UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 1:03-CV-02006 (EGS)**
RINGLING BROS. AND BARNUM & BAILEY CIRCUS, et al.,	:	
Defendants.	:	

DEFENDANT FELD ENTERTAINMENT INC.'S EXPEDITED MOTION TO ENFORCE THE COURT'S SEPTEMBER 26, 2005 ORDER AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Defendant Feld Entertainment, Inc. ("FEI") hereby moves the Court for an order enforcing this Court's order dated September 26, 2005 (Docket No. 50) ("9-26-05 Order") (Ex. 1 hereto). ***FEI requests that the Court consider and rule on the instant motion on an expedited basis due to the nature of the relief requested.*** Accordingly, FEI requests that plaintiffs file a response to FEI's motion no later than June 18, 2007, and that FEI file any reply in support of the motion no later than June 21, 2007.

The 9-26-05 Order resulted from a discovery dispute between the parties in which the Court, *inter alia*, granted in part and denied in part a motion by FEI for protective order. *Id.* at 1. In doing so, the Court expressly admonished the plaintiffs that:

> the purpose of discovery is to produce and seek evidence for use *in litigation* and the Court will not take lightly any abuse of the discovery process for purposes of publicity or to argue the merits of plaintiffs' claims in the media, as opposed to the Court.

Id. at 2 (original emphasis).

As demonstrated below, plaintiffs are in violation of this clear direction from the Court. They have issued press releases or internet press postings that refer to and quote from discovery documents that have no source other than having been produced by FEI in this case pursuant to plaintiffs' production requests and orders of the Court. Thus, contrary to the Court's admonition, plaintiffs are abusing the discovery process in this case for the purposes of publicity and to argue the merits of their claims in the media. Accordingly, FEI requests that the Court order plaintiffs immediately to cease and desist their violation of the 9-26-05 Order by removing from their websites, press releases and other media materials all references to discovery information that has been produced by FEI to plaintiffs in this case.

Pursuant to Local Rule 7.1(m), counsel for defendant hereby certify that they have conferred with counsel for plaintiffs in good faith, in an effort to encourage plaintiffs from improperly using discovery material contrary to the 9-26-05 Order. However, as the correspondence attached hereto shows, the parties have reached a stalemate on this issue. Ex. 2 hereto (paginated compilation of correspondence). Plaintiffs apparently believe that they are in compliance with the 9-26-05 Order and have the unfettered right to distribute freely anything they have obtained in discovery in this case that is not under a protective order. Ex. 2 hereto at pp. 5-7. Indeed, plaintiffs actually threatened FEI with "sanctions" if FEI were to bring to the Court's attention FEI's view that plaintiffs' actions are contrary to the Court's admonition. *Id.* at p. 10. As shown below, plaintiffs' are grossly mistaken as to what they can do with discovery information in this case.

Moreover, because plaintiffs are engaged in ongoing violations of the 9-26-05 Order which can have adverse collateral consequences on the business and reputation of FEI that could

continue unabated until the Court has an opportunity to reach the merits of the case,[1] FEI respectfully requests that the Court give this motion expedited consideration.

[1] On September 7, 2006, FEI filed a motion for summary judgment that has been fully briefed by the parties. *See* Docket Nos. 85-87, 96, 97, 100, 113, 122, 123, 145 & 147.

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO ENFORCE THE COURT'S SEPTEMBER 26, 2005 ORDER

INTRODUCTION AND BACKGROUND

The 9-26-05 Order stemmed from a dispute over discovery of, among other things, the veterinary records for FEI's Asian elephants. On January 25, 2005, plaintiffs moved to compel discovery from FEI. (Docket No. 27). FEI opposed the motion, *see* Docket No. 29, and also moved for a protective order against public dissemination of the veterinary records, *see* Motion for Protective Order (Feb. 15, 2005) (Docket No. 30).

One of the principal concerns that FEI raised in the briefing on these motions was the potential for plaintiffs to misuse in the media information obtained in discovery about FEI's Asian elephants. *See* Memorandum in Opposition to Plaintiffs' Motion to Compel Defendants' Compliance with Plaintiffs' Discovery Requests at 26-27 (Feb. 15, 2005) (Docket No. 29) (pointing to the potential for "mischaracterizations or out-of-context quotations" that "could wind up as fodder for publicity-hungry activists such as plaintiffs"); Reply Memorandum in Support of Defendant's Motion for a Protective Order at 7 (Mar. 16, 2005) (Docket No. 38) (pointing out that two of the plaintiffs had "already used a videotape obtained in discovery in this case to mount a public-relations attack on the care defendant provides to its elephants").

