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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

S.R. NEHAD, an individual, K.R. NEHAD, an individual, ESTATE OF FRIDOON RAWSHAN NEHAD,

CASE NO. 15CV1386 WQH - NLS
ORDER

Plaintiffs,

v.

NEAL N. BROWDER, an individual, CITY OF SAN DIEGO, a municipality, and DOES 1 through 10, inclusive,

Defendants.

HAYES, Judge:

The matter before the Court is the motion for Permissive Intervention for Access to Videotape of Police Shooting and Statement of Officer Regarding the Shooting filed by Voice of San Diego, KPBS, KGTV 10 News, The San Diego Union-Tribune and *inewsourc*e. (ECF No. 16).

BACKGROUND FACTS

On June 24, 2015, Plaintiffs filed a Complaint against Defendant Neal N. Browder, alleging deprivation of civil right rights under 42 U.S.C. § 1983. On July 23, 2015, Plaintiffs filed a First Amended Complaint against Defendant Browder adding the City of San Diego. The First Amended Complaint alleges that Fridoon Rawshan was shot to death on April 30, 2015 by Defendant Browder, a San Diego police officer, acting under color of authority. The First Amended Complaint alleges,

The shooting was captured on a surveillance video owned by a private business named KECO, Inc. (the “KECO Video”). KECO has the video of the shooting and provided a copy to the San Diego Police Department

1 (“SDPD”).

2 (ECF No. 9 at 2). After the City of San Diego was added as a Defendant, Counsel for
3 the City of San Diego “offered to Plaintiffs’ counsel of record all video footage
4 regarding the shooting as well as the San Diego Police Department’s homicide
5 investigation binder, subject to an appropriate protective order.” (ECF No. 26-1 at 9).

6 On July 24, 2015, all parties filed a joint motion for a protective order which
7 would require the Defendants’ attorneys to immediately produce to Plaintiffs’ attorneys
8 copies of “all video footage in their possession . . . depicting the surrounding area or
9 scene of the April 30, 2015 shooting of Fridoon Rawshan Nehad on or around that
10 date.” (ECF No. 11 at 2). The joint motion would require the parties and their
11 attorneys to agree to not “[c]onvey, transfer, copy, publish, show, or distribute the
12 documents or other items produced . . . to anyone other than the parties and their
13 attorneys of record, . . . without court approval.” *Id.*

14 On July 28, 2015, the United States Magistrate Judge signed an Order Granting
15 Joint Motion for Protective Order. (ECF No. 13). The Protective Order provides in part
16 as follows:

17 1. Defendants’ attorneys of record shall immediately produce to
18 Plaintiffs’ attorneys of record copies of all video footage in their
19 possession, custody, or control depicting the surrounding area or scene of
the April 30, 2015 shooting of Fridoon Rawshan Nehad on or around that
date.

20 2. Defendants’ attorneys of record shall produce to Plaintiffs’ attorneys
21 of record redacted copies of all other documents and items contained in the
22 San Diego Police Department’s homicide investigation binder in this case,
as soon as such documents are redacted, and in any event no more than
fourteen court days following the date this Protective Order is issued.

23 3. The parties, their attorneys of record, and anyone acting in concert with
24 them or participating with them, agree to not engage in, allow, nor perform
any of the following:

25 a. Convey, transfer, copy, publish, show, or distribute the documents or
26 other items produced pursuant to this Protective Order, nor authorize
27 another to transfer, copy, publish, show, or distribute such documents or
28 items, to anyone other than the parties and their attorneys of record,
experts, consultants, paralegals, legal assistants, clerical staff and
investigators and other officers, agents, employees and representatives of
the parties or the attorneys of record who are directly assisting the
attorneys of record in this case, without court approval;

1 4. Plaintiffs have asked the Court for leave to serve a subpoena on KECO,
2 Inc., a third party whose surveillance cameras captured the shooting
3 underlying this action (the “KECO Video”). The parties, their attorneys
of record, and anyone acting in concert with them or participating with
them, agree to not engage in, allow, nor perform any of the following:

- 4 a. Convey, transfer, copy, publish, show, or distribute the KECO Video,
5 nor authorize another to transfer, copy, publish, show, or distribute such
6 video, to anyone other than the parties and their attorneys of record,
7 experts, consultants, paralegals, legal assistants, clerical staff and
8 investigators and other officers, agents, employees and representatives of
the parties or the attorneys of record who are directly assisting the
attorneys of record in this case, without court approval; or
b. Use the KECO Video for any purpose other than prosecuting or
defending the instant civil proceedings pursuant to applicable law.

9 . . .

10 9. The terms of this Protective Order shall not prevent any party to this
11 action from seeking a modification of this Protective Order, and the Court
may modify the Protective Order for good cause, or in the interest of
12 justice, **or for public policy reasons**, upon the motion of a party to this
13 action or its own order at any time during the proceedings.

14 (ECF No. 13 at 1-4). Pursuant to the Protective Order, attorneys for Defendant City
15 of San Diego provided “the Homicide Investigation Binder, including all video footage
16 of the scene,” to attorneys for Plaintiffs. (ECF No. 26-1 at 9).

