UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT AND COUNTERCLAIM-PLAINTIFF MEYER GLITZENSTEIN & CRYSTAL'S RESPONSE TO FELD ENTERTAINMENT INC.'S MOTION FOR A PROTECTIVE ORDER[1]

At the outset of discovery, Feld Entertainment, Inc. ("FEI") has requested a "blanket protective order," ECF No. 164 at 23, that would allow any party or third party to designate as "confidential" any and all material that is produced in discovery. ECF No. 164-1 at 2-3. However, the specific Protective Order ("PO") that FEI has proposed does not set forth any substantive standards to be applied by the parties (or third parties) in determining what kind of material may be deemed "confidential," and hence does not comport with the "good cause" standard for the issuance of a PO embodied in Fed. R. Civ. P. 26(c)(1). Further, although the PO that FEI has proposed would allow a party to challenge another party's or third party's designation of materials as "confidential," and allow the Court to resolve such disputes, the PO

[1] Defendants Animal Welfare Institute, the Fund for Animals and the Humane Society of the United States join in this response.

does not set forth any meaningful substantive standard for the Court to apply in evaluating whether material has properly been classified as "confidential."

As a result, the specific PO proposed by FEI is likely to generate precisely the kind of confusion and delay that FEI maintains it is attempting to avoid. In addition, because the proposed PO provides that any public filings in the case must redact any and all information that any party or third party elects to designate as confidential for any (or no) reason, *see* ECF No. 164-1 at 4, the PO sought by FEI will both impose an enormous administrative burden on the parties to redact all information labeled "confidential"– irrespective of whether there is a genuine need for that designation – and also needlessly impair the ability of the public, including members of the bar, to understand the filings and the Court's rulings on them.

Accordingly, while MGC does not object to the establishment of a process for the protection of material that genuinely warrants confidentiality – including the *specific* categories enumerated in FEI's *memorandum* (but not reflected in its proposed PO) – refinements to the proposed PO should be made so that it does not create more practical problems than it prevents, and so that the litigation process does not unfold in undue secrecy.

BACKGROUND

Since MGC does not oppose the entry of a comprehensive PO at this juncture that is designed to protect legitimately confidential information, and simply objects to the overbroad and standardless nature of the specific PO proposed by FEI, a lengthy refutation of FEI's factual rationale for a PO is unnecessary here. However, insofar as FEI's characterization of proceedings in the Endangered Species Act litigation (the "ESA Action") may have a bearing on

the Court's consideration of the nature and scope of an appropriate PO, it is important to set the record straight on several matters.

To begin with, although essentially the entirety of FEI's rationale for a "blanket" protective order here is predicated on FEI's characterization of what occurred during discovery in the ESA Action, that description is misleading at best. Although there were indeed many discovery-related motions and disputes in the ESA Action, contrary to FEI's implication, a very small percentage of them centered on the necessity for and/or scope of protective orders shielding specific information from public disclosure. For example, the significant postponement in the original date for the close of discovery in the ESA Action did not stem from any dispute over what should be provided pursuant to a protective order, but rather was - as explained by Judge Sullivan - "a result of [FEI's] failure to timely produce thousands of pages of veterinary records." ESA Action, ECF No. 176 at 5; ESA Action No. 174 at 1 ("Rather than immediately producing all veterinary records as ordered by the Court on September 26, 2005, [FEI] engaged in a piecemeal production of documents over a number of months, often only in response to threatened or actual motions to compel or Court orders. The Court and plaintiffs have wasted a considerable amount of time and resources because of defendants' failure to produce highly relevant" documents).

Moreover, in keeping with Rule 26(c)(1)'s "good cause" standard, the relatively few protective orders governing the use and disclosure of discovery material that were entered in the ESA Action, to which FEI refers, ECF No.164 at 5, were for the most part *negotiated* by the parties to protect specific materials that implicated enumerated concerns with security, financial, or other concrete interests – not to protect every document exchanged in discovery that a party or

