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 REPLY IN SUPPORT OF ENTRY OF A PROTECTIVE ORDER

Defendant Meyer, Glitzenstein & Crystal's ("MGC's") Response to Plaintiff Feld Entertainment, Inc.'s ("FEI's") Memorandum in Support of Entry of a Protective Order (ECF No. 168) (09/03/13) ("Response" or "Resp.")[1], demonstrates that good cause exists for the entry of a protective order now, at the outset of discovery. MGC does not deny that, together with the other RICO defendants, it ***repeatedly*** disseminated ESA Action discovery material to the media and others – even though the Court expressly "admonished" them against doing so, ***on several occasions.*** Nor could it, given that FEI's documents and videotapes, which were only produced outside of the company in the context of ESA Action discovery, ended up, time and time again, on television, the internet and elsewhere. Indeed, the RICO defendants, through MGC, repeatedly embraced this conduct and claimed that it was their First Amendment "right."

[1] Defendants Animal Welfare Institute ("AWI"), the Fund for Animals ("FFA"), and the Humane Society of the United States ("HSUS") joined in MGC's Response. *See* Resp. at 1 n.1. Defendants Born Free United With Animal Protection Institute ("API"), Wildlife Advocacy Project ("WAP"), Tom Rider, Katherine Meyer, Eric Glitzenstein, Howard Crystal, Jonathan Lovvorn and Kimberly Ockene filed no objections or response to FEI's Memorandum. Therefore, as to these eight (8) defendants, FEI's request for the entry of a protective order should be treated as conceded. *Cf.* LCvR 7(b) ("Within 14 days of the date of service or at such other time as the Court may direct, an opposing party shall serve and file a memorandum of points and authorities in opposition to the motion. If such a memorandum is not filed within the prescribed time, the Court may treat the motion as conceded.").

Nowhere in its Response does MGC represent that it will ***not*** do the same thing in this case. *Cf. Klayman v. Judicial Watch*, 247 F.R.D. 19, 23-24 (D.D.C. 2007) ("Klayman does not … make any representations that he will cease his campaign for the duration of this litigation"). Nor does MGC state that it will not give FEI's discovery documents to PETA or television stations, as occurred in the ESA Action. Moreover, MGC's Response completely ignores the Supreme Court's decision in *Seattle Times* and fails to distinguish between the public's right to access judicial records, *i.e.*, records relied upon by the court when issuing a decision, and its right to access discovery materials. MGC does not disavow the (legally incorrect) course of action that it took in the ESA Action, *i.e.*, using the ECF system as a bulletin board to transform discovery documents into "judicial records" that, in turn, were freely provided to the media. Indeed, the striking aspect of MGC's Response is what it does not say. MGC does nothing to refute the notion that it will litigate this case, and use discovery material produced in it, any differently than it did the ESA Action. FEI's request for a protective order is not based on conjecture or rank speculation, it is based on the RICO defendants' undisputed prior conduct. There is good cause for the entry of a protective order in this case. *Cf. PHE, Inc. v. DOJ*, 139 F.R.D. 239, 252 (D.D.C. 1991) (cited by MGC) (good cause requires movant to articulate "real and specific harm" and "not just 'stereotyped and conclusory statements'").

FEI's proposed protective order will facilitate the orderly completion of discovery in this case by providing a mechanism for the production of confidential information without Court intervention. Indeed, MGC agrees that the Court should issue a "comprehensive" protective order, Resp. at 2, and recognizes that a variety of types of documents and information within the scope of discovery in this case pursuant to the Court's 05/09/13 Order should be treated as

