

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

**TO BE FILED UNDER
SEAL PURSUANT TO
PROTECTIVE ORDER**

PRESCIENT ACQUISITION GROUP, INC.
d/b/a Prescient Capital Corp.,

Plaintiff,

Case No.: 05 CV 6298
(PKC)(AJP)
ECF Case

-against-

ORAL ARGUMENT REQUESTED

MJ PUBLISHING TRUST, MJ-ATV PUBLISHING
TRUST, NEW HORIZON TRUST and MICHAEL
J. JACKSON

Defendants.

**DEFENDANTS MJ PUBLISHING TRUST, MJ-ATV PUBLISHING TRUST AND
MICHAEL J. JACKSON'S RESPONSE TO THE COURT'S *SUA SPONTE* ORDER OF
FEBRUARY 9, 2007**

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The Defendants MJ Publishing Trust (“MJPT”), MJ-ATV Publishing Trust (“MJ-ATV”) and Michael J. Jackson (“MJJ”) (collectively hereafter “MJ Defendants”) respectfully submit this response to the Court’s *Sua Sponte* order of February 9, 2007 (the “Order”). The declarations of Desmond C. Whitaker and MJPT Trustee Raymone K. Bain (“Bain Decl.”) are being filed simultaneously for *in camera* review.

I. ARGUMENT

A. The Records In This Matter Should Remain Sealed In Their Entirety, Or the Unsealing Issue Deferred, Until After The Trial Of This Matter

The MJ Defendants respectfully contend that the records in this action should remain sealed in their entirety, or the unsealing issue stayed or deferred by this Court, until after the trial of this matter, for the reasons set forth below. All parties, in executing the Stipulation and Protective Order dated October 20, 2005 (the “SPO”), contemplated and reasonably expected that the confidential litigation materials would remain confidential throughout any trials, appeals and retrials of the within matter. The Order (to the extent that the Court *sua sponte* seeks to unseal “[a]ll documents in the case”¹ *in advance* of all determinations on pending motions for summary judgment and to amend the MJ Defendants’ answer, any motions *in limine*, scheduled Pre-Trial Conferences, jury selection and the first trial in this case involving the public figure and international entertainer Michael Jackson) would significantly frustrate the parties’ privacy and fair trial expectations in this case. Moreover, the Order raises the significant issue of whether the premature release of information pursuant to the Order prevents the MJ Defendants from

¹ See Order at 2.

empanelling an untainted jury panel through the premature release of information prior to screening by the Court.²

Fed. R. Civ. P. Rule 26 (c) provides that a Court may issue “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” See Fed. R. Civ. P. Rule 26 (c).

On October 20, 2005, the parties executed the SPO that was signed by U.S. District Judge P. Kevin Castel. The Preamble paragraph of the SPO provides that it appeared to the Court that a “Protective Order under Rule 26(c) of the Federal Rules of Civil Procedure is **necessary and appropriate and will facilitate discovery**” See SPO at 1 (emphasis added).

Paragraph 5 of the SPO provides that:

“This Protective Order shall govern the handling of all “CONFIDENTIAL LITIGATION MATERIALS” (as defined in paragraphs 7, 8 and 10 below), and any part of the information contained in those “CONFIDENTIAL LITIGATION MATERIALS,” prior to any hearing or trial (the “Hearing”). This Protective Order shall also govern the handling after the Hearing of all “CONFIDENTIAL LITIGATION MATERIALS,” that do not become part of the Hearing record. With respect to Documents or information to be used at the Hearing and/or which becomes part of the Hearing record, the Parties to the Litigation shall meet and confer prior to the Hearing to develop a method for maintaining the confidentiality of any “CONFIDENTIAL LITIGATION MATERIALS” used at the Hearing. (emphasis added)

See SPO at 3.

Paragraph 6 of the SPO provides that:

All “CONFIDENTIAL LITIGATION MATERIALS,” and any part of the information contained in those “CONFIDENTIAL LITIGATION MATERIALS,” whether produced by Parties or non-parties, shall be used by the Parties solely for the prosecution and defense of the Litigation, including any appeals and retrials, and shall not be used for business, whether for competitive or any other purposes.

