UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, *et al.*,	)	
Plaintiffs,	)	
v.	)	
	)	Civ. No. 03-2006 (EGS/JMF)
RINGLING BROTHERS AND BARNUM & BAILEY CIRCUS, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO FELD ENTERTAINMENT INC.'S "MOTION TO ENFORCE THE COURT'S SEPTEMBER 26, 2005 ORDER" AND REQUEST FOR A HEARING ON THIS MATTER

Introduction

Having tried every trick in the book to keep this long-pending case under the Endangered Species Act from ever being presented at a public trial on the merits, simultaneously defendants are now simultaneously trying to shut down the plaintiffs' ability to share with the public documents that they obtained in discovery that are not covered by a protective order and that have already been submitted as Exhibits in opposition to defendants' motion for summary judgment, until this case is tried on the merits. See Defendant Feld Entertainment Inc.'s Expedited Motion To Enforce The Court's September 26, 2005 Order ("Def. Mot.") (Docket No. 152) at 2-3 (seeking an order requiring plaintiffs to "cease and desist" from sharing with the public and the media "references to discovery material" "until the Court has an opportunity to reach the merits of the case") (emphasis added). Thus, if defendants have their way, the public will never know whether plaintiffs' ESA claims have any validity – while defendants continue to tell the public that they give their elephants the highest

standard of care and use only "positive reinforcement" to train them to do tricks, and that plaintiffs are falsifying their allegations that defendants beat the elephants with bull hooks and other instruments. See *infra* at 20-21.

However, because none of the documents about which defendants complain are covered by a protective order, and because all of these records go to the heart of plaintiffs' claims in this case, plaintiffs have not violated either the actual terms of the Court's September 26, 2005 Order, or the Court's admonishment that plaintiffs not engage in any "abuse of the discovery process." See Court's Order (September 26, 2005) at 2. On the contrary, unlike defendants, who are using discovery to harass the plaintiffs about their financial affairs and to delay this case seemingly indefinitely, plaintiffs have scrupulously heeded the Court's admonishment that "the purpose of discovery is to produce and seek evidence for use *in litigation.*" See id. (emphasis in original).

Further, defendants' efforts to have this Court impose an impermissible gag order on plaintiffs through the guise of a "motion to enforce" the Court's September 26, 2005 Order is a complete abuse of the judicial process. Accordingly, defendants' counsel should be sanctioned, and made to reimburse plaintiffs for the attorneys' fees and costs associated with having to respond to this frivolous motion. See 28 U.S.C. § 1927 (court may require attorneys to pay expenses and attorneys's fees for "unreasonably" and "vexatiously" multiplying the proceedings). Because of the gravity of defendants' accusation – i.e., that plaintiffs have violated a Court order – plaintiffs respectfully request a hearing on this matter.

BACKGROUND

To demonstrate that defendants' motion is completely unfounded, it is necessary to provide the Court with certain relevant background information.

A. Defendants' Unsuccessful Attempts To Litigate This Case In Secret

1. The Court Has Already Denied Defendants' Request For A Broad Protective Order Covering All Documents Obtained In Discovery.

On October 8, 2003, defendants moved for a protective order that would have covered all documents that defendants produced in discovery in this case. See Docket No. 5. On November 25, 2003, this Court denied that motion and held that "[d]efendant may move for a protective order with respect to particular specified information . . . upon a showing of 'good cause,' as permitted by Rule 26(c) of the Federal Rules of Civil Procedure." Order (November 25, 2003) (Docket No. 15), quoting Fed. R. Civ. P. 26(c) (emphasis added).

2. The Court Has Also Denied Defendants' Request For A Protective Order Covering All Of The "Medical and Veterinary Records" For The Elephants.

In October 2004, plaintiffs discovered that, although they had asked defendants in discovery to produce "all medical records" for each of defendants' elephants, Plaintiffs' Document Production No. 8, defendants in fact had withheld from plaintiffs what turned out to be thousands of medical records for these animals – without informing plaintiffs that they had done so and without asserting any privilege for those records. See Plaintiffs' Motion to Compel (Docket No. 27) at 25-29; see also Transcript of September 16, 2005 Hearing ("Sept. Tr.") (Docket No. 51) at 44 (defendants admit that they "overlooked" approximately 2,100 pages of medical records). Thus, on January 25, 2005, plaintiffs filed a motion to compel those records. See Docket No. 27.

