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April 1, 2005

BY ECF
Hon. Steven M. Gold
United States Magistrate Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Padberg, et al. v. McGrath-McKechnie, et al., No. 3355 Civ. 2000 (RJD) (SMG)

Dear Judge Gold:

I represent the plaintiffs in the above-captioned action and write per Your Honor's invitation to brief the question of the protective order pertaining to the deposition of Rudolph Giuliani. The Order of March 18, 2005, issued at defendants' urging, is inconsistent with the law of this Circuit and unfair given the history of this action. It should be rescinded. Mr. Giuliani's testimony, like the actions that led to it, should be available to the public.

Background:

Operation Refusal was decreed at a Mayoral press conference held on November 10, 1999. The former mayor dominated the discussion and expressed personal pride in the policy he announced that day. He said: "[T]he thing I like doing best is changing the things about the city that were wrong that people thought nobody could do anything about. It gives me a great deal of satisfaction…." That announcement, which came a week after a well-publicized complaint by movie star Danny Glover, was reported in all the major New York newspapers as well as on radio and television. It was also reported in newspapers around the country and as far afield as India and Great Britain. The coverage emphasized the mayor's efforts to purge "racist" cabbies.

Two days later, the mayor presided over another press conference at which he announced the results of the first day of Operation Refusal. While the TLC chairwoman and the Police Commissioner both said a few words, Mr. Giuliani did nearly all the talking. At the time, as Mr. Giuliani admitted in his recent testimony, he was at the beginning of a still-unofficial campaign for a seat in the U.S. Senate.

On November 14, Mr. Giuliani made a speech on the radio. In that speech, he said, "I have directed" the NYPD and the TLC to intensify enforcement of the refusal rules. The key aspect of that intensification was the summary suspension of taxi driver licenses and the temporary confiscation of taxicabs, actions that this Court has found unconstitutional.

Following the initial announcement, press attention waned. But the media has reported from time to time on this action. The New York Times and the New York Post reported on the complaint; all the major papers reported Judge Dearie's summary judgment ruling. The Times also reported on the recent summary judgment motions. In addition, newspapers around the country including The Wall Street Journal and The Los Angeles Times have, from time to time, reported on the workings of the TLC courts.

Beyond the mainstream media, there is a dedicated taxi industry press including the Taxi Talk newspaper and television program. Taxi Talk has reported on Operation Refusal and on this action. Its publisher has filed a letter in support of this motion, which is being submitted herewith. It states that taxi divers have a deep and continuing interest in the progress of this action.

Finally, I have written several op-ed articles which have discussed issues raised in this litigation. Former TLC chairwoman Diane McGrath-McKechnie has also written at least one op-ed related to this action and former TLC General Counsel Peter Mazer has recently done so as well. Mr. Mazer's op-ed appeared in a newsletter called The Taxi Insider, which publishes a regular column by TLC Chairman Matt Daus, as well.

At present, the former mayor seeks the limelight on an almost daily basis. Since his deposition, he has, for example, appeared in a television commercial, held a press conference to announce his new law practice, and appeared on The Tonight Show. That he remains by his choosing a very public figure argues in favor of permitting dissemination of his testimony, not against it.

In short, the defendants courted publicity in their conduct leading to this action. There has also been a demonstrable press interest in this action since it was filed. And the witness at issue regularly seeks press attention today.

<u>The Giuliani Deposition</u>:

The Giuliani deposition occurred on March 23, 2005. Before that, for the duration of this action, defendants sought protective orders blocking the former mayor's testimony. Finally, two weeks before the deposition was to begin, defendants sought another protective order limiting the time of the deposition (which was granted), mandating its place (granted), dictating the order of questioning (denied), and forbidding the publication of the deposition videotape (granted). Plaintiffs take issue with this last aspect of the Order that Your Honor issued on March 18, 2005.

Since that order was issued, defendants have contended that a stipulation signed by the parties in September 2003 also made the Giuliani deposition somehow confidential. For

reasons stated in plaintiffs' letter dated April 1, the September 2003 stipulation applies only to documents marked confidential. It has no bearing whatsoever on the instant issue, as defendants admitted when the sought a protective order on different grounds a year-and-a-half later.

<u>Argument</u>:

The law in this Circuit creates a presumption that litigation materials are public. In *In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 145 (2d Cir. 1987), the Court of Appeals stated the general rule: "A plain reading of the language of Rule 26(c) demonstrates that the party seeking a protective order has the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse also is true, i.e., if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection."

In *Agent Orange*, litigation documents had been sealed pursuant to a settlement agreement. Though both parties had accepted the terms of the settlement, the Magistrate Judge, the District Court and the Court of Appeals all agreed the settlement would have to be modified to permit an interested intervenor "a statutory right of access to the subject discovery materials by virtue of Fed. R. Civ. P. 26(c) and Fed. R. Civ. P. 5(d)." 821 F.2d at 141. Here, by contrast, only one party has sought to limit access and there is no legitimate expectation of privacy.

