrysler’s test, while the same motion attaching the same documents—but seeking a remedy just shy of

⁶ We do not decide whether a motion for preliminary injunction is always “nondispositive.”

dismissal—would be “nondispositive.” Neither our case law nor the strong principles of public access to the courts supports such incongruity.

Nor does the case law of other circuits, which rejects a mechanistic rule to determine when the presumption of public access applies. In the Second Circuit, for example, the weight given to the presumption of access is “governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts.” *Amodeo II*, 71 F.3d at 1049. Documents submitted to the court exist on a “continuum,” spanning those that play a role in “determining litigants’ substantive rights,” which are afforded “strong weight,” to those that play only a “negligible role in performance of Article III duties . . . such as those passed between the parties in discovery,” which lie “beyond the presumption’s reach.” *Id.* at 1049–50. Similarly, in the First Circuit, the public has a right of access to “materials on which a court relies in determining the litigants’ substantive rights” which are “distinguished from those that relate[] merely to the judge’s role in management of the trial and therefore play no role in the adjudication process.” *United States v. Kravetz*, 706 F.3d 47, 54 (1st Cir. 2013) (citations omitted) (alterations in original).

The Third and Eleventh Circuits directly reject a literal divide between dispositive and nondispositive motions. According to the Third Circuit, “there is a presumptive right of access to pretrial motions of a nondiscovery nature, whether preliminary or dispositive, and the material filed in connection therewith. . . . We see no reason to distinguish between

material submitted in connection with a motion for summary judgment and material submitted in connection with a motion for preliminary injunction” *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 164 (3d Cir. 1993). The rationale is that the presumption should apply to any motion related to a “matter[] which the public has a right to know about and evaluate.” *Id.* (alteration in original) (citation omitted). Similarly, in the Eleventh Circuit, material filed in connection with any “substantive pretrial motion, unrelated to discovery, is subject to the common law right of access,” “whether or not characterized as dispositive.” *Romero v. Drummond Co.*, 480 F.3d 1234, 1245–46 (11th Cir. 2007) (citing *Amodeo II*, 71 F.3d at 1050).

Given that preliminary injunctions are “extraordinary and drastic” remedies, *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012), they may certainly affect litigants’ “substantive rights,” see *Kravetz*, 706 F.3d at 54, *Amodeo II*, 71 F.3d at 1049. They also invoke important “Article III” powers, *Amodeo II*, 71 F.3d at 1049, so much so that magistrate judges may not even rule upon them, 28 U.S.C. § 636(b)(1)(A). A bright line rule that does not afford a presumption of access to a motion for preliminary injunction because it is “nondispositive” conflicts with the Third and Eleventh Circuits and is, at best, in tension with the First and Second Circuits.

In re Midland National Life Insurance Company Annuity Sales Practices Litigation, 686 F.3d 1115 (9th Cir. 2012), illustrates that our circuit looks past the literal dispositive/nondispositive label. In that case, an intervenor moved to unseal documents attached to a *Daubert* motion. *Id.* at 1118. The district

court, like the district court here, concluded that the documents should remain under seal because “the *Daubert* motion was non-dispositive,” as it “would not have been a determination on the merits of any claim or defense.” *Id.* at 1119. We rejected the district court’s focus on whether the motion was literally “dispositive”: “That the records are connected to a *Daubert* motion does not, on its own, conclusively resolve the issue.” *Id.* As the motion, in effect, “pertain[ed] to central issues bearing on defendant’s summary judgment motion,” we treated that motion as dispositive. *Id.* We did not allow the technically nondispositive nature of the *Daubert* motion to cloud the reality that it was able to significantly affect the disposition of the issues in the case. *See also Oliner*, 745 F.3d at 1025–26 (applying “compelling reasons” test to motion to seal entire court record of an appeal from the bankruptcy court, even though motion did not result in a final determination on the merits).

Case law is also replete with examples of motions for preliminary injunctions that reflect the need for the public right of access—to “provide the public with a more complete understanding of the judicial system and a better perception of its fairness.” *Leucadia*, 998 F.2d at 161 (quoting *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 660 (3d Cir. 1991)). Motions for preliminary injunctions have been utilized to: test the boundaries of equal protection; police the separation of powers in times of domestic and global instability; protect “one of our most valuable rights,” the right to retain United

States citizenship; and even determine life or death.⁷ “People in an open society do not demand infallibility from their institutions” with respect to such issues, “but it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). In light of the strong presumption, these impactful motions should not be categorically shielded from the public right of access.

Consistent with our precedent, we make clear that public access to filed motions and their attachments does not merely depend on whether the mo-

⁷ *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 715 (9th Cir. 1997) (vacating grant of motion for preliminary injunction and sustaining constitutionality of California’s anti-affirmative action initiative, Proposition 209); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 714–15 (9th Cir. 1997) (holding, on appeal from motion for preliminary injunction, that state program setting goals for ethnic and sex characteristics of construction subcontractors violates the equal protection clause); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584–85 (1952) (making a “final determination of the constitutional validity of the President’s order” on an appeal from a motion for preliminary injunction restraining the Secretary of Commerce from seizing the nation’s steel mills); *Reno*, 219 F.3d at 1091, 1098–99 (holding on appeal from a motion for preliminary injunction that the INS may not revoke a person’s citizenship administratively); *Lopez*, 680 F.3d at 1074, 1078 (allowing an execution to proceed on appeal of denial of motion for preliminary injunction over an Eighth Amendment challenge).

tion is technically “dispositive.”⁸ Rather, public access will turn on whether the motion is more than tangentially related to the merits of a case. While many technically nondispositive motions will fail this test, some will pass. Our reading of the public access cases is consistent with our own case law, and more importantly, comports with the old tradition of ensuring public access which “antedates the Constitution and . . . is now beyond dispute.” *Leucadia*, 998 F.2d at 161 (internal quotation marks and citation omitted).