In response, defendants contended that these "detailed veterinary records" that had not been produced to plaintiffs "contain the notes of defendants' veterinarians and animal care staff," and hence should be maintained in confidence. See Defendants' Opposition to Motion to Compel (February 15, 2005) (Docket No. 29) at 26 (emphasis added). Hence, defendants also filed a motion

for a protective order requesting that all of these "detailed veterinary records" be shielded from public view. See Defendants' Motion for a Protective Order (February 15, 2005) (Docket No. 30). In an effort to meet the "good cause" showing required by Rule 26(c) and this Court's previous November 25, 2003 Order, defendants initially presented two arguments for why all of these thousands of pages of "medical records" which they had hidden from plaintiffs should be subject to a protective order.

First, defendants asserted that the detailed "notes" of their veterinarians were "compiled for the veterinary staff's own personal use" and contain a list of "rule-outs" – i.e., "possible causes of the observed symptoms that the veterinarian needs to eliminate as the cause" of an animal's illness. See Motion for a Protective Order (Docket No. 30) at 1. Thus, defendants contended that "[a]ttribution to defendants of such illnesses in their animals could embarrass defendants and injure their reputation," and that "[i]t would also embarrass defendants' veterinary staff, who would be publicly accused of providing deficient care to elephants based on mischaracterizations of, or out-of-context quotes from, their notes. Id. at 2 (emphasis added).

Second, defendants told the Court that "[t]he medical records of defendants' elephants provide the foundation" for "research papers and articles" on various topics of elephant behavior and physiology, that "[t]hese articles will be of great value to both defendants and the elephant management communities," but that "if the data are released prior to publication of these articles, then the studies' value to both defendants and the elephant management community will be greatly diminished." Motion for Protective Order at 2 (emphasis added).

After plaintiffs challenged these conclusory grounds for keeping all of the medical records secret, defendants added a third basis for their requested protective order: they asserted that the

records consisted "chiefly of the handwritten personal notes compiled by attending veterinarians and animal care staff," and that the risk of disclosure of such "personal notes" "would have a chilling effect on defendant's animal care professionals," which in turn would diminish the high quality of care these individuals were providing the elephants. See Reply Memorandum In Support Of Defendant's Motion For A Protective Order (March 16, 2005) (Docket No. 38) at 1-2 (emphasis added).

Plaintiffs opposed the requested protective order as being far too broad, and based on arguments that did not meet the "good cause" exception to the "statutory presumption in favor of open discovery.." See Plaintiffs Opposition (Docket No. 10) at 3, quoting John Does I-VI v. Maharishi Mahesh Yogi, 110 F.R.D. 629, 632 (D.D.C. 1986) (emphasis added). However, plaintiffs made clear that they were willing to consider a protective order for "particular medical records" if defendants could made a "specific showing" that such records "form the basis of particular research papers that defendants intend to publish in the near future . . .." Plaintiffs' Opp. at 16; see also Sept. Tr. at 13.

The Court held a hearing on September 16, 2005 on defendants' motion for a protective order for these medical records. See, e.g. Sept. Tr. at 5 (the Court states that "I'm just focusing on the veterinarian records and medical records right now"). In the course of that hearing, this Court expressed extreme displeasure with the fact that defendants had failed even to identify – let alone produce – thousands of pages of medical records that had been requested by plaintiffs.[1]

[1] See, e.g., id. at 34-36 ("a simple request to produce medical record and veterinarian records. It's not a difficult one to comprehend . . . your clients, I think, have hidden the ball from you and they find themselves in a very precarious position . . . [a]nd I'm going to order that all those documents be produced . . . I am truly displeased about the manner in which discovery has taken place. Those documents should have been produced prior to any meet and confer").

Nevertheless, in deliberating about whether or not to impose the requested protective order, or something more narrowly tailored, the Court took into account the arguments of both defendants and the plaintiffs. Thus, the Court several times inquired as to the precise nature of the harm that would befall the defendants if any of the elephants' medical records should become publicly available. In response, the defendants' counsel repeatedly emphasized that the "notes" of the veterinarians contained in these records were "very cryptic," and hence could be unfairly "misused" by the plaintiffs in the media:

> Court: "How could you be embarrassed by your own files, by your own records? Let the public see them. What are you concerned about?"
>
> Defendants' counsel: "We're not embarrassed by them. We're embarrassed by the misuse and out of context treatment of them . . . the problem with things like veterinary records is they're very cryptic."

