

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO. 09-cv-01155-TJC-MCR

FEDERICO LUZZI, by and through
Francesca Luzzi in her capacity as the
Personal Representative of the Estate of Federico Luzzi,
GIORGIO GALIMBERTI, ALESSIO DI MAURO,
POTITO STARACE, and DANIELE BRACCIALI,

Plaintiffs,

v.

ATP TOUR, INC.,

Defendant.

**PLAINTIFFS' MOTION FOR RESOLUTION OF OBJECTIONS
TO DEFENDANT'S CONFIDENTIALITY DESIGNATIONS**

FEDERICO LUZZI, by and through Francesca Luzzi in her capacity as the Personal Representative of the Estate of Federico Luzzi, GIORGIO GALIMBERTI, ALESSIO DI MAURO, POTITO STARACE, and DANIELE BRACCIALI (hereinafter referred to collectively as the "Plaintiffs"), by and through their undersigned counsel, hereby file their Motion For Resolution Of Objections To Defendant's Confidentiality Designations, and state in support thereof as follows:

1. On July 13, 2009, Plaintiffs filed this action against the Defendant with the United States District Court for the Southern District of Florida (hereinafter the "Southern District").
2. In the Complaint, Plaintiffs allege that the Defendant breached its fiduciary duty
by:

(a) hurriedly presenting them with, and demanding that they sign, a one page pre-printed, partially completed “consent form” written entirely in English immediately prior to their first tennis match of the year in an attempt to contractually bind them to the official rulebook;

(b) failing to give them an opportunity to review, or provide them with a copy of, the official rulebook at the time it demanded that they execute the consent form;

(c) failing to provide translated copies of the consent forms or rulebook;

(d) discriminately targeting them as low-ranked, less prominent professional tennis players for selective enforcement of trivial violations of the “Anti-Corruption Program” (anti-gambling rule) contained in the official rulebook and by ignoring more serious violations of the program by high-ranked, more prominent professional tennis players in order to avoid negatively impacting its revenue and reputation;

(e) advising them that they had a right to a full and fair hearing on alleged violations of the official rulebook before an “independent” individual when in fact such individual was actually appointed and compensated by the Defendant;

(f) depriving them of a full and fair hearing in other respects; and

(g) imposing grossly disproportionate suspensions and fines to trivial violations of the program.

3. Plaintiffs also seek a declaratory judgment that a valid and binding contract consisting of the official rulebook was not created between the parties by virtue of the manner and means in which the consent forms were presented for their signatures and that they were deprived of a full and fair hearing.

4. On October 8, 2009, Defendant filed its Answer and Affirmative Defenses to the Complaint.

5. On November 23, 2009, this action was transferred from the Southern District to this Court.

6. On March 8, 2010, Plaintiffs filed an Unopposed Motion for entry of a Stipulated Protective Order pursuant to the terms of a confidentiality agreement between the parties (Doc. 65) (hereinafter the "Motion").¹

7. On March 10, 2010, the Court entered an Order granting the Motion and adopting the parties' confidentiality agreement (with a modification noted therein) (Doc. 66).

8. The confidentiality agreement enabled the parties to designate discovery material and deposition testimony as "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," and "PROFESSIONAL EYES ONLY - HIGHLY CONFIDENTIAL" under certain circumstances (hereinafter the "Confidentiality Designations"), preserved the right of a party to object to Confidentiality Designations, and provided a procedure for resolution of any objections.

9. Defendant has designated numerous documents and deposition testimony which support Plaintiffs' allegations as "PROFESSIONAL EYES ONLY - HIGHLY CONFIDENTIAL."

10. Specifically, Defendant has designated the following documents and deposition testimony as "PROFESSIONAL EYES ONLY - HIGHLY CONFIDENTIAL":

- (a) document bearing bate stamp number ATP012547;
- (b) document bearing bate stamp number ATP012535;

¹ As noted in the Motion, the confidentiality agreement was intended to expedite the exchange of discovery materials, facilitate the prompt resolution of disputes over confidentiality, and protect discovery materials entitled to be kept confidential.

- (c) document bearing bate stamp number ATP012473;
- (d) document bearing bate stamp number ATP012481;
- (e) documents bearing bate stamp numbers ATP012537 - ATP012538, ATP012540 - ATP012541, and ATP012545 - ATP012546;
- (f) documents bearing bate stamp numbers ATP012549 – ATP012567;
- (g) documents bearing bate stamp numbers ATP012042 - ATP012043 and ATP012548;
- (h) document bearing bate stamp number ATP012390;
- (i) document bearing bate stamp numbers ATP012950 - ATP012952;
- (j) document bearing bate stamp numbers ATP012948 - ATP012949;
- (k) document bearing bate stamp numbers ATP012945 - ATP012947;
- (l) documents bearing bate stamp numbers ATP012447 - ATP012449, ATP012416 - ATP012418, and ATP012284 - ATP012286;
- (m) documents bearing bate stamp numbers ATP012499, ATP012498, ATP012502, ATP012500, ATP012501, ATP012503, and ATP012504;
- (n) documents bearing bate stamp numbers ATP012239 - ATP012241, ATP012243 - ATP012245, and ATP012165 - ATP012181;
- (o) document bearing bate stamp numbers ATP012954 - ATP013019;
- (p) deposition testimony of Gayle Bradshaw;
- (q) deposition testimony of Mark Young; and
- (r) deposition testimony of Jeff Rees

(hereinafter referred to collectively as “Defendant’s Confidentiality Designations”).

