

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION)	
OF CRUELTY TO ANIMALS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	Civ. Nos. 00-1641, 03-2006
)	(EGS)
RINGLING BROTHERS AND BARNUM & BAILEY)	(Consolidated Cases)
CIRCUS, <i>et al.</i> ,)	
)	
Defendants.)	

**PLAINTIFFS’ MEMORANDUM IN OPPOSITION
TO DEFENDANTS’ MOTION FOR A PROTECTIVE ORDER**

Introduction

Plaintiffs oppose defendants’ request for a blanket protective order for all discovery that defendants produce in this case. As demonstrated below, particularly since discovery has not even begun here, defendants have not met their burden to “articulate specific and particular facts showing good cause” that any particular information that is subject to discovery should be subject to a protective order. Avirgan v. Hull, 118 F.R.D. 257, 261 (D.D.C. 1987). Instead, defendants base their extremely broad request on “stereotyped and conclusory statements” that have no evidentiary support, and that fall far short of the requirements of Rule 26(c). PHE, Inc. v. Department of Justice, 139 F.R.D. 249, 252 (D.D.C. 1991). Accordingly, while defendants are certainly allowed to move for a protective order with respect to specific information that they are required to disclose in discovery and for which they believe they can demonstrate the requisite “good cause,” their sweeping request at this juncture for a protective order that covers any discovery that they mark as “confidential” should be denied.

ARGUMENT

Defendants are not entitled to the blanket protective order they have requested. To begin with, defendants have failed to comply with the requirement of Rule 26(c) that a motion for a protective order be “accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.” Rule 26(c), Fed.R.Civ.P. (emphasis added). Here, although defendants state in their memorandum that plaintiffs have “conspicuous[ly] refus[ed] to agree to any limitations on their use of discovery information” in this case, Defendants’ Memorandum (“Def. Mem.” at 3) (emphasis added), in fact, defendants have never discussed with plaintiffs or their counsel their need for a protective order with respect to any particular information at issue in this case. On the contrary, the sole inquiry defendants have ever made is whether plaintiffs would agree to a blanket protective order for all discovery produced by defendants.¹

Indeed, should defendants identify some particular evidence that they believe should be subject to a protective order because, for example, it would reveal a trade secret or invade an individual’s personal privacy, plaintiffs would certainly be willing to discuss with defendants whether a limited, specifically tailored, protective order may be appropriate, and, absent such an agreement, defendants would be free to move for a protective order at that juncture. However, at

¹Thus, as plaintiffs’ counsel explained at the September 23, 2003 status conference, contrary to the representations made by defendants, the parties did not discuss the advisability of a protective order during their Meet and Confer conference. See Transcript of September 23, 2003 Status Conference at 22-23. In fact, the only time defendants’ counsel has raised this matter with plaintiffs’ counsel was immediately after that status conference, when they asked whether plaintiffs would agree to a sweeping protective order for all records produced by defendants. This is why, in contrast to the specific certification that is required by Rule 23(c), defendants were only able to “certify” that “counsel for plaintiffs has declined to agree to the entry of a protective order.” Def. Mem. at 1, note 1.

this stage of the litigation – when discovery has not even begun – defendants have not identified any such information or any particularized concerns. Instead, they have requested the Court to issue a protective order for all discovery that defendants unilaterally mark as “confidential” in this case, and to shift the burden to plaintiffs to demonstrate that such information is not confidential. See Defendants’ Proposed Order.

However, this approach is completely at odds with defendants’ own previous position in this case that the Court should not make an “abstract ruling in advance of any concrete dispute arising from specific discovery disputes.” Defendants’ Response to Plaintiffs’ Motion To Resolve Discovery Dispute (October 8, 2003) (emphasis added). Moreover, in seeking to make plaintiffs bear the burden of demonstrating that information is not confidential, defendants have turned the process on its head: under the Rules, the presumption is that all discovery is public and the movant bears the burden of demonstrating “good cause” for certain information should be subject to a protective order.