See Sept. Tr. at 39-40 (emphasis added); see also id. ("veterinarian's notes, like the notes that lawyers write down, like the notes that doctors write down, are very cryptic"); id. at 49 ("the information in these medical records are the notes of veterinarians. They're very cryptic . . .[a]nd in the nature of personal notes these documents can be taken out of context, they can be misused"); id. at 55 ("I would say that they are cryptic notes that somebody could try to characterize in an inflammatory way or that some people might interpret in an inflammatory way") (emphasis added).[2]

In the course of the hearing, the Court also repeatedly expressed its concern about the presumption that discovery should be open, absent a good reason to keep it secret. Thus, the Court stated that "it may well be that if they're discoverable and there's no privacy interest and there's no otherwise recognized objection to production of these documents, I'm not quite sure they shouldn't

[2] To this day, plaintiffs have only seen a handful of such "handwritten notes."

find their way into the public purview." Sept. Tr. at 42-43 (emphasis added); see also id. at 42 ("I'm not quite sure that there is some legitimate reason to keep these otherwise discoverable documents out of the purview of the public"). The Court further expressed its concern that if a protective order were entered for all of the medical records, this would make it difficult to litigate this case in the open. See Sept. Tr. at 79 ("given the sheer volume of documents we're talking about, I query whether it's going to be consistent with the fair administration of justice to be involved in that type of scenario where everything is sealed from the public and documents are produced in secret and litigation proceeds in secret about what a document means and the public never knows").

Finally, the Court recognized that allowing these documents to be maintained in secret might not be fair to the plaintiffs' ability to counter defendants' own misleading statements to the press about the high standard of care that they provide these endangered elephants, particularly when defendants also insist that plaintiffs are fabricating their allegations of abuse. Thus, the Court stated:

> [i]f the defendants can go on TV and print reports that these allegations are not true and that plaintiffs' organization is a whacky animal rights organization and we have the best of care, why shouldn't the plaintiffs be able to say, you know, our allegations are as follows and our allegations are confirmed by defendants' own records which show mistreatment, in our view, of elephants? Why shouldn't they be afforded the opportunity if the defendants want to mouth off to the media and the press and toot their horn about how good they're treating elephants and other animals? Why isn't that fair? If you choose not to do that, that's fine. Maybe that's the end of it. But if you continue to do it, that's certainly a factor the Court is going to take into consideration.

Sept. Tr. at 81-82 (emphasis added); see also id. at 81 (noting that if Ringling Bros. continues to state publicly that it provides the best of care to its animals "why shouldn't the plaintiffs be entitled to release production of the documents that may cast aspersions on [that] . . . Why wouldn't that be fair?").

At the end of the hearing, the Court asked plaintiffs' counsel whether there was a more narrow protective order for the medical records to which plaintiffs could agree, and plaintiffs' counsel reiterated that plaintiffs had already proposed such a compromise and would submit a proposed order for that purpose. Sept. Tr. at 86-87. On September 23, 2005, plaintiffs submitted a proposed protective order that would bar the public disclosure of any record that is "commercially sensitive because it is being relied on in a particular research paper that defendants intend to publish in the near future, and disclosure of such information would substantially diminish the commercial value of that publication." See Plaintiffs' Notice of Filing of Proposed Protective Order (Docket No. 49).

On September 26, 2005, the Court issued an Order concerning "plaintiffs' Motion to Compel Discovery Responses and Defendants' Motion for Protective Order Relating to Veterinary Records." Docket No. 50. The Court granted plaintiffs' motion to compel "as to the veterinary and medical records," and ordered defendants to turn them over within five days. Id. The Court further ordered that defendants' Motion for Protective Order was granted in part – i.e., the Court "approve[d] and enter[ed] the protective order proposed by plaintiffs" – but denied defendants' request for a broader protective order. See id. The Court also stated that:

> 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. (italics emphasis in original; underlining emphasis added).

3. Plaintiffs Had To Move To Enforce The Court's September 26, 2005 Order To Obtain The Documents At Issue In Defendants' Current Motion.

In response to the Court's September 26, 2005 Order, defendants produced thousands of

additional records to plaintiffs, and also invoked the narrowly tailored protective order for hundreds of those records. However, by April 2006, it was clear that the defendants still had not produced all of the medical and veterinarian records for the elephants that this Court had ordered them to produce. See Sept. Tr. at 36 (Court makes clear that it wants defendants to produce "all of the medical and veterinarian records . . . [a]nd when I say all, I mean all, every last record").

Accordingly, after unsuccessful attempts to obtain those records through the meet and confer process, on June 9, 2006, plaintiffs filed a "Motion to Enforce" the Court's September 26, 2005 Order. See Motion to Enforce the Court's September 26, 2005 Order (Docket No. 69). Defendants filed their opposition on July 7, 2007, and on July 19, 2006 – two days before plaintiffs' final reply brief was due – defendants produced thousands of pages of additional records. See, e.g., Reply to Opposition to Motion to Enforce (Docket No. 74) at 5 (noting that "[p]laintiffs have not yet had an opportunity to review these four boxes of records").[3]

Those boxes of additional records – which defendants provided to plaintiffs in a desperate last ditch effort to avoid the consequences of plaintiffs prevailing on their Motion to Enforce the Court's earlier Order compelling their production – contained all three of the documents that form the basis of defendants' current "motion to enforce." See Letter to Kimberly Ockene from Michelle Pardo (July 19, 2006) (Exhibit 1) (producing documents numbered FEI 10370 - 17173). Therefore, plaintiffs have had all three documents since July 19, 2006. Moreover, none of those records is covered by the protective order that was issued by this Court on September 26, 2005.