For their part, plaintiffs never disclaimed any intent to disseminate publicly the information they were seeking in discovery. Instead, they dismissed FEI's concerns as "speculative and unsubstantiated" and derided FEI for the allegedly "bald assertion that there is something nefarious about plaintiffs exercising their First Amendment rights to publicly criticize defendants' [*sic*] treatment of elephants in their circuses . . . ." Plaintiffs' Opposition to Defendants' Motion for a Protective Order at 10-11 (Mar. 4, 2005) (Docket No. 34). In short,

plaintiffs essentially took the position that they had a First Amendment right to do anything they wanted with respect to discovery information obtained in this case that was not subject to a protective order. Transcript of Sept. 16, 2005 Hearing at 25 (Docket No. 51) (excerpts attached hereto as Ex. 3) ("That's our First Amendment right").

Ruling on the parties' motions, the Court granted plaintiffs' motion to compel as to the veterinary records and referred the other issues in plaintiffs' motion to Magistrate Judge Facciola. 9-26-05 Order at 1. As to FEI's motion for protective order, the Court granted that motion in part and denied it in part. *Id.* at 2. Confidential treatment was accorded the veterinary records used in medical research and, on that subject, the Court entered the protective order proposed by plaintiffs. *Id.*

The Court also responded to FEI's concern that plaintiffs inappropriately had used, and would continue to use, discovery material in the media for publicity purposes. While the Court did not enter a protective order that seals documents from public view, neither did the Court embrace plaintiffs' position that discovery materials not under protective order can be freely distributed outside the litigation process. Instead, the Court included the following provision in the 9-26-05 Order:

> Plaintiffs are admonished, however, that the purpose of discovery is to produce and seek evidence for use *in litigation* and the Court will not take lightly any abuse of the discovery process for purposes of publicity or to argue the merits of plaintiffs' claims in the media, as opposed to the Court.

Id. at 2 (original emphasis). The admonition included in the Court's order appeared to emanate from the following colloquy between the Court and counsel for plaintiffs during the September 16, 2005 hearing on the parties' motions:

> THE COURT: But your argument was that you were going to use these documents in the media, not misuse them, but just use them.

> MS. MEYER: What's wrong with that? That's what the public proceeding is all about. That's our First Amendment right. Again, they go all over the country talking about what they do and how wonderful their care is, et cetera. What's wrong with my client saying, well, maybe, but look at this document, it says this animal had all kinds of wounds, draw whatever conclusions you want to.
>
> THE COURT: Well, you just hit on a point, though, draw whatever conclusions. Is that fair to the defendant, though? Suppose the wounds were caused as a result of non-negligent acts on the part of the defendant. Is that really fair to have that information out in the media with the admonition go ahead and draw whatever conclusions you want? Is that really fair? . . .
>
> MS. MEYER: I think it's perfectly fair, Your Honor, because they can say, well, no, that's not true.
>
> THE COURT: Wait a minute. ***Then you're litigating in a public forum***, though. . . . I think I disagree with you when you say, sure we may use them as our First Amendment right and the public can draw whatever conclusions they want to. Well, it's not up to the public to do that. . . . ***I don't want to turn this into litigation in the public arena.***

Ex. 3 hereto at 25-27 (emphasis added).

Plaintiffs have disregarded the clear language of the Court's admonition. Confirming the concerns that FEI raised in its motion for protective order (and which plaintiffs brushed aside as "speculative and unsubstantiated"), plaintiffs have used discovery information produced by FEI in this case to seek publicity and to argue the merits of plaintiffs' claims in the media.

(1) A March 21, 2007 press release on the website of plaintiff American Society for the Prevention of Cruelty to Animals ("ASPCA") states that "[f]our non-profit organizations, including ASPCA® . . . are currently litigating a case under the federal Endangered Species Act against [FEI], regarding the circus' mistreatment of Asian elephants, including with a sharp training tool called a 'bull hook' or 'ankus.'" Press Release, The American Society for the Prevention of Cruelty to Animals (Mar. 21, 2007) (*available at* http://www.aspca.org/site/PageServer?pagename=press_032107_2 (last visited June 11, 2007))

(Ex. 4 hereto). The press release makes specific reference to documents that FEI produced in the discovery process: "Several items have recently surfaced that shed new light on the inhumane treatment of these magnificent animals by the Circus, including new e-mails from Ringling employees." *Id.* The press release refers to or quotes from at least three documents that FEI produced in discovery in this case. *Compare id. with* Ex. 5 hereto (Document Nos. FEI 15024, 15026-27 & 16646-48).