"confidential."[2] MGC, however, claims that a "specific standard" governing the designation of material as "confidential" is necessary. *Id.* at 11. MGC incorrectly claims that FEI's proposed protective order would allow a producing party to designate material as "confidential" even if Fed. R. Civ. P. 26(c)'s "good cause" requirement is not met, resulting in "vastly overbroad designations" of "any and all material" as "confidential." *Id.* at 8. That is not accurate. Nothing in FEI's proposed protective order abrogates the "good cause" requirement of Rule 26(c). FEI does not propose that this litigation be conducted in secret, nor does it propose that "any and all" information may designated as "confidential." Indeed, the protective order proposed by FEI is less restrictive than the 09/25/07 order entered by this Court in the ESA Action, which applied to ***all*** discovery. Pursuant to FEI's proposed order, which is largely similar to other protective orders entered by courts in this district, only material meeting the requirements of Rule 26(c) may be designated as confidential. MGC's concerns regarding over-designation of material as confidential are unfounded. However, to narrow the areas of disagreement between the parties, FEI has proposed modified language. The Court should enter FEI's proposed order.

I. THERE IS "GOOD CAUSE" SUPPORTING THE ENTRY OF A BLANKET PROTECTIVE ORDER AT THE OUTSET OF DISCOVERY

Specific facts support of the entry of an order protecting the use and disclosure of "confidential" material at the outset of discovery. ***First***, as a threshold matter, the parties agree that the scope of discovery in this case, as set forth in the Court's 05/09/13 Order (ECF No. 151),

[2] The Court reviewed the parties' proposed discovery plans (ECF Nos. 117 & 118), and subsequently issued an order defining the scope of discovery in this case. *See* 05/09/13 Order (ECF No. 151). MGC however, pretends that the 05/09/13 Order never issued and has made clear that it intends to use discovery in this case to re-litigate the ESA Action (indeed, certain of MGC's discovery requests are even ***broader*** than the scope of discovery in the ESA Action). Yesterday, on September 9, 2013, MGC issued 224 document requests to FEI, the majority of which violate the Court's 05/09/13 scope of discovery order, such as: "the legal and factual validity of the claims made by the plaintiffs on the merits in the ESA Action" (Ex. 5, MGC Second Set of Document Requests (09/09/13) (Request No. 160)); FEI's treatment of non-elephant animals, such as zebras and lions (*id.* (Request No. 76); the authenticity of documents admitted into evidence in the ESA Action and relied upon in the Court's 12/30/09 Opinion (*id.*, Request No. 125); the Rule 34 inspections of the elephants in the ESA Action (*id.*, Request Nos. 153-55); and the ESA Action plaintiffs' motion *in limine* (No. 03-2006, ECF No. 344), which was denied by Judge Sullivan. No. 03-2006, 11/04/08 Order (ECF No. 387) (Ex. 5, Request Nos. 47-52).

encompasses multiple categories of material warranting protection under Fed. R. Civ. P. 26(c).[3] *See* Resp. at 7-8 (indicating that various categories of information to be discovered in the RICO Action may satisfy Rule 26(c)(1)'s good cause standard); Mem. at 14-15 (identifying confidential financial data, tax returns, donor lists, "media strategy," and materials over which the defendants likely will claim attorney-client privilege as categories of information to be discovered in this case). As further discussed *infra*, FEI's proposed order ***only*** affords protection to the use and disclosure of materials meeting the requirements of Fed. R. Civ. P. 26(c), and not "any and all material" as MGC's Response contends. *See* Resp. at 8. The parties who have responded to the Court's request for briefing on this issue agree that such material will be produced and should be covered by a "comprehensive" protective order. *See id.* at 2 ("MGC does not oppose the entry of a comprehensive PO at this juncture that is designed to protect legitimately confidential information … .").

Second, entering a "comprehensive" protective order is necessary to facilitate discovery in this case, which has been delayed for ***years*** already (a point which MGC does not, and indeed could not, dispute). The parties are not litigating on a clean slate. The parties have a documented history of litigating over the use and confidentiality of discovery material, which required Court intervention, numerous times, and significantly delayed the production of material in the ESA Action. *See, e.g.*, No. 03-2006, 12/30/09 Mem. Op. (ECF No. 559) (FOF 57). Five separate protective orders were entered in the ESA Action. *Cf.* Resp. at 3 (characterizing the number of protective orders entered in the ESA Action as "relatively few").