non-party elected to keep secret for any reason or no reason. *See, e.g.*, ESA Action, ECF No. 75, at 2 ("Joint Stipulated Protective Order Regarding Video Recordings"); ESA Action, ECF No. 77 ("Joint Stipulated Protective Order Concerning Recordings of Ringling Bros. and Barnum & Bailey Circus Performances"). Tellingly, the only concrete example of a protective order dispute that FEI actually argues *delayed* discovery in the ESA case concerned *Mr. Rider's* request for a PO to cover "certain financial information," ECF No. 164 at 9 – *i.e.,* the sources of funding for his public advocacy efforts on behalf of the elephants. In stark contrast to its position that *everything* should potentially be subject to a protective here, FEI *opposed* Mr. Rider's far more limited request in the ESA Action on the grounds that there was "no evidence of any real and specific harm that would flow from not sealing [the] purportedly confidential information," and that "[t]o show good cause [under Rule 26(c)(1)], the movant [for a PO] must articulate specific facts to support[] its request and cannot rely on speculative or conclusory statements.'" ESA Action, ECF No. 146 at 14 (quoting *Tequila Centinela v. Bacardi & Co.*, Civ. No. 04-02201, 2007 U.S. Dist. Lexis 22887, at *4 (D.D.C. March 29, 2007). FEI further argued that "[n]o protective order will enter where the Court has to speculate to determine what general harm may occur if the "alleged 'confidential material' became public." *Id*. (citing *PHE, Inc. v. DOJ*, 139 F.R.D. 249, 251-52 (D.D.C. 1991)). Putting aside the inconsistent positions that FEI has taken in the two cases, it makes little sense for FEI to now rely on its *own* refusal to agree to a PO in the ESA Action that would have covered a discrete category of financial information as a rationale for why there must be a universal PO that potentially covers anything and everything produced in discovery in this case by any party or any third party.

Likewise, FEI's suggestion that this Court was ultimately compelled to issue a blanket PO in order to address the ESA Plaintiffs' "pattern and practice of not only using, but ***misusing***, discovery material in the media in the ESA Action," ECF No. 164 at 21, is also not borne out by the actual record. FEI relies heavily on a September 16, 2005 status hearing that took place before Judge Sullivan, but neglects to mention that the Court ultimately *agreed with the ESA Plaintiffs* that it would be inconsistent with Rule 26(c)(1) to foreclose public access to every document that any party might want to keep secret for any reason.[2] Accordingly, rather than approve the sweeping PO sought by FEI, Judge Sullivan issued a much narrower PO allowing FEI to designate as "confidential" specific materials in which FEI claimed to have "some identifiable commercial interest." *See* ESA Action, ECF Nos. 49-1, 50.

In addition, although *this* Court issued a broader protective order late in the discovery process, it did so in the context of a request by FEI that was very concrete, *i.e.*, to facilitate the ESA Plaintiffs' Rule 34 inspection of the elephants, and in view of a claim by FEI of specific security concerns attendant to those inspections. *See* ESA Action, ECF No. 195 (9/25/07 Order

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[2] For example, the ESA Plaintiffs' counsel pointed to a brochure that FEI was then disseminating at public venues with photographs of baby elephants, although information then in FEI's possession indicated that several of the baby elephants had died at the time that FEI was using their images to lure customers – a fact that clearly troubled Judge Sullivan and influenced his decision *not* to issue the categorical PO sought by FEI. *See* Transcript of 9/16/05 Hearing at 66-67 (ESA Action, ECF No. 51) (Ms. Meyer: "Now, they didn't bother to tell the public that three of these baby elephants who are depicted here, Kenny, Benjamin, and Ricardo, are dead . . . We think the public is entitled to know that. These baby elephants all died when they were under the age of four in the care of Ringling Brothers. They don't tell the public that. They just say, babies, babies, babies" The Court: "Is this a recent publication?" Ms. Meyer: "Yes, your Honor." The Court: "And it's published post-death of those baby elephants?" Ms. Meyer: "Yes, your Honor."); *id*. at 91 (The Court: "This is entirely misleading." Ms. Meyer: "We think so, Your Honor." The Court: "It's even more misleading, and actually probably worse than that, that's probably not the correct word if it was prepared subsequent to deaths.").

setting forth the procedures to be followed for the elephant inspections and stating that "[f]rom this point, all information disclosed during discovery, including information disclosed during the inspections, will be sealed . . . [a]t the conclusion of the inspections, the Court will permit the parties to brief the question of what, if any, disclosure there should be of information disclosed or learned during discovery, including during the inspections"); *see also* ESA Action, ECF No. 105 at 22 (FEI's request for a protective order concerning the inspections). Further, in response to Plaintiffs' motion for clarification of that Order, *see* ESA Action, ECF No. 196 – which pointed out that Judge Sullivan had previously declined to enter a "global protective order for all discovery materials," *id*. at 1, and sought clarification that the PO "only applies to materials obtained in discovery as of September 25, 2007," and did *not* apply to the voluminous material produced in discovery prior to that date, *id*, at 2 – this Court simply entered a Minute Order granting that motion without further explanation. *See* ESA Action (9/27/07 Minute Order).[3]