The dissent’s doomsday depiction of our opinion, in which we purportedly “eviscerate[] Rule 26(c) and its benefits,” Dissent at 32, not only ignores the real world intersection of Rule 26(c) and the right to public access, but also the clear language from our previous decisions. As the dissent does not dispute, its reading of Rule 26(c) in this context conflicts with virtually every other circuit to review this issue. The district courts in those circuits routinely apply a

⁸ Our circuit already considers motions for preliminary injunctions “dispositive” in the context of magistrate jurisdiction. A magistrate judge may “hear and determine any pretrial matter pending before the court except a *motion for injunctive relief*, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.” 28 U.S.C. § 636(b)(1)(A) (emphasis added). Those “matters listed in 28 U.S.C. § 636(b)(1)(A) are dispositive while, *in general*, other matters are non-dispositive.” *Flam v. Flam*, 788 F.3d 1043, 1046 (9th Cir. 2015) (emphasis in original).

more nuanced test, and none has complained of staring at “an ink blot.” Dissent at 31. We have full confidence that judges in our circuit are equally capable. The dissent’s convenient chessboard sweep of the experiences of our sister circuits—responding only by calling them “irrelevant” in a footnote—illustrates its shaky foundation. Dissent at 28, n.2. And more importantly, the dissent’s indignation that we read certain language in our opinions as descriptive, rather than definitive, ignores that it does the same thing—it chooses to interpret the dispositive/nondispositive language as “a bright line rule,” while painting the “more than tangentially related to the merits of a case” phrase as “reasoning we used to justify the adoption of a bright line rule.” Dissent at 26. Yet the dissent is the only opinion from any appellate court to read our caselaw in such stark terms. We choose to follow language in our case law that makes sense and is consistent with our fellow circuits.

B. The Instant Motion for Preliminary Injunction

Applying our circuit’s case law, we conclude that plaintiffs’ motion for preliminary injunction is more than tangentially related to the merits. In the complaint, plaintiffs were seeking, in addition to damages, injunctive relief, including an order “requiring Chrysler to adequately disclose and repair the [vehicle] defect.” In the preliminary injunction motion, plaintiffs requested that Chrysler notify its customers that there was a part in their vehicle which could require replacement and be dangerous if it failed. As Chrysler argued in its opposition to the preliminary injunction, once notice is given, it “alters the status quo and cannot be undone.” If plaintiffs had suc-

ceeded in their motion for preliminary injunction, they would have won a portion of the injunctive relief they requested in the underlying complaint, and that portion of their claims would have been resolved.

Chrysler's counterarguments are unavailing. First, Chrysler contends that because this motion for preliminary injunction was denied, the court should not apply the presumption of public access. But the common law right of access promotes the "public interest in understanding" the judicial process itself, *Foltz*, 331 F.3d at 1135 (quoting *Hagestad v. Tragger*, 49 F.3d 1430, 1434 (9th Cir. 1995)), and the "bases or explanations for a court's decision," *Oliner*, 745 F.3d at 1025 (citation omitted). Nothing in our precedent suggests that the right of access turns on any particular result. In fact, in *Kamakana*, our circuit applied the presumption of public access to a summary judgment motion that was "denied, in large part." 447 F.3d at 1176; *see also Leucadia*, 998 F.2d at 164 (citing *Westinghouse*, 949 F.2d at 661) (explaining that papers filed in connection with a motion "are not entitled to be shielded from public access merely because the district court denied the motion rather than granted it").

Chrysler also argues that expanding the compelling reasons standard makes it easier for "litigants to override protective orders." As a result, litigants will file more "meritless motions." This argument is similarly unconvincing. District courts can use Rule 11 to impose sanctions on any party that files a motion for an "improper purpose" or who does so without a legal or factual basis. Fed. R. Civ. P. 11(b)–(c).

As the preliminary injunction motion here was more than tangentially related to the merits of the case, we vacate and remand for the district court to consider the documents under the compelling reasons standard.

IV. CONCLUSION

While simplicity has its virtues, it also has its vices. Here, permitting the public's right of access to turn on what *relief* a pleading seeks—rather than on the relevance of the pleading—elevates form too far beyond substance and over reads language in our case law. Our precedent, which always has focused on whether the pleading is more than tangentially related to the merits, recognizes this essential point. To hold otherwise would permit the discovery “exception” to swallow the public access rule. Due to the strong presumption for public access and the nature of the instant motion for a preliminary injunction, Chrysler must demonstrate compelling reasons to keep the documents under seal.

VACATED AND REMANDED.

Chrysler shall bear costs on appeal.

SESSIONS, District Judge, concurring:

I fully concur in the majority opinion's thoughtful analysis of Ninth Circuit precedent, and in its determination that public access to filed motions and their attachments hinges not on whether the motion is literally "dispositive," but on whether the motion is more than tangentially related to the merits of the underlying case. I also concur in the majority's conclusion that the preliminary injunction motion here was more than tangentially related to the merits of the case, and that the district court should therefore reconsider the documents under the compelling reasons standard. I write separately only to express my belief that reversal is warranted even under the binary approach endorsed by the dissent, for in my view the preliminary injunction motion at issue was literally "dispositive" of plaintiffs' request that Chrysler issue notice to its customers.

Along with both the majority and the dissent, I accept that a motion is literally dispositive if it "bring[s] about a final determination." *See* Maj. op. at 10 (quoting Black's Law Dictionary 540 (10th ed. 2014)); Dissent at 26. A motion may bring about a final determination of one claim, however, without disposing of an entire case. Indeed, it goes without saying that parties frequently file motions for partial summary judgment. And as the dissent writes, "it is undisputed that summary judgment motions are dispositive." Dissent at 29. Thus, it appears to be uncontroverted that within a single case, a motion may be dispositive of some claims and nondispositive of others.