Defendants complain that two of the plaintiff organizations – the ASPCA and the Animal Protection Institute – as well as a third organization that is not a party to this case, The Humane

[3] The Court granted plaintiffs' motion to enforce on September 26, 2006. Docket No. 94.

Society of the United States ("HSUS"), have "quoted" or "referred" to these documents in their press releases and websites. See Def. Mot. at 7. The first document, Bates Label FEI 15025-27 (Exhibit 2), is an e-mail from Deborah Fahrenbruck, defendants' "Animal Behaviorist," see id. at 2, to Mike Stuart, the Manager of Ringling Bros. "Blue Unit," dated January 8, 2005, providing him a copy of a letter she had written for Kenneth Feld (FEI's Chief Executive Officer) but never sent. In the letter Ms. Fahrenbruck states that she observed one of the handlers "hook Lutzi [an elephant] under the trunk three times and behind the leg once in an attempt to line her up for the T-mount." Id. (emphasis added). Ms. Fahrenbruck further states that "[a]fter the act I stopped backstage and observed blood in small pools and dripped the length of the rubber and all the way inside the barn." Id. (emphasis added). She further states that she had "seen Isham hook [Lutzi] fairly severely," and that "we had and elephant dripping blood all over the arena floor during the show from being hooked." Id. at 2 (emphasis added). She also states that when she brought this matter to the attention of Troy Metzler, the Superintendent of Animals for the Blue Unit, his reaction was that "big fish were being made out of little ones and what happens in the elephant barn stays in the barn." Id. at 2 (emphasis added).[4]

The second document, FEI 16646-48 (Exhibit 3), is a July, 2004 e-mail from William Lindsay, Ringling Bros.' Chief Veterinarian, forwarding an e-mail to various FEI officials from Heather Riggs, a "veterinary technician" on the Red Unit. In the forwarded e-mail Ms. Riggs states that:

[4] Ms. Fahrenbuck also expresses her view that an "activist" would not have been able to take video tape of another handler named Brian hitting an elephant with a bull hook in Oakland, California, which was subsequently aired in the local news, if the circus would simply "put[] up a tent wall." Id. at 1. She added that "after discussing the situation with Alex [Vargas] a short while later a tent wall went immediately up and further videoing ceased." Id.

> [a]fter this morning's baths, at least 4 of the elephants came in with multiple abrasions and lacerations from the hooks . . . [t]he lacs were very visible, and I had questions at the open house from 2 members of the public about where they were from. Jimmy applied silvadene and wonder dust just before the show.

Id. (emphasis added).

The third document, FEI 15024 (Exhibit 4) is a January 8, 2005 e-mail message from Ms. Fahrenbruck to Mike Stuart which states that in Phoenix, "Troy [Metzler] was observed hitting Angelica [a young elephant] 3 to five times in the stocks before unloading her and using a hand electric prod within public view after unloading." Id. (emphasis added). Ms. Fahrenbruck further states that "Troy carried an electric prod in his back pocket throughout most of the California tour during walk-ins," and that "[t]he use of an electric prod in California is strictly forbidden by state law." Id. (emphasis added).

On October 6, 2006, to demonstrate that there are material facts in dispute concerning whether defendants' mistreat these endangered elephants in violation of the Endangered Species Act, plaintiffs filed with the Court the Fahrenbruck letter concerning the hooking of Lutzi and the e-mail message from the veterinarian technician concerning the elephants "with multiple abrasions and lacerations from the hooks" as Exhibits C and N in opposition to defendants' September 5, 2006 motion for summary judgment. See Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Docket No. 96) at 29-31. On March 30, 2007, to demonstrate that, contrary to defendants' allegations, plaintiffs were not lying about the mistreatment of the elephants, plaintiffs filed the third document, concerning Troy Metzler's hitting of Angelica "3 to five times" and his use of "an electric prod," as Exhibit 32 in opposition to FEI's Motion to Amend Its Answers, see Docket No.132, and that document has since also been filed as Exhibit OO to plaintiffs' summary judgment

opposition. See Docket No. 145.

B. Defendants' Demand That Plaintiffs "Cease and Desist" From Disseminating These Publicly Available Documents To The Media.