In short, neither Judge Sullivan nor this Court ever made any finding in the ESA case that a PO broadly covering all discovery materials was warranted because of any systemic discovery abuse engaged in by Plaintiffs; to the contrary, Judge Sullivan specifically rejected the contention that the entire discovery process should proceed in secret and this Court's PO was issued late in the discovery process, resulted from specific concerns with the inspection of FEI facilities, and

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[3] Following the completion of the inspections, this Court subsequently denied the ESA Plaintiffs' Motion to lift the September 25, 2007 PO, on the grounds that there was no general "'right' of public access to materials produced in discovery." ESA Action, ECF No. 324 at 1. This response to FEI's motion is not predicated on any such general public "right" of access; nor is it based on the desire by MGC or anyone else to conduct a "public relations campaign." *Id*. at 2. Rather, it is based on the time-honored touchstone that FEI has not established the "good cause" that Rule 26(c)(1) requires for the expansive PO FEI seeks, whereas the more circumscribed PO suggested herein would satisfy that standard.

did not apply to the vast bulk of discovery materials, which had been produced during the years before the PO went into effect.[4]

ARGUMENT

Although MGC does not object to an appropriate PO – and, indeed, agrees that certain discrete categories of information *should* be subject to such an Order – there are several reasons why the boundless one proffered by FEI should be rejected.

First, as FEI itself argued in the ESA Action, "[g]ood cause is required to obtain a protective order," and that standard requires the "movant to articulate 'real and specific harm' and not just 'stereotyped and conclusory statements.'" ESA Action, ECF No. 146 at 14 (quoting *PHE, Inc.*, 139 F.R.D. at 252; *see also Avirgan v. Hull*, 118 F.R.D. 257, 261 (D.D.C. 1987) (Rule 26 requires "specific and particular facts showing good cause" for any protective order); *John Does I-VI v. Yogi*, 110 F.R.D. 629, 632 (D.D.C. 1986) (Rule 26 establishes a "statutory presumption in favor of open discovery"). Here, FEI has hardly demonstrated "real and specific harm" unless the entire discovery process is permitted to be conducted in secret. Stated differently, FEI has not established "good cause" for allowing every party and non-party to maintain the confidentiality of each and every document produced in discovery merely by declaring it to be "confidential."

Rather, FEI's own memorandum – as opposed to its proposed PO – refers to *specific categories* of "sensitive and confidential information" that (assuming they are discoverable at all)

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[4] It is also worth noting that FEI's implication that the ESA Plaintiffs sought to "publicize the litigation," ECF No. 164 at 1, whereas FEI has tried its case only to the Court, is incorrect. In fact, FEI has repeatedly sought to publicize its allegations in this case through widely disseminated press releases and other means. *See, e.g.,* http://www.ringlingbrostrialinfo.com.

may well warrant a PO, *i.e.*, "FEI's private financial information (including its profit and loss statements, tax returns, and ticket sales)"; "MGC's tax returns"; and "information concerning the RICO defendants' donors." ECF No. 164 at 14-15. But FEI's ability to articulate discrete categories of information for which Rule 26(c)(1)'s "good cause" standard may indeed be satisfied *undercuts*, rather than supports, a PO that allows every party and non-party to designate any and all material "confidential" for reasons having nothing whatsoever to do with the valid rationales that may justify safeguards for the kinds of documents to which FEI refers.

Second, as suggested previously, the overbroad PO proposed by FEI is not only inconsistent with Rule 26(c)(1)'s "good cause" standard, but would actually create more confusion for the parties and the Court than it would avoid. As noted, the proposed PO authorizes a party opposing a designation of material as "confidential" to challenge that designation in Court, but sets forth no specific governing principles by which the Court will rule on the propriety of such designation. This will inevitably lead not merely to vastly overbroad designations of material as "confidential," but it will place the Court in the unenviable position of ruling on such designations and challenges without having first set forth any substantive criteria to guide the parties or the Court.