[3] MGC's argument that the entry of a comprehensive protective order governing the use and confidentiality of discovery material is somehow inappropriate because FEI's memorandum refers to "*specific categories*" of confidential information, Resp. at 7, makes no sense. FEI provided an illustrative list of topics within the scope of discovery as defined by the Court's 05/09/13 Order, for which Fed. R. Civ. P. 26(c) protection likely is warranted. Additional categories of confidential information almost certainly will surface as requests are issued and discovery progresses. Indeed, the stay on discovery was lifted just one month ago, so it is impossible to predict every type of document or information to be produced that may be confidential, and it makes little sense to burden the Court with a separate filing when an additional category of information arises.

Contrary to MGC's assertion, "most" of those orders were not "negotiated" by the parties, *cf. id.*, but instead were the result of motions practice. *Compare* No. 03-2006, ECF Nos. 76 & 78 (joint stipulated protective orders) *with* No. 03-2006, ECF Nos. 30, 34, 38, 41, 42, 48, 49, 106, 115, 117, 141, 146, 148, 152, 154, 158, 188, 294, 296, 303 (filings concerning the use and confidentiality of discovery materials).

There were ***multiple*** disputes concerning the confidentiality of discovery material that delayed ESA Action discovery ***for years***. *Cf.* Resp. at 4. Information concerning the more than $190,000 in payments to Mr. Rider was "not disclosed initially in discovery, by both omissions and affirmatively false statements," No. 03-2006, 12/30/09 Mem. Op. (ECF No. 559) (FOF 59), and only was produced pursuant to Court-order, ***more than three years*** after it was initially requested. *Id.* (FOF 57). Rider's belated, and hollow, request for confidentiality over the payment information – made only after FEI moved to compel, and after WAP already had produced the same information to FEI without a protective order – was squarely denied. No. 03-2006, 08/23/07 Order (ECF No. 178), at 5. Rider attempted to thwart the production of the payment information because it was damning to his credibility and undermined the reason he was in court, not because that information merited protection under Rule 26(c).[4] Indeed, counsel of record, Ms. Katherine Meyer, was sanctioned pursuant to 28 U.S.C. § 1927 for signing Mr. Rider's June 2004 "false" interrogatory response concerning the payments. No. 03-2006, 3/29/13 Mem. Op. (ECF No. 620), at 41-42 ("the record clearly and convincingly established that Ms. Meyer, who signed the objections to the false response, had been paying Rider through

[4] FEI's positions concerning the use and confidentiality material in this case and the ESA Action are not "inconsistent." *Cf.* Resp. at 4. Protective orders should issue where there is "good cause." Here, the parties agree that the scope of discovery compasses a variety of material meriting protection under Fed. R. Civ. P. 26(c). By contrast, Rider made two frivolous motions for protective orders in the ESA Action concerning information that did not meet the Rule's requirements, and, in reality, were thinly veiled attempts to delay the production of relevant information that was damaging to his credibility. The Court agreed. Both of Rider's motions were, in large part, denied. *See* No. 03-2006, 08/23/07 Order (ECF No. 178).

her law firm and WAP since 2001 … ."); No. 03-2006, 12/30/09 Mem. Op. (ECF No. 559) (FOF 56) ("[T]he Court finds no excuse for this false response."). That sanction was part and parcel of the parties' dispute concerning the confidentiality of Rider's discovery material. When sanctioning Ms. Meyer, the Court rejected her attempt to justify Mr. Rider's June 2004 response based on his purported need for a confidentiality agreement. *See* No. 03-2006, Meyer Decl. (ECF No. 599-2) (06/11/12), ¶¶ 72-76 ("because at the same time we offered to provide FEI with all of the funding information under a confidentiality agreement, both with the initial June 2004 discovery responses and again on subsequent occasions, it was my professional judgment we acted appropriately by responding to the Interrogatory this way"). And, there was another significant dispute concerning the confidentiality of Rider's discovery material, in addition to the payment material, that delayed discovery. Rider's claim of confidentiality concerning his military and arrest records – which MGC's Response completely ignores – delayed questioning on these topics for more than a year. *See* Mem. at 9. In sum, the parties' disagreements over the use and confidentiality of discovery material unquestionably resulted in delay in the litigation of the ESA Action. The same thing should not happen in this case, especially given that FEI's complaint was filed more than six years ago and discovery is only now commencing. *Cf. In re Reporters Committee for Freedom of Press*, 773 F.2d 1325, 1326 (D.C. Cir. 1985) (district court entered blanket protective order where it would have been "undesirable" for producing party to "specify, and the court rule on, objections to disclosure of particular documents, since that would slow discovery enormously and involve the court excessively in the discovery process").

