UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
Plaintiff,	:	
v.	:	**Case No. 07-1532 (EGS/JMF)**
ANIMAL WELFARE INSTITUTE, et al.	:	
Defendants.	:	

PLAINTIFF FELD ENTERTAINMENT, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ENTRY OF A PROTECTIVE ORDER

Pursuant to the Court's August 8, 2013 Order (ECF No. 156), Plaintiff Feld Entertainment, Inc. ("FEI") hereby submits its Memorandum of Points and Authorities in Support of Entry of a Protective Order.

Discovery in this case should proceed in a streamlined and efficient manner to minimize the difficulties that occurred in the Endangered Species Act litigation, Civ. No. 03-2006-EGS/JMF (D.D.C.) ("ESA Action") between FEI and these same defendants who either were plaintiffs or plaintiffs' counsel in that prior action. One of those difficulties, which led to unnecessary litigation between the parties, was the frequent dissemination of discovery documents by the ESA Action plaintiffs and their counsel to the media and to other animal rights organizations. The parties are fully entitled to utilize discovery material to litigate the case, but they have no right, based upon the First Amendment or otherwise, to disseminate discovery documents in order to publicize the litigation. The ESA plaintiffs and their counsel frequently used discovery material to publicize their position in the ESA Action until the Court clamped down on that activity with a blanket protective order. Civ. No. 03-2006, 09/25/07 Order (ECF

No. 195). When the ESA Action plaintiffs sought to lift that protective order to run a publicity campaign, the Court denied their motion. Civ. No. 03-2006, 07/29/08 Mem. Order (ECF No. 324). That protective order remains in effect to this day. *See* 08/08/13 Order (ECF No. 157), at 10 (adding HSUS and WAP to 09/25/07 protective order). Now these same parties (all of whom are now RICO defendants) and their new counsel have made it clear that they intend to do the same thing. *See* 08/08/12 Order (ECF No. 156), at 6-7 (2d Column) (noting that defendants oppose a protective order because "defendants should not be precluded from ***publicizing information*** that tends to disprove plaintiff's claims") (emphasis added). The protective order that FEI seeks and which is attached hereto, will avoid that problem by providing a mechanism by which discovery can operate without significant Court oversight and allowing the parties to use materials obtained in discovery for the purpose intended: to litigate this case.

In the ESA Action, the plaintiffs opposed a blanket protective order which required the parties to make requests for protective orders for particular categories of documents. *See* Civ. No. 03-2006, Pls. Mem. in Opp. to FEI's Mot. for a Protective Order (ECF No. 10) (10/22/03). Multiple discovery disputes arose, many relating to the confidentiality of discovery material. The ESA Action plaintiffs and their counsel disseminated FEI's discovery material to the media, and, indeed, evidently paid the lead plaintiff, Tom Rider ("Rider") to do so.[1] Videotapes and documents that had never been produced anywhere but in ESA Action discovery ended up in the hands of television stations and animal activist organizations, such as People for the Ethical Treatment of Animals ("PETA"). Indeed, PETA still actively uses a videotape produced by FEI in ESA Action discovery. The ESA Action plaintiffs defended their actions on First Amendment grounds, which the Court ultimately rejected. No. 03-2006, 07/29/08 Mem. Order (ECF No.

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[1] Ultimately, the Court found that Rider engaged in some media activity, but that the payments were in fact for his participation and testimony in the ESA Action. Civ. No. 03-2006, 12/30/09 Mem. Op. (ECF No. 559) (FOF 1, 48-52).

324). At the same time, the ESA Action plaintiffs refused to produce information concerning the money they paid to Rider to fund his "media" campaign unless FEI agreed to keep it confidential, an argument that the Court also ultimately rejected. Civ. No. 03-2006, 08/23/07 Discovery Order (ECF No. 178). Substantial Court intervention was required. Six (6) separate motions concerning the use and confidentiality of discovery material were filed, resulting in five (5) separate protective orders.

What happened in the ESA Action should not be repeated here. Discovery material should not go to the media, and legitimate confidentiality concerns should not be allowed to slow the progress of discovery when they can be efficiently and fairly addressed by a protective order. Likewise, neither the Court nor the parties should be burdened with responding to numerous, piecemeal filings concerning the confidentiality of discovery material. Accordingly, the Court should enter FEI's proposed protective order.

FACTUAL BACKGROUND

A. Litigation of the ESA Action Was "Complicated and Demanding," and There Were Numerous Disputes Regarding the Use and Confidentiality of Discovery Materials

In the ESA Action, Animal Welfare Institute ("AWI"), the Fund for Animals/the Humane Society of the United States ("FFA/HSUS"),[2] Born Free United With Animal Protection Institute ("API"), and Rider (collectively, the "ESA Action plaintiffs"), represented by the law firm Meyer, Glitzenstein & Crystal ("MGC") and attorneys Katherine Meyer ("Meyer"), Eric Glitzenstein ("Glitzenstein"),[3] Howard Crystal ("Crystal"), Jonathan Lovvorn ("Lovvorn"), and Kimberly Ockene ("Ockene"), sued FEI claiming that it was "taking" its elephants in violation of

[2] FFA and HSUS merged effective January 1, 2005. First Am. Compl ("FAC") (ECF No. 25) (02/16/10), ¶ 36. For convenience, FEI refers to FFA and HSUS as "FFA/HSUS," as the Court did in its December 30, 2009 Memorandum Opinion. 12/30/09 Mem. Op. (ECF No. 559), at 30 n.15.

[3] Defendant Wildlife Advocacy Project ("WAP") is the alter ego of Meyer, Glitzenstein, and MGC, together and separately. FAC, ¶ 43.

the ESA. That litigation, still ongoing, has been pending for ***more than thirteen years***. *See* Civ. No. 03-2006, Docket Report.