17 On August 19, 2015, Voice of San Diego, KPBS, KGTV 10 News, The San
18 Diego Union-Tribune and *inewsourc*e, collectively referred to as “the Media,” filed a
19 motion seeking intervention pursuant to Federal Rules of Civil Procedure 24(b) “to
20 assert public and press access rights to review and copy the security camera Video of
21 the police shooting of FRIDOON RAWSHAN NEHAD and the official statement of
22 Officer Neal N. Browder. . . .” (ECF No. 16 at 2).¹ The Media further asserts that there
23 has been no particularized showing of harm to support good cause for the continuation
24 of the Protective Order in this case.

25 Defendants City of San Diego and Neal Browder oppose the motion to obtain

27
28 ¹ This information is not a part of the record in this case. On November 30, 2015,
Plaintiffs filed a motion to lodge the KECO video under seal in support of Plaintiffs’
motion to change venue. (ECF No. 44). This motion has not been granted.

1 public and press access to video and investigative records.² (ECF Nos. 26, 27, and 28).
2 Defendants submit the Declaration of Shelly Zimmerman, Chief, San Diego Police
3 Department to establish “good cause” under Rule 26(c)(1) to support the continuation
4 of the Protective Order. Zimmerman states in part, “I am concerned that the release of
5 evidence will inflame violent or unstable elements, leading to threats and violence in
6 San Diego, and particularly against Officer Browder and his family.” (ECF No. 26-1
7 at 6). Zimmerman states, “Violence and threats against officers – including SDPD
8 officers – have increased dramatically the past few years.” *Id.* Zimmerman provides
9 statistics regarding the number of assault on officers, and states that “officers are
10 regularly subjected to not only physical and verbal abuse, but also to threats, some
11 explicit and some more veiled.” *Id.* Zimmerman describes one telephone message in
12 August 2015 involving a threat to two police officers, and one internet postings by
13 “Anonymous” referring to the shooting in this case which demands that Defendant
14 Browder be arrested and charged with murder. *Id.* at 7.

15 On November 12, 2015, the Media filed the Supplemental Declaration of Guylyn
16 Cummins in support of the motion for permissive intervention to obtain access to video
17 and records in which the declarant states in part:

18 On November 9, 2015, San Diego District Attorney Bonnie Dumanis
19 released a statement and gave a televised press conference about the
20 shooting of Mr. Nehad by Officer Browder. . . . The statement is titled
“DA:SDPD Officer Believed Lives Were in Danger, is Legally Justified
in Midway Shooting,” and it further states,

21 San Diego County District Attorney Bonnie Dumanis today
22 found that based on a thorough review of the evidence and
23 the law, a San Diego Police Officer who fatally shot Fridoon
Rawshan Nehad, 42, on April 30 of this year is not criminally
liable for his actions.

24 (ECF No. 37 at 2).

25 On November 30, 2015, Defendants filed the Supplemental Declaration of
26 Michael Parme in opposition to the motion for permissive intervention to obtain access

28 ² Defendant City of San Diego does not oppose the Media’s intervention for the
limited purpose of seeking discovery of the video and the statement.

1 to video and records in which the declarant states in part,

2 The Supplemental Declaration [of Cummins] addresses only the issue
3 regarding the status of the San Diego County District Attorney's criminal
4 investigation. Notwithstanding the completion of the investigation, the
5 San Diego County District Attorney has refused to release the video of the
6 shooting.

7 Officer Browder is currently on active duty with the San Diego Police
8 Department. There is presently an Internal Affairs investigation of Officer
9 Browder regarding the April 30, 2015 incident. Based on information and
10 belief, that investigation remains ongoing as of the date of filing this
11 Declaration.

12 (ECF No. 39 at 2).

13 On November 30, 2015, Plaintiffs filed a Notice of Non-opposition stating in part
14 that Plaintiffs "do not oppose the media's motion to intervene to obtain the video that
15 shows San Diego police officer Neal Browder shooting Fridoon Nehad to death." (ECF
16 No. 45 at 2).

17 On December 15, 2015, the Court held argument on the Media's motion to
18 intervene for access to the KECO video and the statement of Officer Browder. All
19 parties and the Media appeared.

20 **CONTENTIONS OF THE PARTIES**

21 The Media seeks to obtain the video and the statement "in order to publicly report
22 on the killing and how it occurred." (ECF No. 16-1 at 6). The Media asserts that
23 Plaintiffs are willing to provide copies and discuss the information with the Media. The
24 Media asserts that there is no evidence that the release of the materials will increase any
25 threat to Officer Browder's safety or due process rights. The Media contends that it has
26 standing to challenge the Protective Order on the grounds that good cause does not exist
27 under Rule 26(c) of the Federal Rules of Civil Procedure. The Media contends that Rule
28 26(c), the common law, and the First Amendment require that public access be afforded
to the KECO video and the statement at issue.

