

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE  
PREVENTION OF CRUELTY TO  
ANIMALS, et al.,

Plaintiffs,

vs.

RINGLING BROTHERS AND BARNUM  
BAILEY CIRCUS, et al.,

Defendants.

.  
. Docket No. CA-03-2006  
. .

. Washington, D.C.  
. Friday, September 16, 2005  
. 2:35 p.m.  
. .

.....

TRANSCRIPT OF A MOTION  
BEFORE THE HONORABLE EMMET G. SULLIVAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: KATHERINE A. MEYER, Esquire  
KIMBERLY DENISE OCKENE, Esquire  
MEYER GLITZENSTEIN & CRYSTAL  
1601 Connecticut Avenue, NW  
Suite 700  
Washington, DC 20009

For the Defendants: EUGENE D. GULLAND, Esquire  
JOSHUA D. WOLSON, Esquire  
COVINGTON & BURLING  
1201 Pennsylvania Avenue, NW  
Washington, DC 20004-2401

Court Reporter: Elaine A. Merchant, RPR, CRR  
Official Court Reporter  
333 Constitution Avenue, NW  
Room 6822  
Washington, DC 20001  
(202)289-1571

Proceedings recorded by machine shorthand, transcript produced  
by computer-aided transcription.

P R O C E E D I N G S

1  
2 THE CLERK: Civil Action 03-2006, American Society  
3 for the Prevention of Cruelty to Animals, et al. versus  
4 Ringling Brothers and Barnum & Bailey Circus, et al.

5 would counsel please identify yourselves for the  
6 record.

7 MS. MEYER: Katherine Meyer for the plaintiffs. And  
8 with me is Kim Ockene, Your Honor.

9 MR. GULLAND: Eugene Gulland for the defendant. With  
10 me is Josh Wolson.

11 THE COURT: You have not been able to resolve this  
12 discovery dispute yourselves.

13 Let me invite the principal attorneys to the  
14 microphone.

15 Have you spent any time conferring about this dispute  
16 just to see if you can resolve it yourselves?

17 MS. MEYER: No, Your Honor. Not until we filed the  
18 motion to compel. There was a meet and confer effort prior to  
19 that time. And some disputes, relatively minor matters, were  
20 resolved. But the bulk of the information that is the subject  
21 of the motion to compel we remain, continue to remain -- have  
22 diametrically opposed views of what is required here.

23 MR. GULLAND: I think that's accurate. There was a  
24 good deal of discussion before the filing of the motion to  
25 compel.

1 THE COURT: Let me invite plaintiffs' counsel to  
2 remain at the microphone, and I'll invite defendants' counsel  
3 back in just a few minutes.

4 Let me see if I understand your argument.

5 You've propounded some interrogatories, you've served  
6 a request for production of documents seeking veterinarian  
7 records, seeking medical records.

8 Some medical records have been produced?

9 MS. MEYER: Yes, Your Honor.

10 THE COURT: Some veterinarian records have been  
11 produced?

12 MS. MEYER: Very few, Your Honor, yes.

13 THE COURT: But, nevertheless, am I correct in saying  
14 that defendants did not invoke a privilege with respect to  
15 either veterinarian records or medical records?

16 MS. MEYER: That's correct, Your Honor. Instead,  
17 what they did is they just pretended that there were no further  
18 records that were responsive.

19 THE COURT: Absent the editorial, I'm correct,  
20 putting aside whether they pretended or not, no privilege has  
21 been invoked?

22 MS. MEYER: No privilege was invoked, originally.  
23 They are now -- after we filed our motion to compel they are  
24 asserting that all of the medical records that they did not  
25 identify or claim a privilege for are, nevertheless,

1 confidential. And they have now asserted --

2 THE COURT: I just want to make sure I understand  
3 what's in this file. The file is voluminous. I've seen a  
4 privilege log that pertains to, I think, some e-mails or so  
5 that defense counsel filed. You're familiar with that?

6 MS. MEYER: Yes.

7 THE COURT: Is there another privilege log in this  
8 voluminous file?

9 MS. MEYER: No, Your Honor. In terms of a privilege  
10 log, here's what defendants have filed.

11 They filed their original privilege log when they  
12 gave us their first response to our broad discovery request.  
13 And that is Exhibit C to our motion to compel. It lists a  
14 total of five documents, Your Honor.

15 THE COURT: That's what I'm referring to, right.

16 MS. MEYER: In June, when they gave us a supplemental  
17 production of some documents, they supplemented their privilege  
18 log with about, I think it's about 32 or 33 additional  
19 documents. None of those documents listed on either one of  
20 those privilege logs, now for a total of 38 documents, concern  
21 the medical records on the elephants.

22 THE COURT: Right. They concern, Rider, I believe,  
23 don't they?

24 MS. MEYER: Some of them do and some of them concern  
25 some other things.

1 THE COURT: Some other issues.

2 MS. MEYER: There are many issues, Your Honor.

3 THE COURT: I'm just focusing on the veterinarian  
4 records and the medical records right now.

5 MS. MEYER: Right.

6 THE COURT: So for purposes of our discussion then, I  
7 can assume the records do exist?

8 MS. MEYER: Yes, Your Honor.

9 If I could just be clear, Your Honor, we're talking  
10 about basically the charts, the medical charts, on each of the  
11 animals. We haven't seen any of them.

12 THE COURT: All right. Each of the animals has been  
13 identified?

14 MS. MEYER: As far as we know, Your Honor.

15 THE COURT: Well, you've asked for the identities of  
16 all elephants --

17 MS. MEYER: Yes, Your Honor.

18 THE COURT: -- that they own?

19 They don't own some elephants, but they're in  
20 custody?

21 MS. MEYER: Correct, Your Honor.

22 THE COURT: There are some elephants that Ringling  
23 Brothers owns and there are some that Ringling Brothers has  
24 custody of?

25 MS. MEYER: That they lease, correct, Your Honor.

1 THE COURT: who do they lease them from?

2 MS. MEYER: Other owners of captive elephants.

3 THE COURT: So we know who the elephants are, that's  
4 not a big issue, is that right?

5 MS. MEYER: I think we now have a pretty good  
6 inventory, although we had to figure that out on our own.

7 THE COURT: well, you should be able to ask one  
8 question, what elephants do you own and which elephants do you  
9 lease.

10 MS. MEYER: And I'm just telling you, Your Honor,  
11 they didn't tell us all of that information originally. I  
12 think right now we have a pretty good list, but we don't have  
13 the medical records.

14 THE COURT: You shouldn't have to guess as to the  
15 number of elephants or the identities of each. Unless Ringling  
16 Brothers and Barnum & Bailey Circus is prepared to pay  
17 significant sums of money for sanctions, you won't have to  
18 guess about that. They can answer that question. You  
19 shouldn't have to guess.

20 MS. MEYER: We've had to do a lot of guessing in this  
21 case, Your Honor.

22 THE COURT: You're not going to have to do any more  
23 guessing about things that are relevant. ]

24 with respect to the defendants' need for a protective  
25 order, though, what's your objection? Their concern is that

☆

1 they look at web sites maintained by plaintiff and they say,  
2 you know, what's going to happen to us is that maybe we'll be  
3 harmed, maybe seriously harmed, by information that we produce  
4 that's in our files.

5 why isn't that a legitimate concern that they have to  
6 persuade a judge that they're entitled to a protective order?  
7 There's been no fact finding with respect to what, indeed, the  
8 photos or files or films actually mean and whether or not  
9 injuries were caused as a result of defendants' conduct or  
10 actions or inactions, et cetera. So if they produce a ton of  
11 information, they have some legitimate concerns that it will be  
12 used wrongly and inure to the detriment of them.

13 MS. MEYER: I have three responses, Your Honor.

14 First of all, I don't want to belabor the point too  
15 much, but I think in view of the way they have proceeded in  
16 this case, and again that was in failing to even identify the  
17 existence of these documents, nor claim a privilege for them --  
18 and before I said they pretended. I mean, we asked for all the  
19 medical records, they give us some medical records and that was  
20 the end of it. Nothing listed on a privilege log, no  
21 indication that there were other medical records until we  
22 pressed it.