Third, it is undisputed that defendants repeatedly used ESA Action discovery for purposes other than litigating the case. MGC does not deny that it provided videotape(s) produced by FEI to media outlets and animal activist organizations, such as PETA. Nor does

MGC dispute that, when conducting a "media campaign" concerning FEI, the defendants misleading characterized, and selectively quoted from, ESA Action discovery materials. *See* Mem. at 7-8. Moreover, MGC does not deny that the defendants disseminated ESA Action discovery material even though the Court repeatedly, and expressly, "admonished" them against doing so. Indeed, while the Court entered a limited protective order following the September 16, 2005 hearing, that limited order issued before a number of defendants' misuses of discovery materials had occurred (and, before the Court rejected the RICO defendants' frivolous claims of confidentiality and counsel was sanctioned for assisting Rider with making an affirmatively false statement concerning discovery material under oath). Once its repeated practice of (mis)using discovery material in the media became apparent, the Court entered a blanket order sealing all discovery. *See* No. 03-2006, 09/25/07 Order (ECF No. 195). Further, MGC makes no attempt to distinguish *Klayman*, *supra*, where Judge Kollar-Kotelly found good cause for the issuance of a protective order, by relying on, *inter alia*, the plaintiff's demonstrated history of making false and misleading statements about the defendant in the context of an ongoing fundraising and advertising campaign. 247 F.R.D. at 23-24. Here, the facts are even more compelling than they were *Klayman*. In the ESA Action, defendants herein continued to disseminate discovery material, in a misleading fashion, to the media ***even after express Court admonitions on this very subject***.[5]

Fourth, MGC does not deny that the 09/25/07 protective order entered by the Court, which is still in place, facilitated the completion of ESA Action discovery and avoided burdening the Court with needless discovery motions. It is undisputed that no party delayed the production of discovery material, or sought Court intervention, on the basis of confidentiality after the

[5] MGC's post-hoc comment that its Response is not predicated on a "desire" by it or "anyone else to conduct a 'public relations campaign,'" Resp. at 6 n.3, is wholly incredible given its prior conduct.

09/25/07 order issued. MGC's Response does not even acknowledge this point. Moreover, its argument that the 09/25/07 protective order was only issued to facilitate the Rule 34 inspections is wrong. *Cf.* Resp. at 5-6. The ESA Action plaintiffs made this same argument when they sought to lift the order, and it was rejected by the Court – a point which MGC also fails to acknowledge. *See* No. 03-2006, Pls. Mot. to Lift the 09/25/07 Protective Order (ECF No. 294) (05/06/08) (arguing that the 09/25/07 order should be lifted entirely, or only stay in place to protect disclosure of the Rule 34 inspections material); 07/29/08 Mem. Order (ECF No. 324), at 2 (denying plaintiffs' motion and stating that the Court did not "understand" why plaintiffs "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").

Fifth, MGC still fails to recognize that there is a difference between a "judicial record" and a document filed on the ECF system but which has not been relied upon in an opinion issued by the court. The Response does not even cite to *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), or *United States v. El-Sayegh*, 131 F.3d 158 (D.C. Cir. 1997). While MGC continues to contend that there is a common law right of access to "actual motions and court rulings that are filed in a case, especially one that is of public interest," Resp. at 9 n.5, the D.C. Circuit has clearly, and unequivocally, stated that "not all documents filed with courts fall within [the right of access's] purview – at least not in this circuit." *El-Sayegh*, 131 F.3d at 161. Indeed, even the Fourth Circuit case cited by MGC, *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567 (4th Cir. 2004), Resp. at 9 n.5, does not support the proposition that there is a public right of access to motions and supporting materials, where the motion ***has not yet been decided***.[6]

