UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

MALIBU MEDIA, LLC, Plaintiff, v. JOHN DOE subscriber assigned IP address 24.14.81.195, Defendant.	)	Civil Action Case No. 1:13-cv-06312

PLAINTIFF'S MOTION FOR THE ENTRY OF A PROTECTIVE ORDER

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TABLE OF AUTHORITIES

Pursuant to Fed.R.Civ.P. 26(c), Plaintiff moves for the entry of a protective order in the form of N.D. Ill. L.R. 26.2's Model Confidentiality Order and a separate sealed order preventing opposing counsel from talking about the contents of this Motion with anyone.

I. FACTS

[REDACTED]

II. LEGAL STANDARD

Fed.R.Civ.P. 26(c) protects parties from "annoyance, embarrassment, oppression, or undue burden or expense." Generally, protective orders provide a safeguard to parties and other persons in light of the otherwise broad reach of discovery. *See* Ad. Comm. Notes to 1970 Amendment to Rule 26(c). "The only requirement in deciding whether or not to issue a protective order is the statutory mandate of 'good cause.'" *Nieves v. OPA, Inc.*, 948 F.Supp.2d 887 (N.D. Ill. 2013), citing *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 37 (1984). "Good cause . . . generally signifies a sound basis or legitimate need to take judicial action." *Hobley v. Chicago Police Commander Burge,* 225 F.R.D. 221 (N.D. Ill. 2004). "In analyzing whether good cause exists for the entry of a protective order, the court balances the importance of disclosure to the public against the harm to the party seeking the protective order." *Patterson v. Burge*, 2007 WL 433066,*2 (N.D. Ill. 2007) (entering protective order). Consistent with the spirit of the Rule 26(c), courts have held that protection from physical and emotional distress by stalkers warrants the issuance of a protective order. *See Galella v. Onassis,* 487 F.2d 986 (2d Cir. 1973) (protection of public figure from physical and emotional harassment warranted denying party right to attend deposition). The Supreme Court has expressly stated that Rule 26(c) protects privacy interests. *Seattle Times, supra,* 104 S.Ct. at 2208 n. 21.

A. The Public Does Not Have a First Amendment Right to See *Discovery* Materials; The Government Has a Substantial Interest in Protecting Privacy and Reputation

"[P]retrial depositions and interrogatories are not public components of a civil trial . . . . they are conducted in private as a matter of modern practice." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984). "A litigant has no First Amendment right of access to information made available only for purposes of trying his suit." *Id.* "Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." *Id.* The scope of discovery is broad under Rule 26. *Id.* "There is an opportunity, therefore, for litigants to obtain – incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes." *Id.*

III. ARGUMENT

A. Plaintiff's Privilege Log Should Be Protected

The privilege log should be protected under an attorneys' eyes only order. [REDACTED] The privilege log contains information that can be used to identify previously unidentified people. [REDACTED]. Plaintiff and its counsel's ability to attract and retain qualified people will be negatively impacted.

The Northern District of Illinois granted a protective order in a similar case where a party maintained a website dedicated to criticizing the opposing party and intended to "send the videotapes [of depositions] to the media, or post the transcripts on the internet." *Baker v. Buffenbarger*, 03-C-5443, 2004 WL 2124787 (N.D. Ill. Sept. 22, 2004). "In this case, it is apparent that Plaintiffs intend to use Defendants' deposition testimony to further their crusade of

criticizing and embarrassing Defendants. . . . the Court will not allow the discovery in this case to be misused in the manner Plaintiffs suggest." *Id.* Just as in *Baker,* here, this Court should not allow opposing counsel to further his crusade of criticizing and embarrassing Plaintiff.

B. Plaintiff's Financial Records Should Be Protected

Plaintiff is producing its tax returns on February 12, 2014. It does not currently have monthly profit and loss statements. To comply with this Court's order, Plaintiff's principal is creating monthly P&Ls. The project will be finished in a week or two. Plaintiff will produce them as soon as possible.

"Disclosure of tax returns is highly restricted." *Methodist Hospitals, Inc. v. Sullivan,* 91 F.3d 1026, 1031 (7th Cir. 1996). Courts "generally [hold] that tax documents of any stripe are confidential business information." *Crissen v. Gupta*, 2013 WL 5960965 (S.D. Ind. Nov. 7, 2013). "[A] variety of courts, including district courts in this circuit, have also opined that 'a public policy against unnecessary public disclosure arises from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns.'" *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 74-75 (7th Cir. 1992).

Good cause exists to grant Plaintiff a protective order to label its financial records "attorney's eyes only." Plaintiff is a multi-million dollar business. It has two owners, Brigham and Colette Field. Its tax return describes their personal wealth. [REDACTED] *See supra.* Additionally, competitors would learn Plaintiff's revenue and profits, and other aspects relating to its finances. This will place Plaintiff in a vulnerable position.

C. Plaintiff's Agreement With IPP Should Be Protected

Both IPP's oral and written agreement with Plaintiff is confidential commercial information within the meaning of Rule 26(c)(1)(G). If disclosed, IPP may raise the amount it

charges Plaintiff for its data collection services. Plaintiff believes it is getting a good deal from IPP and wishes to maintain it. *Field Dec.* at ¶ 18. Disclosing the terms of the agreement would also adversely affect IPP's business; its other customers may accuse it of overcharging them. Alternatively, another data scanning service may attempt to poach Plaintiff away from IPP. [REDACTED].