Ultimately, after more than five years of discovery and a bench trial that lasted more than six weeks, the Court found that the ESA Action plaintiffs were "unable to produce any credible evidence that any of them had standing to pursue their claims," and dismissed the case for lack of Article III jurisdiction. *See* Civ. No. 03-2006, 03/29/13 Mem. Op. (ECF No. 620), at 2-3. Rider had been paid more than $190,000 by his co-plaintiffs, MGC and WAP. Civ. No. 03-2006, 12/30/09 Mem. Op. (ECF No. 559) (FOF 48). The ESA Action plaintiffs claimed that the money was to do "media" work concerning FEI and its elephants, but the Court found that the primary purpose of the payments was to keep Rider involved with the litigation and to "advance the organizational plaintiffs' purposes for this litigation."[4] *Id.* (FOF 52). Judgment was entered for FEI. Civ. No. 03-2006, 12/30/09 Order and Judgment (ECF No. 558). The district court's judgment was affirmed, in its entirety, by the D.C. Circuit.[5] *ASPCA v. FEI*, 659 F.3d 13 (D.C. Cir. 2011).

The discovery process in the ESA Action was "complicated and demanding." Civ. No. 03-2006, 12/18/07 Order (ECF No. 239), at 1. Collectively, the parties filed more than fifty (50) substantive motions between September 2003 (when the case was remanded by the D.C. Circuit,

[4] The Court recognized that Rider engaged in some media activity concerning FEI's elephants, ***including "publicizing his involvement in th[e] litigation***," but found that Rider's media work was "irregular and sporadic" in nature, even though "the payments and other financial support [came] to Mr. Rider from WAP and the organizational plaintiffs or their counsel without interruption." *Id.* (FOF 48 & 50) (emphasis added).

[5] Following the D.C. Circuit's affirmance, the district court ruled that the ESA Action was "groundless and unreasonable from its inception," and that FEI is entitled to recover the attorneys' fees it incurred when defending itself. *See* Civ. No. 03-206, 03/29/13 Mem. Op. (ECF No. 620), at 3. The district court further found Ms. Meyer and MGC jointly and severally liable for a portion of FEI's fees as a sanction under 28 U.S.C. § 1927. *Id.* at 4. The only issue remaining to be litigated in the ESA Action is the amount of fees to which FEI is entitled. *See id.* at 50. The Hon. John M. Facciola has been appointed as Special Master over the fee proceedings. Civ. No. 03-2006, 06/12/13 Order (ECF No. 629).

following its reversal of the district court's grant of FEI's motion to dismiss) and August 2008 (when the pretrial motions commenced). *See* Civ. No. 03-2006, ECF Nos. 46-333. The vast majority of those motions were discovery motions, and six (6) separate motions concerned the confidentiality of information exchanged in discovery. *See* Civ. No. 03-2006, ECF Nos. 5, 30, 106, 141, 152, 294. Each contested motion involved the filing of not only the initial moving papers, but also an opposition, reply, and in some instances a surreply. In total, the parties filed more than twenty (20) briefs concerning the use and confidentiality of discovery material. *See* Civ. No. 03-2006, Docket Report. Four (4) separate protective orders governing the use and disclosure of discovery material were entered in the ESA Action (No. 03-2006, ECF Nos. 50, 75, 78, 178), until the Court entered a blanket protective order sealing all discovery conducted after September 25, 2007. Civ. No. 03-2006, 09/25/07 Order (ECF No. 195).

As the record demonstrates, and is further discussed below, the use and confidentiality of discovery material was bitterly contested by the parties. FEI repeatedly contended that the ESA Action plaintiffs were misusing discovery material concerning FEI's elephants in the media. The ESA Action plaintiffs ***never*** denied such use and in fact defended it. According to the plaintiffs, the "public interest" at stake in the litigation gave them a "First Amendment right" to use discovery material in the media. *See, e.g.*, Civ. No. 03-2006, Pls. Opp. to FEI's Mot. for Protective Order (ECF No. 34) (03/04/05), at 7 ("the plaintiffs in this case have a particularly strong interest in conducting pretrial discovery in full view of the public") & 10-11 (criticizing FEI's "bald assertion that there is something nefarious about plaintiffs exercising their First Amendment rights to publicly criticize defendants' treatment of elephants in their circus … ."); Ex. 1, Hearing Tr. (09/16/05), at 25 (The Court: But your argument was that you were going use these documents in the media, not misuse, but just use them. Ms. Meyer: What's wrong with

that? That's what the public proceeding is all about. ***That's our First Amendment right***.") (emphasis added). These same arguments were raised repeatedly by the parties over the course of almost six (6) years – in briefing and in argument, in the context of a number of discovery disputes – requiring Court intervention and significantly delaying the completion of discovery.

1. The ESA Action Plaintiffs and Their Counsel Repeatedly Disseminated, and Misrepresented, Discovery Material to the Media and Others

The ESA Action plaintiffs and their counsel repeatedly disseminated discovery material to the media and others over the course of discovery, even after the Court expressly cautioned them against doing so. *See* Ex. 1, Hearing Tr. (09/16/05), at 25 ("Is that really fair? … Wait a minute. Then you're litigating in a public forum, though."), at 26 ("I think I disagree with you when you say, sure, we may use them as our First Amendment right and the public can draw whatever conclusions they want to.") & 26-27 ("I don't want this to turn into litigation in the public arena."); Civ. No. 03-2006, 09/26/05 Order (ECF No. 50), at 2 ("admonish[ing]" plaintiffs that "the purpose of discovery is to produce and seek evidence for use *in litigation* and the Court will not take lightly any abuse of the discovery process for the purposes of publicity or to argue the merits of plaintiffs' claims in the media, as opposed to the Court"); Civ. No. 03-2006, 08/23/07 Order (ECF No. 177), at 2 (stating that the Court was "sensitive to [FEI's] concern that plaintiffs might misuse discovery documents out of context to try their case in the media").