In *S.E.C. v. TheStreet.Com*, 273 F.3d 222 (2d Cir. 2001), the court reiterated the general rule and allowed the press access to depositions, despite a protective order agreed to by the parties. Though the defendants had arguably relied on the protective order, the press interest required "a new balance between privacy rights and the interest of the general public." 273 F.3d at 234.

District courts have followed the rulings of the Court of Appeals. *Flaherty v. Seroussi*, 209 F.R.D. 295 (N.D.N.Y. 2001) involved a Section 1983 action against a town mayor. The defendants "assert[ed] that plaintiff's [intended] to publicize the deposition and make the videotape of it freely available to the media." While the plaintiff did not deny it, the magistrate judge refused to grant a protective order. "The mere fact that some level of discomfort, or even embarrassment, may result from the dissemination of Mayor Seroussi's deposition testimony is not in and of itself sufficient to establish good cause to support the issuance of protective order. To rise to a level of good cause, any such embarrassment must be substantial," the court held.

In *Mathias v. Jacobs*, 197 F.R.D. 29 (S.D.N.Y. 2000), the plaintiffs sought a protective order barring the dissemination of the videotape of a deposition of Alfred DelBello, a former mayor of Yonkers and lieutenant governor of the State of New York. The magistrate judge ruled the movant had not met his burden: "The plaintiff only argues in general terms that defendant's counsel sought irrelevant information and made embarrassing inquiries. But "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." Citing *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir.1986). The court added: "Here, the claims of potential embarrassment are

insufficient. "[B]ecause release of information not intended by the [deponent] 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." *Id. See also Loussier v. Universal Music Group*, Inc. 214 F.R.D. 174 (S.D.N.Y. 2003) (deposition of singing stars would not be sealed despite stipulation of the parties).

Here, defendants cannot conceivably claim any embarrassment, let alone "substantial embarrassment" for Mr. Giuliani. If he is embarrassed at all, it is only because he was required, albeit at a late date, to defend his illegal actions. The former mayor was simply asked for testimony as to his part in an act already ruled unconstitutional, which caused substantial harm to hundreds of taxi drivers. There were no irrelevant inquiries.

Conclusion:

In decreeing Operation Refusal, the former mayor availed himself of all the publicity afforded his office. His actions— taken without even consulting the TLC commissioners— were extremely public. The plaintiff taxi drivers, of course, never enjoyed anything like a similar pulpit for mounting a defense.

Defendants sought publicity in enacting Operation Refusal. The witness still seeks press attention today. Defendants' claim that the Giuliani deposition should be private is as hypocritical as it is contrary to law. There is simply no privacy interest to protect and no basis for a protective order barring publication of his testimony. Accordingly, the order barring copying or publication of the Giuliani videotape and requiring its destruction should be rescinded.

Respectfully submitted,
/s/
Dan Ackman

cc: Dana Biberman, Esq. (by ECF)

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March 30th, 2005

Hon. Steven M. Gold
United States Magistrate Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Padberg, et al. v. McGrath-McKechnie, et al., No. 3355 Civ. 2000 (RJD) (SMG)

Dear Judge Gold:

I am publisher of Taxi Talk, a newspaper that serves the New York City taxi industry with a circulation of 15,000 copies per issue. I also produce the Taxi Talk TV Show, which airs every Friday Night at 10:30 pm on Manhattan Neighborhood Network's channel 67 (…on the Time Warner cable system – *see www.mnn.org*). I am writing in support of plaintiffs' motion to modify the Court's protective order with respect to the deposition of Rudolph Giuliani. The deposition transcript and videotape should be *public* documents.

My readers - *and all of this city's 40,000+ medallion taxi drivers and their families* - have a deep and abiding interest in this action and the Court's rulings regarding 'Operation Refusal.' During Mr. Giuliani's term in office, *thousands* of drivers had their hack licenses suspended or revoked, whether for alleged service refusals or otherwise. Many if not most feared harsh executive enforcement actions and severe rulings of TLC courts. Our viewers and readers were concerned about these policies at the time, and they care about the litigation now. Our newspaper and television show have reported on those policies and on the litigation concerning them.

The former mayor acted very publicly in enacting Operation Refusal, and we believe his testimony in this action should be *equally* public. Though we do not know if we would air any of the deposition testimony, we request – *at the very least* - that the public be granted the unfettered right to the transcript of the deposition testimony.

Thank you for your time Judge Gold, and hope to hear from you soon.

Sincerely,

Bernard Michael Higgins
Publisher - Producer
Taxi Talk Newspaper & TV Show