² Ironically, on February 9, 2007 (upon receipt of the Order), Mr. Eric Rosenberg, plaintiff counsel, telephoned Mr. Desmond Whitaker to revel in the Order, and boldly suggested that there might indeed be an issue of a possible tainted jury if the Order were to cause the premature release of information prior to trial.

See SPO at 4.

Paragraph 7 of the SPO provides that “CONFIDENTIAL LITIGATION MATERIALS” encompass any non-public litigation materials containing trade secrets, personnel or commercially sensitive, personal and/or private financial or proprietary information; information subject by law or by contract to a legally protected right of privacy; documents reflecting the confidential negotiations or discussions between the parties, and any other confidential information as reasonably determined by the person producing the material. See SPO at 4.

Paragraph 8 of the SPO encompasses CONFIDENTIAL LITIGATION MATERIALS provided by non-parties, subject to the standards set forth in paragraph 7 of the SPO. Paragraph 10 of the SPO contemplates that any materials that contain, reflect or are based on “CONFIDENTIAL LITIGATION MATERIALS” shall themselves be deemed “CONFIDENTIAL LITIGATION MATERIALS” for the purposes of the SPO. See SPO at 5.

The parties’ expectations, as endorsed by the Court through its signature on the SPO, were and **still are** that the provisions of the SPO would remain in full force and effect throughout the trial (and any possible appeal or retrial) of this matter, See SPO ¶¶ 20, 21, with the parties and Court approving the SPO so that the action may proceed forward. See, e.g., SPO, Preamble paragraph; SPO ¶ 25. The SPO was executed prior to any discovery being conducted in this action, with the parties reasonably relying upon the protections afforded by the Court-approved SPO to conduct extensive discovery in this matter, including over 100,000 pages of document discovery and over 14 depositions conducted in various parts of the United States and overseas. The documents filed under seal to date, and which are subject to possible release under the Order, are numerous financial records, draft agreements, personal and confidential information about the MJ Defendants, numerous depositions containing unconfirmed hearsay testimony

about the parties and witnesses, and other information that may or may not be admissible once the trial of this action commences. Such information is embodied in the various briefs, declarations, affidavits and exhibits on the motion for preliminary injunction, the motions for summary judgment and to amend, and the various opposition papers thereto.

Where there has been reasonable reliance by a party or deponent, a District Court should not modify a protective order granted under Rule 26 (c) “absent a showing of improvidence in the grant of [the] order or some circumstance or compelling need.” SEC v. TheStreet.com, 273 F.3d 222, 229 (2d Cir. 2001)(quoting Martindell v. Int’l. Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir. 1979)); see also FDIC v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982). The MJ Defendants contend that there is no compelling need for the Court to *sua sponte* unseal the documents subject to the SPO on any basis (or at a minimum, in advance of trial or any appeals, as contemplated by the parties), particularly since, upon information and belief, there have not been any requests by the public or media for access to these case materials to date.

This Honorable Court, in the Order, cites to United States v. Amodio, 44 F.3d 141, 145 (2d Cir. 1995)(“Amodio I”) and Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119-120 (2d Cir. 2006) for the propositions that the Court is obligated to engage in a multi-step process to determine whether the documents under seal herein should be unsealed under a presumption of access that should attach to documents which may be considered “judicial documents.” See Order at 2.

The MJ Defendants contend that the analysis of the issue of what may constitute a “judicial document” under the Amodio-Lugosch analysis is a difficult one at best, given the mixture of documents and information subject to the Order. This mixture of documents and information may arguably make it difficult for the Court to make a determination of what may

constitute “judicial documents” under the multi-step approach of Lugosch.³ What is truly at issue is the *information* contained in the documents under submission, rather than the actual documents themselves.