23 THE COURT: What gave you an inkling there were  
24 additional records?

25 MS. MEYER: Because when we went through the records,

1 Your Honor, we saw absolutely no medical records for some of  
2 the animals that we knew existed. For other animals we saw  
3 these things called medical histories, which are summaries of  
4 medical records, which obviously are taken from the actual  
5 charts, the actual raw medical records on each of the animals.

6 ~~And so when we pressed that during the meet and~~  
7 confer, where are the actual medical records on each of the  
8 animals, the answer we got was basically, oh, those medical  
9 records, you wanted those medical records. And we said, yes,  
10 we wanted all of the medical records, that's what we asked for.  
11 And suddenly it became clear that there are other detailed,  
12 what they called the detailed medical records, for each of the  
13 animals.

14 Again, didn't identify them, didn't claim a privilege  
15 for them, didn't list them on a privilege log, Your Honor. So  
16 I would like that to be taken into account when you ask why  
17 shouldn't they now get a protective order. Here we are a year  
18 and a half later after we asked for this basic information that  
19 goes to the core of our case and they're now saying, oh, those  
20 medical records, oh, those medical records are all confidential  
21 and should be withheld from the public.

22 So my first point, Your Honor, is I believe,  
23 particularly under the Athridge case, which was a decision by  
24 Judge Facciola, that they have waived, clearly waived, their  
25 opportunity to rely on a privilege at this late stage of the

1 game.

2 Number two, Your Honor, there is a strong presumption  
3 in favor of open proceedings in civil litigation. And it is  
4 their burden to come forward and overcome that strong  
5 presumption. And what they've said is the reason all of the  
6 medical records should be held under a protective order is  
7 because my clients are somehow going to take that information.  
8 And we're talking about things like lesion noted on left ear,  
9 abrasion on leg, bedsore on left side. My clients are somehow  
10 going to take that information and twist it and misuse it and  
11 mischaracterize it in the media. That's their argument, first  
12 argument, for trying to overcome the strong presumption in  
13 favor of open proceedings.

14 we don't think there's any evidence to suggest that  
15 we're going to do that. We haven't done that with respect to  
16 the paucity of medical records we've received so far. And our  
17 main concern on that, Your Honor --

18 THE COURT: Why don't you consent to a protective  
19 order then?

20 MS. MEYER: I'll tell you why, Your Honor. Because,  
21 again, I don't think they should be rewarded with a protective  
22 order, but putting that aside --

23 THE COURT: I don't reward people.

24 MS. MEYER: Putting that aside, Your Honor --

25 THE COURT: One approach could be production of lots

1 of records pursuant to a protective order and then some further  
2 argument as to whether or not those documents should be made  
3 available to the public. That's one approach. I don't know.

4 MS. MEYER: I think it's backwards, Your Honor.

5 THE COURT: I don't know what the documents show and  
6 I don't know whether the documents if made available to the  
7 public will produce the kind of Burka harm that they're talking  
8 about. I just don't know.

9 Do I have a desire to look at some 1,700 films? No.  
10 Do I have the time to do it? No. I mean, if I have the desire  
11 to do it, I don't have the time to do it.

12 How is a judge to resolve this? I don't want to  
13 appoint someone, appoint some magistrate judge, and force upon  
14 him or her the responsibility for the next year or two to look  
15 over these documents and determine what the public should see  
16 and what the public shouldn't. I totally agree with you. I  
17 couldn't agree with you more about the public's right to know  
18 what's going on in these courthouses and these courtrooms. I  
19 couldn't agree with you more. And I've said it and I've said  
20 it and said it and I'll say it again when it's appropriate.  
21 But what's fair at this juncture?

22 MS. MEYER: I'll tell you what's fair. I'll tell you  
23 what we've said is fair.

24 And before I get to what I think is fair, I just want  
25 to make another point, Your Honor.

1           These records go to the core of our case. And our  
2 concern, if you impose a protective order here, is that  
3 essentially we're going to be litigating this case in secret.  
4 Because any time a lay witness wants to refer to these medical  
5 records, an expert witness wants to refer to any of these  
6 medical records, we want to refer to them in any motions,  
7 procedural or otherwise --

8           THE COURT: But you're assuming that the Court, after  
9 production of records or all the records or some of the  
10 records, will never make a determination before you get to that  
11 stage that the public has a right to see some of these, you're  
12 making that assumption.

13           Look, if I were to do that, if I were to say, look,  
14 you're entitled to all these records, because there's been no  
15 privilege and because there's been a waiver, but they should be  
16 first pursuant to a protective order, I wouldn't keep in place  
17 that protective order forever until the end of this litigation.  
18 At some point there should be some determination as to what  
19 those records show and whether or not, indeed, the public has a  
20 right to see those records. This is a public enterprise. This  
21 defendant travels across this country day in and day out and,  
22 for the most part, exhibits its animals to the public.

23           MS. MEYER: They not only do that, Your Honor --

24           THE COURT: And they charge the public to come and  
25 see the animals.

1 MS. MEYER: They not only do that, Your Honor, but  
2 they spend an enormous amount of money on public relations  
3 talking about what great care they give their animals. What  
4 they're trying to do here, Your Honor, is stifle the other part  
5 of the debate. They release the information they want to  
6 release, they go on the Today's Show, they put it on their web  
7 sites, they produce color brochures about all the wonderful  
8 care they give their elephants and say that our clients are  
9 whacky animal rights activists who cannot be trusted when they  
10 say these animals are being beaten and chained, et cetera. And  
11 then when we say, well, how about if we get the information  
12 that would actually show the condition these animals are kept  
13 under, the answer is, oh, it's very secret and confidential,  
14 you can't see it and you're going to misuse it.

15 THE COURT: Has Katie Couric ever invited you to the  
16 Today's Show?

17 MS. MEYER: No, we haven't had that opportunity yet,  
18 Your Honor.

19 THE COURT: And they've been on the Today's Show?

20 MS. MEYER: Yes, they have, Your Honor.

21 THE COURT: Really?

22 MS. MEYER: Yes, Your Honor. Kenneth Feld pretty  
23 much on an annual basis gets to go on the Today's Show.

24 But the point being, Your Honor, if we're going to  
25 have a robust public debate about an issue --

1 THE COURT: In fairness, NBC News ought to invite  
2 both sides.

3 MS. MEYER: I agree.

4 THE COURT: That's just an observation. That's not a  
5 ruling, because NBC is not a party.

6 MS. MEYER: They shouldn't be able to control the  
7 entire debate on this issue. I think the fair way -- you asked  
8 what's the fair way to deal with it.

9 what we have suggested in our papers is if they can  
10 show some -- they've made this claim that some of this  
11 information is being relied on in some papers, some  
12 unidentified papers that they're working on.

13 THE COURT: Apparently you're sensitive to that,  
14 though, because you said in the footnote you would consent  
15 to --

16 MS. MEYER: Right. If they can make a showing with  
17 respect to particular records that are somehow related to a  
18 particular study that they're working on and they don't want to  
19 disclose that information to the public because somehow it's  
20 commercially valuable and it would somehow jeopardize their  
21 ability to get that study out, we would be more than happy to  
22 see that information under a protective order.

23 But we don't think they are entitled to a blanket  
24 protective order for all the medical records. I would remind  
25 Your Honor, I think what's going on here, again, because these

1 records are so -- go so much to the core of our case and are  
2 going to be relied on and referred to by all the witnesses in  
3 this case, I think what's going on here is that they're trying  
4 to get through the back door of this protective order, which  
5 what you would not let them get at the beginning of discovery  
6 when they asked, you may recall, for a broad protective order  
7 to cover all of the discovery in this case. And you said, no,  
8 you can't have that broad protective order, you make a  
9 particular good cause showing with respect to specified  
10 information and we'll take a look at that.

11 we do not believe that they have made that kind of  
12 showing here when they say all of the detailed medical records  
13 on all of the elephants must be kept secret. And that's what  
14 they have said here.

15 so we believe that, again, they have the burden.  
16 They haven't met the burden, particularly in light of the way  
17 they've proceeded here, by not even telling us these records  
18 existed and not claiming a privilege for them or listing them  
19 on their privilege log. That they should not get this kind of  
20 blanket protective order, which will in effect mean that we  
21 will not, without coming to you and asking you to lift it, so  
22 we'll be having this argument again, we will not be able to  
23 refer to any of the medical records on the elephants in public.