In the present case, plaintiffs' complaint sought not only damages, but also injunctive relief, including an order "requiring Chrysler to adequately disclose and repair the [vehicle] defect." Similarly, plaintiffs' preliminary injunction motion requested that Chrysler notify its customers that a part in their vehicles may be dangerous and require replacement. Because notice cannot be withdrawn once it is given, granting the preliminary injunction motion would have awarded plaintiffs a portion of their requested relief. For that reason, I find that the preliminary injunction motion here was literally "dispositive" of plaintiffs' request that Chrysler issue notice to its customers.

In sum, I fully concur in the judgment of the Court for the reasons discussed in Judge Owens's majority opinion. I add, however, that in my view the motion for preliminary injunction in the present case was literally "dispositive" of plaintiffs' request for disclosure. As a result, even under the dissent's approach, I would vacate and remand for the district court to reconsider whether the documents relevant to plaintiffs' demand for notice should remain under seal using the compelling reasons standard.

IKUTA, Circuit Judge, dissenting:

According to the majority, the district court here erred because it “relied on language in our cases which provides that when a party is attempting to keep records attached to a ‘non-dispositive’ motion under seal, it need only show ‘good cause.’” Maj. op. at 5. This comes as a surprise, because the “language in our cases” constitutes binding precedent. But no matter, the majority invents a new rule, namely that a party cannot keep records under seal if they are attached to *any* motion that is “more than tangentially related to the merits of a case,” Maj. op. at 17, unless the party can meet the “stringent standard” of showing that compelling reasons support secrecy, Maj. op. at 8. Because this decision overrules circuit precedent and vitiates Rule 26(c) of the Federal Rules of Civil Procedure, I strongly dissent.

I

The right of litigants to protect certain documents disclosed in discovery from release to the public is embodied in Rule 26(c), which authorizes the district court to grant a protective order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c). This includes “requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.” Fed. R. Civ. P. 26(c)(1)(G).

When discovery material is filed with a court, we balance the protection afforded litigants under Rule 26(c) with the presumption that the public has a

right of access to public documents, including judicial records. See *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002). Our cases, as well as Supreme Court decisions, have made clear that the common law right of access “is not absolute,” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978); see also *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984). The presumption in favor of access can be overcome by showing “sufficiently important countervailing interests.” *Phillips*, 307 F.3d at 1212.

We have developed the following bright line rule to balance the common law right of access to court records with the protection afforded litigants under Rule 26(c):

(1) If a party to a legal proceeding attaches a sealed discovery document to a *nondispositive* motion, “the usual presumption of the public’s right of access is rebutted,” and “the party seeking disclosure must present sufficiently compelling reasons why the sealed discovery document should be released.” *Phillips*, 307 F.3d at 1213.

(2) If a party attaches a sealed discovery document to a *dispositive* motion, the presumption of the public’s right of access is not rebutted, and the party seeking to protect the document must show compelling reasons to maintain the documents under seal. *Foltz*, 331 F.3d at 1136.

There is nothing ambiguous about this rule, which we have recited numerous times. Beginning in *Phillips*, we explained that “when a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public’s right of

access is rebutted, so that the party seeking disclosure must present sufficiently compelling reasons why the sealed discovery document should be released.” 307 F.3d at 1213. We justified this bright line rule on the ground that the presumption of access to judicial documents should not eviscerate a district court’s protective order, and that “[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action.” *Id.* (quoting *Rhinehart*, 467 U.S. at 33).

We repeated this rule in *Foltz*, quoting *Phillips* verbatim for the proposition that “when a party attaches a sealed discovery document to a *nondispositive* motion, the usual presumption of the public’s right of access is rebutted.” 331 F.3d at 1135. *Foltz* then added the second prong of our rule, holding that “the presumption of access is not rebutted where, as here, documents subject to a protective order are filed under seal as attachments to a *dispositive* motion.” *Id.* at 1136 (emphasis added).

We repeated this two-part rule in *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006). We first explained that we have “carved out an exception to the presumption of access to judicial records for a sealed discovery document [attached] to a *non-dispositive* motion, such that the usual presumption of the public’s right of access is rebutted.” *Id.* at 1179 (citing *Phillips*, 307 F.3d at 1213, and *Foltz*, 331 F.3d at 1135) (internal citations and quotation marks omitted). By contrast, “[t]hose who seek to maintain the secrecy of documents attached to *dispositive* motions must meet the high threshold

of showing that ‘compelling reasons’ support secrecy.” *Id.* at 1180 (emphasis added).

Summing up, “we treat judicial records attached to dispositive motions differently from records attached to non-dispositive motions.” *Id.* at 1179. “Those who seek to maintain the secrecy of documents attached to dispositive motions must meet the high threshold of showing that ‘compelling reasons’ support secrecy.” *Id.* By contrast, “[a] ‘good cause’ showing under Rule 26(c) will suffice to keep sealed records attached to non-dispositive motions.” *Id.*

II

The majority boldly rejects this rule. It belittles the “simplicity” of our “binary approach,” which holds that the public’s presumed right of access applies to sealed discovery documents attached to a dispositive motion, but does not apply to sealed discovery documents attached to a nondispositive motion. Maj. op. at 10–11.

Instead of following precedent, the majority creates a new rule: “[W]e make clear that public access to filed motions and their attachments does not merely depend on whether the motion is technically ‘dispositive.’ Rather, public access will turn on whether the motion is *more than tangentially related to the merits of a case.*” Maj. op. at 17 (emphasis added). In plucking this “more than tangentially related” language from the reasoning we used to justify the adoption of a bright line rule, *see, e.g., Phillips*, 307 F.3d at 1213, the majority improperly replaces the rule itself with a single phrase from our reasoning.