11. Plaintiffs respectfully submit that Defendant's Confidentiality Designations were not made in good faith and were not warranted by the necessity to avoid a substantial risk of serious injury that could not be avoided by a designation of "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL."

12. In *Meharg v. Astrazeneca Pharmaceuticals LP*, No. 1:08-cv-184-DFH-TAB, 2009 WL 2960761, at * 2-3 (S.D. Ind. Sept. 14, 2009), the district court stated as follows:²

When a party raises what appears to be a reasonable objection to a confidentiality designation, and counsel cannot resolve this dispute, the Court can and should scrutinize whether the designation is proper. To minimize such disputes and the need for judicial involvement, and consistent with notions of fair play, all parties must act in good faith when designating documents as confidential. *See* Fed. R. Civ. P. 26(g)(1) (requiring discovery responses to be 'not interposed for any improper purpose'); *compare* Fed. R. Civ. P. 11 (requiring presentations to the court to be not 'for any improper purpose'); *see also* *Shovan v. Allstate Ins. Co.*, No. 08-cv-01564-LTB-BNB, 2009 WL 1537846, at * 1 (D. Colo. June 2, 2009) (citing *Gillard v. Boulder Valley Sch. Dist.*, 196 F.R.D. 382, 386 (D. Colo. 2000)) (requiring that confidential designation be 'based on a good faith belief that the information is confidential'). . . . The good faith requirement is important for two reasons. **First, a confidential designation limits what the opposing party can do with the documents.** *See Arvco Container Corp. v. Weyerhaeuser Co.*, No. 1:08-cv-548, 2009 WL 311125, at * 6 (W.D. Mich. Feb. 9, 2009) ('**It is clear to this court that the indiscriminate use of 'attorneys eyes only' protective orders does pose a significant handicap on the restricted litigant.**') Under this protective order, for example, the receiving party must limit who can view the information, meet and confer with the designating party prior to filing designated information in open court, and return or destroy all confidential material. [Docket Nos. 138 at 4-5, 8.] **Second, a confidential designation is only one step removed from filing under seal, where the Court becomes involved and the public has an interest in the underpinnings of judicial decisions.** *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002) ('But those documents, usually a small subset of all discovery, that influence or underpin the judicial decision are open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality.')

(Emphasis supplied).

² Copies of unreported decisions cited herein are attached as Composite Exhibit "A."

13. The Court in *Meharg* thus required the designating party to make a particularized showing that the information sought is confidential and provide specific examples of competitive harm as opposed to vague and conclusory allegations of confidentiality and competitive harm. *Id.* at * 3.

14. Moreover, Plaintiffs are precluded from referencing the substantive contents of such documents and deposition testimony in connection with summary judgment motions and at trial until the court resolves Plaintiffs' objections to Defendant's Confidentiality Designations.³

15. In *Creative Montessori Learning Center v. Ashford Gear LLC*, No. 09-C-3963, 2010 WL 1418585, at * 2 (N.D. Ill. April 8, 2010), the district court cited to Judge Posner's panel opinion in *Citizens First Nat. Bank of Princeton v. Cincinnati Insurance Co.*, 178 F.3d 943, 945-946 (7th Cir. 1999) as follows:

The order that the district judge issued in this case is not quite so broad as 'seal whatever you want,' but it is far too broad to demarcate a set of documents clearly entitled without further inquiry to confidential status.

* * *

We are mindful of the school of thought that blanket protective orders ('umbrella orders'), entered by stipulation of the parties without judicial review and allowing each litigant to seal *all* documents that it produces in pretrial discovery, are unproblematic aids to the expeditious processing of complex commercial litigation because there is no tradition of public access to discovery materials. [Citations omitted]. The weight of authority, however, is to the contrary. Most cases endorse a presumption of public access to discovery materials, [citations omitted], and therefore require the district court to make a determination of good cause before he may enter the order.

16. Under numbered paragraph 16 of the confidentiality agreement and Federal Rule 26(c), Defendant bears the burden of proving the necessity and appropriateness of Defendant's Confidentiality Designations.

³ The deadline to file motions for summary judgment is September 7, 2010.

17. In accordance with Local Rule 1.09 and numbered paragraph 12 of the confidentiality agreement, Plaintiffs intend to file an unopposed motion to seal the documents and deposition testimony subject to Defendant's Confidentiality Designations in order to enable the Court to appropriately consider and resolve Plaintiffs' objections thereto.

18. Plaintiffs made a good faith effort to resolve their objections to Defendant's Confidentiality Designations pursuant to Local Rule 3.01(g) and numbered paragraph 16 of the confidentiality agreement but, were unable to resolve their objections with the Defendant.

WHEREFORE, Plaintiffs respectfully request this Honorable Court to enter an Order sustaining their objections to Defendant's Confidentiality Designations and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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By: /s/ Robert F. Elgidely

Robert F. Elgidely, Esq.
Florida Bar No. 111856

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Plaintiffs' Motion For Resolution Of Objections To Confidentiality Designations has been furnished by the Court's CM/ECF System to JOHN F. MACLENNAN, ESQ., Smith Hulsey & Busey, P.A., 225 Water Street, Suite 1800, Jacksonville, FL 32202, on the 30th day of August, 2010.

By: /s/ Robert F. Elgidely

Robert F. Elgidely, Esq.