24 THE COURT: Did the defendants ever tell you in  
25 response to your request for production of documents or in

1 response to interrogatories that the documents, the medical  
2 records that you've previously received, were, indeed, all the  
3 medical records in possession of the defendants, did they say  
4 that?

5 MS. MEYER: They did. They said -- actually, I'll  
6 have to pull the cite out. They said that you have the  
7 complete information requested.

8 THE COURT: That was in response to your request for  
9 medical records and veterinarian records?

10 MS. MEYER: Yes, Your Honor.

11 THE COURT: And now they've told you, only because of  
12 your persistence, that there are additional other medical  
13 records?

14 MS. MEYER: That's right.

15 THE COURT: Do they refer to them as medical records  
16 as well?

17 MS. MEYER: They call them the detailed medical  
18 records. Oh, those medical records, you mean the detailed  
19 medical records, you wanted those, we didn't know you wanted  
20 those.

21 And this gets me to a broader point.

22 THE COURT: I just want to be clear about that.

23 Your response was unequivocal, produce all medical  
24 records in your possession?

25 MS. MEYER: Yes. We want all the medical records on

1 each of the elephants. And instead we got these little  
2 summaries for some of the elephants, and mums the word that  
3 there was anything else.

4 That gets me to another point, Your Honor.

5 THE COURT: Someone swore to that, someone filed that  
6 under oath? I assume a declarant filed that under oath?

7 MS. MEYER: No. We just got a box of documents.

8 THE COURT: Well, someone attested to that, though.  
9 Didn't someone certify that, either an attorney or --

10 MS. MEYER: I guess they certified that these are the  
11 responses to the discovery.

12 THE COURT: Well, I'm concerned that those were all  
13 the medical records. Was it an officer of the corporation?

14 MS. MEYER: I wish I could lay my hands on the quote  
15 that would help put this in a --

16 If you'll just bear with me for a minute, Your Honor.

17 THE COURT: I mean, if it was in response to a  
18 request for an interrogatory --

19 MS. MEYER: I'll find it, Your Honor.

20 THE COURT: You don't have to find it.

21 If it was in response to a request for an  
22 interrogatory, then some officer -- attorneys can't sign  
23 that -- some officer of the corporation would have to sign  
24 that?

25 MS. MEYER: That would be correct, Your Honor.

Criminal  
obstruction  
of  
justice

1 THE COURT: So maybe as part and parcel that person  
2 needs to come and tell me why he lied or she lied under oath.  
3 Because that was provided to you under oath, these are all the  
4 medical records?

5 MS. MEYER: That's right, Your Honor, that's the way  
6 we view it.

7 The only caveat I'll add to that, Your Honor, and it  
8 goes to sort of the gravamen --

9 THE COURT: We're talking about production of  
10 documents or something more serious like interference with the  
11 fair administration of justice or obstruction of justice or  
12 something criminal in nature. I take this very, very  
13 seriously.

14 No attorney should have to put up with this nonsense.  
15 And, indeed, it appears to me that it is nonsense. If someone  
16 has told you they've produced all the records and then told you  
17 later, oh, are you referring to the more detailed medical  
18 records, there's no excuse for that.

19 MS. MEYER: That's right, Your Honor, that's what  
20 happened in this case.

21 The only thing I'll add to that in their defense, if  
22 it's a defense at all --

23 THE COURT: You're going to defend them?

24 MS. MEYER: I just want to be reasonable here, Your  
25 Honor, because I think this may be what they say. And this

1 goes to the gravamen of our motion to compel really, or the  
2 thing I really wanted to spend my time on with respect to that,  
3 but it's related. Is that what they did here, Your Honor, is  
4 they asserted ten very broad general objections to our  
5 discovery. And then they asserted those, all ten of those  
6 general objections, with respect to every single interrogatory  
7 and every single document production request, all right,  
8 without telling us, well, which documents are you saying are  
9 being withheld from us under which of those objections.

10 we had a privilege log that, as I showed you, had a  
11 total of five documents listed on it. And it may be that they  
12 thought, as I think they're trying to play this game with  
13 respect to all the other information at issue here under our  
14 motion to compel, they may say to you, oh, those medical  
15 records, those detailed medical records, they fell under some  
16 of these one, two, three, all ten of our general objections,  
17 and, therefore, we didn't have to say whether or not they  
18 existed or were privileged.

19 That seems to be their position with respect to a lot  
20 of the categories of information that we have moved to compel.  
21 And for that proposition, Your Honor, they're relying on this  
22 decision by the D.C. Circuit a couple of years ago in the  
23 Philip Morris RICO case. And in that case the court held that  
24 the District Court, Judge Kessler, had erred in not allowing  
25 the defendants to assert a general objection and have the Court

1 decide the general objection before making the defendants  
2 assert a privilege, okay.

3 And that seems to be the case upon which they're  
4 relying for the proposition that they can assert ten general  
5 objections with respect to every single discovery request, not  
6 tell us which documents are being withheld and why, and then  
7 after we figure it all out come into your court and say, oh,  
8 yes, well, now those are privileged, those are privileged.

9 And that Philip Morris case does not stand for that  
10 proposition at all. There Philip Morris was relying on some  
11 very specific general objections. It made it very clear which  
12 objections applied to which documents. And they asserted those  
13 general objections before the Court and asked the Court to  
14 decide them before they raised their privilege.

15 we have not had that here. I don't even know which  
16 of these general objections they think is covered, do cover the  
17 medical records at issue. But that's the only defense I can  
18 make, is they think those medical records they failed to  
19 identify, failed to assert a privilege for, and, again,  
20 pretended did not exist, Your Honor, they may think they're  
21 covered by some of those general objections, I don't know.  
22 That's all I can say on that point.

23 Here we go. Document request number eight, which is  
24 the one for the medical records, all medical records on each  
25 elephant. Here is what they say in a November 8, 2004 letter

1 on page seven to me and my co-counsel, Ms. Ockene.

2 Quote, defendants have produced to you more than 700  
3 pages of elephant medical records. There is no basis for  
4 plaintiffs to demand records regarding trunk washes or other  
5 tuberculosis tests -- that's another issue in this case, Your  
6 Honor -- as there is no claim or defense in this case relating  
7 to elephant tuberculosis.

8 Next sentence, moreover, the records that defendants  
9 produce to you are complete in that they contain all of the  
10 pages in defendants files, end quote.

11 That's what they said.

12 Now apparently there's some other detailed medical  
13 records. And there have to be, Your Honor. This corporation  
14 claims that it is breeding this endangered species to conserve  
15 it for future generations, that it has this wonderful standard  
16 of care. They've got to have detailed medical records on each  
17 of the elephants, just like if you go to your veterinarian with  
18 your pet, your dog, you go in there, there's a problem, they  
19 will pull out the chart on your animal. Especially if you've  
20 been going to the same place for ~~many years~~, just like a human  
21 being, they have charts, medical charts, on each of the  
22 animals. We haven't seen ~~any of those~~, Your Honor.

23 so should they get a protective order in lieu of all  
24 of that? I don't think so. And simply on the grounds that my  
25 clients are going to somehow misuse the information to inform

1 the public about what's really going on behind the scenes. I  
2 don't think that meets the good cause showing that is required  
3 under the rules.

4 And I think it would basically mean that this case, a  
5 large part of this case would have to be litigated in secret,  
6 which is what they want, which is what they've always wanted,  
7 because they don't want the public to know what's going on  
8 behind the scenes and they do want to control the debate, they  
9 want to control it, and they've been controlling it. And the  
10 way to control it is to keep my clients from getting the  
11 information.

12 And you denied their request for a broad protective  
13 order in November of 2003. And I think similarly you should  
14 deny it here. And, again, if they want to make a particular  
15 showing with respect to some particular medical records -- and,  
16 again, Your Honor, I could just pass an example up to you,  
17 because I have one right here. This is from their history.  
18 This is the kind of thing we got, instead of the detailed  
19 medical charts. Can I pass that up? This is on an elephant  
20 named Zena.