On April 30, 2007, defendants' counsel sent plaintiffs' counsel a letter complaining that the "Press Room" section of ASPCA's website "makes specific reference" to this lawsuit and to the contents of these three documents. See Letter from John Simpson to Katherine Meyer (April 30, 2007) (Exhibit 5). Defendants' counsel further stated that "[o]ur understanding is that [plaintiff] Tom Rider has also made statements to the press about the same discovery document." Id. (emphasis added). Defendants' counsel did not assert that the documents were subject to a protective order, that they were privileged, or that they were not authentic internal FEI documents. Nor did defendants' counsel present any other basis for treating these documents as confidential, other than the fact that they had been obtained in discovery. See id.

On that basis alone, defendants' counsel insisted that the use of these documents by the ASPCA and Mr. Rider was "directly contrary" to this Court's September 26, 2005 Order which had denied defendants' request for a protective order that would have covered all of the medical and veterinarian records that the Court had to force defendants to produce in this case. See id.; see also supra at 3-4. Defendants' counsel also "demand[ed]" that "plaintiffs immediately cease and desist their violation of Judge Sullivan's September 26, 2005 order." See Exhibit 5 at 2 (emphasis added).

By letter dated May 3, 2007, plaintiffs' counsel explained that plaintiffs were not in violation of this Court's Order, and that the records to which defendants referred were not covered by any protective order. See Letter from Katherine Meyer to John Simpson (May 3, 2007) (Exhibit 6). Plaintiffs' counsel further explained that plaintiffs had also done nothing at odds with the Court's

admonishment, since the documents about which defendants complained "were in fact all obtained in discovery for the purpose of demonstrating to Judge Sullivan the correctness of plaintiffs' claims that defendants routinely harm the elephants with bull hooks and other instruments in violation of Section 9 of the Endangered Species Act." See id. at 2 (citing Amended Complaint ¶¶ 1, 62, 96). Plaintiffs' counsel further noted that, indeed, all three documents had already been filed as Exhibits in the case. Id. at 2.[5]

Nevertheless, on June 11, 2007, defendants filed their "motion to enforce" this Court's September 26, 2005 Order against plaintiffs, which requests this Court to "order plaintiffs immediately to cease and desist" their "violation" of that 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." See Def. Mot. at 2.

In other words, in defendants' view, rather than denying defendants' initial request for a broad protective order that would have covered all discovery in this case, as the Court did on November 25, 2003, the Court actually granted that motion when it admonished plaintiffs not to "abuse the discovery process" in its much more limited grant of a protective order on September 26, 2005 with respect to the medical and veterinarian records. However, despite defendants' wishful thinking, this view of what occurred here has absolutely no basis in reality.

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[5] Plaintiffs' counsel also observed that defendants' demand that Mr. Rider stop making "statements to the press" about defendants' abuse of the animals was inconsistent with defendants' insistence to the Court – in its proposed RICO counterclaim – that Mr. Rider is "not" conducting a media campaign concerning the abuse of the elephants with funding from the plaintiff organizations and others, but is instead accepting "bribes" for his testimony on this matter. See id. at 1; see also Plaintiffs' Opposition to Defendants' Motion To Amend (Docket No. 132) at 26-28. Perhaps this explains why defendants' motion to enforce now conspicuously omits any reference to Mr. Rider.

ARGUMENT

I. PLAINTIFFS HAVE NOT VIOLATED THIS COURT'S ORDER.

A. The Court Has Twice Declined To Prohibit Plaintiffs From Disclosing These Kinds of Documents.

As demonstrated by the background recited above, by no stretch of the imagination have plaintiffs "violated" this Court's September 26, 2005 Order. Thus, none of the three documents about which defendants complain is covered by any protective order in this case. Moreover, this Court expressly declined to enter a protective order for these documents twice: initially, on November 23, 2003, when the Court denied defendants' request for a protective order that would have covered all documents obtained from them in discovery; and again, on September 26, 2005, when the Court denied defendants' request for a protective order for all of the medical and veterinary records.

Defendants do not contest the fact that these three documents are not covered by a protective order. Moreover, although in their efforts to shield all of these records from public view defendants insisted to the Court that this was necessary to protect the personal "notes" of the veterinarians and animal care staff that were so "cryptic" that they could be taken out of context, see Sept. Tr. at 39-40, 49, 55, in fact, there is nothing "cryptic" at all about these three documents generated by Ringling's animal care staff: all three of them quite clearly describe Ringling elephant handlers hitting elephants with bull hooks – conduct that forms the basis of one of plaintiffs' principal claims in this ESA case.

