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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, et al.,)

Plaintiffs,)

vs.)

JAMES E. MITCHELL and JOHN
JESSEN,)

Defendants.)

No. CV-15-0286-JLQ

ORDER GRANTING
MOTION FOR PROTECTIVE
ORDER IN PART

BEFORE THE COURT is Defendants’ "Motion for a Protective Order re: Manuscript and Manuscript Drafts" (ECF No. 81)(hereafter the "Motion"). While the Motion is styled as being filed “the Defendants,” the Defendant James Mitchell is the principal Defendant filing the Motion. Response and Reply briefs were filed and the matter was submitted without oral argument.

I. Discussion

Defendant James Mitchell states he is under contract to co-author a book concerning the CIA’s enhanced interrogation program. Mitchell has apparently worked on draft manuscripts and a final manuscript has been prepared. The Motion states: “Plaintiffs seek production of the Manuscript and all drafts thereof in discovery.” (ECF No. 81, p. 2). Defendants’ Motion states the parties have reached a confidentiality agreement, but claims entry of a court order is needed to afford adequate protection to the commercial interests of Crown Publishing (hereafter “Crown”).

In support of the Motion, Mitchell has submitted the Declaration of Tina Constable, a Senior Vice President and Publisher at Crown. (ECF No. 82). Ms.

1 Constable states Crown contracted with Dr. Mitchell on September 9, 2015 to prepare a
2 manuscript “detailing his involvement in the United States Central Intelligence Agency’s
3 Rendition, Detention, and Intelligence Program.” (ECF No. 82, ¶ 4). Ms. Constable
4 states Crown purchased the rights for a “significant sum.” She further states Crown
5 intends to publish the manuscript in the “first quarter of 2017.” (*Id.* at ¶ 7). She contends
6 if the manuscript were to become public in advance of publication, Crown would “suffer
7 direct monetary harm”. (*Id.* at ¶ 10).

8 A manuscript, created by one of the Defendants and concerning the subject matter
9 of this lawsuit, is certainly relevant evidence in this case. Plaintiffs state they requested
10 the manuscript and drafts on August 8, 2016. (ECF No. 86). The court is concerned more
11 than 60 days passed from Plaintiffs’ request before Defendants filed the Motion for
12 Protective Order on October 11, 2016. The standard time for responding to a document
13 request under Fed.R.Civ.P. 34 is 30 days unless otherwise stipulated or ordered by the
14 court. It appears, however, the parties were working on a Confidentiality Agreement (at
15 ECF 86-2), which was executed on September 26, 2016. The Confidentiality Agreement
16 specifically includes “manuscripts that are pending publication” in the definition of
17 “confidential material”. (ECF 86-2 at ¶ 2).

18 Defense counsel states they asked Plaintiffs’ counsel to agree to the entry of a
19 separate Protective Order covering the manuscript and drafts, but Plaintiffs’ counsel
20 allegedly “refused to agree based solely on Plaintiffs’ belief that the Court’s preference
21 was to refrain from entering protective orders.” (ECF No. 83, ¶ 4). Counsel for Mitchell
22 further argues an Order is necessary due to the alleged highly publicized nature of the case
23 and the interaction of Plaintiffs’ counsel with the media. (ECF No. 83, ¶¶ 8-9). Plaintiffs’
24 counsel takes offense at the insinuation they would leak confidential material to the media
25 and calls such argument “insulting, reckless, and completely without basis.” (ECF No. 86,
26 ¶ 3). Plaintiffs’ counsel states: “Plaintiffs have not, and would not, violate the
27 Confidentiality Agreement.” (*Id.*).

1 The parties agree the final manuscript and drafts thereof are relevant to this case and
2 will be kept confidential. Despite such agreement, the parties have now expended time
3 and resources of counsel and the court addressing the issue of whether the monetary
4 interests of a non-party, Crown, are adequately protected by an “agreement” or whether
5 an “order” is required.