21 And if you look at this, Your Honor, again, we're  
22 talking at, if you look at bate stamp, the last two pages of  
23 this document, here's the kind of thing we're talking about at  
24 the bottom of the document, if you're with me. It's 0003224.  
25 I think it's the second to the last page, where the entry is

1 8-10-02. This is, again, a summary of the patient's medical  
2 records.

3 It says, healed wound on left upper forehead, small  
4 healing abrasion on left auxiliary area.

5 Okay. What is so confidential about that? We can't  
6 possibly have a notation like that in the public arena because  
7 it's going to cause Ringling Brothers severe commercial  
8 competitive harm? I don't think so. I don't think they've met  
9 their burden to show that, Your Honor.

10 So, again, yes, we think the motion for the  
11 protective order for all the medical records on the elephants,  
12 particularly in light of the way Ringling Brothers has  
13 proceeded in this case, should be denied. And, again, we're  
14 willing to entertain a narrow protective order with respect to  
15 particular documents if they can show that they're actually  
16 being relied on for some kind of scientific research study and  
17 disclosure would somehow hurt them commercially.

18 THE COURT: Let's use this history as an example.

19 Is there something in this medical history for Zena  
20 that suggests to you that there are other records available for  
21 her?

22 MS. MEYER: This is a history.

23 THE COURT: Well, the first two pages appear to  
24 pertain to patient history and then the remainder to medical  
25 history.

1 MS. MEYER: It's typed up for one thing. It's not  
2 handwritten. It's not the actual -- this is something that was  
3 taken from another document. Again, Your Honor, and you can  
4 see, they've got it by date, 2000. This is something that was  
5 made from other documents. It's absolutely clear to me.

6 We have had a veterinarian student, who's been  
7 working with us, who's gone through what we did get from  
8 Ringling Brothers, and she's assured us that this is not all  
9 there is. I mean, they've admitted, they admitted. They're  
10 not suggesting these records do not exist, Your Honor. They're  
11 now admitting that there are what they call detailed medical  
12 records, they're just not willing to disclose them publicly  
13 because they claim they're confidential.

14 So that's where we are on that. I just gave this as  
15 an example to show you that, as far as I'm concerned, their  
16 claim that this kind of information is commercially sensitive,  
17 in my view, is bogus, Your Honor. We're talking about very  
18 short descriptions of the condition of the animals. Again,  
19 there's absolutely no evidence that my clients are going to  
20 somehow take this information and misuse it in the media.  
21 That's the reason they gave for wanting the broad protective  
22 order in the beginning of this case, and you rejected it then  
23 and you should reject it now.

24 THE COURT: Are there any cases anywhere, to your  
25 knowledge, that would persuade the Court that there are some

1 privacy interests involved here of these animals --

2 MS. MEYER: No, Your Honor.

3 THE COURT: -- that have been referenced by some  
4 court somewhere?

5 MS. MEYER: No, Your Honor, the elephants don't have  
6 any personal privacy that I'm aware of.

7 THE COURT: I know you don't do this type of  
8 litigation --

9 MS. MEYER: Some of my clients might disagree with  
10 that statement.

11 THE COURT: -- but if this were litigation regarding,  
12 say, wrongful death and we're talking about the medical records  
13 of a plaintiff or medical records of a decedent --

14 MS. MEYER: Individuals.

15 THE COURT: -- you would agree that a protective  
16 order would be appropriate?

17 MS. MEYER: Sure, probably, yes.

18 They haven't asserted privacy on behalf of the  
19 animals.

20 THE COURT: I'm trying to figure out what the basis  
21 is.

22 MS. MEYER: They've made three arguments.

23 One is we're going to misuse it in the media, which  
24 I've already addressed.

25 Two is it's commercially sensitive because they might

1 want to rely on it for some study.

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

5 MS. MEYER: What's wrong with that? That's what the  
6 public proceeding is all about. That's our First Amendment  
7 right. Again, they go all over the country talking about what  
8 they do and how wonderful their care is, et cetera. What's  
9 wrong with my client saying, well, maybe, but look at this  
10 document, it says this animal had all kinds of wounds, draw  
11 whatever conclusions you want to.

12 THE COURT: Well, you just hit on a point, though,  
13 draw whatever conclusions. Is that fair to the defendant,  
14 though? Suppose the wounds were caused as a result of  
15 non-negligent acts on the part of the defendant. Is that  
16 really fair to have that information out in the media with the  
17 admonition go ahead and draw whatever conclusions you want? Is  
18 that really fair?

19 MS. MEYER: We haven't even released any of this  
20 information.

21 THE COURT: I'm just asking questions.

22 MS. MEYER: I think it's perfectly fair, Your Honor,  
23 because they can say, well, no, that's not true.

24 THE COURT: Wait a minute. Then you're litigating in  
25 a public forum, though.

1 MS. MEYER: No.

2 THE COURT: You're here before me because you've  
3 alleged that they're not complying with the Endangered Species  
4 Act.

5 MS. MEYER: Right.

6 THE COURT: These are allegations that I take  
7 seriously, as I do allegations in all these cases. And at some  
8 point the Court is going to resolve your complaint against, but  
9 it shouldn't shift to the public forum, should it, at this  
10 point?

11 I think I disagree with you when you say, sure, we  
12 may use them as our First Amendment right and the public can  
13 draw whatever conclusions they want to. Well, it's not up to  
14 the public to do that. It's not up to the public to look at  
15 some photos of an injured elephant and say, you know, damn  
16 Ringling Brothers, look what they're doing to that elephant.  
17 Is that appropriate for the public to do it at this particular  
18 juncture absent a finding of malfeasance or misfeasance on the  
19 part of the defendants? I think that gets to the heart of the  
20 issue right before the Court.

21 MS. MEYER: Well, again, Your Honor --

22 THE COURT: Why isn't that an accurately --

23 why isn't that a completely accurate statement of  
24 what this focus should be on as opposed to the public's focus  
25 at this time? I don't want this to turn into litigation in the

1 public arena.

2 MS. MEYER: Your Honor, I was simply saying if any of  
3 this information did make its way into the public forum, I  
4 don't think --

5 THE COURT: You essentially told me it's going to  
6 make its way into the public forum.

7 MS. MEYER: I don't know why they've saying that. We  
8 haven't been using any of this information.

9 THE COURT: Basically you said, well, that's our  
10 First Amendment right and the public can let the chips fall  
11 where they may.

12 All I'm saying is should I allow that happen at this  
13 junction as opposed to the juncture where I allow this  
14 information to come in under a protective order and then I  
15 resolve the merits of this case and then I let the chips fall  
16 where they may as a matter of law and then the public can draw  
17 whatever perceptions they can and say the judge was wrong, the  
18 judge was right, this was outrageous, but not now. I don't  
19 want this to turn into a media circus -- no pun.

20 Look, it's in this court now. Let me resolve the  
21 issues. I think you're going to get a lot of this information.  
22 In fact, I know you're going to get a lot of this information,  
23 but query whether it should be protected at least at this time  
24 until a determination of fault by this Court. I haven't made a  
25 fault determination at all. It may be another year or two or

1 longer before I do that. I may never make a fault  
2 determination.

3 MS. MEYER: Well, meanwhile we have Ringling Brothers  
4 going around spending an enormous amount of money telling the  
5 public what wonderful care they give their elephants and that  
6 our clients are lying. That's what they're saying. What is  
7 our response to that going to be?

8 THE COURT: The documents would show what, and your  
9 editorial would show what, how Ringling Brothers has mistreated  
10 elephants. That's what's going to happen. That's what they're  
11 concerned about.

12 MS. MEYER: Your Honor, that's my other problem with  
13 this. There's an assumption we're going to somehow take all  
14 this information when we get it and somehow misuse it in the  
15 media. We haven't used any of --

16 THE COURT: You keep saying misuse.

17 MS. MEYER: Or use it, whatever you want to call it.  
18 Your Honor, the information I just passed up to you,  
19 we haven't issued press releases on that. There's no -- why  
20 would we? Again, what does it say?

21 I mean, I don't think this case should be litigated  
22 in secret. I don't think there's any basis for Ringling  
23 Brothers to control the debate should something make its way  
24 into the public forum and someone want to draw a conclusion  
25 from it. I'm not telling them what conclusion to draw. If

1 they want to, they do. That's what happens.