Thus, plaintiffs certainly understand why defendants initially did not want plaintiffs – or the Court – even to know that these particular documents existed, and why, when plaintiffs filed their

motion to compel all such records defendants then sought to ensure that these documents would never become publicly accessible. However, the fact remains that these documents are not covered by the limited protective order entered by the Court for information that "forms the basis of a specific research paper that defendants intend to publish in the near future." See Protective Order (Docket No. 49).

B. Plaintiffs Are Not "Abusing The Discovery Process."

Moreover, because all three of these documents go to the heart of plaintiffs' case on the merits, plaintiffs have clearly abided by the Court's admonition that "the purpose of discovery is to produce and seek evidence for use *in litigation*." Order (emphasis in original); see also Roberson v. Bair, ___ F.R.D. ___, 2007 WL 1373180, *4 (D.D.C. May 10, 2007) (explaining that one reason to allow a protective order to prohibit public disclosure of information obtained in discovery is because "it is impossible to ascertain whether all of the information produced in discovery will ever be used to support or attack the merits of Plaintiffs' claims,"and "[a]ny public interest in the disclosure is, therefore, at its weakest at this stage of the case") (emphasis added). Indeed, as discussed above, all three of these documents have been filed with the Court as Exhibits in opposition to defendants' September 5, 2006 motion for summary judgment, and will also be used at a trial of this case on th merits. Accordingly, plaintiffs are certainly not using discovery "to argue the merits of plaintiffs' claims in the media, as opposed to the Court." September 26, 2005 Order (emphasis added).

Nor is there any basis for defendants' suggestion that plaintiffs are somehow "abusing" the discovery process by discussing on their websites, in press releases, and in support of proposed legislation, the fact that they are currently engaged in litigation challenging Ringling's mistreatment

of these endangered animals, and referencing non-privileged/non-confidential documents that show the legitimacy of those claims. Plaintiffs have a First Amendment right to discuss these matters in these forums. See, e.g., International Action Center v. United States, 207 F.R.D. 1, 3 (D.D.C. 2002) (observing that "the essence of First Amendment freedoms" is . . . to effectively convey the message of the protest").

Plaintiffs agree that it is well established that a Court may restrict the exercise of that right by granting a protective order under Rule 26(c) for "good cause" shown. See Seattle Times Co. v. Rhinehart, 467 U.S. 20, (1984) (holding that "where . . . a protective order is entered on a showing of good cause as required by Rule 26(c) . . . it does not offend the First Amendment") (emphasis added); Roberson v. Bair, 2007 WL 1373180, at *3 (noting that "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information") (emphasis added) (citations omitted). However, here the Court declined to impose any such "restraints" with respect to the category of documents about which defendants now complain – i.e., those "medical and veterinary records" that do not contain information that "forms the basis of a specific research paper that defendants intend to publish in the near future." See Protective Order (Docket No. 49).

Indeed, by entering a much more limited protective order than the one sought by defendants for all "medical and veterinary records," the Court necessarily decided that defendants had not made the requisite showing of "good cause" for all such records that would warrant overriding the "statutory presumption in favor of open discovery" that is reflected in Rule 26. See John Does I-VI v. Maharishi Mahesh Yogi, 110 F.R.D. at 632; see also In Re "Agent Orange" Product Liability Litigation, 104 F.R.D. 559, 567 (E.D.N.Y. 1985) (in the absence of a showing of "good cause" "the

discovery is open to the public").[6]

Indeed, although defendants complain mightily that plaintiffs might "mischaracterize" defendants' documents, see Def. Mot. at 4, defendants conspicuously fail to demonstrate that any of the plaintiffs have "mischaracterized" the information from the three documents in their press releases or on their websites. In fact, neither plaintiffs nor HSUS has "mischaracterized" any of these documents – rather, they have simply quoted directly from defendants' own internal documents. See Def. Exhibit 5.

Moreover, as demonstrated supra at 9-10, plaintiffs have had all three of these documents since July 19, 2006 – when defendants released them in response to plaintiffs' filing of their Motion to Enforce the Court's ordering compelling their release. Therefore, by recently referring to these documents on their websites and in press releases – eight months after receiving them – plaintiffs can hardly be accused of rushing these documents into the media, particularly when, again, all three documents have already been filed as Exhibits in this case and hence are readily available to anyone who requests a copy from the courthouse or through the PACER system. In fact, had defendants refrained from moving for summary judgment until after discovery was over, plaintiffs would not have had occasion to submit all three of these documents to demonstrate that there are material

[6] In fact, at the hearing on their motion for a protective order, defendants used as an example of plaintiffs' "abuse" of discovery the fact that plaintiffs had provided to a reporter a videotape produced by defendants that showed a female elephant in chains giving birth to a baby elephant named Riccardo, who has since died while in defendants' care. See Sept. Tr. at 37-38; 65-66. Despite defendants' protestations that such information should not be released to the public, the Court did not include such records within the scope of the protective order that it entered. In view of this fact, it is not at all clear on what basis defendants now insist that plaintiffs are nevertheless in "violation" of the Court's September 26, 2005 Order because they have released to the public other internal FEI documents that bear directly on plaintiffs' claims in this case.

issues in dispute regarding defendants' insistence that is does not mistreat the elephants. However, having chosen to move for summary judgment, defendants cannot now complain that plaintiffs have filed copies of defendants' own internal documents that cast serious doubt on defendants' arguments.