6 Rule 26 “confers broad discretion on the trial court to decide when a protective
7 order is appropriate and what degree of protection is required.” *Seattle Times v. Rhinehart*,
8 467 U.S. 20, 35 (1984). Federal Rule of Civil Procedure 26(c)(1) provides a court may
9 “for good cause, issue an order to protect a party or person from annoyance,
10 embarrassment, oppression, or undue burden or expense.” The court may require that
11 “confidential research, development, or commercial information” not be revealed, or be
12 revealed only in a specified way. Fed.R.Civ.P. 26(c)(1)(G). The party asserting good
13 cause “bears the burden, for each particular document it seeks to protect, of showing that
14 specific prejudice or harm will result if no protective order is granted.” *Foltz v. State Farm*
15 *Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003). “Broad allegations of harm, unsubstantiated
16 by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.” *Id.* citing
17 *Beckman Industries v. International Insurance*, 966 F.2d 470, 476 (9th Cir. 1992).

18 Defendant Mitchell has submitted the Declaration of Ms. Constable to establish the
19 harm that would result if the manuscript is not kept confidential. Ms. Constable states
20 Crown purchased the publication rights for a “significant sum,” and a book’s first
21 publication “often has the most substantial and lucrative commercial impact.” (ECF No.
22 83, ¶ 4). Ms. Constable states if the manuscript becomes public prior to its official first
23 publication, “consumers will have little or no impetus to purchase” because it will already
24 be available at no cost. (*Id.* at ¶ 9). She further states early release would “likely disrupt
25 publicity and marketing plans” designed to promote the manuscript. (*Id.* at ¶ 11). Crown
26 admits it would be “difficult, if not impossible, to accurately or fully quantify” the impact
27 on sales that may result from early disclosure. (*Id.* at ¶ 10). Crown has not claimed, nor

1 could it, that its interest in Mitchell's manuscript allegedly containing Mitchell's
2 description of his role in the establishment and operation of the "enhanced interrogation"
3 program precludes the use of the manuscript in this litigation.

4 Ms. Constable's Declaration is also lacking in some specificity. It does not state
5 how much Crown paid for the publication rights. It does not state anticipated sales, or
6 anticipated profit to Crown from the sales. The Declaration also does not state how much
7 Crown has, or will spend, on marketing and publicity. Despite the lack of specificity, it
8 is reasonable to believe early disclosure of the manuscript may result in some loss of sales.
9 Plaintiffs do not challenge the need for the manuscript to remain confidential and have
10 entered into the Confidentiality Agreement without the requirement of a court order.

11 **IT IS HEREBY ORDERED:**

12 1. The Defendants' Motion for Protective Order (ECF No. 81) is **GRANTED IN**
13 **PART**. The court finds the final manuscript of the book co-authored by Defendant James
14 Mitchell which is currently pending publication, and the non-final drafts of some or all of
15 such manuscript are the appropriate subject of a limited in time and content protective
16 order. However, the court declines to enter the overly detailed proposed protective order
17 (ECF No. 81-1).

18 2. Defendants shall produce to counsel for Plaintiffs the final manuscript and drafts
19 thereof **no later than November 4, 2016**. Defendants shall produce the documents
20 marked "CONFIDENTIAL PER ORDER" as they suggested in the proposed order.

21 3. The parties have already agreed to a "Discovery Confidentiality Agreement"
22 (ECF No. 86-2)(hereafter the "Agreement"). The Agreement provides a party may use
23 Confidential material "only for prosecuting, defending, or attempting to settle" the
24 litigation. (*Id.* at ¶ 4.1). The parties shall employ the same standards for the
25 "CONFIDENTIAL PER ORDER" manuscript materials as they have agreed to in the
26 Agreement. The Agreement requires counsels' employees, experts, consultants, etc. to
27 sign an Acknowledgment and Agreement (ECF No. 86-2, Ex. A) prior to receiving the

1 materials. The parties shall modify the Acknowledgment and Agreement for
2 “CONFIDENTIAL PER ORDER” documents to reflect the documents are subject to a
3 Protective Order and to state violation of the Order or Agreement could result in
4 imposition of sanctions and/or proceedings for contempt of court if the court finds a
5 violation of the Protective Order.

6 4. Based upon the representations of Crown as to the time and circumstances for
7 publication of the Mitchell book, this Order is subject to modification or termination upon
8 good cause shown, and in no event shall it continue past **April 3, 2017** or the first
9 publication by Crown of the Mitchell book.

10 **IT IS SO ORDERED.** The Clerk shall enter this Order and furnish copies to
11 counsel.

12 Dated this 25th day of October, 2016.

13 s/ Justin L. Quackenbush
14 JUSTIN L. QUACKENBUSH
15 SENIOR UNITED STATES DISTRICT JUDGE
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