There can be no mistake that this new rule is inconsistent with our existing precedent. As the majority concedes, “dispositive” has a precise legal definition: a motion is dispositive if it “bring[s] about a final determination.” Maj. op. at 10 (quoting Black’s Law Dictionary 540 (10th ed. 2014)). Likewise, the majority concedes that this legal definition “would include motions to dismiss, for summary judgment, and judgment on the pleadings,” but would not include “a motion for preliminary injunction or a motion in limine.” Maj. op. at 10–11. And in this case, the majority assumes “that the instant motion for preliminary injunction was technically nondispositive.” Maj. op. at 13. Under our existing precedent, therefore, the majority effectively admits it is wrong in holding that the documents attached to the preliminary injunction motion are subject to the public’s presumed right of access absent compelling reasons for secrecy.¹

The majority attempts to avoid this problem by relying on the oft-rejected casuistry that words have no fixed meaning, and therefore “non-dispositive” can also mean “dispositive.” Surely, the majority argues, we did not intend to be bound by the literal meaning of the terms “dispositive” and “nondispositive” that “we have sometimes deployed,” Maj. op. at 9, because

¹ As the concurrence points out, Conc. op. at 21, the majority could have reached the same result on much narrower grounds by holding that the preliminary injunction motion at issue in this case was literally “dispositive.” But apparently eager to jettison our precedent, the majority instead assumes without deciding that the motion was “technically nondispositive.” Maj. op. at 13.

that would merely “morph” these words “into mechanical classifications,” Maj. op. at 11. Nothing in our case law (other than the words themselves), the majority claims, “contemplates that the right of public access would be limited solely to *literally* dispositive motions.” Maj. op. at 12 (emphasis added).

This theory that we are not bound by the literal meaning of the words of our opinions would, of course, deprive our precedent of any binding force. Such a theory erodes the concept that law can be applied as written, whether by the legislature or judges, and “undermines the basic principle that language provides a meaningful constraint on public and private conduct.” *Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564, 569 (9th Cir. 1988). But judges are bound not merely by “the reason and spirit of cases” but also by “the letter of particular precedents.” *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) (internal quotation marks omitted). While we have the authority to distinguish precedent on a principled basis, we are not free to ignore the literal meaning of our rulings, even when the panel believes the precedent is “unwise or incorrect.” *Hart*, 266 F.3d at 1170; *see also, e.g., United States v. Contreras*, 593 F.3d 1135, 1136 (9th Cir. 2010) (en banc) (reversing a three-judge panel for overruling binding circuit precedent that was not clearly irreconcilable with intervening higher authority.) Moreover, we are bound by our precedent even if every other circuit has rejected our view. *See Al Ramahi v. Holder*, 725 F.3d 1133, 1138 n.2 (9th Cir. 2013) (noting that “[n]early all our sister circuits have rejected” our interpretation of the Real ID Act, but “in the absence of any intervening higher authority we are bound by”

our prior opinion.).² By intentionally disregarding the language “we have sometimes deployed,” Maj. op. at 9, the majority has flouted this most basic, fundamental principle.

The majority’s claim that we have previously rejected a literal interpretation of the word “dispositive” does not withstand examination. For instance, *In re Midland National Life Insurance Co. Annuity Sales Practices Litigation*, 686 F.3d 1115 (9th Cir. 2012), *see* Maj. op. at 15–16, did not purport to overrule our distinction between dispositive and nondispositive filings. Rather, it deemed the expert reports filed “in connection with” pending summary judgment motions, *id.* at 1120, as being equivalent to attachments to those motions. Because it is undisputed that summary judgment motions are dispositive, the panel concluded that the attached reports did not “fall into the exception to the presumption of public access” which applies to judicial records attached to a non-dispositive motion.

Nor does our interpretation of the Federal Magistrates Act, 28 U.S.C. § 636, support the majority’s approach. *See* Maj. op. at 17 n.8. Section 636(b) authorizes a magistrate judge to “hear and determine any pretrial matter pending before the court, *except* a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to

² For this reason, the out-of-circuit cases relied on by the majority, Maj. op. at 14–15, are entirely irrelevant.

dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.” *Id.* § 636(b)(1)(A) (emphasis added). In passing, we have referred to the category of motions listed in the exceptions to a magistrate judge’s jurisdiction as “dispositive motions.” Thus we have noted that the Federal Magistrates Act “provides that certain matters (for example, non-dispositive pretrial matters) may be referred to a magistrate judge for decision, while certain other matters (such as case-dispositive motions [and] petitions for writs of habeas corpus) may be referred only for evidentiary hearing, proposed findings, and recommendations.” *Flam v. Flam*, 788 F.3d 1043, 1046 (9th Cir. 2015) (quoting *United States v. Reyna–Tapia*, 328 F.3d 1114, 1118 (9th Cir. 2003) (en banc)) (internal quotation marks omitted). But we have never addressed the question whether a preliminary injunction motion constitutes a case-dispositive motion for purposes of the Federal Magistrates Act—let alone for purposes of the public’s presumed right of access—nor would we have occasion to do so, because the Act precludes a magistrate judge from ruling on such a motion regardless of how it is characterized.

III

In reality, the majority’s only rationale for disregarding our precedent is policy: the majority prefers to strike a different balance between the common law right of public access and the protections provided by Rule 26. According to the majority, the key policy concern here is that a motion for preliminary injunction is very important. Such a motion may “test the boundaries of equal protection,” “police the separation of powers in times of domestic and global

instability,” and “may even, as a practical matter, determine the outcome of a case,” Maj. op at 13, 16. Therefore, according to the majority, treating a non-dispositive motion for preliminary injunction the same as a summary judgment motion would be incongruous, and “[n]either our case law nor the strong principles of public access to the courts supports such incongruity.” Maj. op. at 13–14.

