UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Sea World of Florida, LLC, Respondent.	OSHRC Docket No. **10-1705**

ORDER

Sea World of Florida, LLC, moves for a protective order to place designated documents under seal.[1] The Secretary objects to Sea World's motion, arguing Sea World has failed to meet the standards for entitlement to a protective order.

The court has reviewed *in camera* representative documents that Sea World has designated as confidential. Based upon the review of the documents and an analysis of the applicable legal standards, the court finds Sea World has failed to meet its burden establishing the designated documents are entitled to protection. For the reasons stated below, Sea World's Motion for Protective Order is DENIED.

Analysis

Sea World contends it has established its need for a protective order under two separate rules: Commission Rule 29 C. F. R. § 2200.52(e)(7) and Federal Rule of Civil Procedure 26(c). Each rule requires a showing of "good cause" that a protective order is needed. The party seeking protection bears the burden of showing that it is entitled to the protection being sought. *Gulf Oil Co. v. Bernard,* 101 S.Ct. 2193 (1981).

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[1] Sea World also moved for a protective order requiring the Secretary's non-federal expert to sign a non-disclosure agreement before Sea World allows him entry to the back areas of Shamu Stadium. The Secretary avers she has required her expert "to sign a confidentiality order prohibiting the disclosure of use of all documents, information, and communications which he receives concerning this case, and requiring him to return to the Secretary or destroy all documents provided to him" (Secretary's Response, pp. 10-11, footnote 7). This issue appears to have been resolved by the parties.

Commission Rule 52(e)(7)

Rule 52(e)(7) provides:

> In connection with any discovery procedures, and where a showing of good cause has been made, the Commission or Judge may make any order including . . . [t]hat a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way[.]

Sea World declines to specifically identify any trade secrets or confidential information in the documents at issue. Respondent states:

> It is not necessary for Sea World to differentiate between trade secret or confidential research, development, or commercial information, because all of these categories fall under the same protections afforded a party under Rule § 2200.52(e)(7). . . . Sea World has repeatedly expressed the position that it would suffer harm due to documents being in the public domain and accessible to its known adversaries.

(Sea World's Reply, p. 8).

Sea World expresses no concerns regarding the use to which its business competitors would put the designated documents. Sea World seeks protection only from public interest groups it identifies as its "known adversaries." Sea World names PETA, the Orca Project, and the Humane Society as the entities who would use the documents to "destroy" and "demolish" it (Sea World's Reply, pp. 9, 10). Respondent argues the three organizations share the same belief: "Sea World should release all orcas immediately to the wild and, for that matter, all animals that are being held in captivity" (Sea World's Reply, p. 9). Although this may be an accurate characterization of the organizations' positions with regard to Sea World, the company offers no rationale for classifying the designated documents as confidential.

Sea World articulates no reason, nor gives any specific example of how these organizations might use the designated documents to harm its business. By its nature as an amusement park, a great deal of Sea World's business is open to the public, with its workplace and procedures on display. For the price of a ticket, anyone can enter Sea World's premises, including members of PETA, the Orca Project, and the Humane Society. The court reviewed *in camera* the documents produced by Sea World with an eye towards the potential harm they could do if they were released to adversarial groups. None of the documents contains financial or commercial information. The

court found nothing beyond employee training materials, emergency procedures, and unremarkable veterinary records. These types of documents are produced routinely in OSHA proceedings without recourse to a protective order. An observant paying customer could glean a great deal of the information found in the designated documents simply by paying attention. If there is a "smoking gun" in the documents, Sea World has provided no guidance in finding it.

There is no question that the named animal rights organizations are philosophically opposed to Sea World's business model. It is a central tenet of these organizations that orcas are not suited to captivity. It is Sea World's burden, however, to show why specific documents are entitled to heightened protection. Instead, Sea World has made sweeping, unsubstantiated allegations that "[a]ny information that can be obtained to achieve the purpose of harming Sea World will further the goals of all these organizations" (Sea World's Reply, p. 10). Sea World has failed to establish the documents for which it seeks protection contain either trade secrets or any confidential information, as required by Rule 52(e)(7).