2 I don't see anything nefarious or wrong about that.  
3 They're free to respond to it. Right now they are out there on  
4 a daily basis making all kinds of statements about the  
5 wonderful care that they give their elephants, that they're  
6 conserving them for the future and that our clients are lying,  
7 Mr. Rider is lying about what he is saying about these  
8 elephants being beaten all the time, chained all the time, that  
9 we're lying about the babies being forcibly removed from their  
10 mothers, that we are whacky animal rights activists, we cannot  
11 be trusted. None of that is true. And they're controlling the  
12 entire debate.

13 Now, if they're going to get to control the entire  
14 debate, then perhaps we should get a gag order against them for  
15 making those kind of statements and then we'll be on equal  
16 footing. But I don't think that they should be able to use  
17 that fact that one of these documents might make its way into  
18 the public somewhere along the line and somebody might draw an  
19 inference from it as a basis for getting a protective order.

20 THE COURT: I agree with you. There's no reason why  
21 your organization ought be maligned. Especially if they  
22 control the media, they can get on the Katie Couric show and  
23 bad mouth your organization and call you whatever they're  
24 calling you, I agree with you.

25 MS. MEYER: That's right. And what we have on the

1 other side, Your Honor, we have Tom Rider, a plaintiff in this  
2 case, he's going around the country in his own van, he gets  
3 grant money from some of the clients and some other  
4 organizations to speak out and say what really happened when he  
5 worked there. That's what we have on their side.

6 And they want to make sure that none of the  
7 information that might actually shed some light on what's going  
8 on, I'm not saying it necessarily does, but it might, I don't  
9 know, not be ever disclosed to the public. We have to litigate  
10 this case in secret so that they can control the debate.

11 And, again, Your Honor, the presumption is open  
12 proceedings. They have to come forward with good cause to get  
13 a protective order. They simply haven't met their showing.

14 The number one argument is that we're going to, they  
15 say, misuse the information in the public. No showing on that  
16 score.

17 Number two, they say the information relate, all of  
18 the medical records, all of the detailed medical records,  
19 relate to scientific research papers that they're working on  
20 right now. We say, well, we doubt that all of the medical  
21 records do, if you could show us particular records of  
22 particular studies we might be able to willing to agree to a  
23 protective order.

24 And their third argument that they came up with most  
25 belatedly, I think it was in their reply brief on the motion

1 for a protective order, was if any of these records are  
2 disclosed publicly, Your Honor, if they somehow make their way  
3 into the public domain, this is going to cause their  
4 veterinarians, who up until now give the highest standard of  
5 care to these animals, to suddenly be chilled in doing so  
6 because they won't want to write down any more what they've  
7 done or what they've observed because they'll be afraid that if  
8 they write down their observations it will get out into the  
9 public and somehow they'll be embarrassed or whatever. That's  
10 their other argument. They're going to stop giving the animals  
11 the highest standard of care that they normally give them  
12 because of the fear that our clients are somehow going to  
13 misuse and twist and use this information in a nefarious way.

14 I just don't think they've met their burden here,  
15 Your Honor.

16 And, again, we are more than willing on the second  
17 point to see if there are any particular records that relate to  
18 some commercially sensitive research paper they're working on,  
19 and, if so, enter into a protective order. But to have a  
20 blanket protective order for all of the medical records on all  
21 of these animals, particularly, again, when for a year and a  
22 half they pretended these records didn't even exist, I just  
23 don't think is fair, Your Honor, nor is it warranted under the  
24 rules of civil procedure.

25 THE COURT: Thank you.

1 Yes, counsel. Good afternoon.

2 MR. GULLAND: Good afternoon, Your Honor. Let me  
3 address, first, by rejecting categorically any suggestion that  
4 we have hidden the ball. That's not the way we litigate cases,  
5 I assure you.

6 THE COURT: That's not the way your law firm  
7 litigates cases, but maybe your clients haven't been as  
8 forthcoming to you as they should have been.

9 MR. GULLAND: Well, let me tell you what happened in  
10 this case.

11 THE COURT: Did an officer of the corporation sign  
12 that answer to interrogatory or response to a request for  
13 production that these are the entire medical documents?

14 MR. GULLAND: I'm not aware that there is any  
15 statement that these are the entire medical records, so let me  
16 take you through what happened.

17 we provided our responses to the document requests.  
18 And this was, I think, last May or June of 2004. There was no  
19 response to our production for months and months and months  
20 until late last fall. Plaintiffs then asked for the meet and  
21 confer.

22 we talked with them. They pointed out that -- and  
23 Mr. Wolson handled all this. They pointed out that the history  
24 documents which are nonconfidential and that we had produced --

25 THE COURT: The patient history document?

1           MR. GULLAND: That's right. That they had showed  
2 you, must have been compiled with information from  
3 veterinarians, because that's the way veterinarians work.

4           Mr. Wolson went back and said we don't seem to have  
5 the veterinary information the plaintiffs have pointed out to  
6 us. And they said, well, we better check our veterinarians,  
7 our off-site veterinarians, who it turned out a guy named  
8 Lindsey had medical records on his own that he kept in his  
9 office off the sites of Ringling and it was not included in the  
10 Ringling files.

11           And as soon as we found that, we got back to them,  
12 said we do have veterinary medical records, but they contain a  
13 lot of information that --

14           THE COURT: I think your clients are hiding the ball  
15 from you. It wasn't that long ago I practiced law. And I can  
16 recall frequently returning retainers to clients who wouldn't  
17 be complete, wouldn't be up front with the attorney. Because  
18 then the attorney's hands are tied and then the attorney finds  
19 himself in proceedings like this trying to justify things that  
20 are hard to justify.

21           They asked for all medical records and all  
22 veterinarian records. These aren't unintelligent people who  
23 own this circus. They knew what the request was for.

24           MR. GULLAND: Your Honor, I can only say, it's a very  
25 decentralized organization. It's an organization that travels.

1 THE COURT: What's more serious is they're playing  
2 footloose and fancy-free with the Court, and I take that very  
3 seriously. And if I have to march those CEOs in here for  
4 explanations under oath and under penalty of perjury, I'll do  
5 that. I would hope that I won't have to do that. But a simple  
6 request to produce medical records and veterinarian records.  
7 It's not a difficult one to comprehend. And for them to say,  
8 oh, gee, we really have to look further. I mean, without their  
9 diligence these records would have been unnoticed.

10 MR. GULLAND: I have to say that I think if there had  
11 not been the meet and confer process, we would not have gone  
12 back and found the veterinary records. But that's what a meet  
13 and confer process is for.

14 There is no bad faith here, Your Honor. The only  
15 reason --

16 THE COURT: That's not a condition precedent for your  
17 clients to be up front with you and up front with their  
18 advisories. There was a request made. They complied with the  
19 request. They produced what they wanted to produce. And they  
20 knew these other records existed. And no one said they didn't  
21 know these records existed. That's what concerns me.

22 MR. GULLAND: Your Honor --

23 THE COURT: I have the highest regard for you and  
24 your firm, you know that. When you're before this Court and my  
25 colleagues and other judges in this country, your firm does

1 great work. But your clients, I think, have hidden the ball  
2 from you and they find themselves in a very precarious  
3 position.

4 MR. GULLAND: Your Honor, I am unaware of any bad  
5 faith or effort to hide the ball here.

6 THE COURT: The bad faith would be they didn't  
7 produce everything they knew existed, though. That's the bad  
8 faith. Oh, off-site veterinary, oh, we didn't know you were  
9 talking about that, we thought it was just these couple of  
10 documents, and thank God the plaintiffs had the diligence to  
11 have a meet and confer because now we know. I mean, that's  
12 crap. And I'm not referring to you. That's just crap your  
13 clients are giving you, counsel. That's exactly what it is.

14 And I'm going to order that all those documents be  
15 produced. And I want someone to come in here and tell me. I'm  
16 going to set this down for an evidentiary hearing because I am  
17 truly displeased about the manner in which discovery has taken  
18 place. Those documents should have been produced prior to any  
19 meet and confer. There was a request. They had an obligation  
20 as clients to be up front with the plaintiffs and the Court.  
21 And if there were privileged documents, to say these documents  
22 are privileged so we could have litigated the privilege issue.