(2) An April 27, 2007 press release by plaintiff, the Animal Protection Institute ("API"), made specific references to this lawsuit and the contents of the documents FEI produced:

> New evidence of circus elephant abuse brought to light by federal lawsuit against Ringling
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> ...
>
> The Sacramento-based Animal Protection Institute, co-sponsor of AB 777, is a plaintiff in a federal lawsuit against Ringling Bros. and Barnum & Bailey circus for violations of the Endangered Species Act in their treatment of Asian elephants. Several items of concern have recently surfaced during the "discovery" process of this lawsuit that shed new light on the inhumane treatment of circus elephants including new emails from Ringling employees....

News Release, Animal Protection Institute, Former Ringling employee joins legislator and elephant experts to rally for humane legislation: New evidence of circus elephant abuse brought to light by federal lawsuit against Ringling (April 23, 2007) (*available at* http://www.api4animals.org/press?p=1202&more=1 (last visited June 11, 2007)) (Ex. 6 hereto). Like ASPCA's press release, API's press release referred to and quoted from the same discovery material produced by FEI. *Compare id. with* Ex. 5 hereto (Document Nos. FEI 15024, 15026-27 & 16646-48).

(3) A May 15, 2007 press release by the Humane Society of the United States ("HSUS")[2] makes specific reference to the instant lawsuit and to the contents of discovery material produced by FEI to plaintiffs:

> Recently released evidence exposes animal abuse by the Ringling Brothers and Barnum and Bailey Circus. . . . The documents recount trainers using painful bullhooks to subdue and discipline the circus' performing Asian elephants during training. . . .
>
> The new evidence stems from a groundbreaking lawsuit against the parent company of the circus, Feld Entertainment. Filed by The Fund for Animals, American Society for the Prevention of Cruelty to Animals, The Animal Protection Institute, Animal Welfare Institute, and Tom Rider, a former employee of Ringling Bros., the lawsuit charges the circus with violating the federal Endangered Species Act. . . .

Press Release, The Humane Society of the United States, New Evidence of Cruelty Mounts as Ringling Bros. Circus Comes to Wilkes Barre (May 15, 2007) (*available at* http://www.hsus.org/press_and_publications/press_releases/new_evidence_of_cruelty_wilkesbarre.html (last visited June 11, 2007)) (Ex. 8 hereto). This item also refers to and quotes from a discovery document produced by FEI. *Compare id. with* Ex. 5 hereto (Document No. FEI 15026-27). On May 29, 2007, HSUS issued three additional press releases that were identical to its May 15, 2007 release.[3]

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[2] HSUS merged with or acquired the Fund for Animals ("FFA"), one of the organizational plaintiffs in this case. HSUS therefore is bound by any order that this Court has issued against FFA in this case. In addition, HSUS is advertising this case as part of its current docket on its website. *See* http://www.hsus.org/in_the_courts/docket/ringling_brothers_elephants.html (last visited June 11, 2007) (Ex. 7 hereto).

[3] Ex. 9 hereto: Press Release, The Humane Society of the United States, New Evidence of Cruelty Mounts as Ringling Bros. Circus Comes to Tupelo (May 29, 2007) (*available at* http://www.hsus.org/press_and_publications/press_releases/ringling_bros_tupelo.html (last visited June 11, 2007)); Press Release, The Humane Society of the United States, New Evidence of Cruelty Mounts as Ringling Bros. Circus Comes to Colorado Springs (May 29, 2007) (*available at* http://www.hsus.org/press_and_publications/press_releases/ringling_bros_colorado_springs.html (last visited June 11, 2007)); Press Release, The Humane Society of the United States, New Evidence of Cruelty Mounts as Ringling Bros. Circus Comes to Pensacola (May 29, 2007) (*available at*

On April 30, 2007, counsel for FEI sent a letter to counsel for plaintiffs stating that one or more of the plaintiffs were using documents in a manner expressly prohibited by the 9-26-05 Order and requesting that the plaintiffs "immediately cease and desist their violation of [this Court's] September 26, 2005 order." Ex. 2 hereto at pp. 1-2. By letter dated May 3, 2007, plaintiffs' counsel denied that plaintiffs were violating the Court's order, arguing that the documents that plaintiffs admitted disseminating "were not covered by a protective order." *Id.* at p. 6. Plaintiffs refused to cease and desist because "plaintiffs in this case were not ordered to keep all documents obtained in discovery secret," and because the documents defendants complained about "are already a mater of public record in a public proceeding." *Id.* at p. 6, 7. Plaintiffs claimed that this Court's order only admonished them from the dissemination of veterinary records. *Id.* at p. 5. Plaintiffs threatened to seek "sanctions" should FEI bring this matter to the attention of the Court. *Id.* at p. 10. FEI's motion to enforce thereupon followed.