In this regard, defendants' reliance on cases that stand for the proposition that courts may also restrict access to certain records that have been submitted to the court, by placing such documents under seal, without offending the First Amendment or common law right of access to "judicial records," see Def. Mot. at 12-13, have no relevance here. This Court has placed no such restrictions on the three documents that have been filed as Exhibits to plaintiffs' opposition to defendants' motion for summary judgment, nor, for that matter, have defendants ever suggested – let alone demonstrated – that there is any legitimate basis for sealing such records.[7]

II. DEFENDANTS HAVE MADE NO SHOWING THAT WOULD WARRANT THE COURT REVISITING DEFENDANTS' REQUEST FOR A PROTECTIVE ORDER THAT PROHIBITS THE PUBLIC DISCLOSURE OF ALL DISCOVERY IN THIS CASE.

At bottom, defendants appear to be using their bogus "motion to enforce" the Court's September 26, 2005 Order as an avenue for having this Court reconsider its previous November 25, 2003 Order that denied defendants' request for a global protective order that would have prohibited plaintiffs from disseminating to the public any document that defendants produce in discovery. Indeed, remarkably, defendants insist that even though this Court denied that request, and also denied defendants' more limited request that plaintiffs be prohibited from disseminating all "medical and veterinary records," the Court's admonition in its September 26, 2005 Order nevertheless amounts

[7] Indeed, defendants have now also filed copies of all three documents with the Court as Exhibits to their "motion to enforce," see Def. Ex. 5, making them again readily available to the public.

to the same thing – i.e., it prohibits plaintiffs from sharing with the public any documents that were received in discovery. Thus, defendants have asked the Court to order plaintiffs 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." Def. Mot. at 2 (emphasis added). However, as demonstrated above, in light of the fact that the Court already denied that request – twice – it is highly unlikely that the Court nevertheless meant to impose that restriction on plaintiffs through its admonition.

Moreover, defendants failed to make the requisite showing of "good cause" in 2003 for such an order, and it has again failed to make any such showing that would overcome the "statutory presumption in favor of open discovery." John Does I-VI, 110 F.R.D. at 632; see also Burka v. United States Dep't of Health & Human Services, 87 F.3d 508, 517 (D.C. Cir. 1996) (in deciding whether to issue a protective order the court must consider "the harm which disclosure would cause the party seeking to protect the information"). Indeed, other than their generic complaint that plaintiffs and others with access to these publicly available documents are referring to these documents in the media, defendants have conspicuously failed to make any showing whatsoever as to why such documents should be maintained in secret, let alone the "good cause" showing that is required by Rule 26(c) and this Court's November 25, 2003 Order.[8]

Thus, the only assertion of harm that has been made by defendants is the extremely nebulous contention – made by counsel in its brief without any evidentiary support whatsoever – that the release of such documents to the public "can have adverse collateral consequences on the business

[8] Should defendants attempt to make such a showing for the first time in their reply memorandum, plaintiffs should be granted the opportunity to respond to such arguments.

and reputation of FEI that could continue unabated until the Court has an opportunity to reach the merits of the case." Def. Mot. at 3. However, such conclusory, speculative, and self-serving assertions of "harm" made by counsel, unaccompanied by any evidence, simply do not satisfy the "good cause" requirement of Rule 26(c). See, e.g., Exum, M.D. v. United States Olympic Committee, 209 F.R.D. 201, 206 (D.D.C. 2002) ("the party seeking a protective order must show that disclosure will result in a clearly defined and serious injury to the party seeking protection"); id. ("[c]onclusory or stereotypical assertions are insufficient to show good cause"); citing Gulf Oil Corp. v. Bernard, 452 U.S. 89, 102 n.16 (1981); accord PHE, Inc. v. Department of Justice, 139 F.R.D. 249, 252 (D.D.C. 1991); Avirgan v. Hill, 118 F.R.D. 257, 261-62 (D.D.C. 1987).