23 MR. GULLAND: Your Honor, we've never said the  
24 documents are privileged.

25 THE COURT: I want them produced. But I want them

1 also to show cause why they shouldn't be held in contempt of  
2 court, and I mean it. And if I find they're in contempt of  
3 court, I'm going to impose sanctions. I'm going to give the  
4 word monetary recovery a new definition, because they're  
5 playing games with the Court and I don't appreciate that.

6 MR. GULLAND: Your Honor, with all due respect, I  
7 don't think that there's an adequate basis here to reach that  
8 conclusion.

9 THE COURT: Fine. Then they can respond to my order  
10 to show cause, but someone is going to respond and tell me why  
11 they could not respond to a clear English request for a  
12 production of all medical and veterinarian records. They're  
13 going to do that. And if they don't, if they can't do it, I'm  
14 going to hold them in contempt and impose significant -- and do  
15 you know what, I'm not going to rule out incarceration either.  
16 Because I'm sick and tired of all these efforts by litigants to  
17 hide the ball. I've seen it time and time again and I'm tired  
18 of it.

19 So an order to show cause will be separate and apart  
20 from my ruling to produce all of the medical records and  
21 veterinarian records. And when I say all, I mean all, every  
22 last record.

23 Now, if there's some research going on that is going  
24 on in an effort to prepare some documentary, that's something  
25 different. If it can be justified. If it can be justified.

1           Now, I'm open to someone filing something, either  
2 under seal or on the public record, in an effort to persuade me  
3 that there's a need or a basis for a protective order in that  
4 regard. And I'll just leave it at that. It may well be that a  
5 basis will exist for the entry of such a protective order. And  
6 it doesn't sound like plaintiffs seriously disagree with that  
7 if an appropriate showing can be made.

8           But with respect to veterinarian records and medical  
9 records, I want them all produced and I want them produced now.

10           MR. GULLAND: Your Honor, on the question of the  
11 protective order, Ms. Meyer said --

12           THE COURT: The medical records and veterinarian  
13 records?

14           MR. GULLAND: Yes. Focused on that.

15           Ms. Meyer said again and again that there's no basis  
16 here to fear that the plaintiffs are going to misuse these.  
17 Just last week, Your Honor, a San Francisco television station,  
18 plaintiff Tom Rider appeared on that. Tom Rider appeared on  
19 that station and provided a reporter on that station with  
20 copies of tapes that were produced in this litigation.

21           In particular, there was a tape showing the birth of  
22 a baby elephant. And Mr. Rider and other persons affiliated  
23 with the plaintiffs made a commentary on that, very one-sided  
24 in our point of view, showing the elephant chained while she  
25 was having a baby in order to protect the baby elephant and

1 those around her. But they characterized the situation as one  
2 of abuse.

3 There was no opportunity on our part to have somebody  
4 respond. And it's a perfect illustration of exactly the kind  
5 of thing we fear, the use of information here to attack  
6 Ringling Brothers, which is quite unfair. And cases are not to  
7 be tried in the media.

8 In addition, the reporter for that San Francisco  
9 station was given a copy of Mr. Wolson's correspondence to  
10 counsel for plaintiffs discussing the information and tapes  
11 being turned over. So the point of the matter is that there's  
12 a very real need for some protection here.

13 THE COURT: Is there any case anywhere directly on  
14 point that deals with this precise issue where a public  
15 interest group has attacked the manner in which an organization  
16 either houses or cares for or raises animals and information is  
17 produced and then it ends up in the public arena? I'm not  
18 aware of any case directly on point.

19 MR. GULLAND: I'm not aware of a case that is that  
20 specifically on point. But there are plenty of cases that  
21 enter protective orders, which, if you'll recall, extend also  
22 to matters of embarrassment, as well as commercial and  
23 proprietary information on the view that information that's  
24 produced in discovery should not be used to try somebody out of  
25 court or to attack them out of court.

1           We're not going around -- our clients are not going  
2 around attacking particular plaintiffs here. Our clients are  
3 going around defending the care that they give the animals, but  
4 they're not using discovery information.

5           THE COURT: Counsel didn't make that up. Have there  
6 been characteristics of whacky animal rights organizations  
7 alluded to this organization?

8           MR. GULLAND: I'm not aware of any attack on these  
9 plaintiffs on the part of the defendants in this case. I'm  
10 simply unaware of that.

11           But, Your Honor --

12           THE COURT: How could you be embarrassed by your own  
13 files, by your own records? Let the public see them. What are  
14 you concerned about?

15           MR. GULLAND: We're not embarrassed by them. We're  
16 embarrassed by the misuse and out of context treatment of them.

17           If you take --

18           And we submitted affidavits in support of the  
19 protective order.

20           THE COURT: Suppose the information is produced.  
21 Well, it will be produced. But suppose the information is then  
22 used by plaintiffs with an admonition to plaintiffs that if  
23 they use this information in the public arena, they state only  
24 that this information was produced pursuant to a request by  
25 plaintiffs, period, without any editorial?

1           MR. GULLAND: well, the problem with things like  
2 veterinary records is they're very cryptic.

3           THE COURT: what's wrong with that approach? If  
4 they're produced, and they will be, and the plaintiffs are  
5 directed if you use this, because you do have a right to, it's  
6 not privileged information and you aren't arguing that it is  
7 privileged information, but if you use this, you use this with  
8 the following sentence, these documents were produced in  
9 discovery pursuant to a request by plaintiff, period. What's  
10 wrong with that?

11           MR. GULLAND: well, what's wrong with that, Your  
12 Honor, is two things.

13           First, veterinarian's notes, like the notes that  
14 lawyers right down, like the notes that doctors write down, are  
15 very cryptic. They're not drafted and prepared for the purpose  
16 of recording in a narrative necessarily understandable way  
17 what's going on. These are the notes of the veterinarian, or  
18 in the case of human beings the doctor.

19           THE COURT: Right. But these medical histories and  
20 patient records mean absolutely nothing without the  
21 underpinnings. They wouldn't say that. The doctor didn't sit  
22 down and type this information, I assume. I assume that's not  
23 the way it works. I mean, when I take an animal to a vet, and  
24 I had to do that today, the doctor wrote notes and I assume at  
25 some point should generate a record, I guess.

1           But what's wrong with that? You aren't arguing  
2 privilege. What's wrong with the underpinnings for this and  
3 what's wrong with the public seeing what those notes are? And  
4 maybe they aren't cryptic, but nevertheless they're notes of  
5 the professional that had a responsibility of treating an  
6 animal in a professional manner. What's the prejudice?

7           MR. GULLAND: That's exactly right. And I think it's  
8 perfectly appropriate, if the case ever gets to trial, somebody  
9 can try to use a medical record to examine a witness and find  
10 out exactly what it all means.

11           But to shovel this stuff into the public record and  
12 try to draw inferences from it, or put it in out of context,  
13 lends itself to all sorts of abuse, the very kind of abuse that  
14 we contend took place on that San Francisco television station  
15 last week.

16           And added to that is the problem also addressed by  
17 one of our affidavits that a number of the veterinarians and  
18 other staff people who've worked for Feld are engaging in  
19 scientific research. And it's well known that when the raw  
20 data for scientific research is publicized before the article  
21 is published, you use the publishability of the article.

22           So we would request, Your Honor, that at least until  
23 you can determine, based on our production of the information  
24 and our explanation our client's explanation of why it was not  
25 produced to begin with, that you have a provisional protective

1 order, if we have to turn it over, subject to a later order of  
2 the Court on this subject.

3 But in the meantime --

4 THE COURT: Do I have a statement from anyone under  
5 oath as to the reason why these documents were never produced  
6 in the first place? I don't think so.

7 MR. GULLAND: I don't think you have any statement  
8 under oath addressing the question why the documents were not  
9 produced in the first round of document production.

10 THE COURT: I mean, but for the plaintiffs' diligence  
11 we wouldn't have these documents now. Someone spent the time  
12 to go over these documents and say, you know, there's something  
13 else here, there's some notes for these medical histories,  
14 there are other things. And then you go back and ask your  
15 clients and they say, gee, I guess there are some other  
16 documents. I mean, that's not the way our system of litigation  
17 should operate.

