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6
7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA

9 * * *

10 KIRK and AMY HENRY,
11
Plaintiffs,

Case No. 2:08-CV-635-PMP-GWF

12 vs.

13 FREDRICK RIZZOLO aka RICK RIZZOLO,
an individual; LISA RIZZOLO, individually
14 and as trustee of The Lisa M. Rizzolo Separate
Property Trust and as successor trustee of The
15 Rick J. Rizzolo Separate Property Trust; THE
RICK AND LISA RIZZOLO FAMILY TRUST;
16 THE RICK J. RIZZOLO SEPARATE
PROPERTY TRUST; and THE LISA M.
17 RIZZOLO SEPARATE PROPERTY TRUST,
18
Defendants.

**ERRATA TO REPLY TO
PLAINTIFFS OPPOSITION TO
LISA RIZZOLO'S MOTION TO
ENFORCE PROTECTIVE ORDER**

19 LISA RIZZOLO,
20
Crossclaimant,

21 vs.

22 FREDRICK RIZZOLO aka RICK
RIZZOLO, DOES I through X and
23 ROE CORPORATIONS I through
X, inclusive,
24
Crossdefendant.

25
26 Defendant, LISA RIZZOLO, by and through her attorneys of record, BAILUS COOK &
27 KELESIS, LTD., files this Errata to include page 2 of the Reply to Plaintiffs Opposition to Lisa
28 Rizzolo's Motion to Enforce Protective Order, filed August 20, 2009 (#175), which as the result

EXHIBIT 1

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8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

10 * * *

11 KIRK and AMY HENRY,
12 Plaintiffs,

Case No. 2:08-CV-635-PMP-GWF

13 vs.

14 FREDRICK RIZZOLO aka RICK RIZZOLO,
an individual; LISA RIZZOLO, individually
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16 Rick J. Rizzolo Separate Property Trust; THE
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REPLY TO PLAINTIFFS
OPPOSITION TO LISA
RIZZOLO'S MOTION TO
ENFORCE PROTECTIVE ORDER

19 Defendants.

20 _____
21 LISA RIZZOLO,
22 Crossclaimant,

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24 FREDRICK RIZZOLO aka RICK
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25 ROE CORPORATIONS I through
X, inclusive,

26 Crossdefendant.
27 _____
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1 Stephens Media, LLC. Stephens Media owns the Las Vegas Review-Journal. Not only does
2 Plaintiffs' counsel represent the Stephens Media group in many ongoing affairs, but he has also
3 represented the columnist at issue, John L. Smith. (See Exhibit B, Registers of Action in civil cases
4 within the Eighth Judicial District Court of Nevada; Exhibit C, article of Las Vegas Review Journal,
5 November 9, 2008, "THOMAS MITCHELL: "False, vindictive claims"; Exhibit D, article of March
6 2, 2009, Las Vegas Review Journal, "Court hears media challenges over OJ jury secrecy (Don
7 Campbell referred to as "representing the AP and Stephens Media LLC, the owner of the Review-
8 Journal"))).

9 Further, Plaintiffs' counsel has before made use of confidential information in an effort to
10 resolve cases. In a November 9, 2008 article in his client's daily newspaper, the Las Vegas Review
11 Journal, the editor-in-chief of that publication touted Mr. Campbell for his unprecedented "legal skill
12 and audacity" in another matter involving the use of confidential information garnered from
13 discovery. (Exhibit C). The verbatim editorial of his client makes it very clear as to why the Review-
14 Journal believes Campbell so "skillful":

15 "What prompted (Venetian Hotel owner Sheldon) Adelson to suddenly settle? As a
16 part of the discovery process while preparing for a scheduled trial in December,
17 Smith's attorney, Don Campbell, managed to gain access to *confidential* Gaming
18 Control Board records relating to Adelson's gaming license."

18 Of course, the "Smith" referred to is the same columnist, John L. Smith, whose article
19 exposed Ms. Rizzolo to public humiliation and embarrassment regarding her private finances and
20 the outlandish suggestion that she be criminally investigated for fraud – not coincidentally, the theory
21 of liability by Plaintiffs.

22 In reality, there is no culpability on the part of Ms. Rizzolo and none of the documents and/or
23 personal information are probative of any other conclusion. Plaintiffs have not offered any cogent
24 argument as to why Ms. Rizzolo's desire to keep her private and financial information confidential
25 is not, as represented, made with good cause. Even though not required under the SPO, Ms.
26 Rizzolo's affidavit clearly demonstrates "good cause" for keeping her personal, financial and/or asset
27 information confidential. See, Fed. R. Civ. P. 26 (c) That rule is designed to protect parties, like Ms.
28 Rizzolo, from "annoyance, embarrassment and oppression."