For example, in March 2005, AWI and Rider issued a press release referencing the ESA Action and describing "new videotape evidence – obtained from Ringling Bros. itself." *See* Civ. No. 03-2006, FEI's Reply in Support of Mot. for a Protective Order, Tab C (ECF No. 38-3) (03/16/05). Several months later, in September 2005, a San Francisco television station featured an interview with Rider commenting misleadingly with respect to the same videotape. Ex. 1, Hearing Tr. (09/16/05), at 37-38. That videotape had never been produced by FEI to anyone,

except to the plaintiffs in ESA Action discovery. Plaintiffs' counsel, Ms. Meyer, admitted that the plaintiffs had given the videotape to the television station together with FEI's production letter. *Id.* at 65-66. Indeed, Ms. Meyer stated in open court that the flow of discovery information from FEI – to the ESA Action plaintiffs – to the media was part and parcel of Rider's "media" campaign (for which he was being paid by her law firm, its alter ego and his co-plaintiffs), and proclaimed that there was "nothing nefarious" about turning over discovery material to the media.[6] *Id.*

Even after the plaintiffs had been "admonished" that the Court would "not take lightly any abuse of the discovery process for the purposes of publicity," 09/26/05 Order at 2, in the spring of 2007, ASPCA, API and HSUS issued a series of press releases using documents produced by FEI in ESA Action discovery that had been attached as exhibits to filings in the case. *See* Civ. No. 03-2006, FEI's Mot. to Enforce the Court's September 26, 2005 Order (ECF No. 152) (06/11/07), at 6-8; Ex. 6 thereto (ECF No. 152-7) (press release referring to "[s]everal items … [that] surfaced during the 'discovery' process") & Ex. 8 thereto (ECF No. 152-9) (press release citing "[r]ecently released evidence" in the ESA Action). Further, in June 2007, the ESA Action plaintiffs distributed discovery material to a news station in Las Vegas, Nevada. *See* Civ. No. 03-2006, FEI's Reply in Support of Mot. to Enforce (ECF No. 158) (07/03/07). On June 22, 2007, Las Vegas Channel 8 posted on its website a link entitled "Fact Sheet: Federal Lawsuit Against Ringling Brothers and Barnum & Bailey Circus." *See id.* at 4. The link, when accessed,

[6] Even though PETA was not a party to the ESA Action, that same videotape was posted on PETA's website. *See* Civ. No. 03-2006, FEI's Opp. to Pls. Mot. to Compel Inspections and Cross Motion to Enforce Prior Court Orders (ECF No. 105) (11/09/06), at 22 n.9 ("Plaintiffs have yet to explain how a video of an elephant birth that was made available to Plaintiffs ended up on the PETA website."). Indeed, PETA's link to that videotape is still active. *See* http://www.peta.org/tv/videos/investigations-animals-in-entertainment/1724194172001.aspx (last visited 08/19/13). Ironically, when PETA was ordered by the United States District Court for the Eastern District of Virginia to produce videotapes pursuant to FEI's third-party subpoena in the ESA Action, PETA requested that its production be made under a protective order. *See* Civ. No. 08-mc-04 (E.D. Va.), PETA's Mot. for Protective Order (ECF No. 38) (08/08/08). PETA is one of the third-parties likely to receive a subpoena(s) in this action.

led to a memorandum, issued jointly by all of the organizations who were plaintiffs at that time, and attachments that included various documents produced by FEI in discovery (the same documents referenced in the organizations' press releases, described *supra*). *Id.* On the same date, June 22, 2007, that news station aired further stories about FEI. *See id.* The broadcast exhibited a discovery document produced by FEI, and featured a video of Rider reading from another discovery document. *Id.* at 4 & 10. Importantly, Rider misrepresented the document he was reading from. *See id.* at 10; *see also id.* at 9 (the documents attached to the plaintiffs' memorandum excluded a key document showing that a letter was never sent to its addressee).

The ESA Action plaintiffs did not deny that they were publicly disclosing discovery documents. Civ. No. 03-2006, Pls. Opp. to FEI's Mot. to Enforce (ECF No. 154) (06/25/07), at 1 ("defendants are now simultaneously trying to shut down the plaintiffs' ability to share the public documents that they obtained in discovery"). Contrary to clear Circuit precedent, plaintiffs took the position that any document filed as an exhibit on the ECF system could be freely disseminated to the media, even if those documents had not been relied on by the Court in rendering any decision. *See id.* at 15. Thus, according to the ESA Action plaintiffs' theory, simply including discovery documents as an exhibit to a court filing essentially licensed them to give the material to the media. *See id.*

2. Rider's Protective Order Motions Significantly Delayed Discovery

Meanwhile, as the parties' repeated disagreements about the use of discovery material in the media were unfolding, Rider filed ***two*** motions seeking the entry of protective orders in connection with motions to compel that were filed by FEI. Both motions significantly delayed FEI's ability to complete discovery necessary to its defense, because Rider (1) waited to move

for protective orders until after FEI filed its motions to compel and (2) Rider refused to produce the requested material until the Court ruled on the respective motions.

Rider moved for a protective order concerning testimony at a deposition that plaintiffs' themselves noticed. Plaintiffs' counsel instructed her own client, Rider, not to answer questions concerning certain relevant topics including, *inter alia*, his military service and arrest record. *See* Civ. No. 03-2006, FEI's Opp. to Rider's Mot. for a Protective Order (ECF No. 115) (11/27/06), at 1. Plaintiffs' counsel's instructions interfered with the deposition and required FEI to file a motion to compel. Rider ***then*** sought a protective order from the Court. Civ. No. 03-2006, Rider's Mot. for a Protective Order to Protect His Personal Privacy (ECF No. 106) (11/13/06). Ultimately, the Court ordered Rider to answer certain of the deposition questions that were the subject of FEI's motion to compel, but subject to a protective order. Civ. No. 03-2006, 08/23/07 Discovery Order (ECF No. 178), at 2. ***Over a year after his first deposition***, Rider finally provided answers to FEI's questions at his second deposition.

Rider also moved for a protective order over certain financial information, *i.e.*, the extensive payments to him by his counsel, co-plaintiffs and other animal advocates and/or animal advocacy organizations. *See* Civ. No. 03-2006, Rider's Mot. for Protective Order with Respect to Certain Financial Information (ECF No. 141) (04/25/07).[7] As with Rider's motion for a protective order over his deposition testimony, he waited to move for the entry of a protective order over his financial information until ***after*** FEI moved compel compliance with its discovery requests. *See id.* At the same time, Rider refused to provide this information without a

[7] The protective order proposed by Rider over his financial information was significantly more onerous than the order FEI currently is proposing. *See* Civ. No. 03-2006, Rider's Mot. for Protective Order with Respect to Certain Financial Information, Proposed Order (ECF No. 141-7) (04/25/07) (proposing that the parties, counsel of record, the Court and its personnel, court reporters and expert witnesses be required to sign an agreement to be bound by the protective order and making no provision for publicly filing redacted materials on the ECF system).

protective order,[8] and that refusal delayed FEI's discovery of the true nature and extent of the payments to him ***for years***, until after FEI's motion to compel was granted and Rider's protective order motion was denied. 12/30/09 Mem. Op. (FOF 57) ("The true nature and extent of the payments the organizational plaintiffs had made to Mr. Rider directly or through MGC or WAP was not fully disclosed until after the Court's order of August 23, 2007, granting FEI's motion to compel the disclosure of such information.").