[6] In *Virginia Dep't of State Police*, the Fourth Circuit affirmed the district court's decision to unseal, *inter alia*, documents filed in connection with summary judgment briefing, ***after the Court granted the summary judgment motion***. 386 F.3d at 578-80. *See also Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (cited in *Virginia Dep't of State Police, supra*) (recognizing that "there may be instances in which

Defendants cannot attach irrelevant discovery materials to court filings and then turn around and claim that those materials are "judicial records" that can be disseminated to the media merely because an ECF header has been affixed to them. That approach, which MGC does not dispute it advocated for in the ESA Action, is contrary to *El-Sayegh*.[7]

Finally, MGC makes no attempt to weigh the *Hubbard* factors, or even dispute FEI's discussion of them. *See* Mem. at 18-22. Those factors weigh in favor of the entry of a protective order over confidential material to be produced in this case, to which the public previously has not had access. *See id.* at 19-20. Further, while MGC again claims that the public access analysis should somehow be changed because this case is of "public interest" (the same argument it made in the ESA Action), *cf.* Resp. at 9 n.5, it cites no authority in support of that proposition.[8] Nor does it dispute that *Philip Morris* was a RICO case of "public interest" where multiple protective orders were entered.[9] *Cf. id.* at 10. In sum, the "good cause" requirement is more than satisfied in this case, and the Court should enter FEI's proposed order.

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discovery materials should be kept under seal even after they are made part of a dispositive motion"; the district court must make that determination "***at the time it grants a summary judgment motion*** … .") (emphasis added).

[7] MGC's attempt to justify its own conduct by citing to FEI's website, http://www.ringlingbrostrialinfo.com, *see* Resp. at 7 n. 4, is entirely unpersuasive. A cursory review of the contents of that website shows that FEI only has posted court decisions, limited briefing, and documents relied upon in various court decisions, *i.e.*, materials that clearly are judicial records. FEI has not filed random discovery documents on the ECF system and then posted them on its website claiming they were "judicial records" – which is what the MGC and the other RICO defendants have done.

[8] Ironically, MGC advocates for public access to this case of great "public interest," but, at the same time, complains about the "enormous administrative burden" associated with making redactions to filings on the ECF system. Resp. at 2 & 8-9. The alternative, making filings entirely under seal, affords the public no access to the record, at all.

[9] MGC's discussion of *Philip Morris* ignores that multiple protective orders were entered in that case, including a separate order governing the disclosure of confidential information. *See 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, ***supplementing existing protective order governing confidential information***).

II. THE COURT SHOULD ENTER THE PROPOSED PROTECTIVE ORDER

FEI's proposed order provides a mechanism for any producing party[10] to designate discovery material as "confidential" pursuant to Fed. R. Civ. P. 26, and provides a process for handling any disputes over such designations. *See* Proposed Order ¶¶ 3, 5, 12. The proposed order expressly states that a designation of material as "confidential" "shall constitute a representation that the material so designated contains or constitutes at the time of the designations information considered by the Producing Party to be sensitive, proprietary or otherwise protected. Any such designations are to be reasonably limited in both subject matter and time." *Id.*, ¶ 5. Further, the proposed order makes clear that where there is a dispute as to whether material has been properly designated, the "burden of proving that material is properly designated as Confidential shall at all time remaining with the Producing Party which designated the material as Confidential." *Id.* ¶ 12. FEI's proposed order contemplates that a producing party will only designate material as "confidential" if there is a basis under Rule 26(c) for doing so. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), § 11.432 n. 134 (2004) ("[C]ounsel should not mark documents as protected under the order without a good-faith belief that they are entitled to protection. … The designation of a document as confidential should be viewed as equivalent to a motion for a protective order and subject to the sanctions of Federal Rule of Civil Procedure 37(a)(4), as provided by Rule 26(c).").