As a threshold matter, even if the policy judgment embodied in our precedent were wrong, the majority would still be bound by it. *See Hart*, 266 F.3d at 1170. But there are many policy reasons to reject the rule the majority invents today. For one, the majority’s “more than tangentially related” test has no discernible meaning. A bright line distinction between dispositive and nondispositive orders is easy to administer, while district courts will have no framework for deciding what quantum of relatedness is more than tangential. The majority’s ill-defined standard is certainly no improvement for the district courts that the majority claims have “struggled” with our rule. Maj. op. at 5 n.2. The district courts that have declined to follow our rule have simply adopted an alternate bright line rule, holding that motions for preliminary injunctions are per se deemed dispositive in the sealing context.³ The majority rejects

³ *See, e.g., Selling Source, LLC v. Red River Ventures, LLC*, 2011 WL 1630338, at *5 (D. Nev. Apr. 29, 2011) (“[R]equests for preliminary injunctive relief should be treated as dispositive motions for purposes of sealing court records.”); *Yountville Investors, LLC v. Bank of Am., N.A.*, 2009 WL 411089, at *2 (W.D. Wash. Feb. 17, 2009) (“A motion for a preliminary injunction is treated as a dispositive motion under these rules.”).

even this rule—which at least purports to follow our precedent—in favor of an ink blot test.

More important, the majority’s rule upsets the balance between the common law right of access and Rule 26 that we have developed. As *Rhinehart* explained, “[i]t is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse,” because, among other things, it “may seriously implicate privacy interests of litigants and third parties” if litigants obtain information that “if publicly released could be damaging to reputation and privacy.” 467 U.S. at 34–35. For this reason, despite the “extent of the impairment of First Amendment rights that a protective order” may cause, *id.* at 32, the Court concluded that “[t]he government clearly has a substantial interest in preventing this sort of abuse of its processes,” *id.* at 35.

Recognizing the competing considerations between the common law right of access and the policy goals embodied in Rule 26, we struck an appropriate balance between the two. As we explained, there are “good reasons to distinguish between dispositive and non-dispositive motions.” *Kamakana*, 447 F.3d at 1179 (quoting *Foltz*, 331 F.3d at 1135). We noted that “the public has less of a need for access to court records attached only to non-dispositive motions,” and so “[t]he public policies that support the right of access to dispositive motions, and related materials, do not apply with equal force to non-dispositive materials.” *Id.* We were also careful to avoid eviscerating Rule 26(c), noting that “[a]lthough we understand the public policy reasons behind a presumption of access to judicial documents (judicial accountabil-

ity, education about the judicial process etc.), it makes little sense to render the district court's protective order useless simply because the plaintiffs attached a sealed discovery document to a nondispositive sanctions motion filed with the court." *Phillips*, 307 F.3d at 1213. Thus, our rule tracks the "good cause" standard of Rule 26(c) with respect to nondispositive motions, but gives due regard to the common law right of access to materials supporting dispositive motions by requiring litigants to make a higher showing to rebut the public's presumed right of access to material that resolves a legal dispute.

By contrast, the majority's test effectively holds that *all* sealed documents attached to *any* filing that has *any* relation to the merits of the case are subject to the public's presumed right of access, and therefore deprives protective orders issued under Rule 26(c) of any force or effect. Rule 26(c) "gives the district court much flexibility in balancing and protecting the interests of private parties," *Kamakana*, 447 F.3d at 1180, and has the beneficial effects of encouraging parties to exchange documents while reducing discovery disputes. The majority's rule eviscerates Rule 26(c) and its benefits.

Indeed, this very case demonstrates the problems with the majority's new rule. The plaintiffs obtained 86,000 documents from Chrysler (including confidential and trade secret documents) without being put to the cost and delay of fighting discovery battles because Chrysler could confidently rely on the district court's protective order. But under the majority's new rule, the majority holds that these confidential documents filed under seal are subject to the public's presumed right of access because the plaintiff elected

to attach them to a motion for preliminary injunction on a tangential issue (and which was summarily denied by the district court). Any member of the public will be able to obtain these documents filed under seal unless Chrysler can meet the intentionally stringent “compelling reasons” standard, which generally requires proof that the documents are being intentionally used for an improper purpose “such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets.” *Kamakana*, 447 F.3d at 1179 (internal quotation marks omitted). In addition to the unfairness of making Chrysler bear the consequences of encountering a three-judge panel that disagrees with its own circuit’s precedent, it is clear that no future litigant can rely on a protective order and will have to chart its course through discovery cautiously and belligerently, to the detriment of the legal system.

Our circuit has considered it important to reject efforts by three-judge panels to overrule binding circuit precedent. *See Contreras*, 593 F.3d at 1136. Disregarding the language of our opinions erodes the framework of our judicial system. Because the majority here overtly overrules our prior decisions, I dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETER VELASCO,	)	Case No. CV 13-
CHRISTOPHER WHITE,	)	08080 DDP (VBKx)
JACQUELINE YOUNG,)	
and CHRISTOPHER	)	ORDER RE
LIGHT, on behalf of	)	CENTER FOR
themselves and all others	)	AUTO SAFETY'S
similarly situated,	)	MOTION TO
	)	UNSEAL AND
Plaintiffs,	)	MOTION TO
	)	INTERVENE
v.)	
CHRYSLER GROUP LLC,)	
	)	[Dkt. Nos. 81, 82]
Defendant.)	