Third, as noted, the ability of the parties or even non-parties to designate material as "confidential" with no standards or criteria in the PO itself will impose an enormous burden on the parties and their counsel when they make public filings in the case, and will also needlessly impair the public's ability to understand such judicial filings and the Court's rulings based on them. Since, under the proposed PO, any information labeled "confidential" must be redacted from every public filing – including not only discovery-related motions, but also, e.g., summary

judgment motions and other pretrial filings – the overbroad designation of such materials will necessitate the expenditure of significant time and resources in the redaction process alone. And because parties and counsel will wish to avoid any suggestion that they have disclosed material in violation of the PO, they will inevitably err on the side of redacting from public filings any material that might arguably expose information that any party or non-party has classified as "confidential."

Consequently, the interested public's ability even to follow the actual filings and judicial rulings in this case will be severely and needlessly compromised by FEI's proposed PO. On the other hand, a more tailored PO, authorizing the designation of materials as "confidential" only where there is a genuine need for such treatment would far better balance the "public interest in disclosure" with any legitimate "private interest in non-disclosure," as the Court of Appeals has instructed. *United States v. Hubbard*, 650 F.2d 293, 321 (D.C. Cir. 324-25).[5]

Accordingly, the Court should refine the PO sought by FEI by providing that materials may only be labeled "confidential" by a party or non-party when good cause in fact exists to protect particular information because it contains sensitive commercial information, personal financial information; donor information; or comparable material as to which there is a genuine

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[5] FEI quotes *Hubbard* for the proposition that "'partial or redacted disclosure'" of discovery materials may "'satisfy both interests,'" ECF No. 164 at 18, but it is difficult to understand how FEI's proposed PO will lead to that balanced result. Rather, the ability to designate materials as "confidential" for any reason or no reason will inevitably yield wholesale designations, with commensurately overbroad redactions from public filings and perhaps even the rationale for judicial rulings in the case. *See also Virginia Dep't of State Police v. TheWashington Post*, 386 F. 3d 567, 575 (4th Cir. 2004) (the "common law presumes a right of the public to inspect and copy all '*judicial* records and documents'" – i.e., actual motions and court rulings that are filed in a case, especially one that is of public interest) (emphasis added) (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)).

need for confidentiality. Such a modification would not only comport with the categories of genuinely confidential material enumerated in FEI's own motion – albeit not in its proposed PO – but it would also be far more in keeping with other protective orders that FEI suggests should be used as a model for this case.

For example, FEI refers to the "protective orders [that] were entered in . . . the government's massive RICO case against several well-known tobacco companies," ECF No. 164 at 20, but Judge Kessler did *not* approve a "blanket protective order" in that case. *Id*. Rather, as FEI's own descriptions make clear, Judge Kessler approved protective orders that were specifically tailored to such items as "marketing data" and "highly sensitive trade secret material and information." *Id* at 20; *see also United States of America v. Philip Morris Inc.,* No. 99-2496, ECF No. 210 (11/15/00 Order) (limiting the protection of discovery materials to "material and information which are both Trade Secrets and Highly Sensitive" and setting forth detailed definitions of those terms). Consequently, if, as FEI contends, "[t]his RICO case should be treated no differently" than the tobacco case, ECF No. 164 at 20, that strongly counsels *against* a PO that allows any party or non-party to designate materials as "confidential" with no guideposts whatsoever by which that designation is either to be assigned or its validity ascertained.

CONCLUSION

The Court should issue a PO but refine the one proposed by FEI by setting forth a specific standard by which the parties (and the Court in the event of disputes) are to assess whether materials may be deemed "confidential." In particular, the PO should provide that:

> **information produced in discovery may be labeled 'confidential' by a party or third party responding to a discovery request only when 'good cause' within the meaning of Rule 26(c)(1) of the Fed. R. Civ. P. in fact exists to protect a particular document because the document contains sensitive commercial information; personal financial information; donor information; or comparably sensitive private information. "Good cause" requires the designating party's counsel to certify that there is a "reasonable likelihood" that an "identifiable" and "real, specific harm" will result if confidentiality is not provided for the information being so designated. Upon any challenge to a confidentiality designation, the burden shall be on the party designating the material to establish how this confidentiality standard is satisfied for the information in question.**

A PO with this or similar language will adequately protect any legitimate interests in confidentiality – including those interests in FEI's motion – while avoiding running afoul of the "good cause" standard in Rule 26(c)(1) and other practical and legal complications.

Respectfully submitted,

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September 3, 2013

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of September, 2013, I caused a true and accurate copy of the foregoing pleading to be served by first-class mail postage prepaid and/or electronic mail, on the following counsel of record:

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