1 It is not a numbers game as Plaintiffs would suggest in referring to cases like *THK America,*
2 *Inc. v. NSK Co.*, 157 F.R.D. 637, 645 (N.D. Ill. 1993), where a designation of “79 per cent of the
3 produced documents was found to be “absurdly high”. In the case, *sub judice*, it just so happens that
4 a high percentage of documents relates to private or personal financial information that would serve
5 no purpose in making public at this stage of the proceedings. Whether it is 1 per cent, 79 per cent,
6 or 100 per cent, if the documents are rightfully in good faith, confidential, then they are confidential.
7 The Plaintiffs are clearly wrong in hoping to convince this court that the high percentage of
8 documents marked confidential are not marked with good cause simply because of the numbers.

9 Likewise, the Plaintiffs reliance on the Court’s language concerning public policy inuring to
10 public access of information in the Protective Order Governing Confidentiality of Documents (#65)
11 is inapposite. The issue is not about necessary documents attached to dispositive motions, but an
12 effort by the Plaintiff to challenge the mere fact that Ms. Rizzolo has marked any of her private
13 and/or personal finance documents “confidential” pursuant to the SPO.

14 Moreover, Plaintiffs make broad allegations and essentially argue, “how can all these
15 documents be confidential” but make no effort whatsoever to point out which documents so marked
16 are not confidential. In other words, it cannot be gleaned which of Lisa Rizzolo’s voluminous
17 production of confidential, and frankly sensitive, documents are *not* confidential or why Plaintiffs
18 want the designation lifted.

19 Inasmuch as this Court stated that any presumptions in favor of public access can be
20 overcome by “sufficiently important countervailing interests” regarding proper attachments to
21 dispositive motions (citing *San Jose Mercury News v. United States District Court*, 187 F. 3d 1096,
22 1102 (9th Cir. 1999), the Plaintiff can show no interest in challenging Ms. Rizzolo’s designation of
23 her private and/or personal documents as confidential at this stage of the proceedings. (#65). If for
24 no other reason, Ms. Rizzolo has been forced to take the step in filing the instant motion to preclude
25 the Plaintiffs’ effort to sidestep the procedures designated in the SPO concerning confidential
26 information.

27 In its Opposition (at 5), Plaintiffs’ argue that Ms. Rizzolo is seeking an “unprecedented and
28 likely unconstitutional sealing of *all* the documents and *all* the deposition testimony given in this

1 action.” Simply put, Plaintiffs are wrong. Contrary to Plaintiffs’ assertions, the deposition testimony
2 of Ms. Rizzolo was not designated as “Confidential.” Further, during the deposition of Dean Patti,
3 Esq., the Defendant only designated certain portions of Mr. Patti’s testimony as “Confidential.”
4 Obviously, Plaintiffs have misconstrued Ms. Rizzolo’s motion. Ms. Rizzolo is not seeking to have
5 *all* the documents and *all* the deposition testimony sealed, but until such time as the Plaintiffs stop
6 almost exclusively requesting confidential information regarding Ms. Rizzolo, especially as it relates
7 to her private financial and/or asset information, she will keep marking this specific information in
8 good faith and for good cause as “Confidential” as provided for in the Stipulation and Protective
9 Order (“SPO”).

10 For example, on June 18, 2009, Defendant served on Plaintiffs her Third Supplemental
11 Response to Kirk Henry’s First Set of Requests for Production. Plaintiffs’ do not dispute that the
12 documents produced by Defendant in this supplement consisted primarily of account statements from
13 various banking and investment accounts, closing documents relevant to the purchase of a
14 condominium in Chicago, and insurance policies. All contained personal, private financial and asset
15 information regarding Ms. Rizzolo.

16 The SPO (¶ 1(b)) provides:

17 “Confidential Information” means any information that is designated as
18 confidential in the manner specified in this Order by the party supplying
19 the information. Confidential Information may be contained in
20 documents produced, exhibits, interrogatory answers, responses to
21 requests for admission or otherwise. A party designating information as
22 Confidential Information will make such designation only as to that
23 information that it reasonably believes contains ***confidential, private or
trade secret information.***

22 Accordingly, Defendant appropriately designated all documents produced in her third
23 supplement as “Confidential” as subject to the provisions of the SPO. The exact documents which
24 the Plaintiff now complains of as lacking good cause is impossible to glean; the public disclosure
25 of which would be even harder to justify. On the other hand, there is ample legal authority and public
26 policy for keeping the confidential information just that. See *In re Boston Herald, Inc.* 321 F. 3rd 174
27 91st Cir. 2003)(citations omitted).