Presently before the Court are motions by non-party Center for Auto Safety (“CAS”) to intervene in this matter and to unseal documents related to Plaintiffs’ prior motion for a preliminary injunction, (Dkt. No. 49), which was denied on October 27, 2014. (Dkt. No. 88.) Having considered the parties’ submissions and oral arguments, the Court adopts the following order.

I. BACKGROUND

This case is a putative class action regarding the alleged failure of an electronic control unit, known as the “TIPM-7,” installed in a number of late-model Chrysler vehicles. On March 26, 2014, Magistrate Judge Kenton issued a protective order allowing any

party to designate a document in the case “Confidential,” which would protect the document from public view. (Dkt. No. 35.) On September 18, 2014, Plaintiffs moved for a preliminary injunction authorizing them to send potential class members a preliminary notice warning of the potential for dangerous component failures in Chryslers equipped with the TIPM-7. (Dkt. No. 49.) Plaintiffs applied to submit certain documents related to the motion “provisionally under seal,” because the parties were still attempting to reach settlement. (Dkt. No. 51.) Plaintiffs nonetheless expressed the opinion that the documents should be in the public record, and they requested the right to subject the documents to “later motion practice” to unseal “should the parties be unable to resolve their disagreement.” (*Id.*)

Defendant similarly filed an application to submit documents in opposition to the motion under seal, primarily because the documents constituted confidential business information. (Dkt. No. 63.) The Court granted both parties leave to file under seal. The documents filed under seal were as follows:

- Unredacted copies of the Motion and Memorandum in Support of the Motion, the proposed Order, the Opposition, and the Reply;
- Unredacted declaration of David Stein and Exhibits A-U attached thereto;
- Unredacted declaration of Rachel Naor and Exhibit P attached thereto;
- Unredacted declaration of James Bielenda and Exhibits A-D attached thereto;

- Exhibits B, C, E, F, and Q attached to the declaration of Dylan Hughes;
- The parties' various applications and proposed orders regarding the sealing of the above documents.

On October 27, 2014 the Court heard oral arguments and denied the motion for preliminary injunction. (Dkt. No. 88.)

On October 23, 2014, nonparty CAS filed these motions to intervene in the case and to unseal the sealed portions of the record on the motion for preliminary injunction. (Dkt. Nos. 81, 82.) Defendant opposes the motions. (Dkt. Nos. 95, 96.)

II. LEGAL STANDARD

“Nonparties seeking access to a judicial record in a civil case may do so by seeking permissive intervention under Rule 24(b)” *San Jose Mercury News, Inc. v. U.S. Dist. Court—N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999). Rule 24(b) ordinarily requires the intervenor to show “(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant’s claim or defense and the main action.” *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). However, where a nonparty proposes to intervene solely for the limited purpose of ensuring public access to court documents, no independent ground for jurisdiction is required. *Id.*

Ordinarily, there is a strong presumption that court records should be open to public inspection. *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978). However, the right is not absolute, and pub-

lic access may be denied, for example, where the records involved contain sensitive business information, the release of which “might harm a litigant’s competitive standing.” *Id.* at 598. “[M]ost judicial records may be sealed only if the court finds ‘compelling reasons.’ However, a less exacting ‘good cause’ standard applies to . . . previously sealed discovery attached to a nondispositive motion.” *Oliner v. Kontrabecki*, 745 F.3d 1024, 1025 (9th Cir. 2014) (citations omitted) (internal quotation marks omitted).

III. ANALYSIS

A. Motion to Intervene

CAS argues that it has satisfied the requirements for permissive intervention under Rule 24(b), because it has intervened in a timely manner and its attempt to unseal documents in the case clearly shares “common questions of law and fact” with the main action. Defendant does not dispute that CAS meets these requirements, but argues that the Court should nonetheless deny the motion to intervene because the intervention could prejudice the adjudication of its rights, CAS’s interests are adequately represented by the original parties, and it does not serve the principle of judicial economy to allow CAS to intervene. (Opp’n to Mot. Intervene at 2-8.)

On the merits, the Court finds it likely that CAS has the better argument. Nonetheless, the proposed intervention is for the sole purpose of unsealing the documents in question, and the Motion to Unseal is denied, Part III.B. *infra*. There is no other reason for CAS to be a party to this action. The Motion to Intervene is therefore denied without prejudice.

B. Motion to Unseal

1. Legal Standard

The public is presumptively entitled to review court records. Ordinarily, a party must show “compelling reasons” to seal a court document. *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). However, the party need only show “good cause” to keep sealed records attached to a “non-dispositive” motion. *Id.* at 1180. Defendant argues that the motion for preliminary injunction was such a “non-dispositive” motion. CAS argues, on the other hand, that a motion for preliminary injunction can be “dispositive” if “the documents at issue are, in fact, relevant to the merits of a case.” (Reply ISO Mot. Unseal at 5:12-14.) Here, CAS argues, the documents sought are relevant to the merits, the preliminary injunction motion should be considered “dispositive,” and Defendant should be required to show “compelling reasons” why the documents should remain sealed.

There is little clarity as to what, exactly, constitutes a “dispositive” motion. “Aside from noting that summary judgment motions are dispositive, and that discovery sanctions motions are non-dispositive, the distinction has not been articulated by the Ninth Circuit.” *Dish Network L.L.C. v. Sonicview USA, Inc.*, No. 09-CV-1553 L (NLS), 2009 WL 2224596, at *6 (S.D. Cal. July 23, 2009) (citations omitted). Plaintiff cites a recent District of Idaho case, *Mela-leuca Inc. v. Bartholomew*, for the proposition that a motion for preliminary injunction is a dispositive motion, because “[i]njunctive relief proceedings involve significant discussion of the merits of the case.” No.