ARGUMENT

The 9-26-05 Order is a reasonable exercise of the Court's authority, both under Fed. R. Civ. 26(c) and the Court's inherent powers, to control the discovery process and abuses thereof. It is settled that a civil litigant does not have a First Amendment or common law right to disseminate, in advance of trial, information gained through the pretrial discovery process. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-36 (1984) (answering in the negative the question "whether a litigant's freedom comprehends the right to disseminate information that it has obtained pursuant to a court order that both granted it access to that information and placed restraints on the way in which the information might be used"); *Boehner v. McDermott*, No. 04-7203, 2007 U.S. App. Lexis 10001, at *12 (D.C. Cir. May 1, 2007) (*en banc*) ("[p]arties to civil

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http://www.hsus.org/press_and_publications/press_releases/ringling_bros_pensacola.html (last visited June 11, 2007)).

litigation d[o] not 'have a First Amendment right to disseminate, in advance of trial, information gained through the pre-trial discovery process'") (*quoting Seattle Times*); *Roberson v. Bair*, Civ. Act. No. 06-0282, 2007 U.S. Dist. Lexis 34145, at *5 (D.D.C. May 10, 2007) (Facciola, J.) ("any supposed presumption in favor of public access to discovery material . . . did not survive the Supreme Court's conclusion in *Seattle Times*").

"Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." *Seattle Times*, 467 U.S. at 34. Therefore, restraints that a court places "on discovered, but not yet admitted information, are not a restriction on a traditional public source of information." *Id.* at 33. Courts have a substantial interest in preventing the abuse of the discovery process, as well as the inherent power to prevent it. *Id.* at 35. *See also Int'l Products Corp. v. Koons*, 325 F.2d 403, 407-08 (2d Cir. 1963) ("we entertain no doubt as to the constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another by use of the court's processes").

Thus, a federal district court has ample authority and discretion in fashioning orders to govern the dissemination of information generated during the discovery phase of a civil case – ranging from completely sealing parts of the court file to more modest restrictions that simply prohibit distribution of discovery information outside the litigation process. The 9-26-05 Order falls within this range. While the order does not have the effect of shielding documents utilized to litigate this case from public view, it nonetheless admonishes plaintiffs not to use such material outside the litigation process for purposes of publicity and to argue the case in the media. Such a restriction is entirely reasonable and lawful. *See Seattle Times*, 467 U.S. at 27 (trial court's order "prohibited petitioners from publishing, disseminating, or using the

information [obtained through the discovery process] in any way except where necessary to prepare for and try the case"); *In re Korean Air Lines Disaster of September 1, 1983*, 597 F. Supp. 621, 622-23 (D.D.C. 1984) (rejecting challenge to order that prohibited parties from discussing discovery material with the media until after the case had been tried).

There can be no serious argument that plaintiffs' press releases and website materials described above are contrary to the Court's 9-26-05 Order. There is no dispute that the documents referred to in the press releases and on the websites are documents that plaintiffs obtained from FEI in discovery in this case and from no other source. Nor can there be any doubt that the purposes of these press releases and websites are to seek publicity and to argue the merits of plaintiffs' claims against FEI in the media. This is obvious from the face of the press releases and the websites themselves. Thus, plaintiffs are doing exactly what the Court admonished them not to do, *i.e.*, "abus[ing] . . . the discovery process for purposes of publicity or to argue the merits of plaintiffs' claims in the media, as opposed to the Court." 9-26-05 Order at 2.

Plaintiffs have attempted to justify their actions on two grounds, neither of which has any merit. *First*, plaintiffs claim that the Court's 9-26-05 Order is limited to veterinary records. Ex. 2 hereto at p. 5. It is not. No such limitation appears in the Court's admonition. While veterinary records may have been the root of the dispute that gave rise to the 9-26-05 Order, the concern that FEI raised in its motion for protective order was broader; FEI pointed out to the Court that plaintiffs had already utilized discovery material (other than vet records) inappropriately in the media to conduct a public relations campaign against FEI. Docket No. 38 (at p. 7); Ex. 3 hereto at 37-38. The 9-26-05 Order was responsive to FEI's concerns and to the concern expressed by the Court at the September 16, 2005 hearing that this case not be "turned

into litigation in the public arena." Ex. 3 hereto at 26-27. *See also id.* at 27 ("I don't want this to turn into a media circus – no pun"). The Court's order could have been limited to veterinary records, but it was not. By its own terms, the order admonishes plaintiffs against "***any abuse of the discovery process*** for purposes of publicity or to argue the merits of plaintiffs' claims in the media as opposed to the Court," 9-26-05 Order at 2 (emphasis added) – not just discovery abuses based on vet records.