The first set of documents submitted to the Court, and subject to the Order, are the papers submitted in connection with the plaintiff’s motion for a preliminary injunction, which were filed under seal under the SPO. The preliminary injunction motion was resolved by stipulation of the parties, without a determination on the merits by the Court. The physical documents on the preliminary injunction motion are not essential to the Court’s determination of the pending summary judgment motions, and thus would not be subject to the presumption of public access generally afforded to “judicial documents” under the Amodeo-Lugosch line of cases. However, what is critical is the information contained in such documents, as more fully reflected in the accompanying Bain Declaration. The papers on submission on the motion for preliminary injunction contain the same personal, confidential information about the parties that was more fully developed in the submissions on the motions for summary judgment. The protection afforded to the information in the preliminary injunction documents should necessarily extend to the *information* contained to the papers on the summary judgment submissions. Neither Amodeo nor Lugosch preclude this type of protection for the *information* passed from one motion or set of documents to another, and accordingly all documents currently under seal should be subject to the same protection against access that would be afforded the submissions on the preliminary injunction motion.

Moreover, the U.S. Supreme Court has held that while there may be presumption favoring access to judicial records, access to such records is not without restrictions. The Court noted that “it is uncontested that the right to inspect and copy judicial records is not absolute.

³ The multi-step process of Lugosch is more fully discussed in Point 1.C *infra*.

Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.” See Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978). The Court noted that access to documents has been denied to records used to gratify spite or promote scandal and files that might “serve as reservoirs of libelous statements for press consumption.” Id.

The Plaintiff’s Opposition papers to MJ Defendants’ Motion for Summary Judgment already serve as notice of the type of libelous material to be expected in the trial of this case, with counsel proclaiming that Mr. Michael Jackson is “the world’s most notorious pedophile,” notwithstanding that the gravamen of the case is for breach of contract against the trust MJPT, and not Mr. Jackson. This type of proclamation, and the salacious content in the various documents in the papers submitted in connection with the summary judgment motions, will undoubtedly affect the right of the MJ Defendants to a fair trial. The Second Circuit has held that “the rights of the defendants to a fair trial is of the utmost importance, and the defendants’ claim is one that we do not treat lightly. . . . The common law right [to access] is not absolute, and must bow to the defendants’ fair trial right if the two rights are irreconcilable; that is, countervailing factors may overcome the presumption of access” See U.S. v. Graham, 257 F.3d 143, 154 (2d Cir. 2001). The Court made particular note of circumstances which, similar to the present case, could prove particularly inflammatory, such as where there was little or no pretrial publicity, and in which some portion of the evidence was clearly inflammatory and unlikely to be admitted at trial. Id. at 155. While there has been little or no publicity to date, plaintiff counsel’s suggestion of possible tainting of the jury pool by the premature release of information under the Order implies that there will be pretrial publicity. This is what the MJ Defendants are vigorously trying to protect against.

The MJ Defendants respectfully contend that the timing of the Order is most problematic, particularly since the parties are still under the Court's schedule for the submission of *in limine* motions, proposed *voir dire* submissions, Pre-Trial Conferences and joint party submissions. These procedures are necessary for the efficient administration of the judicial function in this case, and will be frustrated if evidence is leaked prematurely. Moreover, this case is readily distinguishable from the Amodeo line of cases, which involved applications for records that had already been shown to a jury.

The MJ Defendants respectfully contend that the Order be vacated in its entirety, or the issue of the unsealing of records be deferred until disposition of the motions for summary judgment or the trial of this matter (currently scheduled for June 2007), in accordance with the above.

B. The MJ Defendants Withdraw Certain Depositions

In the event that this Honorable Court does not vacate the unsealing order in its entirety, or defers consideration of the same until after trial, the MJ Defendants contend that certain documents may be appropriate for withdrawal from consideration on the pending summary judgment motion.