3. The Court Issued an Order Sealing All Discovery

In August 2007, the Court ruled on a number of outstanding discovery motions, including FEI's motions to compel Rider to produce deposition testimony and payment information, discussed *supra*, as well as the ESA Action plaintiffs' motion to compel Rule 34 elephant inspections. *See* Civ. No. 03-2006, 08/23/07 Discovery Order (ECF No. 178), at 10-11. Confidentiality again became a point of disagreement between the parties: FEI requested that the inspections be conducted under a confidentiality order due to security concerns. *See* Civ. No. 03-2006, Notice of Issues for Status Conference (ECF No. 188) (09/19/07), at 4; Ex. 2, Hearing Tr. (09/19/07), at 27-28. Just one day before a hearing on the inspections protocol, API issued a press release referencing, and linking to, a "report" by a purported "journalist" based heavily upon documents obtained by plaintiffs in discovery. *See* Civ. No. 03-2006, FEI's Opp. to Pls. Mot. to Lift the September 25, 2007 Protective Order, Ex. 6 (ECF No. 296-6) (05/20/08) ("The federal court discovery documents citing these issues are the result of an endangered species lawsuit brought by national animal advocacy groups including Sacramento-based plaintiff, the

[8] The frivolousness of Rider's protective order motion was underscored by the fact that his own counsel, acting in their purported "WAP capacities," already had provided some of the same payment information to FEI pursuant to a third party subpoena, ***without any confidentiality order***. *See* Civ. No. 03-2006, FEI's Opp. to Rider's Mot. for a Protective Order With Respect to Certain Financial Information (ECF No. 146) (05/15/07), at 10-12. The matter could not be resolved by agreement because, while Rider's counsel "offered" to agree to confidentiality for Rider's financial information, she refused to agree to confidentiality for FEI's financial information, *i.e.*, "heads I win, tails you lose."

Animal Protection Institute (API).") (quoting from a "2005 email from Ringling animal behaviorist to Ringling general manger" and "2004 report from Ringling veterinary technician") ("Documents discovered in the course of that lawsuit … .") ("Included in the documents provided in discovery were emails between circus veterinarians and top Ringling Bros. executives.").

At the hearing, the Court expressed concern about the publication of discovery materials in the media and noted that "***under the Supreme Court's decision in …* Seattle Times*, discovery usually is not placed on the public record. In this jurisdiction, it's not filed at all***." Ex. 2, Hearing Tr. (09/19/07), at 18 (emphasis added). Days later, on September 25, 2007, the Court entered a blanket protective order sealing all information disclosed during discovery from that date forward. Civ. No. 03-2006, 09/25/07 Order (ECF No. 195), at 4 ("From this point, all information disclosed during discovery, including information disclosed or learned during the inspections, will be sealed and both parties and their counsel are prohibited from disclosing it to any person who is not a party to this lawsuit or counsel to one of the parties."). That protective order facilitated the completion of discovery, because no party was able to delay the production of documents or information, or seek Court intervention, on the basis of confidentiality, as had occurred previously.

4. The ESA Action Plaintiffs' Motion to Lift the September 25, 2007 Protective Order was Denied

The ESA Action plaintiffs continued to disseminate discovery material to the media, even after the Court entered the September 25, 2007 protective order. Shortly after the protective order was entered, FEI learned that plaintiff API attempted to purchase billboard space for an advertisement that included a picture of an FEI elephant and a quote lifted (out of context) from documents produced in the ESA Action. *See* Civ. No. 03-2006, FEI's Opp. to Pls. Mot. to Lift

the September 25, 2007 Protective Order (ECF No. 296) (05/20/08), at 10-11. Further, API held a press conference where it referenced discovery material and also wrote a letter to the Washington Post that quoted from a discovery document. *See* FEI's Opp. to Pls. Mot. to Lift the 09/25/07 Protective Order, Exs. 8 & 10 (ECF Nos. 296-8 & 296-10). API's media efforts were not in isolation. ASPCA violated the protective order by referring, in a letter to a television network, to the contents of sealed depositions (taken ***after*** entry of the protective order and were subject to its terms). *See* FEI's Opp. to Pls. Mot. to Lift the September 25, 2007 Protective Order, at 11-12.

In May 2008, the ESA Action plaintiffs sought to lift the September 25, 2007 protective order, arguing that "there is nothing inherently wrong with disclosing relevant information obtained discovery in an effort to further an important public policy debate … ." Civ. No. 03-2006, Pls. Reply in Support of Mot. to Lift the September 25, 2007 Protective Order (ECF No. 303) (06/02/08), at 6. *See also* Civ. No. 03-2006, Pls. Mot. to Lift the Sept. 25, 2007 Protective Order (ECF No. 294) (05/06/08). That motion was denied and the Court expressly rejected the plaintiffs' attempt to try the case in the media:

> [W]hile plaintiffs claim a public interest in the disclosure of information yielded by the compulsion of discovery, they would candidly have to admit that they wish to use the discovery materials as part of their public relations campaign to ban the Circus from using performing elephants. While they are free to express their views, I do not understand why they can claim a right to draft the court to help them by permitting their use of documents produced for litigation purposes in discovery for an entirely different purpose. The public had no access to these documents before this lawsuit was filed and plaintiffs cannot claim, on behalf of the public, the right to them now … .

Civ. No. 03-2006, 07/29/08 Mem. Order (ECF No. 324), at 2. *See also id.* at 1 ("[T]here is not and never has been any 'right' of public access to materials produced in discovery.") & 2 ("I am

loath to create out of thin air some 'right' of a party to use documents secured by the judicial compulsion inherent in the discovery process for a public relations campaign.").