18 MR. GULLAND: I'd say two things in response to that.  
19 First, I don't think that question determines whether  
20 there's a good case for a protective order here.

21 THE COURT: No. I don't think there should be any  
22 punitive aspect to it at all. I think I should be guided by  
23 Burka and other precedent from this Circuit. No one has  
24 invoked a privilege. And I'm not quite so sure that there is  
25 some legitimate reason to keep these otherwise discoverable

1 documents out of the purview of the public.

2 I agree with you, misuse. And that's why I stopped  
3 counsel when she kept using the word misuse. I'm concerned  
4 about the appropriate utilization, if at all, of these  
5 documents. And it may well be that if they're discoverable and  
6 there's no privacy interest and there's no otherwise recognized  
7 objection to production of these documents, I'm not quite sure  
8 they shouldn't find their way into the public purview.

9 MR. GULLAND: well, it's well settled, Your Honor,  
10 that when information that is produced in discovery is later  
11 admitted into evidence in court, then it is in the public  
12 domain and there's no way we can disagree with that.

13 But the purpose of discovery protective orders is to  
14 prevent all of the raw materials that are exchanged between the  
15 parties during the litigation which may contain confidential,  
16 embarrassing or other information and lend themselves to  
17 misuse, or even if not intentional misuse, misinterpretation in  
18 the public domain. That's why you have the order.

19 And I quite agree with you that after things  
20 percolate and we determine whether it's relevant, whether it's  
21 admissible, whether it would be appropriate to come into  
22 evidence, then if you make that determination, then it's not  
23 subject to a protective order.

24 But all I'm asking right now is that the materials  
25 should be protected as we are shoveling them into the --

1 THE COURT: How many materials --  
2 what kind of volume are we talking about for these  
3 documents?

4 MR. GULLAND: May I address that question to  
5 Mr. Wolson?

6 MR. WOLSON: Your Honor, the records vary by  
7 elephant, of course. But we're talking about on the order of  
8 about 70 elephants. And the records tend to be anywhere from  
9 ten to 30 pages from the ones I've seen. I don't know that  
10 I've seen them all.

11 THE COURT: Per elephant?

12 MR. WOLSON: Per elephant, that's right.

13 THE COURT: I'm sorry, ten to 30 pages?

14 MR. WOLSON: Per elephant, yes.

15 I don't know that I've seen them all, Your Honor, so  
16 there may be variation outside those bounds either way for some  
17 of the elephants.

18 THE COURT: A couple thousand pages that they  
19 overlooked?

20 MR. WOLSON: That's right, Your Honor.

21 THE COURT: They overlooked them?

22 MR. WOLSON: They overlooked them.

23 THE COURT: How could you overlook 2,100 pages of  
24 documents?

25 MR. WOLSON: The answer, Your Honor, is really that

1 there's a disconnect at times, I think in any organization,  
2 including this one, between in-house lawyers, who are sort of  
3 coordinating the process of discovery, and people at various  
4 decentralized locations. As Mr. Gulland referenced, this is a  
5 very decentralized organization. And, in this case, records  
6 that were off-site and stored in one of the veterinarian's  
7 homes were overlooked. That's my understanding, his home  
8 office, as I understand it.

9 THE COURT: Someone needs to get me a declaration  
10 under oath about that, because I'm not pleased about that at  
11 all. And, again, I want the record crystal clear, I'm not  
12 faulting the law firm at all. I have every reason to believe  
13 that you did exactly what any outstanding lawyer would do, you  
14 tell your clients to get these documents and then you have to  
15 rely upon what your clients give you. So I'm not shifting the  
16 blame to the lawyers at all. But I'm displeased about an  
17 argument that they overlooked some 2,100 pages.

18 By the same token, I don't think the remedy is to  
19 punish anyone and for a Court not to seriously consider the  
20 pros and cons of a protective order. I would not do that and  
21 not be arbitrary in that regard. But it causes the Judge to  
22 pause when we're talking about failure to produce documents of  
23 this magnitude.

24 MR. GULLAND: I can surely understand dissatisfaction  
25 with the failure to produce the documents in the first round,

1 Your Honor. But I can only say that when that question was  
2 raised, we pursued it with the client and the client without  
3 attempting to hide anything --

4 THE COURT: That's a good effort, counsel, but that  
5 doesn't save the day, because you told your clients this is a  
6 request, there is no privilege, get the documents. I know  
7 that, I know you did. So I appreciate your effort to try and  
8 save your client's skin, but that's not acceptable, from your  
9 client's point of view. I understand what you're doing, you're  
10 doing your job, but your client spun you on this one. And it  
11 spun the Court as well. I'm not pleased about this.

12 And I want some declaration from the CEO.

13 Is there a CEO of this circus?

14 I want a declaration from that person as to what  
15 happened. I want it submitted under oath, because I don't take  
16 this lightly at all.

17 MR. GULLAND: Well, we will submit declarations that  
18 describe the process, Your Honor. I don't know whether the CEO  
19 has any personal knowledge of this. And I would suggest that  
20 we'll provide declarations of people who do. And then if you  
21 want supplemental declarations, we would respond to that as  
22 well.

23 THE COURT: That's fine.

24 MR. GULLAND: May I just conclude on the protective  
25 order matter by saying that I think the protective order

1 certainly --

2 THE COURT: You agree that Berka is the controlling  
3 decision in our circuit, or are you principally relying on the  
4 Philip Morris case? Why is this case like Philip Morris?

5 MR. GULLAND: Your Honor, we're relying on a number  
6 of cases that broadly give the District Court the discretion to  
7 determine whether under all the circumstances there ought to be  
8 a protective order protecting a party from potential  
9 embarrassment. Now --

10 THE COURT: Wait a minute. I understand you. Look,  
11 there's no privilege here, and I appreciate your not trying to  
12 persuade me there's some privilege or privacy interest that  
13 attaches.

14 would you agree that the plaintiffs have the right to  
15 use documents, though, consistent with their First Amendment  
16 rights to reveal what they've received in discovery? would you  
17 agree with that, putting aside who these plaintiffs are?

18 MR. GULLAND: No. There are many cases that say that  
19 the First Amendment does not apply to give a party a First  
20 Amendment right to use information obtained in discovery.  
21 That's pretty clear. They have a First Amendment right, but  
22 not a First Amendment right to use and disseminate the  
23 information that is produced subject to the control of a court  
24 in discovery. And we submit, Your Honor, that we'll produce  
25 those documents, but they ought to be at the initial stage

1 subject to a protective order.

2 As the case goes on, plaintiffs can come back in and  
3 say, Your Honor, there's nothing here that ought to be subject  
4 to a protective order. We disagree with that. We think it  
5 will be plain that they should be subject to a protective  
6 order. But they can ask for that at that time. And I'm  
7 particularly concerned that if the raw data comes into the  
8 public domain --

9 THE COURT: The raw data meaning what?

10 MR. GULLAND: The raw data meaning the information  
11 that is contained in these records and that is part of the  
12 basis for scientific studies that are being conducted by  
13 contractors and by Feld, Ringling Brothers personnel. It will  
14 destroy the publishability of that.

15 THE COURT: There was recently a case on my docket,  
16 and I'm not so sure whether this case is analogous to that or  
17 not, a case filed by a plaintiff or plaintiff's organization,  
18 seeking the disclosure of pictures, photos of coffins being  
19 returned to the Dover Air Force Base. The parties --

20 I want to make sure I'm not talking about anything  
21 privileged. I want to be careful.

22 The parties have reached a resolution of that. And I  
23 know they have. And the media has already made reference to a  
24 partial settlement. It's a case involving the Federal  
25 Government and the plaintiff's organization.

1           And I can appreciate what the government's concern  
2 was. The showing of photos of our kids being returned in  
3 coffins en masse could have a number of effects on the public,  
4 et cetera, et cetera.

5           Is that the kind of concern that you're attempting to  
6 persuade me that exists in this case? Because in that case the  
7 Federal Government finally agreed that the public has a right  
8 to see those photos, and those photos have been published.