To identify for the Court the documents at issue, and to preserve confidential family and financial information, the MJ Defendants withdraw certain depositions they submitted on summary judgment but did not cite. See Commerce Funding Corp. v. Comprehensive Habilitation Servs., Inc., No. 01 Civ. 3796(PKL), 2004 WL 1970144, at *5 (S.D.N.Y. Sept. 3, 2004) (allowing defendants to withdraw two of their exhibits); see also Nat'l Assn. for the Advancement of Colored People v. A.A. Arms, Inc., No. CV 3999(JBW), 99 CV 7037(JBW), 2003 WL 2004641, at *2 (E.D.N.Y. April 29, 2003) (allowing defendants to withdraw thirteen of

their exhibits); Kidder, Peabody & Co., Inc. v. IAG Int'l Accept. Group, No. 94 CIV. 4725(CSH), 1999 WL 20892, at *3 (S.D.N.Y. Jan. 19, 1999) (holding court “need not determine their relevance for present purposes because IAG represents that it will withdraw Exhibits 458-462 . . .”).

In an abundance of caution, the MJ Defendants submitted the full deposition transcripts of Mr. Michael J. Jackson and Mrs. Katherine Jackson, so that Prescient would not misquote or misstate their deposition testimony. The MJ Defendants did not cite either deposition transcript in their summary judgment or motion to amend briefs, or in their reply briefs. As stated in the Bain declaration, both depositions contain private family and financial information. Therefore, before the depositions are released to the media, the MJ Defendants withdraw in their entirety both Defendants’ Summary Judgment Exhibit 3 (Mr. Michael J. Jackson’s deposition) and Defendants’ summary judgment exhibit 5 (Mrs. Katherine Jackson’s deposition) (Bain Decl. ¶¶ 15-16).⁴

For similar reasons, the MJ Defendants submitted the full deposition transcript of Mr. Donald Stabler as Defendants’ summary judgment exhibit 6. The Stabler deposition contains unfounded allegations by Mr. Stabler as well as private family and financial information (Bain Decl. ¶¶ 9, 12). The MJ Defendants cited only pages 319, 320 and 443-444 from the Stabler deposition. Therefore, except for pages 319, 320 and 443-444, the MJ Defendants withdraw the rest of Defendants’ Summary Judgment Exhibit 6.

C. Certain Documents Do Not Qualify as “Judicial Documents”

Certain, select documents, either in whole or in part, do not qualify as “judicial documents” under the multi-step review of the Second Circuit. See Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119-120 (2d Cir. 2006). Under the Second Circuit’s multi-step

⁴ Because these deposition exhibits are being withdrawn in their entirety, no redacted version is submitted.

process, the Court “must first conclude that the documents at issue are indeed ‘judicial documents.’” Lugosch, 435 F.3d at 119. The Second Circuit holds that: “The mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access.” United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995). Under the Second Circuit’s standards, “to be designated a judicial document, ‘the item filed must be relevant to the performance of the judicial function and useful in the judicial process.” Lugosch, 435 F.3d at 119 (quoting Amodeo, 44 F.3d at 145) (emphasis added). The MJ Defendants believe that the following documents do not qualify as “judicial documents.”

1. The deposition of Mrs. Katherine Jackson is not a “judicial document”

Mrs. Katherine Jackson’s deposition, submitted as Defendants’ Summary Judgment Exhibit 5, was not cited by any party in the briefs. Accordingly, it is not relevant to the judicial function and does not qualify as a “judicial document.” Lugosch, 435 F.3d at 119.

2. The deposition of Michael J. Jackson is largely not a “judicial document”

Although Plaintiff submitted large tracts of Michael J. Jackson’s deposition, it cites only three pages from Mr. Jackson’s deposition, which it submitted as Plaintiffs’ Opposition to MJ Defendants’ Summary Judgment Exhibit 42 (pages 398-400). The rest of Plaintiff’s Opposition to MJ Defendants’ Summary Judgment Exhibit 42 is not cited anywhere by any party, and does not qualify as a “judicial document.” Lugosch, 435 F.3d at 119. Therefore, the Court should order removed or exclude from unsealing the rest of Plaintiff’s Opposition to MJ Defendants’ Summary Judgment Exhibit 42 (pages 66-93, 102-113, 146-173, 182-185, 218-229, 319-322, 351-354, 395-406, 411-418, 435-438, 447-462, 487-494; lines 1-24 on each page). Redacted versions are annexed. Alternatively, because these excerpts jeopardize Mr. Jackson’s right to a

fair trial, the MJ Defendants submit that they overcome the presumption of access, and should remain under seal. (Bain Decl. ¶¶ 9-11). See infra Point I.D.

