

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ASSOCIATION TO PRESERVE AND)
PROTECT LOCAL LIVELIHOODS, *et al.*)

Plaintiffs,)

PENOBSCOT BAY AND RIVER PILOTS)
ASSOCIATION,)

Plaintiff-Intervenor,)

v.)

Civil Action No. 1:22-cv-416-LEW

TOWN OF BAR HARBOR, a municipal)
corporation of the State of Maine,)

Defendant,)

CHARLES SIDMAN,)

Defendant-Intervenor.)

CONFIDENTIALITY ORDER

1. Scope. All documents produced in the course of discovery, including initial disclosures, all responses to discovery requests, all deposition testimony and exhibits, other materials which may be subject to restrictions on disclosure for good cause and information derived directly therefrom (hereinafter collectively “documents”), shall be subject to this Order concerning confidential information as set forth below. This Order is subject to the Local Rules of this District and of the Federal Rules of Civil Procedure on matters of procedure and calculation of time periods.

2. Form and Timing of Designation. A party may designate documents as confidential and restricted in disclosure under this Order by placing or affixing the words “CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER” or “CONFIDENTIAL

- **ATTORNEYS' EYES ONLY**" (both hereinafter referred to as "**CONFIDENTIAL**" unless otherwise specified) on the document in a manner that will not interfere with the legibility of the document and that will permit complete removal of the CONFIDENTIAL designation. Documents shall be designated CONFIDENTIAL prior to or at the time of the production or disclosure of the documents. The designation "CONFIDENTIAL" does not mean that the document has any status or protection by statute or otherwise except to the extent and for the purposes of this Order.

3. Documents Which May be Designated CONFIDENTIAL. Any party may designate documents as "CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER" but only after review of the documents by an attorney or a party appearing *pro se* who has in good faith determined that the documents contain information protected from disclosure by statute or that should be protected from disclosure as confidential personal information, trade secrets, personnel records, or commercial information (including but not limited to information that could lead to a competitive disadvantage).

A party may designate as "CONFIDENTIAL – ATTORNEYS' EYES ONLY" any document that the party has in good faith determined contains: (a) information that is so sensitive that it would cause substantial harm to that party if disclosed to another party in this action;(b) Sensitive Security Information (SSI) that is controlled under the provisions of 49 C.F.R. Parts 15 and 1520; (c) SSI regarding the implementation of portions of the maritime security regime required by the Maritime Transportation Security Act of 2002, as codified in 46 U.S.C. Chapter 701; (d) SSI relating to the requirements of domestic maritime security regulations with the international maritime security standards in the

International Convention for the Safety of Life at Sea, 1974 (SOLAS Chapter XI-2) and the International Code for the Security of Ships and of Port Facilities, parts A and B, adopted on 12 December 2002; (e) SSI relating to facility security plans as required by the Department of Homeland Security and United States Coast Guard under 33 C.F.R. Ch. I, Subch. H (Maritime Security); and (f) other SSI that relates to the operation or functionality of federally regulated marine facilities. The designation shall be made subject to the standards of Rule 11 and the sanctions of Rule 37 of the Federal Rules of Civil Procedure.¹ Information or documents that are available in the public sector may not be designated as CONFIDENTIAL.

This Confidentiality Agreement acknowledges there may be SSI held by the Plaintiffs that they do not have authority under 49 C.F.R. Parts 15 and 1520 or other federal law to produce under any category of confidentiality. Such SSI would only be produced pursuant to court order.

4. Depositions. Deposition testimony shall be deemed CONFIDENTIAL only if designated as such. Such designation shall be specific as to the portions to be designated CONFIDENTIAL. Depositions, in whole or in part, shall be designated on the record as CONFIDENTIAL at the time of the deposition. Deposition testimony so designated shall remain CONFIDENTIAL until seven days after delivery of the transcript by the court

¹ An attorney who reviews the documents and designates them as CONFIDENTIAL must be admitted to the Bar of at least one state but need not be admitted to practice in the District of Maine and need not file the certification required of visiting lawyers by Local Rule 83.1(c) unless they are appearing generally in the case on behalf of a party. By designating documents confidential pursuant to this Order, counsel submits to the jurisdiction and sanctions of this Court on the subject matter of the designation.

reporter. Within seven days after delivery of the transcript, a designating party may serve a Notice of Designation to all parties of record as to specific portions of the transcript to be designated CONFIDENTIAL. Thereafter, those portions so designated shall be protected as CONFIDENTIAL pending objection under the terms of this Order. The failure to serve a Notice of Designation shall waive the CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER designation made on the record of the deposition. CONFIDENTIAL – ATTORNEYS’ EYES ONLY designations cannot be waived by a disclosing party. If deposition excerpts have not been designated as confidential pursuant to this order, they are not to be treated as sealed documents when filed with the court.