Thus, the Federal Rules of Civil Procedure “create a statutory presumption in favor of open discovery, extending even to those materials not used at trial.” John Does I-VI v. Maharishi Mahesh Yogi, 110 F.R.D. 629, 632 (D.D.C. 1986). Rule 26(b) permits far-ranging discovery, and Rule 26(c) tempers that reach by permitting the Court to issue protective orders “for good cause shown . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” including “a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.” Fed. R. Civ. P. 26(c), 26(c)(7) (emphasis added). However, “in the absence of such proof, the discovery is open to the public.” In Re “Agent Orange” Product Liability Litigation, 104 F.R.D. 559, 567 (E.D. N.Y. 1985) (emphasis added). Rule 26(c)(7) also authorizes the

Court to order that

Here, defendants have failed to carry their burden to demonstrate that “good cause” exists to warrant the issuance of the sweeping protective order they have requested. Rather, they have simply asserted that a protective order is necessary to protect certain unidentified “sensitive” information from being publicly disclosed in some unidentified “abusive” way. Def. Mem. at 4-5. However, it is well established that “the party seeking a protective order must show that disclosure will result in a clearly defined and serious injury to the party seeking protection,” and that “[c]onclusory or stereotypical assertions are insufficient to show good cause.” Exum, M.D. v. United States Olympic Committee, 209 F.R.D. 201, 206 (D. Co. 2002) (emphasis added), *citing* Gulf Oil co. v. Bernard, 452 U.S. 89, 102 n.16 (1981); *accord* PHE, Inc., 139 F.R.D. at 252; Avirgan v. Hull, 118 F.R.D. at 261-62. Here, however, defendants have provided only “conclusory” and “stereotypical” assertions in support of their motion.

Thus, defendants assert that they should be granted a blanket protective order because, according to them, plaintiffs are “animal rights activists whose avowed goals include bringing an end to animal circus performances.” Def. Mem. at 2. However, not only is defendants’ pronouncement devoid of any citations or evidence whatsoever, but, absent some further link between defendants’ self-serving characterization of plaintiffs and some impermissible harm that would flow from conducting discovery here, it is also utterly irrelevant to whether defendants should be granted a protective order.

While plaintiffs do not know exactly what Ringling means by the term “animal rights activist,” and why the use of that term somehow automatically entitles defendants to a blanket protective order in this case, it may be useful to again describe who the plaintiffs are and their interest in this case. Plaintiff Tom Rider is a former Ringling Bros. employee, who worked in

the elephant barns at the circus for two and a half years, during which time he became extremely fond of the elephants, and formed a deep personal bond with them. See Complaint ¶ 18. He does not have an “avowed goal” of “bringing an end to animal circus performances,” but, rather, like the other plaintiffs in this case, simply seeks to end the abusive and unlawful treatment of endangered Asian elephants in Ringling’s circus. See Complaint ¶ 22. The three organizational plaintiffs are all national animal protection organizations. The American Society for the Prevention of Cruelty to Animals, founded in 1866, is the nation’s oldest humane organization, and, along with carrying out its national mission to prevent the abuse and neglect of all animals, it has been endowed by the New York State legislature with the authority to investigate and enforce that state’s animal cruelty laws. See NY Agric & Mkts Law, § 373(1). The Fund for Animals, founded in 1967 by social historian and author, Cleveland Amory, and the Animal Welfare Institute, founded in 1951 by Christine Stevens, are leading animal protection organizations in this country that have been instrumental in the passage of several federal statutes designed to protect animals, including the Animal Welfare Act, 7 U.S.C. 2141 *et seq.*, and the Humane Slaughter Act, 7 U.S.C. § 1701 *et seq.*

All of these plaintiffs have availed themselves of their right under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), to bring this case, which, based on eye-witness accounts and investigative findings by the United States Department of Agriculture, challenges Ringling’s routine use of force and confinement to train and control the endangered Asian elephants it uses in its circus performances, as violating the prohibition against the “taking” of an endangered species under the Endangered Species Act, 16 U.S.C. 1538(a). See, e.g., Complaint ¶¶ 19, 80-84. Furthermore, this issue – whether wild animals trained with force and confinement should be used in entertainment – is one of great public interest that has been debated for years

in this country and many others. See, e.g., H.R. 2929, 106th Cong. (1999) (Legislation to ban the use of elephants in circuses) (Exhibit A) ; see also www.circuses.com/cban2.html (Animal Acts banned in Australia, Brazil, Canada, Costa Rica, Finland, Greece, Ireland, and many local jurisdictions in the United States). In fact, defendants themselves have been extremely active in this debate. See, e.g., Ringling Bros. Press Release (June 12, 2000) (Exhibit B). Therefore, the mere fact that plaintiffs have discussed this issue in the media and even advocated their position that such treatment of endangered species should not be permitted for entertainment, hardly demonstrates that defendants or anyone else will be unfairly harmed in any serious way in the absence of a blanket protective order. Indeed, this public debate – which specifically includes Ringling’s treatment of endangered elephants – will continue regardless of whether documents produced in discovery are made available to the public.