3. Portions of Plaintiff's opposition to summary judgment on the contract claim and the deposition of Donald Stabler are not "judicial documents"

Plaintiff's Opposition to MJ Defendants' Summary Judgment on the contract claim contains an irrelevant statement on page 5 regarding allegations of Michael J. Jackson's beliefs about why the California criminal charges were filed against him. (Bain Decl. ¶ 10). Likewise, Plaintiff submits excerpts from the deposition of Don Stabler which contains these and similar, unfounded allegations regarding the California criminal trial. These allegations are contained in Plaintiff's Opposition to MJ Defendants' Summary Judgment Exhibit 6 (page 25, lines 6-24; page 26, lines 1-16; page 63, lines 4-24; page 160, lines 10-24; page 161, lines 1-24; page 208, lines 8-16). (Bain Decl. ¶ 12). Redacted versions are annexed. These statements are irrelevant to the case, and do not qualify as a "judicial document." Lugosch, 435 F.3d at 119. Alternatively, because these excerpts jeopardize Mr. Jackson's right to a fair trial, the MJ Defendants submit that they overcome the presumption of access, and should remain under seal. See infra Point I.D; (Bain Decl. ¶ 9-12).

4. Plaintiff's submission of the full Stabler deposition in opposition to summary judgment on the fraudulent conveyance claim is overbroad and largely is not a "judicial document"

Plaintiff has submitted the full deposition of Mr. Donald Stabler in its Opposition to Defendant New Horizon Trust's Summary Judgment on the fraudulent conveyance claim as Exhibits 1 and 2. However, Plaintiff cites only a small portion of Mr. Stabler's deposition (including pages 20, 22-24, 26, 36-38, 43-44, 53-54, 59). The remainder of Plaintiff's Exhibits 1 and 2 (which is the full Stabler depositions) are not cited in its Opposition to Defendant New Horizon Trust's Summary Judgment on the fraudulent conveyance claim, therefore, these

overbroad excerpts are not “judicial documents” and should be excluded from Plaintiff’s Opposition to Defendant New Horizon Trust’s Summary Judgment on the fraudulent conveyance claim Exhibits 1 and 2 (pages 1-19, 21, 25, 27-35, 39-42, 45-52, 55-58, 60-449; lines 1-24 on each page). (Bain Decl. ¶ 12). Redacted versions are annexed to the Bain Declaration. Alternatively, because these excerpts jeopardize Mr. Jackson’s right⁵ to a fair trial, the MJ Defendants submit that they overcome the presumption of access, and should remain under seal. See *infra* Point I.D.

5. The deposition of Michael J. Jackson from the *Schaffel* case is not a “judicial document”

Plaintiff cites in its Opposition to MJ Defendants’ Motion for Summary Judgment on the contract claim, at fn 24 and 38, a few excerpts of Michael J. Jackson’s deposition at the *Schaffel* case. The majority of Plaintiff’s MJ Defendants’ Motion for Summary Judgment on the contract claim Exhibit 41 is not cited and is irrelevant to the pending motions or the facts in the *Prescient* matter. Thus, the entire deposition transcript of Mr. Jackson contained in Exhibit 41 should be kept under seal, because it is not relevant and is not a “judicial document.” *Lugosch*, 435 F.3d at 119. Alternatively, because these excerpts jeopardize Mr. Jackson’s right to a fair trial, the MJ Defendants submit that they overcome the presumption of access, and should remain under seal. (Bain Decl. ¶ 13). See *infra* Point I.D.

D. Certain Documents Overcome the Presumption of Public Access

Even when a document qualifies as a “judicial document,” it may remain under seal if it overcomes the presumption of public access. See *Amodeo*, 44 F.3d at 145. The Second Circuit has held that this includes “records used to gratify spite or promote scandal and files that might ‘serve as reservoirs of libelous statements for press consumption.’” *Amodeo*, 44 F.3d at 146.