5. Protection of Confidential Material.

(a) General Protections. Documents designated CONFIDENTIAL under this Order shall not be used or disclosed by the parties, counsel for the parties or any other persons identified in ¶ 5(b) for any purpose whatsoever other than to prepare for and to conduct discovery and trial in this action, including any appeal thereof. Documents designated CONFIDENTIAL are not public records for purposes of the Freedom of Access Act, 1 M.R.S. § 400 *et seq.* If any person seeks to compel disclosure of documents designated CONFIDENTIAL in a separate judicial action, the producing party shall be provided notice and the opportunity to oppose disclosure.

(b) Limited Third-Party Disclosures. The parties and counsel for the parties shall not disclose or permit the disclosure of any CONFIDENTIAL documents to any third person or entity except as set forth in subparagraphs (1)-(6). Subject to these requirements,

the following categories of persons may be allowed to review documents that have been designated CONFIDENTIAL.

(1) Counsel. Counsel for the parties and employees of counsel who have responsibility for the preparation and trial of the action;

(2) Parties. Material designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER may only be disclosed to receiving parties and employees of a receiving party to the extent counsel for the receiving party determines that the specifically named individual party or employee’s assistance is reasonably necessary to the conduct of the litigation in which the information is disclosed. Material designated CONFIDENTIAL – ATTORNEYS’ EYES ONLY may not be disclosed to receiving parties and employees;

(3) Court Reporters and Recorders. Court reporters and recorders engaged for depositions;

(4) Contractors. Those persons specifically engaged for the limited purpose of making copies of documents or organizing or processing documents but only after each such person has completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound;

(5) Consultants and Experts. Consultants, investigators, or experts (hereinafter referred to collectively as “experts”) employed by the parties or counsel for the parties to assist in the preparation and trial of this action but

only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound; and

(6) Others by Consent. Other persons only by written consent of the producing party or upon order of the Court and on such conditions as may be agreed or ordered. All such persons shall execute the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound.

Under no circumstances may material designated “CONFIDENTIAL—ATTORNEYS’ EYES ONLY” be disclosed to any party, any third-party, or any employees of any party or third-party pursuant to this Order.

(c) Control of Documents. Counsel for the parties shall make reasonable efforts to prevent unauthorized disclosure of documents designated as CONFIDENTIAL pursuant to the terms of this Order. Counsel shall maintain the originals of the forms signed by persons acknowledging their obligations under this Order for a period of six years from the date of signing.

(d) Copies. Prior to production to another party, all copies, electronic images, duplicates, extracts, summaries or descriptions (hereinafter referred to collectively as “copies”) of documents designated as CONFIDENTIAL under this Order, or any individual portion of such a document, shall be affixed with the designation

“CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” if the word does not already appear on the copy. All such copies shall thereafter be entitled to the protection of this Order. The term “copies” shall not include indices, electronic databases or lists of documents provided these indices, electronic databases or lists do not contain substantial portions or images of the text of confidential documents or otherwise disclose the substance of the confidential information contained in those documents.

6. Filing of CONFIDENTIAL Documents. Before any document marked as CONFIDENTIAL is filed with the Clerk the party filing the document shall make reasonable efforts to ensure that the document is protected from public disclosure or has been redacted to remove nonessential confidential information. The filing party shall first consult with the party that originally designated the document as CONFIDENTIAL to determine whether, with the consent of that party, a redacted document may be filed with the Court not under seal. Where agreement is not possible or adequate, a confidential document may be electronically filed under seal only in accordance with Local Rule 7A. Other than motions to seal and memoranda governed by Local Rule 7A, if the confidential contents of CONFIDENTIAL documents are incorporated into memoranda or other pleadings filed with the court, counsel shall prepare two versions of the pleadings, a public and a confidential version. The public version shall contain a redaction of the contents of CONFIDENTIAL documents and shall be filed with the Clerk. The confidential version shall be a full and complete version of the pleading, including any exhibits which the party

maintains should be under seal and shall be filed with the Clerk attached to a motion to seal filed in accordance with Local Rule 7A. The public version shall plainly indicate the exhibits (both by number and description of the exhibit) that have been filed under seal with the confidential version. In the event the confidential exhibit must be filed under seal because the parties cannot reach agreement on redaction, the filing party, if not the party seeking to maintain confidentiality status, shall describe the document and give it an Exhibit Number, indicating that it will be filed separately under seal by the opposing party. The party seeking to maintain confidential status shall file a motion to seal in accordance with Local Rule 7A within 3 business days of the filing of the opposing party's pleading. Failure to file a timely motion to seal could result in the pleading/exhibit being unsealed by the court without further notice or hearing.