Second, plaintiffs apparently believe that they are not bound by the Court's admonition as long as whatever discovery documents they distribute to the media have already been filed in the case as an exhibit. Ex. 2 hereto at pp. 6-7. This reasoning is seriously flawed. In the first place, it renders the Court's admonition a nullity. The admonition directs plaintiffs to confine their use of discovery material to the litigation. It plainly does not license them to conduct a publicity campaign with discovery documents as long as they have first been filed with the Court.

Moreover, plaintiffs' apparent premise, namely, that any court-filed document is a publicly accessible judicial record that plaintiffs can do with as they wish, is simply incorrect. As shown above, civil litigants do not have a First Amendment or common law right to distribute pre-trial discovery material outside the litigation process. *Seattle Times*, 467 U.S. at 32-34. And while there is a common law right of public access to judicial records, "not all documents filed with courts fall within its purview -- at least, not in this circuit." *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997); *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1335-36 (D.C. Cir. 1985) (no common law right of access to prejudgment records in civil cases). "[W]hat makes a document a judicial record and subjects it to the common law right of access is the role it plays in the adjudicatory process." *El-Sayegh*, 131 F.3d at 163. A document that plays no role in the adjudicatory process because it was not the basis for a court ruling falls

outside the ambit of the common law right to judicial records – whether or not it is physically contained in the court file. *Id.* (ruling that a document attached as an exhibit to a motion that was not ruled on by the court was not a judicial record subject to public access). Thus, attaching a discovery document to a court filing does not turn it into a judicial record; it must have been the basis for judicial action to be a judicial record. *Id.* at 162 ("[t]his principle, of course, assumes a judicial decision. If none occurs, documents are just documents; with nothing judicial to record, there are no judicial records").

The discovery documents that plaintiffs have made the centerpiece of their press releases and put on their websites, have not been the basis of any ruling by this Court. They have not been attached to any motion that has been acted upon by this Court. Therefore, these materials are not "judicial records." Plaintiffs' apparent belief that they can evade the Court's order on the dissemination of discovery information by utilizing the court record in this case as a "bulletin board" for discovery materials that plaintiffs want to get into the hands of the media is sorely misguided. *Cf. Reporters Committee*, 773 F.2d at 1333 ("[e]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, . . . courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption . . . or as sources of business information that might harm a litigant's competitive standing") (citations omitted).

"A motion to enforce judgment is the usual method for requesting a court to interpret its own judgment." *Heartland Hosp. v. Thompson,* 328 F. Supp. 2d 8, 11 (D.D.C. 2004) (*citing SEC v. Hermil, Inc.*, 838 F.2d 1151, 1153 (11th Cir. 1988)). "'Such a motion should be utilized to compel compliance with a prior decision, especially in cases of willful or deliberate violation of a court order.'" *Id.* (citation omitted). *See also Armstrong v. Executive Office of the President,*

821 F. Supp. 761, 764 (D.D.C. 1993) (a court has inherent authority to "coerce obedience to a lawful Order"). A motion to enforce judgment should be granted when a party demonstrates that the opposing party has not complied with a judgment entered against it, "even if the noncompliance was due to misinterpretation of the judgment." *Heartland*, 328 F. Supp. 2d at 11 (citation omitted).

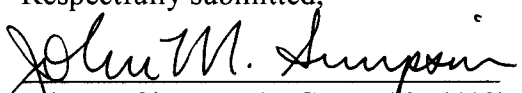
Plaintiffs' actions are contrary to the 9-26-05 Order because plaintiffs are using discovery documents to seek publicity and to argue the merits of their case in the media, and the order expressly admonishes plaintiffs to refrain from such actions. Accordingly, the Court should enter an order enforcing the 9-26-05 Order and directing plaintiffs to remove all references to discovery materials produced in this case from plaintiffs' press releases, websites and other publicly disseminated media and to refrain from including discovery materials in such media until further order of the Court.

CONCLUSION

Accordingly, for the reasons stated herein, defendant's motion should be granted.

Dated this 11th day of June, 2007.

Respectfully submitted,



John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Michelle C. Pardo (D.C. Bar #456004)
George A. Gasper (D.C. Bar #488988)

FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-0200
Facsimile: (202) 662-4643

Counsel for Defendant Feld Entertainment, Inc.