Furthermore, the issue of how elephants used in circuses are treated and made to perform tricks on demand is one of undeniable public importance. See, e.g., Plaintiffs Opposition to FEI Motion To Amend Answers (Docket No. 132) at 6-8 (listing federal, state, and local ordinances that would ban the use of elephants in circuses or ban the use of bull hooks and other training instruments); id. at 26-28 (demonstrating widespread media interest in this issue). Indeed, keenly aware of this fact, defendants spend considerable resources touting to the public and the press the care that they give these animals and denying that they use anything other than "positive reinforcement" to make the animals perform. See, e.g., Ringling Bros. website (http://www.ringling.com/animals) (Exhibit 7) ("we're committed to the absolute highest standards of care for our animal performers) (emphasis added); id. ("the cornerstone of all circus elephant training at *Ringling Bros.* is reinforcement through praise, repetition, and reward") (emphasis added); id. (Ringling uses only "Positive Reinforcement" "[o]ur training methods are based on continual interaction with our animals, touch and words of praise, and food rewards") (emphasis added); see

also Plaintiffs' Opp. To FEI Motion to Amend at 26, n.24 (citing document showing that FEI spends $1 million on advertising the circus each year in New York City alone).

Defendants also continue to insist that plaintiffs' allegations that Ringling Bros. elephant handlers use bull hooks and chains to make the animals perform are not true, and that the plaintiff organizations and Mr. Rider are fabricating these allegations for their own financial and "extremist" reasons. See, e.g., Proposed RICO Counterclaim, Exhibit 3 to FEI Motion to Amend (Docket No.121) at ¶ 7 (accusing plaintiffs of "perpetuat[ing] a scheme to permanently ban Asian elephants in circuses and to defraud FEI of money and property . . . through a pattern of, among other things, bribery and illegal gratuity payments . . . obstruction of justice, mail fraud and wire fraud"); id. at ¶ 60 (alleging that Tom Rider is "a paid plaintiff and key fact witness" with a "contrived injury in fact"); ¶16 (accusing Mr. Rider of presenting "false testimony under oath"); see also Pl. Opp. To FEI Motion to Amend at 26-28; Opinion Piece by Deborah Fahrenbruck, Ringling's "Animal Behaviorist" (May 17, 2004) (Exhibit 8) (referring to the ASPCA as an "extremist group").

Therefore, in light of the public importance of this debate about the treatment of an endangered species, and the fact that defendants themselves are heavily engaged in making sure the public knows their side of the debate and in attempting to discredit plaintiffs' view, it simply would not be fair to deny plaintiffs the opportunity to educate the public about this issue by referring to Ringling's own non-confidential records that shed light on this subject. Again, as this Court observed at the hearing on defendants' motion for a protective order concerning these matters:

> [i]f the defendants can go on TV and print reports that these allegations are not true . . . why shouldn't the plaintiffs be able to say [] these allegations are as follows and our allegations are confirmed by defendants' own records which show mistreatment, in our view, of elephants? Why shouldn't they be afforded the opportunity if the defendants want to mouth off to the media and the press and toot their horn about how good

> they're treating elephants and other animals? Why isn't that just fair? If you choose to do that, that's fine. Maybe that's the end of it. But if you continue to do it, that's certainly a factor the Court is going to take into consideration.

See Sept. Tr. at 81-82 (emphasis added).

This is precisely what plaintiffs have done here – they have explained on their websites what this lawsuit is about and they have quoted from defendants' own documents to show that their "allegations are confirmed by defendants' own records which show mistreatment" of the elephants. See id. Accordingly, plaintiffs have done nothing in violation of this Court's September 26, 2005 Order.

CONCLUSION

Because plaintiffs clearly have not violated the Court's September 26, 2005 Order in any respect, and defendants have failed to make any showing of "good cause" that would warrant the Court imposing a broad protective order for all discovery materials, defendants' motion requesting the Court to order plaintiffs to "remov[e] 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," Motion at 2, should be denied.

Moreover, because there is absolutely no factual or legal basis for defendants' motion, this Court should sanction defendants for wasting the time of both plaintiffs and the Court in having to deal with this matter, by making defendants reimburse plaintiffs for their attorneys' fees and costs in connection with having to respond to this motion. See 28 U.S.C. § 1927. A proposed order for this purpose is attached.

Respectfully submitted,

/s/ Katherine A. Meyer
Katherine A. Meyer
(D.C. Bar No. 244301)
Kimberly D. Ockene
(D.C. Bar No. 461191)
Tanya M. Sanerib
(D.C. Bar No. 473506)

Meyer Glitzenstein & Crystal
1601 Connecticut Ave., N.W.
Suite 700
Washington, D.C. 20009
(202) 588-5206

Date: June 25, 2007