7. Electronically Stored Information. Disclosure or discovery of electronically stored information (“ESI”) shall be handled as follows: The parties shall preserve all ESI relating to the issues in dispute between the parties. To reduce the expense and burden associated with producing ESI:

1. All word documents, emails, and PowerPoint files be converted and produced in multi-page pdf file format, with document-level extracted/OCR text, and labeled with bates-numbers. Files already in pdf format will remain in pdf format, labeled with bates-numbers. Excel files will be produced in native format, with a PDF image placeholder. All other files that cannot be imaged (e.g., audio/video) will be produced in native format, with a PDF image placeholder. All files (PDF, native, and OCR text) should be named for the start bates number.

8. No Greater Protection of Specific Documents. No party may withhold information from discovery on the ground that it requires protection greater than that afforded by this Order unless the party moves for an order providing such special protection.

9. Challenges by a Party to Designation as Confidential. Any CONFIDENTIAL designation is subject to challenge by any party or non-party (hereafter “party”). The following procedure shall apply to any such challenge.

(a) Objection to Confidentiality. Within 30 days of the receipt of any document designated CONFIDENTIAL or of the refusal to produce a document on the ground of such designation, a party may serve upon the designating party an objection to the designation. The objection shall specify the documents to which the objection is directed and shall set forth the reasons for the objection as to each document or category of documents. CONFIDENTIAL documents to which an objection has been made shall remain CONFIDENTIAL until designated otherwise by waiver, agreement or order of the Court.

(b) Obligation to Meet and Confer. The objecting party and the party which designated the documents to which objection has been made shall have fifteen (15) days from service of the objection to meet and confer in a good faith effort to resolve the objection by agreement. If agreement is reached confirming or waiving the CONFIDENTIAL designation as to any documents subject to the objection, the

designating party shall serve on all parties a notice specifying the documents and the nature of the agreement.

(c) Obligation to File Motion. If the parties cannot reach agreement as to any documents designated CONFIDENTIAL, for the purpose of discovery, the designating party shall file within 30 days of the service of the objection a motion to retain the CONFIDENTIAL designation. The moving party has the burden to show good cause for the CONFIDENTIAL designation. The failure to file the motion waives the CONFIDENTIAL designation of documents to which an objection was made, but the fact that the parties have agreed that the document will remain confidential for all purposes other than use in court does not mean that the item will necessarily be ordered sealed by the Court, even in the absence of objection by the opposing party

10. Action by the Court. Applications to the Court for an order relating to documents designated CONFIDENTIAL shall be by motion under Local Rule 7. Nothing in this Order or any action or agreement of a party under this Order limits the Court's power to make orders concerning the disclosure of documents produced in discovery or at trial.

11. Use of Confidential Documents or Information at Trial. A party which intends to present or which anticipates that another party may present at trial CONFIDENTIAL documents or information derived therefrom shall identify the issue, not the information, in the pretrial memorandum. The Court may thereafter make such orders as are necessary to govern the use of such documents or information at trial.

12. Obligations on Conclusion of Litigation.

(a) Order Remains in Effect. Unless otherwise agreed or ordered, this Order shall remain in force after dismissal or entry of final judgment not subject to further appeal.

(b) Return of CONFIDENTIAL Documents. Within thirty days after dismissal or entry of final judgment not subject to further appeal, all documents treated as CONFIDENTIAL under this Order, including copies as defined in ¶ 6(d), shall be returned to the producing party unless: (1) the document has been offered into evidence or filed without restriction as to disclosure; (2) the parties agree to destruction in lieu of return; or (3) as to documents bearing the notations, summations, or other mental impressions of the receiving party, that party elects to destroy the documents and certifies to the producing party that it has done so. Notwithstanding the above requirements to return or destroy documents, counsel may retain attorney work product, including an index which refers or relates to information designated CONFIDENTIAL, so long as that work product does not duplicate verbatim substantial portions of the text or images of confidential documents. This work product shall continue to be CONFIDENTIAL under this Order. An attorney may use his or her work product in a subsequent litigation provided that its use does not disclose or use CONFIDENTIAL documents.

(c) Deletion of Documents Filed under Seal from ECF System. Filings under seal shall be deleted from the ECF system only upon order of the Court.

