

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

HOLLIS M. GREENLAW,
TODD F. ETTER,
CARA D. OBERT,
BENJAMIN L. WISSINK,
UMT HOLDINGS, L.P.,
UDF HOLDINGS, L.P.,
UNITED DEVELOPMENT FUNDING, L.P.,
UNITED DEVELOPMENT FUNDING III, L.P.,
UNITED DEVELOPMENT FUNDING IV, L.P.,
UNITED DEVELOPMENT FUNDING INCOME
FUND, V,
UNITED MORTGAGE TRUST,
AND
UNITED DEVELOPMENT FUNDING LAND
OPPORTUNITY, FUND, L.P.,

Plaintiffs,

v.

DAVID KLIMEK,
JAMES NICHOLAS BUNCH,
CHRISTINE L. EDSON, a/k/a CHRISTY EDSON,
and DOES 1 – 10.

Defendants.

Case No. 4:20-cv-00311-SDJ

**INTERESTED PARTY UNITED STATES OF AMERICA’S RESPONSE IN
OPPOSITION TO PLAINTIFFS’ MOTION TO FILE REDACTED COMPLAINT¹**

Pursuant to 28 U.S.C. § 517, interested party the United States of America (hereinafter “United States”) respectfully submits this Response in Opposition to Plaintiffs’ Motion to File Redacted Complaint (the “Motion”). Although the United States is not a party to this action, the

¹ Plaintiffs served the Motion to File Redacted Complaint via email on August 4, 2020, at 5:29 p.m. CST. Therefore, pursuant to Local Rule 5(d), service is deemed to have taken place on August 5, 2020. Local Rule CV-5(d). Therefore, the United States’ and individual defendants’ responses to Plaintiffs’ Motion are due on or before August 19, 2020. Local Rule CV-5(d), 7(e).

relief sought in the Motion implicates an ongoing federal criminal investigation, in which the United States has an interest. The individual-capacity Defendants, AUSA Nick Bunch and FBI Special Agents David Klimek and Christine Edson, through their undersigned counsel, join in the United States' arguments.

I. INTRODUCTION

This case is a *Bivens* action in name only. In reality, disappointed by their failure to convince either the United States Attorney's Office for the Northern District of Texas ("NDTX") or the Deputy Attorney General to halt a complex criminal investigation of their conduct and have Assistant United States Attorney James Nicholas Bunch (hereinafter "AUSA Bunch") removed from that case, Plaintiffs are using this "*Bivens* action" to yet again interfere with legitimate law enforcement activity. In furtherance of their efforts, Plaintiffs ask the Court to unseal a redacted complaint and publicize their version of the history of a very active ongoing criminal investigation in the NDTX including details of non-public aspects of the investigation.

Plaintiffs filed this case under seal in recognition of the potential threat to the NDTX's ongoing criminal investigation and of violating district court orders in NDTX. The threat exists because the complaint is based, at least in part, on the NDTX's sealed search warrant affidavit, which the Plaintiffs obtained a limited right to review, but not copy. That search warrant affidavit remains sealed to this day despite Plaintiffs' efforts, including its unsuccessful filed motion to unseal, in NDTX. Although Plaintiffs have purported to redact references to the sealed search warrant affidavit in their proposed redacted complaint, those limited redactions they proposed fail to ensure that the remaining allegations are not tainted from information gleaned from the sealed affidavit. Additionally, the proposed redacted complaint contains references to and descriptions of non-public and sealed aspects of the NDTX's criminal investigation, which Plaintiffs have not

proposed to redact.² In this case, the United States' interest in preserving the integrity of this ongoing pre-indictment investigation outweighs the public's qualified right to review judicial records. Accordingly, Plaintiffs' complaint should remain sealed until at least the NDTX's criminal investigation results in either (1) charges being filed, or (2) prosecution being declined.

II. ARGUMENT

The United States maintains a strong interest in the integrity of ongoing criminal investigations. The Fifth Circuit recognizes the public shares a similar interest in law enforcement. *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962). The common law right to inspect and copy judicial records that Plaintiffs rely on here clashes with the United States' and public's interest in effective investigations and law enforcement. And while the Fifth Circuit has recognized the public has a common law right to inspect and copy judicial records, it has recognized that the common law right of access is not absolute. *Bradley on Behalf of AJW v. Ackal*, 954 F.3d 216, 225 (5th Cir. 2020). The court has consistently held the public's right to inspect and copy judicial records is a *qualified right of access* that must be balanced against countervailing factors supporting non-disclosure, such as the United States' and the public's interest in maintaining the integrity of law enforcement. *See generally, Ackal*, 954 F.3d at 225-33 (conducting a case-specific analysis balancing the public's right of access against interests favoring non-disclosure). The balance of interests in here weighs in favor of keeping the complaint under seal for now.