4:12-CV-00216-BLW, 2012 WL 5931690, at *2 (D. Idaho Nov. 27, 2012) (internal quotation mark omitted). *See also Selling Source, LLC v. Red River Ventures, LLC*, 2011 WL 1630338, *5 (D. Nev. 2011); *Dish Network*, 2009 WL 2224596, at *6. The Court does not find this argument persuasive, for two reasons.

First, it ignores the plain meaning of the word “dispositive”: motions for preliminary injunction do not actually create any sort of “disposition,” in the sense of a *final* determination on some issue.¹ The Northern District of California rejected arguments almost identical to those made by CAS here, precisely because the preliminary injunction did not offer a final resolution on the merits:

According to the media entities . . . a preliminary injunction is dispositive because such a motion “inevitably involve[s] consideration of the merits of a dispute.” *But this argument misconstrues the discussion in Kamakana, which emphasizes the “resolution of a dispute on the merits,” not the mere “consideration” of the merits.* The media entities similarly place undue emphasis on the *Kamakana* court’s characterization of non-dispositive motions (that such motions “are often unrelated, or

¹ Black’s, for example, defines “disposition” as “[a] final settlement or determination” and “dispositive” as “bringing about a final determination.” Black’s Law Dictionary 505 (8th ed. 2004). *See also In re Seracare Life Sciences, Inc.*, No. 05-CV-2335-H (CAB), 2007 WL 935583, at *16 (S.D. Cal. Mar. 19, 2007) (“[B]ecause the case against KPMG will be over if the Court grants its motion, KPMG’s motion is dispositive.”).

only tangentially related, to the underlying cause of action.”)

In view of the Ninth Circuit’s reasoning, the court concludes that a preliminary injunction motion is not dispositive because, unlike a motion for summary adjudication, it neither resolves a case on the merits nor serves as a substitute for trial.

In re Nat’l Sec. Agency Telecommunications Records Litig., No. MDL 06-1791 VRW, 2007 WL 549854, at *3-4 (N.D. Cal. Feb. 20, 2007) (emphasis added). *See also Reilly v. MediaNews Grp. Inc.*, No. C06-04332 SI, 2007 WL 196682 (N.D. Cal. Jan. 24, 2007) (treating motion for TRO as non-dispositive).

Second, even if the *Melaleuca*, *Selling Source*, and *Dish Network* courts are correct that a motion for a preliminary injunction *can* be a dispositive motion, it does not follow that *every* motion for an injunction will be dispositive. Likely that determination should depend on the nature of the relief requested.

For example, in *Dish Network*, the district court granted plaintiff satellite television companies’ ex parte motion for a temporary restraining order and a writ of civil seizure against manufacturers of equipment allowing consumers to “intercept and steal” the plaintiffs’ signals. *Dish Network*, 2009 WL 2224596, at *1. The motion asked the court to enjoin a defendant from continuing a disputed business practice – a temporary version of the relief requested in the underlying lawsuit. Necessarily, in order to grant the motion, the court had to peek into the merits of the case, in order to determine that there was suffi-

cient evidence of the piracy alleged in the underlying case. Moreover, the TRO covered no other extraneous matters; thus, the court's decision on the TRO was limited to, and fundamentally dependent on, an examination of the merits of the case.

In this case, however, the motion was *not* a motion to temporarily grant the relief ultimately sought in underlying suit; rather, it was a request to send notice of potential problems with Defendant's vehicles to thousands of purchasers. Determining whether to send such notice necessarily involved consideration of the widest possible range of vehicles, some of which may ultimately be weeded out by the parties in the course of litigation. Thus, it involved evidence and issues which may ultimately not factor into the underlying case. Moreover, in *Dish Network* the plaintiff requested a writ of seizure, which was necessary to prevent the destruction of evidence crucial to the main case. Here, however, the prosecution of the main case did not turn on the outcome of the motion; the case could easily have continued without the motion ever being filed at all. Thus, unlike the motion in *Dish Network*, the motion in this case was not even intended to *aid* in the ultimate disposition of the case.

Because the motion for preliminary injunction here was not a resolution of any issue on the merits, was broader and shallower in scope than a true consideration of the merits, and was not necessary to the resolution of the case, the Court finds that the motion was not dispositive.

Because the motion was a non-dispositive motion, and the exhibits attached to it were sealed un-

der the magistrate's protective order, the Court conducts its analysis under the good cause standard, not the compelling reasons standard.

2. Good Cause to Keep Documents Sealed

The Court finds that in this case there is good cause to keep the documents sealed at this time, for at least three reasons. First, a number of the documents seem to include Defendant's technical information, which could comprise trade secrets. Of course, technical information is only a trade secret if it provides competitors with some useful advantage.² Techniques and processes which are obvious to anyone in the industry do not count as trade secrets.³

In a declaration attached to the Opposition, James Bielenda, Chrysler's Manager of Product Investigations, explains that some of the documents could provide competitors with information about Defendant's manufacturing and testing processes, specifications, and standards, as well as Defendant's "operational capacity." (Bielenda Decl., ¶¶ 14-17.) Such information could provide competitors with

² "The economic value of that property right [in a trade secret] lies in the competitive advantage over others that Monsanto enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984).

³ *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 465 (9th Cir. 1990) (affirming a district court holding that "[i]t would be absurd to permit [the [plaintiff] to appropriate as his own 'secrets' common pedagogical and job search techniques which would be used in any job placement course.").

specific guidance as to how to manufacture their own products more efficiently, without having to engage in the expensive research and development that Defendant has already done. The disclosure of such specific technical information, in other words, would enable competitors to “leapfrog” Defendant’s hard engineering work and unfairly reap the competitive rewards.