13. Non-Waiver of Privilege. The production of any privileged or work-product protected document, material, electronically stored information (“ESI”), or information (the “Privileged Material”), whether inadvertent or otherwise and regardless of whether the information was designated as CONFIDENTIAL the time of disclosure, is not a waiver of the privilege or work product protection from discovery in this case or any other federal or state proceeding, unless the Producing Party intentionally waives the privilege or protection by using the Privileged Material in support of its own claim or defense, in which event the scope of any such waiver shall be determined by Federal Rule of Evidence 502(a)(2) and (3). This provision and Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d). Nothing contained herein is intended to or shall serve to limit a party’s right to conduct a review of documents, ESI, or information (including metadata) for relevance, responsiveness, and/or segregation of privilege or work product protection before production.

14. Clawback. The Producing Party may, upon discovery of the production of the Privileged Material, request the return of the Privileged Material. Upon receipt of such a request, the Receiving Party shall promptly return or destroy the Privileged Material and any copies; must not use or disclose the Privileged Material until any claim concerning the Privileged Material is resolved; must take reasonable steps to retrieve the Privileged Material if the Receiving Party disclosed it before being notified; and if the Receiving Party objects to the claim of privilege, may present the matter to the Court under seal for a determination of the claim within fifteen (15) days of receipt of the return request.

15. Retrieval of Unauthorized Access to Confidential Information. In the event that a party discovers that CONFIDENTIAL information it has received has been disclosed to someone not authorized under this Order to receive such information, counsel of record for the party responsible for the unauthorized disclosure shall promptly give written notice to counsel of record for the designating party. If a party fails to treat documents designated as CONFIDENTIAL in the manner provided herein, that party will immediately take such steps as are necessary to have such items placed under seal and/or restored to their confidential status.

16. Addition of New Parties. Any party appearing in the case following entry of this Order shall be subject to its provisions. Within ten (10) days of (a) entry of an appearance by a new party to this Litigation, counsel for the Plaintiffs (in the case of a new party plaintiff) or counsel for Defendants (in the case of a new party defendant) shall serve a copy of this Order on the new party's counsel who have filed an appearance.

17. Order Subject to Modification. This Order shall be subject to modification by the Court on its own motion or on motion of a party or any other person with standing concerning the subject matter. Motions to modify this Order shall be served and filed under Local Rule 7.

13. No Prior Judicial Determination. This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any documents or information designated CONFIDENTIAL by counsel or the parties is subject

to protection under Rule 26(c) of the Federal Rules of Civil Procedure or otherwise until such time as the Court may rule on a specific document or issue.

14. Persons Bound. This Order shall take effect when entered and shall be binding upon all counsel and their law firms, the parties, and persons made subject to this Order by its terms.

So Ordered.

Dated: June 1, 2023

/s/ Karen Frink Wolf
United States Magistrate Judge

**WE SO MOVE/CONSENT
and agree to abide by the
terms of this Order**

/s/ Patrick W. Lyons
Signature

Patrick W. Lyons, Esq.
Counsel for Plaintiffs

Dated: 5/31/2023

**WE SO MOVE/CONSENT
and agree to abide by the
terms of this Order**

/s/ Allison Economy
Signature

Allison Economy, Esq.
Counsel for Defendant Town of Bar
Harbor

Dated: 5/31/2023

/s/ Robert Papazian
Signature

Robert Papazian, Esq.
Counsel for Defendant-Intervenor
Charles Sidman

Dated: 5/31/2023

/s/ John Kingston
Signature

John Kingston, Esq.
Counsel for Plaintiff-Intervenor
Penobscot Bay and River Pilots Assn

Dated: 5/31/2023

ATTACHMENT A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

ASSOCIATION TO PRESERVE AND)
PROTECT LOCAL LIVELIHOODS, *et al.*)

Plaintiffs,)

PENOBSCOT BAY AND RIVER PILOTS)
ASSOCIATION,)

Plaintiff-Intervenor,)

v.)

Civil Action No. 1:22-cv-416-LEW

TOWN OF BAR HARBOR, a municipal)
corporation of the State of Maine,)

Defendant,)

CHARLES SIDMAN,)

Defendant-Intervenor.)

_____)

**ACKNOWLEDGMENT
AND
AGREEMENT TO BE BOUND**

The undersigned hereby acknowledges that he/she has read the Confidentiality Order dated _____ in the above-captioned action and attached hereto, understands the terms thereof, and agrees to be bound by its terms. The undersigned submits to the jurisdiction of the United States District Court for the District of Maine in matters relating to the Confidentiality Order and understands that the terms of the Confidentiality Order obligate him/her to use documents designated CONFIDENTIAL in accordance with the Order solely for the purposes of the above-captioned action, and not

to disclose any such documents or information derived directly therefrom to any other person, firm or concern.

The undersigned acknowledges that violation of the Confidentiality Order may result in penalties for contempt of court.

Name: _____

Job Title: _____

Employer: _____

Business Address: _____

Date: _____

Signature