5. The Court Shut Down Plaintiffs' Blogging and Posting of Transcripts and Certain Videotape Evidence at Trial

The September 25, 2007 protective order remains in effect, except with regard to information admitted into evidence at the trial of the ESA Action. *See* 08/08/13 Order (ECF No. 157), at 10 (adding HSUS and WAP to 09/25/07 protective order). Indeed, even at the public trial of the ESA Action, the Court expressed concern about the plaintiffs' continued attempt to try the case in the media. *See* Ex. 3, Trial Tr. (02/05/09 a.m.), at 6 ("This case is going to be tried and decided based on the evidence in the courtroom."). The Court shut down the plaintiffs' attempts to blog about the trial (*see id.*), and it disallowed the parties from posting trial transcripts and certain videotape evidence on their websites. The Court made clear that, even during the trial, the public's "right to know" could be "curtailed" because the Court had not yet rendered a decision or determined which evidence it would rely on, and thus there was a potential for confusion. Ex. 4, Trial Tr. (02/10/09 a.m.) at 18-19 ("there are instances in which the public's right to know everything is curtailed by compelling reasons: privacy, secrecy of proceedings, sealed proceedings, confidentiality, and here it would be because the judge has not determined the scope of competent evidence which he's going to rely [on] to make a decision … .") & 21-23 ("[T]here's the potential for a misperception of just what the weight of the evidence is, so … I'm not going to allow the posting of any transcripts on a party's website.").

B. Litigation of the RICO Action

The extraordinary history of the ESA Action, including the numerous disputes over the use and confidentiality of discovery material, sets the stage for the litigation of this case. Discovery is set to commence in the second chapter of litigation between the parties, where their

roles are reversed. FEI is the plaintiff and the ESA Action plaintiffs and their counsel are the defendants in a case alleging violations of the RICO statute, the Virginia Conspiracy Act, and various common law torts (the "RICO Action"). *See generally* FAC. The allegations in the complaint are grave. FEI alleges, *inter alia*, that the RICO defendants' conduct related to the ESA Action amounted to a pattern of racketeering activity, including numerous acts of bribery, illegal gratuity payments, obstruction of justice, mail and wire fraud and money laundering. *See id.*

Discovery in this case has long been delayed. The case was originally filed in August 2007, but discovery has been stayed the vast majority of the time that the case has been pending, primarily at the RICO defendants' behest. *See* Order (ECF No. 22) (11/07/07) (granting the RICO defendants' Motion to Temporarily Stay All Proceedings); Minute Orders (03/08/11 & 03/09/11) (staying discovery pending the outcome of the RICO defendants' Motions to Dismiss); Order (ECF No. 94) (08/03/12) (holding all responses to outstanding written discovery in abeyance).

On May 9, 2013 this Court issued an order setting forth the scope of discovery in this case. ECF No. 151. The Court's order makes clear that discovery will involve inquiry into sensitive and confidential information not only from all of parties to the case, but also from third parties. For example, the scope of discovery includes, *inter alia*: FEI's private financial information (including its profit and loss statements, tax returns and ticket sales); portions of MGC's tax returns; documents and information over which the RICO defendants likely will claim attorney-client privilege (*e.g.*, drafts and versions of selected discovery responses); information concerning the RICO defendants' donors; and, information previously withheld

from production in the ESA Action by the ESA Action plaintiffs (now RICO defendants) on the basis of "media strategy."[9] *See id.*

Given that this litigation already has been pending for more than six years, and that the parties have a long history of disputes concerning the use and confidentiality of discovery material that significantly complicated the prior litigation between them, FEI hereby proposes the entry of a protective order at the outset of discovery. The entry of such an order will facilitate the orderly completion of discovery, conserve Court resources, and protect the confidential material of all of the parties and third parties who may be subpoenaed for documents and testimony.

ARGUMENT

A. The Court Has Broad Discretion to Enter a Protective Order

A trial court has "wide discretion in managing discovery." *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 898 (D.C. Cir. 2006). A trial court may exercise that discretion to, "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); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (Rule 26(c) "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required."). The court may "*inter alia*, deny discovery completely; limit the conditions, time, place or topics of discovery; or limit the manner in which a trade secret or other confidential, research, development, or commercial information may be revealed." *Burka v. United States Dep't of Health and Human Servs.*, 87 F.3d 508, 518 (D.C. Cir. 1996). The "good cause" requirement of

[9] The RICO defendants already have represented that discovery in this case "will engender myriad disputes over attorney-client, First Amendment, and other privilege issues." Defs. Discovery Plan (ECF No. 59) (02/11/11), at 4. *See also* Defs. Joint Discovery Plan (ECF No. 118) (09/10/12), at 2 (indicating that donor discovery in the RICO action will "infringe[] [on] core First Amendment associational rights of nonprofit organizations and their supporters").

Rule 26(c) is met where the movant articulates specific facts to support its request. *Klayman v. Judicial Watch*, 247 F.R.D. 19, 23 (D.D.C. 2007).

There is neither a right nor a presumption in favor of public access to material produced in civil discovery. *Seattle Times*, 467 U.S. at 32 ("A litigant has no *First Amendment* right of access to information made available only for purposes of trying his suit.") & 33 ("[P]retrial depositions and interrogatories are not public components of a civil trial."). *See also* Fed. R. Civ. P. 5(d) ("discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing"); LCvR 5.2(a) ("interrogatories, depositions, requests for documents, requests for admissions, and answer and responses thereto … shall not be filed with the Clerk until they are used in the proceeding or upon order of the Court"); Civ. No. 03-2006, 07/29/08 Order (ECF No. 324), at 1 ("there is not, and never has been any 'right' of public access to materials produced in discovery"); Ex. 2, Civ. No. 03-2006, Hearing Tr. (9/19/07), at 18 ("[U]nder the Supreme Court's decision in … *Seattle Times*, discovery usually is not placed on the public record. In this jurisdiction, it's not filed at all.").

"[T]he only purpose of discovery is to aid the parties in preparing for litigation." *Tavoulareas v. Washington Post Co.*, 111 F.R.D. 654, 658 (D.D.C. 1986); *see also id.* ("Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement of litigated disputes."). Rule 26(c) is a "tool used by courts to prevent abuse of that process." *Id*. Rule 26(c) "balances the governmental and first amendment interests at stake when a party seeks to disseminate information obtained through pretrial discovery." *Avirgan v. Hull*, 118 F.R.D. 252, 253 (D.D.C. 1987).

A "district court unquestionably has discretion to seal documents produced in discovery that were not introduced into evidence and were not relied upon by the court in rendering a

decision." *Anderson v. Ramsey,* 2005 U.S. Dist. LEXIS 2935, at *5 (D.D.C. Mar. 1, 2005) (Facciola, J.). *See also Seattle Times*, 467 U.S. at 33 ("restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information").