28 Plaintiffs’ counsel, Jack DeGree’s letter of July 8, 2008, which is the impetus for the instant

1 motion does not constitute an appropriate objection under the requirements for specificity or
2 grounds. In his letter, Mr. DeGree failed to identify any specific documents that Plaintiffs' counsel
3 felt were not subject to protection, but rather made a blanket objection to the, "Confidential"
4 designations in [the] most recent supplemental production of documents (Bate nos. L400825-
5 L401643)." (Exhibit "3" to Plaintiff's Opposition to Lisa Rizzolo's Motion to Enforce Protective
6 Order (# 164-2)). Mr. Degree further stated only that the confidential designations were, in
7 Plaintiffs' counsel's opinion, "unreasonable and improper," which are not sufficient legal bases
8 and/or lacking the specificity required under the SPO for objecting to the designations. *Id.*

9 Each of the documents produced in Ms. Rizzolo's third supplement to her discovery
10 responses contained private financial and/or asset information regarding Ms. Rizzolo which,
11 although only arguably relevant to the instant litigation, and which have no legitimate use outside
12 that context. Under the SPO (¶4), Plaintiffs have wide latitude in using confidential documents
13 within the confines of the litigation; they are permitted to disclose or make available that information
14 to:

15 (I) this court, (ii) any appellate court, (iii) members of any jury panel or jury that
16 hears this case, (iv) the party that designated the document or information as
17 Confidential Information, (v) counsel for the parties and the professional, secretarial
18 and clerical personnel of such counsel to whom disclosure of Confidential
19 Information is necessary for purposes of this Proceeding and to be used exclusively
20 for purposes anticipated within this Proceeding, (vi) the Plaintiffs or Defendants, (vii)
21 Deponents during a deposition, (viii) Witnesses during a trial or hearing (ix)
22 independent third party consultants and experts and their staff retained by a party or
23 by a party's counsel in connection with this Proceeding, (x) authorized persons taking
24 or recording testimony involving Confidential Information and necessary
25 stenographic, and clerical personnel therefore, and (xi) persons identified by counsel,
26 acting in good faith, as potential fact witnesses, after any such fact witness has
27 executed and delivered to counsel a statement in the form annexed hereto as Exhibit
28 "A."

23 Federal Rule of Civil Procedure 26(c) states that when a party or a motion asserting good
24 cause for a protective order, "the court in which the action is pending ... may make any order which
25 justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue
26 burden or expense." Accordingly, Rule 26(c) authorizes the district court to issue "any order which
27 justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue
28 burden." The Supreme Court in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81

1 L.Ed.2d 17 (1984), has interpreted the foregoing language as conferring “broad discretion on the trial
2 court to decide when a protective order is appropriate and what degree of protection is required” *Id*
3 at 36. The Supreme Court continued, by noting that the “trial court is in the best position to weigh
4 the fairly competing needs and interests of the parties affected by discovery. The unique character
5 of the discovery process requires that the trial court have substantial latitude to fashion protective
6 orders” *Id*. Ms. Rizzolo’s humiliation, embarrassment and feelings of oppression is not prospective,
7 it is real, and her designation of private and personal information as confidential reflects good cause.
8 (See Exhibit E, Affidavit of Lisa Rizzolo).

9 The public's interest in access to unfiled discovery materials is even less substantial than its
10 interest in court filings and evidence presented at trial. In the *Seattle Times* case, the Supreme Court
11 stated that “pretrial depositions and interrogatories are not public components of a civil trial. Such
12 proceedings were not open to the public at common law ... and, in general, they are conducted in
13 private as a matter of modern practice.” *Id*. at 33; see also *Union Oil Co. v. Leavell*, 220 F.3d 562,
14 568 (7th Cir.2000) (observing that “[m]uch of what passes between the parties remains out of public
15 sight because discovery materials are not filed with the court.”); *Citizens First National Bank of*
16 *Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir.1999) (stating “[i]t is true that pretrial
17 discovery, unlike the trial itself, is usually conducted in private.”).