Under this rationale, documents which contain specific technical information about Defendant’s manufacturing and testing processes, or product standards and tolerances, are likely to be trade secrets. As far as the Court can determine at present, given limited briefing, the group of documents containing such information would likely encompass at least the following: Exhibits A-C, E, and J-P (Dkt. No. 57); the Bielenda Decl. (Dkt. No. 65) and Exhibit A thereto; and Exhibits E and F to Hughes Decl. (Dkt. No. 74).

Other documents currently under seal seem to have less claim to trade secret status; the bulk of the remaining documents are internal communications among Defendant’s employees, or between its employees and outside contractors, that do not appear to contain significant technical information. A few others are letters between counsel. Nonetheless, the Court declines to unseal them at this time.

Important policy considerations favor not unsealing the documents. As Defendant points out, the record at this time is incomplete. While bringing to light and publicly examining product failures, and manufacturers’ responsibility for such failures, is one of the key functions of this kind of litigation, it is also

important that the Court not release information that could become “a vehicle for improper purposes.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978). One such improper purpose would be to “promote public scandal.” *Id.* Speaking generally, with absolutely *no* reference to CAS itself, there is some danger that the wide publication of selected, out-of-context materials, in a matter that is only in the early stages of litigation, could unnecessarily harm Defendant and present an unfair picture of the alleged facts to the public.⁴

This concern is bolstered by the fact that, even with complete access to the sealed documents, the Court could not come to any solid conclusion as to what they might prove – which is why the Court denied the motion for preliminary injunction in the first place. (Dkt. No. 88.) The disclosure of early, incomplete discovery documents that the Court itself found inconclusive has great potential to mislead the public.

This is particularly the case when it comes to the disclosure of small snippets of informal corporate communications, which may frequently be incomplete, inaccurate, jocular, or filled with an insider’s shorthand or jargon. An offhand remark in an email

⁴ Of course, “[t]he mere fact that the production of records may lead to a litigant’s embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records.” *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). Certainly, in the event that the full adjudication of this case reveals facts that are embarrassing to Defendant, that will provide no reason to hide them from public view.

can easily become the “gotcha” quote in headlines and press releases, and Defendant would be forced to litigate the case in court *and* litigate in the press. Moreover, as investigations of alleged TIPM-7 failures are ongoing both inside and outside the company, the Court is leery of creating an environment that would chill free and open communication among Defendant’s engineers, or incentivize the use of closed-door meetings that leave no paper trail.

The motion to unseal is therefore denied, except for the documents described in Part III.B.4., *infra*.

This is not to say that these documents may never be unsealed, or that identical information will not become available to the public in the course of the litigation. When the Court is called upon to make *dispositive* rulings, the “compelling reasons” standard will apply, and Defendant will be granted much less deference in protecting its technical information and its internal communications. Because the record will be more complete, there will be less concern that disclosure could give a false impression or unnecessarily promote public scandal. The Court may also subject Defendant’s alleged trade secrets to significantly more scrutiny at that point. The Court emphasizes that this order is limited to the narrow question posed – whether the sealed documents documents submitted in support of arguments about the motion for preliminary injunction should be unsealed at this time.

3. Briefs and Declarations

In its Reply, CAS argues that “[b]ecause the parties’ briefing and declarations on the motion for preliminary injunction are not even arguably discovery

documents, they cannot possibly fall under the exception to the presumption of public access for sealed discovery documents attached to non-dispositive motions. Therefore . . . the compelling reasons standard indisputably applies to these records.” (Reply ISO Mot. Unseal at 6.) This argument relies on a highly literal reading of the rule that completely negates its intended effect. There can be no reason to attach a discovery document to a motion or brief except in order to make reference to its contents, and it would be nonsensical to carefully exempt the discovery document from disclosure, only to allow full disclosure of citations to it in a briefing paper. The same standard applies to the discovery documents and to the references to them in the briefs and declarations. The redacted portions of the briefs and declarations remain under seal.

4. Disclosures Agreed to by Defendant

Defendant has no objection to the unsealing of: Naor Decl. & Ex. P thereto; Stein Decl., Exs. H, Q; Hughes Decl., Ex. Q. (Opp’n to Mot. Unseal at 1 n.1.). These documents will therefore be unsealed.

IV. CONCLUSION

CAS’s Motion to Intervene and Motion to Unseal are DENIED. However, the denial is without prejudice, and CAS is free to move to intervene again in the event that future motions also present questions of public access to court records. Additionally, as all parties agree to the unsealing of certain documents, the Court hereby ORDER the Plaintiffs to file a single new document entitled “DOCUMENTS PREVIOUSLY FILED, UNSEALED AS ORDERED BY THE COURT” comprised of one unredacted copy of

50a

each of the following: Naor Decl. (Dkt. No. 55) & Ex. P thereto; Exs. H, Q to Stein Decl. (Dkt. No. 57); Ex. Q. to Hughes Decl. (Dkt. No. 74).

IT IS SO ORDERED

Dated: December 30, 2014

s/
DEAN D. PREGERSON
United States District Judge

APPENDIX C

FILED
FEB 18 2016
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CENTER FOR AUTO SAFETY, Intervenor - Appellant, v. CHRYSLER GROUP, LLC, Defendant - Appellee.
--

No. 15-55084
D.C. No. 2:13-cv-08080-
DDP-VBK
Central District of
California, Los Angeles
ORDER

Before: IKUTA and OWENS, Circuit Judges and
SESSIONS,* District Judge.

Judge Owens has voted to deny the petition for rehearing and the petition for rehearing en banc, and Judge Sessions has so recommended. Judge Ikuta would vote to grant the petition for rehearing and the petition for rehearing en banc.

* The Honorable William K. Sessions III, District Judge for the U.S. District Court for the District of Vermont, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed on January 25, 2016, are DENIED.