Moreover, contrary to the RICO defendants' position in the ESA Action, the D.C. Circuit has expressly held that the mere submission of discovery materials to the Court does not automatically transform such materials into "judicial records" subject to the public's right of access. *See United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997) ("not all documents filed with courts fall within [the right of access's] purview – at least not in this circuit"). The public has a right to access judicial records, but that right "is far from absolute." *McConnell v. FEC*, 251 F. Supp. 2d 919, 925 (D.D.C. 2003) (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978)). "What makes a document a judicial record and subjects it to the common law right of access ***is the role it plays in the adjudicatory process***," *i.e.*, whether the court has relied upon the record in issuing a decision or order. *El-Sayegh,* 131 F.3d at 163 (emphasis added); *see also id.* at 162 ("If [no judicial decision] occurs, documents are just documents; with nothing judicial to record, there are no judicial records."). That is because "[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action." *Seattle Times*, 467 U.S. at 33. *See also United States v. Hubbard*, 650 F.2d 293, 321 (D.C. Cir. 1980) (in criminal case, holding that the district court should not have unsealed the record where, *inter alia*, a third party's documents "were not determined by the trial judge to be relevant to the crimes charged," they "were not used in the subsequent 'trial,'" and they were not "described or even expressly relied upon by the trial judge in his decision" on underlying suppression motion).

When determining whether to enter a protective order over discovery material, courts in this district weigh the following six factors set forth in *Hubbard, supra*: (1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced. 650 F.2d at 317-22. *See also Anderson*, 2005 U.S. Dist. LEXIS 2935, at *6 (weighing *Hubbard* factors). "[W]here both the public interest in access and the private interest in non-disclosure are strong, partial or redacted disclosure [may] satisfy both interests." *Hubbard,* 650 F.2d at 324-25.

B. The *Hubbard* Factors Strongly Weigh in Favor of the Entry of a Protective Order

The *Hubbard* factors dictate the entry of a protective order in this case. The key issue is that materials that will subject to the proposed order – materials produced for the first time in the RICO Action – ***are sensitive, confidential information and documents that have never been made public before.*** The "single most important" *Hubbard* factor is the "purposes for which the documents were introduced." *Hubbard*, 650 F.2d at 321. Here, given that we are at the outset of discovery, the information that would be subject to the order has never been introduced, let alone relied upon by the Court in rendering a decision. Indeed, at this stage of the litigation, "it is impossible to ascertain whether all of the information produced in discovery will ever be used to support or attack the merits" of the parties' claims. *Roberson v. Bair*, 242 F.R.D. 130, 133-34 (D.D.C. 2007) (Facciola, J.). "Any public interest in the disclosure is, therefore, at is weakest at this stage of the case." *Id.* at 134. This is not a case where the parties have been engaged in

discovery for years, and a party seeks to seal documents that have been introduced at trial or otherwise relied upon by the Court in rendering a decision.

The need for public access and the extent to which the public has had access prior to the sealing order likewise weigh in favor of the entry of a protective order. There is no need for public access to the documents for the reasons discussed above: none of the discovery material has been used at a trial or hearing or relied upon by the Court in rendering a decision. *Cf. Hubbard*, 650 F.2d at 318 (public access factor weighed in favored of sealing documents where "[n]one of the documents at issue here was either used in the examination of witnesses during the protracted public hearing … or specifically referred to in the trial judge's public decision on the motion"). Further, the public has never had access to the discovery material that will be subject to the order. *See id.* at 318 ("Previous access is a factor which may weigh in favor of subsequent access."); Civ. No. 03-2006, 07/29/08 Order (ECF No. 324), at 2 ("The public had no access to these documents before this lawsuit was filed and plaintiffs cannot claim, on behalf of the public, the right to them now … ."). And, the parties would not have had access to such information but for this litigation. *Cf. Seattle Times*, 467 U.S. at 32; *Klayman*, 247 F.R.D. at 23 (entering a protective order and noting that the plaintiff would not have had access to the information but for the instant litigation). For example, FEI's financial information is not publicly available because FEI is a privately held corporation. Likewise, as a private law firm, MGC's tax returns and financial data have, as far as FEI is aware, not been made public. Accordingly, the public access factors weigh in favor of the entry of a protective order. *Cf. Hubbard,* 650 F.2d at 318-19 ("There is thus no previous access to weigh in favor of the access granted through the district court's unsealing order."); *Roberson,* 242 F.R.D. at 133 ("there is nothing in the record to imply a need for public access to the documents or that the public has had previous access to the

documents"); *Anderson*, 2005 U.S. Dist. LEXIS 2935, at *6 ("The public has never had access to plaintiffs' medical and ***tax records*** and there is no need for it to have access now. … [T]he documents are not in evidence, but were produced in discovery and therefore any public interest in their disclosure is at its weakest.") (emphasis added).

That the RICO defendants contend this case is of public import, because of the nature of the allegations FEI has made about them, does not change the public access analysis. The RICO defendants have no "right" to publicly disseminate discovery material, which apparently is what they plan on doing – just as they did in the ESA Action. *See* Defs. Discovery Plan (ECF No. 59) (02/11/11), at 16 ("Defendants do not believe that a blanket protective order is authorized by pertinent legal precedent and, moreover, do not believe that FEI should be permitted to make egregious allegations in its Amended Complaint – e.g., that highly reputable animal protection charities are defrauding the public concerning FEI's treatment of Asian elephants – and then seek to litigate the validity of such accusations in secret."). Indeed, protective orders were entered in another, significantly more high profile RICO case – the government's massive RICO case against several well-known tobacco companies – where the government alleged that those companies engaged in a conspiracy to conceal the harmful effects of smoking. *United States v. Philip Morris*, 449 F. Supp. 2d 1, 932 (D.D.C. 2006) (noting that the defendant tobacco companies' marketing data, which is proprietary, would be "subjected to appropriate projective orders, such as have already been used in this litigation with no difficulties"); *see also United States v. Philip Morris*, 2000 U.S. Dist. LEXIS 18673 (D.D.C. Nov. 15, 2000) (entering protective order governing highly sensitive trade secret material and information, supplementing existing protective order governing confidential information). This RICO case should be treated no differently.