Defendants oppose modifying the Protective Order prior to trial to allow public
disclosure of the KECO video and the statement. Defendants contend that good cause
exists to protect the video and statement from public dissemination. Defendants assert

1 that particularized prejudice or harm will result from the dissemination of the
 2 information in the absence of a Protective Order, including: 1) prejudice to the pending
 3 Internal Affairs investigation, 2) risk to Defendant Browder's safety and due process
 4 rights, and 3) prejudice to the potential jury pool.³

5 ANALYSIS

6 Rule 26(c) of the Federal Rules of Civil Procedure provides in part,

7 (1) In General. A party or any person from whom discovery is sought may
 8 move for a protective order in the court where the action is pending
 9 The court may, for good cause, issue an order to protect a party or person
 10 from annoyance, embarrassment, oppression, or undue burden or expense,
 11 including one or more of the following: (A) forbidding the disclosure or
 12 discovery; . . .

13 FRCP 26(c)(1). In *Phillips Ex Rel. Estates of Byrd v. G. M. Corp.*, 307 F.3d 1206 (9th
 14 Cir. 2002), the Court of Appeals explained,

15 For good cause to exist, the party seeking protection bears the burden of
 16 showing specific prejudice or harm will result if no protective order is
 17 granted. *See Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470,
 18 476 (9th Cir.1992) (holding that "broad allegations of harm,
 19 unsubstantiated by specific examples or articulated reasoning, do not
 20 satisfy the Rule 26(c) test"); *see also San Jose Mercury News, Inc.*, 187
 21 F.3d at 1102 (holding that to gain a protective order the party must make
 22 "particularized showing of good cause with respect to any individual
 23 document"). If a court finds particularized harm will result from disclosure
 24 of information to the public, then it balances the public and private
 25 interests to decide whether a protective order is necessary.

26 307 F.3d at 1210-11.

27 In this case, the Court must determine whether good cause exists under Rule
 28 26(c)(1) to prevent the disclosure of the information pursuant to the Protective Order.⁴
 The record demonstrates that the criminal investigation of Officer Browder is
 completed. There are no facts in the record to demonstrate that the Internal Affairs
 investigation of the San Diego Police Department will be improperly influenced by the

29 ³ Defendant Browder asserted that the protections in the California Public
 30 Records Act for investigation records provides a "good reason to oppose public access
 31 to investigation documents until the DA's criminal investigation is completed." (ECF
 32 No. 27 at 13). The record now demonstrates that the criminal investigation is
 33 completed.

34 ⁴ The Protective Order does not include a finding of good cause .

1 disclosure of the KECO video and the statement to the public. Defendants do not
2 provide evidence that would connect the release of the information sought in this case
3 to an increase in assaults on police officers or to a particularized threat of harm to
4 Defendant Browder. *See Beckman Indus., Inc.*, 966 F.2d at 476 (“Broad allegations of
5 harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the
6 Rule 26(c) test.”) (citation omitted).

7 In order to justify prior restraint of information on the grounds of the right to an
8 impartial jury, it must be “clear that further publicity, unchecked, would so distort the
9 views of potential jurors that 12 could not be found who would, under proper
10 instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence
11 presented in open court.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 569 (1976); *see*
12 *also, Columbia Broad. Sys, Inc. v. U.S. District Court for the Cent. Dist. of Cal.*, 729
13 F.2d 1174, 1180 (9th Cir. 1984) (“the publicity must threaten to prejudice the entire
14 community so that twelve unbiased jurors can not be found.”). There is no evidence to
15 suggest that the public dissemination of the information from this case currently limited
16 by the Protective Order could meet this standard or that peremptory challenges and
17 instructions to the jury would not be sufficient to obtain a fair and impartial jury.

18 CONCLUSION

19 Plaintiffs request that the Court vacate the Protective Order and stand ready to
20 disclose the information to the Media. The Court concludes that Defendants have not
21 carried their burden to show “good cause” to continue the Protective Order under Rule
22 26(c). Because the Court has not found that “particularized harm will result from
23 disclosure of [the] information to the public,” the Court declines to conduct an *in*
24 *camera* review of the video or to “balance[] the public and private interests to decide
25 whether a protective order is necessary.” *Phillips*, 307 F.3d at 1211.

26 The Court will vacate the Protective Order. The information at issue is not
27 currently a part of the court record. Consequently, the Court will not grant the motion
28 to order public access to the information at this stage in the proceedings.

1 IT IS HEREBY ORDERED that the Protective Order (ECF No. 13) filed on July
2 28, 2015 is vacated.

3 IT IS FURTHER ORDERED that motion of the Media for Permissive
4 Intervention for Access to Videotape of Police Shooting and Statement of Officer
5 Regarding the Shooting (ECF No. 16) filed by Voice of San Diego, KPBS, KGTV 10
6 News, The San Diego Union-Tribune and *inewsourc*e (ECF No. 16) is granted in part
7 and denied in part as follows: permissive intervention is granted, the motion for public
8 access is otherwise denied without prejudice.

9 IT IS FURTHER ORDERED that this order is stayed for seven days in order to
10 allow any party the opportunity to file a Notice of Appeal.

11 DATED: December 16, 2015

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13 **WILLIAM Q. HAYES**
United States District Judge

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