Indeed, other than labeling plaintiffs “animal rights activists,” the only evidence defendants rely on to demonstrate the need for a broad protective order covering every document that they may produce in discovery is that the plaintiffs have disseminated to the public records they obtained under the Freedom of Information Act concerning the United States Department of Agriculture’s failure to enforce the Animal Welfare Act against Ringling Brothers, and that they have also exercised their First Amendment right to advise those who oppose the mistreatment of endangered elephants not to patronize the Ringling Bros. circus. See Def. Mem. at 3-4; see also NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (recognizing constitutional right to boycott businesses to force compliance with the law). However, those actions do not even remotely support Ringling’s request for a blanket protective order here. Indeed, Ringling’s argument is akin to saying that where any public interest “activist” is a plaintiff in any civil case – e.g., an environmental organization, a civil rights group, or even a labor union – a blanket

protective order is automatically warranted because of public positions that the group takes on the underlying issue of public concern. But that obviously is not, and should not, be the law. On the contrary, in determining whether the movant for a protective order has sufficiently demonstrated “good cause” to overcome the general presumption that discovery is conducted in open, the court must take into consideration “whether the case involves issues important to the public.” Exum, 209 F.R.D. at 206 (emphasis added).

In fact, arguments extremely similar to Ringling’s were rejected in Cipollone v. Liggett Group, Inc., 822 F.2d 335, 345-46 (3rd Cir. 1987) – a case against the tobacco industry – where defendants’ asserted that plaintiffs “intended to disseminate to the general public selected portions of the material received by them in discovery” concerning the health hazards associated with smoking, and “to accompany such dissemination with slanted ‘explanations’ of the significance of particular documents.” Compare Def. Mem. at 2 (“[p]laintiffs selectively used the information obtained from their FOIA requests to present an unfair and one-sided picture of USDA’s regulatory oversight of defendants”). However, observing that the defendants “fail[ed] to provide the district court with a single document as a concrete example of the type of harm they would suffer,” and that “petitioners made only broad allegations of harm,” the Third Circuit upheld the district court’s denial of a sweeping protective order. See also John Does I-VI v. Yogi, 110 F.R.D. 629, 634 (D.D.C. 1986) (“[d]efendants have not proved to the Court with sufficient specificity that the materials sought contain proprietary information such as to justify a blanket seal of discovery material”) (emphasis added); United States v. International Business Machines Corp., 67 F.R.D. 40, 46 (S.D. N.Y. 1975) (an applicant for a protective order must demonstrate “that disclosure of allegedly confidential information will work a clearly defined and very serious injury to his business”) (emphasis in original).

Similarly in Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984), the principal case on which defendants rely, the trial court refused to issue the blanket protective order requested by the plaintiffs on the grounds that the facts alleged in support of that order “were too conclusory to warrant a finding of ‘good cause,’” as required by Rule 26(c) of the Washington Court Rules. 467 U.S. at 25 (emphasis added). Thus, it was only after the plaintiffs submitted affidavits detailing actual threats of physical harm to individuals, as well as incidents of “attacks, threats, and assaults” directed at members of the plaintiff organization, that the trial court issued a tailored protective order concerning particular financial and membership information. See 467 U.S. at 26-27; see also PHE Inc. (protective order denied where movant’s argument was “wholly speculative and [did] not rise to the level of specific real harm required to be shown for entry of a protective order”); United States v. MWI, 209 F.R.D.21, 26 (D.D.C. 2002) (protective order issued only where movant demonstrated that particular information at issue qualifies as a “trade secret or other confidential research, development, or commercial information”); Avirgan v. Hull, 118 F.R.D. at 261 (protective order not warranted where allegations that discovery will result in “annoyance, embarrassment, [and] oppression” are not supported with any proof of such harm).

In sum, defendants are certainly not entitled to the requested blanket protective order, although they are certainly free, at the appropriate time, to seek such an order for a particular document or item of information for which they can demonstrate “specific real harm,” PHE, Inc. – such as trade secrets or information that would result in an invasion of personal privacy. Indeed, as stressed above, plaintiffs would strive to accommodate any legitimate request for confidentiality by defendants with regard to particular categories of information. But that is a far cry from Ringling’s effort to throw a cloak over all materials bearing in any way on its treatment

of endangered Asian elephants – an approach that is completely at odds with the general “presumption in favor of open discovery.” John Does I-VI, 110 F.R.D. at 632.

CONCLUSION

For the foregoing reasons, defendants’ motion for a protective order should be denied.

Respectfully submitted,



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