Further, the privacy interests at stake – for all parties, and the third parties who may be subpoenaed – is high, as is the possibility of prejudice to the parties seeking to keep the material confidential. The material to be discovered in this case – confidential financial data, tax returns, donor lists, and "media strategy," among other things – is sensitive.[10] The parties and third parties producing such information could be severely prejudiced if it is disclosed publicly. *Cf. Hubbard*, 650 F.2d at 321 ("The likelihood of prejudice will in turn depend on a number of facts, including, most importantly, the nature of the materials disclosed."). Those concerns are heighted in this case given the RICO defendants' demonstrated pattern and practice of not only using, but ***misusing***, discovery material in the media in the ESA Action. *See supra* pp. 6-13. The RICO defendants repeatedly disseminated discovery material to the media (and presumably PETA, *see supra* n. 6) and made misrepresentations about it. Indeed, that was the cornerstone of Rider's purported "media campaign." This Court should not permit the RICO defendants to engage in the same conduct in this case. The case should be tried in court, and not in the media. *See* Ex. 3, Trial Tr. (02/05/09 a.m.), at 6 ("This case is going to be tried and decided based on the evidence in the courtroom.").

The Factual Background section of this Memorandum demonstrates, with great specificity, that there is good cause for the entry of protective order in this case given the RICO defendants' track record of filtering discovery material to the media and others. Indeed, this case is analogous to *Klayman*, *supra*, where the plaintiff, Klayman, in connection with the filing of his lawsuit, engaged in a fundraising campaign aimed at the defendant's supporters. *See id.* at

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[10] This is exactly the type of information that Rule 26(c) contemplates protecting. *See* Fed. R. Civ. P. (c)(1)(G) (a court may, for good cause, enter a protective order "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way"). Indeed, courts in this district have sealed financial information until necessary to prove up punitive damages, which is the only reason FEI's financial information is discoverable here. *See John Does I-VI v. Yogi*, 110 F.R.D. 629, 633 (D.D.C. 1986).

21. Defendant Judicial Watch alleged that Klayman made tens of thousands of solicitations to its supporters and made advertisements in national publications based on "intentionally false, misleading and/or disparaging statements," resulting in harm. 247 F.R.D. at 21-22. Judge Kollar-Kotelly granted Judicial Watch's motion for a protective order, citing Klayman's past conduct and the fact that he never stated that he would cease his fundraising campaign. *Id.* at 23-24. ("Klayman does not dispute that he is engaged in this fundraising and advertising campaign, nor does he make any representations that he will cease his campaign for the duration of this litigation."). Similarly here, the RICO defendants have a demonstrated pattern of using discovery material in the media, and making "intentionally false, misleading and/or disparaging statements" about FEI and its treatment of its elephants. *Cf. id.* at 22. In the ESA Action, and in this very case, the defendants have refused to say that they will ***not*** pass discovery materials to the media. Instead, they have repeatedly (and incorrectly) claimed that it is their First Amendment "right" to do so. *See supra* pp. 6-13. Accordingly, a protective order should be entered in this case for the same reasons relied upon by the *Klayman* court.

C. The Court Should Enter FEI's Proposed Protective Order Now, At the Outset of Discovery

Given the history of the ESA Action and the nature of the information that will be discoverable in this case, FEI seeks the entry of a protective order now, at the outset of discovery, to govern the use and confidentiality of discovery material during the pretrial discovery process. FEI does not seek a protective order to in any way limit the production of any material deemed within the scope of discovery by the Court's May 9, 2013 Order. FEI also does not propose to put all discovery under protective order; the parties would decide which materials should be designated, and it is expected that such designations would be made judiciously. *See* Proposed Order, ¶ 5 (Designation of Discovery Material). Nor would FEI, at trial, necessarily

seek to keep confidential information that was ultimately admitted into evidence sealed. *See id.* ¶ 15 (Trial); *cf. Seattle Times*, 467 U.S. at 33 ("judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context"); *Yogi*, 110 F.R.D. at 634 ("A protective order may be justified as to pretrial materials where it would not be justified as to materials placed on the record at trial or in connection with substantive motions."). But FEI does believe that a mechanism for preventing dissemination of discovery information before there ever is a trial is a necessary and appropriate way to facilitate discovery in this case.

Courts in this district have entered blanket protective orders governing the use and disclosure of discovery during pretrial discovery in complex cases, such as this one, where a large quantity of discovery material will be produced and doing so will facilitate the discovery process:

> We recognize that flexibility will be required to accommodate the practical needs of the discovery process with the standards enunciated (in this case), particularly where the discovery embraces a large quantity of documents. It may be appropriate, for example, for a trial court (on a proper showing) to issue a blanket protective order covering all documents in a large-scale exchange of files without prejudice to raising the merits of the protective order as applied to particular documents at a later time. If a party wishes to disseminate a particular document, he might then inform the opposing party (precisely as plaintiffs have done here). At that point the burden would revert back to the party resisting dissemination to establish 'good cause' as applied to the particular document(s), consistent with the standards enunciated in this opinion. This procedure is commonly used to preserve parties' right to assert claims of privilege with respect to particular documents in complex cases, while at the same time facilitating needed discovery.

Tavoulareas v. Piro, 93 F.R.D. 24, 29-30 n.4 (D.D.C. 1981) (quoted in *Anderson*, 2005 U.S. Dist. LEXIS 2935, at *7-8). *See also In re Reporters Committee for Freedom of Press*, 773 F.2d 1325, 1326 (D.C. Cir. 1985) (district court entered blanket protective order to protect the

disclosure of third party's sensitive and confidential information, where it was "undesirable" to the have the third party "specify, and the court rule on, objections to the disclosure of particular documents, since that would slow discovery enormously and involve the court excessively in the discovery process"); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.432 (2004) ("When the volume of potentially protected materials is large, an umbrella order will expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication.").