The information is also not relevant and unfairly prejudicial. As explained in Plaintiff's Memorandum In Opposition to Bar Testimony, no witness has ever been paid for testimony, and the evidence reported to Plaintiff by IPP is independently verifiable. Consequently, at the appropriate time, Plaintiff will move *in limine* to prohibit this evidence from being introduced at trial. If Defendant wants to make arguments about the agreements then Plaintiff can file its interrogatory answer describing the oral agreement and the written agreement under seal so that the Court knows the facts. There is no reason to disseminate it to the hate group now.

In *Directory Concepts, Inc. v. Fox*, 2008 WL 5263386, at *7 (N.D. Ind. 2008), the Court entered a protective order preventing the "Disclosure of Non–Party Private Information [because it] would risk unnecessary annoyance or embarrassment of non-parties, would unfairly and gratuitously invade the privacy of non-parties, would subject non-parties to the possibility of identity theft, and would strain the business relationships the parties have with the non-parties." The *Directory Concepts* Court also found disclosure "would enable a competitor to target the producing party's customers and potential customers, undercut the producing party's pricing, and mimic the producing party's successful business plan." The rationale set forth in *Directory Concepts* applies equally in this case. A protective order is warranted here too.[1]

[1] Plaintiff does not have the date of first recorded infringement for each .torrent file in its possession. However, Plaintiff is obtaining this information from Michael Patzer and will produce it.

D. Plaintiff Requests That Discovery Be Managed Tightly

Opposing counsel's wild goose chase to find a "smoking gun" will come to no avail. There can be no "smoking gun." This case is not like the widely publicized Prenda case where John Steele made up a client and then bought and sued on copyrights. Plaintiff is a real multi-million dollar business. Its owners' *genuinely and deeply* want to protect their copyrights. Indeed, as set forth above, they have endured nearly unbearable harassment because of this commitment. Ms. Field and other employees of Plaintiff routinely testify in proceedings and attend mediations. Plaintiff has a constitutional right under the Petition Clause to sue for infringement. *Nothing* can be discovered that will prevent Plaintiff from exercising this right. Without any evidence of malfeasance, opposing counsel is intentionally harassing Plaintiff with extremely burdensome discovery. Consequently, a relatively simple peer-to-peer copyright infringement case is being *needlessly* complicated. Indeed, while discovery is in its early stages, Plaintiff already knows Defendant is the infringer because Defendant's WiFi router *requires* an 8 digit password and Defendant does not subscribe to cable television. Opposing counsel's fishing expedition should be limited to legally cognizable claims or defenses and managed tightly.

1. Discovery Related to Hash Values Generally Should be Prohibited

Several discovery requests seek *all* information related to the .torrent files with the unique hash values infringed by Defendant. Defendant infringed twenty four (24) works. Defendant sent Excipo's servers 301 "pieces" of these works. Each transaction for a piece is set forth on a MySQL server log report. Each piece correlates to a PCAP. At trial, Plaintiff will introduce one PCAP per infringed work and the log report. Plaintiff is producing all of this.

IPP charges Malibu by the hour to extract the PCAPs. It is labor intensive. Each month around three hundred thousand people infringe Plaintiff's works globally. If Defendant wants

more than the twenty-four PCAPs he should pay for them. He can buy anyone on Defendant's MySQL report. If he wants all third party infringement data in Excipio's possession it will cost *hundreds* of thousands of dollars. [REDACTED]. Third party evidence is not even relevant. Defendant would not and could not use it. Plaintiff should be protected from this harassment.

E. Plaintiff Requests The Court Enter A Sealed Order Preventing Opposing Counsel From Disclosing The Contents Of This Memorandum With Anyone

[REDACTED]

F. Plaintiff Requests The Court Enter The Model Confidentiality Order

As is clear from the parties' papers, there is a *real* lack of trust between the parties and their counsel. This is a shame because Plaintiff tries hard to act cooperatively with all counsel. Indeed, as it did here, Plaintiff stipulates to the entry of protective orders as a matter of policy in its cases and also as a matter of policy will acquiesce in a defendant's request to stay anonymous up until trial. *See* CM/ECF 14. Here, to facilitate the exchange of discovery in this case, Plaintiff respectfully requests that Court enter its Model Confidentiality Order as set forth in N.D. Ill. L.R. 26.2. Knowing that opposing counsel will be subject to sanctions if he continues to share information with the Internet hate group will go a long way toward assuaging Plaintiff's concerns about providing him with discovery. Consequently, it will reduce the likelihood that the parties will need further judicial involvement.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter its Model Confidentiality Order as set forth in N.D. Ill. L.R. 26.2 and a sealed order preventing opposing counsel from talking about [REDACTED] with *anyone*.

Dated: April 29, 2014

Respectfully submitted,

NICOLETTI LAW, PLC

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all counsel of record and interested parties through this system.

By: /s/ *Paul J. Nicoletti*