FEI's proposed protective order's description of "confidential information" is, in large part, similar to protective orders entered by other courts in this district. *See, e.g., Roberson v.*

[10] There will likely be numerous third party subpoenas for documents and testimony issued by all of the parties to this case. For example, the parties will need to subpoena former ESA Acton plaintiff and RICO defendant American Society for the Prevention of Cruelty to Animals ("ASPCA"), for documents and testimony. Indeed, when the stay on discovery was briefly lifted in 2010-2011, AWI issued several subpoenas, including subpoenas to FEI's counsel's law firms and its ESA Action testifying experts. Allowing these third parties to produce confidential material pursuant to a protective order will facilitate this part of the discovery process. MGC's Response does not object to third parties being permitted to designate discovery material, which they produce, as "confidential."

Bair, No. 1:06-00282-TFH (ECF No. 31) (05/24/07), ¶ 1 ("Discovery in this action may involve disclosure of confidential personal, medical, and financial information. It may also include personal information regarding the FDIC's past, present, or future employees … ."); *Anderson v. Dist. of Columbia*, No. 1:04-cv-00056-GK (ECF No. 27-3) (11/30/04), ¶ 2 ("The term 'Confidential and/or Proprietary Information" … ***shall mean all information designated as confidential by either party***, ***including, but not limited to***, the parties medical records, counseling records, personnel files, financial records, diaries, journal, notes, and tax records. Any information may be designated as confidential if a party in good faith believes it to be confidential.") (emphasis added). Indeed, it is also similar to language used in the protective order recently proposed by defendant HSUS in litigation in the District of South Dakota, which defines "confidential information" merely as "confidential, proprietary, personal, private, or other sensitive information." *Christensen v. Quinn et al.*, No. 4:10-cv-04128-KES (D.S.D.) (ECF No. 154) (09/21/12), ¶ 2.

MGC does not oppose the entry of a "comprehensive" protective order. Indeed, MGC does not dispute this is the type of large scale, complicated case where the entry of such an order would facilitate discovery and minimize the burden on the Court. But, MGC contends that a "substantive standard" should be used to define the term "confidential," to prevent producing parties from over-designating material. *See* Resp. 1-2. MGC unfoundedly asserts that the order would allow "every document that any party might want to keep secret for any reason" to be designated a "confidential." *Id.* at 5. As previously discussed, FEI's proposed order only affords protection to material protected by Fed. R. Civ. P. 26(c), and not any and all material arbitrarily marked as "confidential." The language proposed by MGC, *id.* at 11, will only cause further disputes as discovery progresses because it purports to identify a limited set of materials that

may be deemed "confidential," *id.*, even though additional categories of confidential material likely will be identified as discovery progresses and requests are issued. Attempting to set bounds on the scope of "confidential" material now, as MGC's modifications purport to do, is premature and will result in Court intervention in confidentiality disputes – the result the entry of a blanket protective order should avoid. Moreover, the omnibus catch-all proposed by MGC, "comparably sensitive private information," is vague and provides no guidance – the very problem it complains of.

While FEI maintains that its protective order should be issued as drafted, to narrow the areas of disagreement between the parties, FEI proposes adding the following language indicated in boldfaced font below, modeled after the Manual for Complex Litigation:

> 3. **Confidential Material.** As used herein, the term "Confidential Material" shall refer to all documents and information exchanged or obtained in the Lawsuit that may be designated by any party to the Lawsuit or any Third Party producing the documents or information (the "Producing Party") as "Confidential," including all copies thereof, reference thereto in deposition testimony or otherwise, and information contained therein. When producing Discovery Material, any Producing Party may designate, in whole or in part, any document or discovery response that the Producing Party reasonably believes includes information that is Confidential. **Counsel should not mark documents as Confidential under the order without a good-faith belief that they are entitled to protection under Rule 26(c). The designation of a document as Confidential should be viewed as equivalent to a motion for a protective order.**

CONCLUSION

Accordingly, for all of the reasons stated above, the Court should enter FEI's proposed protective order.

Dated: September 10, 2013

Respectfully submitted,

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