This case, which will involve the discovery of confidential information from thirteen (13) parties (and likely from numerous third parties), ***is*** exactly the type of complicated, multi-party litigation that warrants the entry of such an order. *Cf. Yogi*, 110 F.R.D. at 634. A protective order will facilitate the orderly completion of discovery. FEI has waited almost six years to proceed with discovery in the RICO Action, and now that discovery is commencing, it should not be derailed by disputes over the confidentiality of discovery material as it was in the ESA Action. No party should be permitted to refuse to produce responsive material on the basis of confidentiality, as occurred in the ESA Action. *See supra* pp. 8-10. The RICO defendants advocate considering the confidentiality of discovery material on a case by case basis (*see* Defs. Discovery Plan (ECF No. 59) (02/11/11), at 16), as they did at the outset of the ESA Action. But the history of the ESA Action demonstrates that such a piecemeal approach will only delay discovery, result in multiple protective order motions, and burden the Court. *See supra* pp. 4-13. *Cf. Peskoff v. Farber*, 230 F.R.D. 25, 33 (D.D.C. 2005) ("The acrimonious tenor of the pleadings and motions in this action, more than any of the arguments proffered by the plaintiff or the defendant, convinces the Court of the futility of any confidentiality order that does not encompass both personal and business/commercial information.").

Accordingly, FEI proposes the entry of a protective order that includes the following terms:[11]

- **Use of Discovery Material:** The use of discovery material marked as confidential is expressly limited to the litigation of this case. Proposed Order, ¶¶ 2 & 7. Any party seeking to use confidential material outside of the litigation must seek permission from the Court by motion. *Id.* ¶ 7.

- **Designation of Confidential Material:** Any party or third party producing discovery material may designate it as confidential. Proposed Order, ¶ 3.

- **Designation of Documents Filed in Court:** The proposed order requires the parties to follow the procedures set forth in the Local Rules concerning sealed filings. Proposed Order ¶ 6. Contrary to the approach followed by the plaintiffs in the ESA Action (*see, e.g.*, Civ. No. 03-2006, ECF No. 265), the proposed order requires the parties to use their best efforts so that only information governed by the order is redacted, and file the remainder of any brief publicly on the ECF system. Proposed Order ¶ 6. The order does not authorize the parties to make wholesale filings under seal. *Id.* This approach follows the Local Rules, and balances the parties' privacy interests with the public's interest in following the litigation. *See Hubbard,* 650 F.2d at 324-25 ("[W]here both the public interest in access and the private interest in non-disclosure are strong, partial or redacted disclosure [may] satisfy both interests.").

- **Confidential Material – Permitted Disclosure:** The proposed order contemplates that discovery material marked as confidential may be provided to, *inter alia*: the Court and court personnel; the parties; counsel for the parties; outside consultants, experts, and

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[11] FEI's proposed protective is largely similar to the protective order recently proposed by HSUS in ongoing civil litigation in the District of South Dakota. *See* Civ. No. 4:10-cv-4128-KES, *Christensen v. Quinn et al.* (D.S.D.), HSUS's Mot. for Entry of Order on the Confidentiality of Documents and Other Information (ECF No. 154) (09/21/12). Therefore, HSUS should be familiar with the terms proposed by FEI and not have any objection to them.

vendors; any person who is an author or addressee of a document or thing; witnesses at deposition and their counsel; lay witnesses; the government, in context of a subpoena for the documents and information; and other persons pursuant to agreement by the parties. Proposed Order, ¶ 8. The proposed order requires that anyone receiving material marked as confidential be advised of the existence of the order, and instructed that confidential material may not be used other than in connection with the litigation and may not be disclosed to anyone other than those persons authorized by the order. *Id.* ¶ 9. Some, but not all, of the persons set forth above must sign an acknowledgement to that effect. *Id.* ¶ 10. Pursuant to paragraphs 8-9 the proposed order, the parties and their counsel cannot share confidential material with third parties. *See id.* ¶¶ 8-9. For example, AWI's counsel, DiMuro Ginsberg, PC, has represented PETA, and defendant MGC also has previously represented PETA. Pursuant to the proposed order, neither DiMuro Ginsberg nor MGC may share confidential material with PETA, because PETA is not a party to this matter. *See id.*

- **Confidential Material – Challenging a Confidential Designation:** The proposed order provides a procedure for challenging confidentiality designations. Proposed Order, ¶ 12. The proposed order makes clear that all discovery material must be produced even if there is a dispute concerning whether the material should be marked as confidential, and disputes concerning confidentiality shall not delay discovery. *Id.* The burden of proving that material designated as confidential shall remain with the producing party which designated the material as confidential. *Id. See also In re Reporters Committee for Freedom of Press*, 773 F.2d at 1326 (where confidentiality designation challenged, party seeking protection had the burden of establishing good cause for a document's continued protection); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.432 n. 140 ("[t]he burden remains on the party seeking protection").

- **Trial:** The proposed order governs the disclosure of discovery material marked as confidential during the pretrial discovery process, up to the time of the pretrial conference. Proposed Order, ¶¶ 2, 7 & 15. The proposed order contemplates that the Court will resolve whether any discovery material marked as confidential, and listed by a party on its pretrial statement as an exhibit, will remain sealed or will be unsealed at the trial, at the pretrial conference. *Id.* ¶ 15. If material marked as confidential is listed as a proposed trial exhibit, but is not used at the trial, it will remain sealed. *Id.*

- **Protective Order in No. 03-2006:** The proposed order makes clear that the September 25, 2007 protective order entered in Civ. No. 03-2006 (ECF No. 195) remains in place. Proposed Order, ¶ 17. Further, the proposed order expressly states that the materials produced pursuant to that order, but which are not part of the judicial record in Civ. No. 03-2006, shall remain sealed in this case. *Id.* Pursuant to the parties' agreement, the Court ordered that HSUS and WAP be added to the September 25, 2007 protective order for the purpose of gaining access to and receiving copies of any document that is responsive to discovery requests in this matter that were previously produced in Civ. No. 03-2006 pursuant to the September 25, 2007 protective order. *See* 08/08/13 Order (ECF No. 157), at 10.

- **Violation of the Order:** The proposed order explicitly states that the Court retains jurisdiction to enforce it, and any violation of the order may be punishable by a contempt of court. Proposed Order, ¶ 18.

CONCLUSION

For all of the reasons stated above, the entry of a protective order now, at the outset of discovery, is necessary to facilitate the orderly completion of discovery in this case, as well as to protect the parties' confidential information and the confidential information of third parties who

may be subpoenaed in this action. FEI's proposed protective order establishes a clear protocol for the designation of confidential material, and the resolution of any disputes concerning the same. Accordingly, the Court should enter FEI's proposed order, which is attached to this Memorandum.

Dated: August 19, 2013

Respectfully submitted,

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