

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANIMAL WELFARE INSTITUTE, <u>et al.</u> ,)	
Plaintiffs,)	
v.)	Case No: 03-2006 (EGS/JMF)
FELD ENTERTAINMENT, INC.,)	
Defendant.)	

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE UNDER SEAL
CONFIDENTIAL RATE DATA AND SUPPORTING POINTS AND AUTHORITIES**

Plaintiffs do not oppose the relief sought by defendant Feld Entertainment, Inc.’s (“FEI’s”) Motion for Leave to File Under Seal Confidential Rate Data and Supporting Points and Authorities (“Sealing Motion”) (ECF 665). Accordingly, FEI’s proposed order should be entered. Plaintiffs’ “Response” (ECF 670), however, is disingenuous. To correct the inaccuracies contained therein, FEI hereby states as follows:

1. FEI engaged in a good faith meet and confer process with plaintiffs concerning the relief sought in the Sealing Motion. In September 2013, FEI informed plaintiffs’ counsel that it *only* intended to file under seal the portions of its Petition for Attorneys’ and Expert Witness Fees (“Petition”) that referred to confidential, third-party billing rate data. FEI explained, on several occasions, that it would be filing its invoices and its counsel’s rates publicly, and it only sought to seal the Peer Monitor survey and potentially other confidential third-party rate data. At the time FEI initially conferred with plaintiffs concerning the Sealing Motion, FEI had not finalized its Petition and thus did not have a finalized list of the data upon which it would be relying. However, FEI explained that any additional rate data would be similar in nature to that

of the Peer Monitor survey. FEI began the meet and confer process in September so that this issue could be handled well in advance of the filing of the Petition.

2. Counsel engaged in several telephone conferences and e-mail exchanges on this issue. FEI understood that plaintiffs would consent to the Sealing Motion, given the narrow nature of the relief requested. FEI sent plaintiffs' counsel the same proposed order that it ultimately filed with the Court. To FEI's surprise, plaintiffs abruptly responded that they could not agree to the proposed sealing order. ***Plaintiffs' counsel provided FEI with no rationale for their refusal to consent, nor did they propose an alternative order.*** See Sealing Motion Ex. 9 at 2.

3. The parties engaged in extensive correspondence after FEI filed its Sealing Motion, a copy of which is attached as Exhibit 10 hereto. (Plaintiffs did not attach this correspondence to their Response.) It was during the course of this post-filing correspondence that plaintiffs' counsel first informed FEI that they did not consent to FEI's proposed order because its language purportedly was "open-ended." See Ex. 10 (10/24/13 email, 3:49 p.m., from Caridas to Simpson et al.). Further, plaintiffs tied the Sealing Motion to other confidentiality issues not relevant to the sealing of the confidential rate data cited in the Petition. See *id.* (10/24/13 email, 5:29 p.m., from Caridas to Simpson et al.).

4. Plaintiffs' post-hoc argument that the proposed sealing order's language was overbroad is a smokescreen. FEI repeatedly made clear that the ***only*** data it intended to file under seal was the (1) Peer Monitor survey and (2) data analogous to it. The same rationale for sealing the Peer Monitor survey, which plaintiffs have now consented to, would have applied with equal force to this second category of information. There was no basis for plaintiffs to refuse to consent to the Sealing Motion.

5. Because plaintiffs refused to consent to FEI's straightforward and narrow proposed sealing order, FEI had to expend attorney time and money preparing its Sealing Motion, which it presumed would be contested. It takes significantly more time to prepare a contested motion than it does a consent motion. *Cf.* Resp. at 2. Further, after the Sealing Motion was filed, plaintiffs' counsel engaged in a lengthy back and forth with FEI's counsel, which also consumed a significant amount of time. This should have been a simple consent motion, resolved in advance of the filing of the Petition, that involved minimal attorney time. Instead, it is an example of vexatious litigation tactics that FEI has had to confront throughout this case.

6. FEI complied with its contract with Peer Monitor and the Local Rules regarding service of the sealed materials. Pursuant to FEI's contract with Peer Monitor, *see* Sealing Motion Ex. 1, FEI cannot provide plaintiffs, or any third party other than the Court, with the confidential rate data relied upon in its Petition until a sealing order is entered. *See id.* ¶ 2 (Consent and Waiver). Plaintiffs do not dispute the effect of that contract. FEI lodged the portions of the Petition and accompanying materials under seal pending the Court's issuance of a sealing order. This procedure complies with Local Rule 5.1(h) and the practice in this district concerning contested sealing motions *Cf. In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 154-155 (¶¶ 48(b) & 49(c)) (D.D.C. 2008). FEI will serve plaintiffs with copies of the sealed materials, via electronic transmission, as soon as the sealing order is entered.

7. Plaintiffs' argument concerning delay is without merit. FEI filed under seal only a portion of *one footnote* of the Petition, a portion of two paragraphs of the Simpson Declaration (which is 263 paragraphs long), and three (3) out of the nearly seventy (70) exhibits to the Petition. Given that plaintiffs have until January 20, 2014 to file their opposition to the Petition (ECF 631), there can be no "prejudice" to plaintiffs. *Cf.* Resp. at 2.

Dated: November 8, 2013

Respectfully submitted,

/s/ John M. Simpson

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