18 There should be no quarrel that the district court has a duty and the discretion to oversee the
19 discovery process. Pretrial discovery “has a significant potential for abuse.” *Id*. at 34. Discovery
20 “may seriously implicate privacy interests of litigants and third parties.” *Seattle Times Co. v.*
21 *Rhinehart*, 467 U.S. at 35. “There is an opportunity, therefore, for litigants to obtain-incidentally or
22 purposefully-information that not only is irrelevant but if publicly released could be damaging to
23 reputation and privacy.” *Id*. This Court has a substantial interest in preventing any abuse of the
24 discovery process. *Id*. See, e.g., *Baker v. Buffenbarger*, 2004 WL 2124787 (N.D.Ill. Sept.22, 2004)
25 (granting defendant's motion for protective order prohibiting the use of deposition testimony for
26 purposes other than the lawsuit because plaintiffs intended to misuse defendants' deposition
27 testimony to criticize and embarrass the defendants and possibly influence an upcoming union
28 election).

1 In its Opposition (at 7-8), Plaintiffs relies heavily upon *Kamakana v. City and County of*
2 *Honolulu*, 447 F.3d 1172 (9th Cir. 2006). Such reliance is misplaced. A careful reading of the
3 *Kamakana* case reveals that it is factually and/or legally distinguishable from the instant case. In
4 *Kamakana*, the Ninth Circuit examined the presumption of public access to judicial files and records
5 and held that, parties seeking to maintain secrecy of documents attached to dispositive motions must
6 show “compelling reasons” to overcome the presumption of public access. *Id* at 1182. In the case
7 *sub judice*, the “compelling reasons” standard is not applicable as the subject documents are not
8 attached to a dispositive motion. In fact, Plaintiffs acknowledge in their opposition that the
9 appropriate standard is “good cause” which Defendant has met. Even though applying the more
10 demanding “compelling reasons” standards, the Court stated:

11 Even so, the magistrate judge did not summarily order the production of
12 the City’s documents. Rather, she conducted an “exhausting if not
13 exhaustive” *in camera* review of the materials. After this review, the
14 magistrate judge noted that “the testimony and documents attached to the
15 dispositive motions do not contain information that could be used for
16 ‘scandalous or libelous’ purposes,” ***and that these documents did not***
17 ***contain sensitive personal information.*** She also determined that
18 deposition testimony on confidential informants and criminal
19 investigations was “years old” and “largely resulted in criminal
20 indictments which were made public over three years ago.” ***She found,***
21 ***however, that the personal information of Kamakana and various law***
22 ***enforcement officers (home addresses and social security numbers) met***
23 ***the “compelling reason” standard.*** *Id.* at 1182. (Emphasis added.)

18 * * * *

19 In her order, the magistrate judge acknowledged the nature of Kamakana’s
20 claims and concluded that “the testimony and documents concerning this
21 matter are of significant public concern. ***She also determined that the***
22 ***testimony and documents did not contain “sensitive personal***
23 ***information” or information that would be used for “scandalous or***
24 ***libelous” purposes. Finally, as to the documents she ordered to remain***
25 ***sealed, the magistrate judge concluded that disclosure of the officers’***
26 ***home address and social security numbers could expose the officers and***
27 ***their families to harm or identity theft.*** *Id* at 1184. (Emphasis added.)

24 Unlike the *Kamakana* case, the documents that Ms. Rizzolo has sought to keep
25 “Confidential” contain sensitive personal information.

26 In the case *sub judice* Ms. Rizzolo has objected to the discovery of her private financial
27 information. Notwithstanding these objections, Ms. Rizzolo has, in good faith, produced documents
28 that contain information regarding her private assets, under the premise that such matters would be

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**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 26-7 AND/OR
WITH PROVISIONS OF THE STIPULATION AND PROTECTIVE ORDER**

The undersigned counsel hereby certifies that the parties have attempted to promptly resolve the matter informally and/or have conferred in a good faith effort to amicably resolve the issues raised in the motion without the necessity of court action, but to no avail.

DATED this 20th day of August, 2009.

BAILUS COOK & KELESIS, LTD.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August, 2009, I electronically filed a true and correct copy of the foregoing with the Clerk of the Court for the United States District Court, District of Nevada by using the appellate CM/ECF system. All parties were served by the CM/ECF system except the following:

Rick Rizzolo
1760 Amarone Way
Las Vegas, NV 89012

/s/
Kristy DeLong
Employee of Bailus Cook & Kelesis, Ltd.