In this case, Plaintiffs were correct to file the case under seal in the first instance. The Complaint contained references to and discussions of NDTX's sealed search warrant affidavit. Although Plaintiffs' proposed redacted complaint purportedly redacts these references, there is no

² Although Plaintiffs' counsel conferred with counsel for the individual-capacity Defendants and United States regarding potentially unsealing the complaint and search warrant affidavit, they did not confer regarding a potential redacted complaint and did not share any proposed redactions prior to filing their motion.

indication that their access to a “transcription” of that affidavit does not color the remaining unredacted allegations. Regardless, it is clear that the proposed redacted complaint still discusses non-public aspects of NDTX’s ongoing, very active, pre-indictment investigation. *See e.g.s.* Redacted Compl. ¶¶ 73- 75, 97, 100-01, 103. Publicizing this information could threaten NDTX’s investigation, and therefore weighs against unsealing the proposed redacted complaint at this time.³ Also, given these allegations discuss meetings between witnesses and investigators, publicizing the nature and content of these meetings could have a chilling effect on these witnesses’ willingness to cooperate with investigators for the duration of the investigation, on the cooperation of new witnesses, and could potentially chill witness cooperation in future investigations. *See United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995) (“Officials with law enforcement responsibilities may be heavily reliant on the voluntary cooperation of persons who may want or need confidentiality. If that confidentiality cannot be assured, cooperation will not be forthcoming.”)

Ultimately, the NDTX investigation will result in the filing of charges or the determination not to do so. At that time, the threat posed to NDTX’s criminal investigation through public disclosure of the complaint’s allegations will be less significant.⁴ For this reason, the United States opposes Plaintiffs’ Motion *at this time*. Once the NDTX files charges or declines to do so, sealing

³ Plaintiff’s Motion to File Redacted Complaint is only 13 pages long. Yet, ten of those pages—not to mention the 35 pages and eighty-one (81) exhibits in the Declaration of Paul Pelletier—consist of a recitation of the allegations contained in the Plaintiffs’ *Sealed* Complaint. Plaintiffs’ decision to file the Motion unsealed and immediately publish the Motion and Pelletier Declaration, *see* <http://www.udfonline.com/bivens-action> (last visited Aug. 19, 2020), is yet another example of Plaintiffs’ attempt to impede the criminal investigation. The timing is questionable given that the Defendants’ responsive pleadings are not due until September 14, 2020, meaning there is no urgent need to publicize this matter, especially when Plaintiffs have not even survived a motion to dismiss.

⁴ In the event of an indictment, it is likely the Government and the individual-capacity Defendants will seek a limited stay of this civil suit except to resolve any motions to dismiss.

the redacted complaint would no longer be necessary to protect the integrity of NDTX's criminal investigation. Given the United States is not requesting these documents remain sealed forever, the interest in protecting the integrity of the criminal investigation outweighs the qualified public interest in inspecting judicial records. *See In re Sealed Search Warrants Issued June 4 and 52008*, No. 08-M-208, 2008 WL 5667021, at *4 (N.D.N.Y. July 14, 2008) ("Where, as here, the investigation will result in the filing of charges or the determination not to do so, the interest in the integrity and security of that investigation outweighs the interest in immediate access to the documents, particularly where future disclosure of the documents is likely."). The fact the United States does not seek to keep the seal in place indefinitely mitigates Plaintiff's purported "need to litigate this case publically." Pls.' Mot. 12, ECF No. 17. This is especially true at such an early stage of the pleadings when the Plaintiffs' claims have not even survived a motion to dismiss.

III. CONCLUSION

Plaintiffs' attacks on NDTX's investigation of their conduct are nothing new. However, the Court should not allow Plaintiffs to use this purported Bivens action as a weapon to further their crusade. To preserve the integrity of NDTX's investigation, the Court should deny Plaintiffs' Motion to unseal the proposed redacted complaint. Once NDTX's investigation concludes, resulting in charges or a declination, unsealing of the redacted complaint may be appropriate. But, until that time, the Motion should be denied.

Respectfully submitted,

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**ATTORNEY FOR INDIVIDUAL-
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NICHOLAS BUNCH, CHRISTINE
EDSON, AND DAVID KLIMEK**

CERTIFICATE OF SERVICE

I certify that on this 19th day of August, 2020, a true copy of this motion with attachments was served on all counsel of record by way of the Court's CM/ECF system.

/s/ James Gillingham
JAMES GILLINGHAM

General Information

Court	United States District Court for the Eastern District of Texas; United States District Court for the Eastern District of Texas
Federal Nature of Suit	Civil Rights - Other[440]
Docket Number	4:20-cv-00311