FED. R. CIV. P. 26(c)[2]

FED. R. CIV. P. 26(c) provides in pertinent part: "The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]"

Sea World seeks a protective order under Rule 26(c), yet fails to specify how the public release of the designated documents would lead to its annoyance, embarrassment, or oppression. (Sea World has already produced the documents to the Secretary, so there is no issue of undue burden or expense.) The only rationale Sea World provides for invoking Rule 26(c) is that giving PETA, the Orca Project, and the Humane Society "free reign into the inner workings of the organization by allowing access to the confidential documents would be detrimental to Sea World" (Sea World's Reply, p. 10). There is no attempt to show how either embarrassment, annoyance, or

[2] Commission Rule § 2200.2(b) provides: "In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure." Commission Rule § 2200.52(e)(7) specifically provides for protective orders. Therefore, Rule 52(e)(7), and not FED. R. CIV. P. 26(c), is applicable here. Assuming, for the sake of argument, that FED. R. CIV. P. 26(c) did apply in the instant case, Sea World has failed to meet its burden under that rule establishing entitlement to a protective order.

oppression would follow if the designated documents were not protected. Sea World does not assert it will be harmed if the documents are released to the general public.

Protection under Rule 26(c) requires some proof that one or more of the listed conditions would result if the information were disclosed. The standard for embarrassment is higher for a business entity than for a person.

> [B]ecause release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious. As embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is monetizable, to argue for a protective order on this ground. . . . [T]o succeed, a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.

Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3rd Cir. 1986).

Sea World has not shown that the disclosure of the documents at issue would harm its competitive or financial position. Sea World has failed to demonstrate any link between disclosure of the designated documents and actual negative consequences to its business. Sea World has not met its burden in establishing a protective order under Rule 26(c) is warranted.[3]

Section 12(g) of the Act

The Secretary has raised an additional point the court feels obliged to address. The Secretary notes Sea World seeks a protective order asking that confidential documents and deposition testimony be sealed, as well as that "any testimony during a hearing on this matter be conducted in such a fashion as to protect [the documents'] confidentiality" (Sea World's Motion, p. 2). The Secretary states, "While Sea World's motion does not use specific words seeking a request to close the hearing, . . . 'Conducted in such a fashion' is a euphemism used by Sea World to request that the hearing be closed at any time 'confidential' or 'trade secret' documents are used" (Secretary's Response, p. 3).

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[3] Sea World also argues the documents at issue are protected under Exemption 4 of the Freedom of Information Act, which exempts trade secrets and confidential business information from disclosure. Because it is concluded the documents contain neither trade secrets nor confidential information, the court does not address the Exemption 4 arguments.

Section 12(g) of the Act provides:

> Every official act of the Commission shall be entered of record, and its hearings and records shall be open to the public.

As Sea World points out, the fact the Commission Rules provide procedures for sealing documents and testimony demonstrates that the framers of the Act anticipated the need to seal evidence at times. In the present case, however, the scope of the protective order sought likely would result in closing most or all of the hearing. This, in turn, would compromise the court's ability to write a decision available to the public.

In *Hicklin Engineering, L. C. v. Bartell,* 439 F.3d 346, 348-349 (7th Cir. 2006), the court of appeals took exception to a judge's order sealing two opinions she issued in a case involving trade secrets. The court stated:

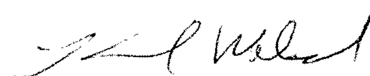
> What happens in the federal courts is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.

If granted, the breadth of the protective order sought by Sea World would hinder the court's ability to comply with the requirements mandated by § 12(g).

Commission Rule § 2200.52(d)(2)

Pursuant to Rule 52(d)(2), the documents at issue and the portions of the pleadings designated in the court's previous order, dated April 20, 2011, are sealed pending interlocutory or final review of the ruling.

SO ORDERED.



Date: April 29, 2011

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