⁵ Because the entire exhibit should remain under seal, no redacted version is submitted.

Additionally, when the release of documents would cause an “unfair trial by adverse publicity” those documents may be kept under seal. See id. at 147 (citation and quotation omitted).

1. Paragraph 12 of Mr. Steven Altman’s reply declaration in support of Plaintiff’s motion for an injunction references an outside settlement

Paragraph 12 of Mr. Steven Altman’s reply declaration in support of Plaintiff’s motion for an injunction references an outside settlement. (Bain Decl. ¶ 12 and chart). Plaintiff’s Opposition to Defendant New Horizon Trust’s Motion for Summary Judgment on the fraudulent conveyance claim Exhibit 34 also contains the settlement. Because this was a confidential settlement with a nonparty to this case, and is not relevant to any pending motions, the Court should keep under seal both: (1) paragraph 12 of Mr. Altman’s Reply Declaration dated April 10, 2006, in support of Plaintiff’s Motion for an Injunction; and (2) Plaintiff’s Opposition to Defendant New Horizon Trusts Motion for Summary Judgment on the fraudulent conveyance claim Exhibit 34. See Gambale v. Deutsche Bank AG, 377 F.3d 133, 143 (2d Cir. 2004) (holding terms of settlement overcame presumption of access and should remain confidential). Redacted versions of Mr. Altman’s Reply Declaration dated April 10, 2006 in support of Plaintiff’s motion for an injunction are annexed to the Bain Decl.

2. Plaintiff’s Summary Judgment Exhibit 28 Contains a Confidential Bank Account Number

Plaintiffs’ Opposition to MJ Defendants’ Motion for Summary Judgment on the contract claim Exhibit 28 contains a confidential HSBC check and account number. As the Court recognized in its *Sua Sponte* Order of February 9, 2007, bank account information should remain under seal. The Court should not unseal Plaintiffs’ Opposition to MJ Defendants’ Motion for Summary Judgment on the contract claim Exhibit 28 in its entirety. (Bain Decl. ¶ 3).

3. The Bank of America and Fortress documents contain confidential financial information and jeopardize the right to a fair trial

MJ Defendants' Motion for Summary Judgment exhibits 14, 15, 16, 17, 20, 21, 23, 24, 25, 28, Plaintiff's Opposition to MJ Defendants' Motion for Summary Judgment on the contract claim Exhibits 9, 13, 14, 16, 17, 19, 21, 31, 32, 43, 44, and 49, and Plaintiff's Opposition to Defendant New Horizon Trust Motion for Summary Judgment on the fraudulent conveyance claim Exhibits 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 28, contain financial documents relating to Bank of America, Fortress or affiliated lenders. (Bain Decl. ¶ 4). Similarly, New Horizon Trust's Summary Judgment Exhibits 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 25, 26, 27, 28, 31, 32, 33, 34 and 35, also contain financial documents relating to Bank of America, Fortress or affiliated lenders. (Bain Decl. ¶ 5). Finally, Mr. Steven Altman's Reply Declaration dated April 10, 2006, in support of Prescient's motion for an injunction attaches Exhibits BB, CC, DD, EE, FF, GG, II, JJ, KK and LL, which contain financial documents relating to Bank of America, Fortress or affiliated lenders. For the reasons stated in greater detail above, because these financial documents jeopardize the MJ Defendants' right to a fair trial, they should be kept under seal in their entireties until the conclusion of any trial. (Bain Decl. ¶ 8). See supra Point I.A.⁶

II. CONCLUSION

For the reasons stated in the Bain Declaration and in this brief, the MJ Defendants request that the selected documents described above remain under seal. If this request is denied, the MJ Defendants respectfully request that the Court stay its order for a short period of seven days to allow them to review the Court's order and determine whether there are grounds to seek an interlocutory appeal under the collateral order doctrine. See Richardson-Merrell, Inc. v. Koller,

⁶ Because these exhibits are sought to be excluded in their entirety, no redacted version is submitted.

472 U.S. 424, 430-31 (1985) (holding collateral order doctrine applies to “trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal”).

Respectfully submitted,

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