9           Now, does the concern that you have about the  
10 information that's in possession of your clients rise to the  
11 level, the concern, that the government had about the photos of  
12 our kids in coffins at Dover?

13           MR. GULLAND: well, I can't really try to compare  
14 that apples and oranges situation.

15           THE COURT: There's no comparison whatsoever, is  
16 there?

17           MR. GULLAND: No, I find it hard.

18           But I can say here what we have --

19           THE COURT: Isn't that a compelling reason then to  
20 allow the documents in possession of your client that will be  
21 produced to be shared with the public?

22           MR. GULLAND: I don't think so. Because the  
23 information that is in these medical records are the notes of  
24 veterinarians. They're very cryptic. They're going to  
25 describe the complaints, if you will, of an elephant.

1 complaints in the medical sense. That is to say, you know,  
2 whether there's an abrasion. The doctors or the veterinarians  
3 hypothesizes about what it could be. And in the nature of  
4 personal notes these documents can be taken out of context,  
5 they can be misused. Or evenly innocently, if they're just  
6 spread in the public record without any explanation of what  
7 they mean and what the veterinarian meant, they can be either  
8 unintelligible, on the one hand, or embarrassing on the other.

9 And the idea that there is a public interest in the  
10 dissemination of these private veterinarian notes that is  
11 comparable to the public interest in what you're talking about,  
12 the consequences of a war and the fact that thousands --

13 THE COURT: We're talking about our kids in coffins.

14 MR. GULLAND: -- that hundreds of young Americans are  
15 being killed, I just don't think they can be compared. Because  
16 on the one hand you have the consequences of a war, that is to  
17 say the fact that we are shedding blood, is a matter of strong  
18 public --

19 THE COURT: The point I'm making, though, is that the  
20 government, I assume, reached a conclusion that the photos  
21 should be released.

22 MR. GULLAND: I'm sorry?

23 THE COURT: The photos should be released. I hadn't  
24 ruled on it, the issue. I mean, to the government's credit it  
25 reached that decision. That's the point I'm making. And I'm

1 just trying to see whether or not the information in  
2 plaintiffs' files produce such a compelling argument for  
3 nonproduction of that information for the public's view. And I  
4 don't think it does. And I appreciate your candor. I don't  
5 think it does as well. There's no comparison. But that's the  
6 point. There's no comparison.

7 And, indeed, in a very compelling case, the  
8 defendant, the Federal Government agreed that the public has a  
9 right to see these photos and draw whatever conclusions the  
10 public wants to draw, absent an editorial. I don't even think  
11 there was an editorial. I mean, the photos spoke for  
12 themselves. And that's why I was asking the question maybe the  
13 information is -- well, the information is producible and the  
14 plaintiff can use it without any editorial. I don't know.

15 MR. GULLAND: I'm sorry, without any?

16 THE COURT: Without an editorial. Without a spin.  
17 Because counsel kept focusing on the misuse, misuse, misuse.  
18 And then I focused her attention on the use. What is the  
19 appropriate utilization? Maybe the appropriate utilization is  
20 this was produced in discovery, period. I don't know. What's  
21 wrong with that from a legal point of view? It's not  
22 participation in litigation in the public forum. That's just  
23 an accurate statement of what was produced in response to a  
24 legitimate request for production of documents, what was  
25 produced from defendants' own file.

1 MR. GULLAND: Your Honor, I think that kind of paints  
2 a misuse of the discovery process. That is to say namely a  
3 situation in which somebody requests discovery and then tries  
4 to disseminate what it obtains in discovery.

5 The purpose of discovery is to exchange information  
6 for the use in a particular case. The disputed issues should  
7 be tried in that case. And whatever you determine ultimately  
8 is relevant evidence to that trial is public. There is no  
9 getting around that. And if you determine that medical records  
10 or particular medical records are relevant evidence and allow  
11 it into the record, then ipso facto, it's subject to no  
12 protective order.

13 It's just that to protect parties under Rule 26, to  
14 encourage the discovery process to go forward without delays,  
15 embarrassment and to protect you from having to intervene every  
16 time there's some question about whether a party is misusing  
17 discovery information, we have protective orders.

18 THE COURT: The last thing I want to do is be  
19 arbitrary about it. I recognize one approach would be give me  
20 the 2,100 pages, now that I know we're talking about 2,100  
21 pages. That would be one approach. I mean, that would be  
22 burdensome on the Court. And it may well be that the more  
23 appropriate reason to respond should be produce it pursuant to  
24 a protective order and then we'll sort it out. I don't know.

25 MR. GULLAND: I would suggest that if you say --

1 THE COURT: I haven't seen the document. They  
2 haven't seen it either.

3 Have you seen these 2,100 pages?

4 MR. GULLAND: I have not. Mr. Wolson has seen a lot  
5 of it, but not all of it.

6 But my suggestion would be we'll produce it promptly  
7 under a broad protective order; that is, at the present time  
8 keeps it confidential. We can confer with the plaintiffs about  
9 how to proceed from that point with those records about what,  
10 if anything, should and should not be subject to -- continually  
11 subject to the protective order. If there are disputes about  
12 that, you can resolve it. In the meantime, on a parallel  
13 track, we will provide the information and the declarations you  
14 have requested about the delay in the production of that  
15 information.

16 THE COURT: Let me ask you. I can separate out the  
17 issues of a protective order versus the issues of privilege.  
18 And we all know that even though privileges aren't invoked  
19 there still could be a basis for a protective order. We all  
20 know. We recognize that. And I appreciate your candor in not  
21 arguing that there are some privileges that attach here. And  
22 I'm not going to be cavalier or arbitrary about a protective  
23 order. Obviously, I've spent a lot of time already on that  
24 issue.

25 Another approach would be this.

1           Do you have an opinion as to whether the Court could  
2           be persuaded by virtue of an in camera submission that a  
3           legitimate basis exists for a protective order?

4           MR. GULLAND: The difficulty of that, Your Honor, is,  
5           as I say, so much of this information is cryptic notes. And  
6           the concern that I have, and that we have, about that is the  
7           way those notes might be interpreted or misinterpreted if  
8           they're just allowed in their raw form.

9           And, similarly, we have the concern that some aspects  
10          of the medical records are being used for scientific research  
11          and the publishability of that research depends on the  
12          continuing confidentiality of the underlying data.

13          And I think there are parts of these records that  
14          might not present a concern, but there are large other parts  
15          that do. And the notion --

16          THE COURT: Is that a yes or a no?

17          If I afford you the opportunity to make an in camera  
18          submission, though, of the most --

19          what would be the appropriate word, inflammatory  
20          records, would that be appropriate? I haven't seen it, so I'm  
21          grasping now.

22          MR. GULLAND: You mean illustrations of what we're  
23          talking about?

24          THE COURT: Right.

25          MR. GULLAND: We could certainly do that, yes.

1 THE COURT: would that be the appropriate  
2 phraseology, inflammatory?

3 MR. GULLAND: I wouldn't say necessarily  
4 inflammatory. I would say that they are cryptic notes that  
5 somebody could try to characterize in an inflammatory way or  
6 that some people might interpret in an inflammatory way.

7 For example, a veterinarian might, as is true of some  
8 of these notes, scribble down alternative hypotheses about what  
9 might or might not be wrong with an elephant.

10 THE COURT: Or the cause of the injury.

11 MR. GULLAND: Or the cause of the injury, exactly.

12 And the difficulty is when you have the individual's  
13 notes, what you really need is to talk to the individual or  
14 cross examine the individual in order to understand them.

15 THE COURT: I assume the next step will be to depose  
16 those people, if they've not already been deposed.

17 MR. GULLAND: They have not been, no.

18 THE COURT: Have their identities been revealed to  
19 plaintiffs?

20 MR. GULLAND: I think the veterinarians' identities  
21 are known to the plaintiffs, yes.

22 THE COURT: Have they been the subject of  
23 interrogatories, those veterinarians?

24 MR. GULLAND: Not individually.

25 THE COURT: I assume had they been, they would have

1       been asked to produce the medical records, and they would  
2       produce everything in their possession up to this point, I  
3       assume?

4               MR. GULLAND: Well, the veterinarians have not  
5       individually received subpoenas or a request to produce  
6       information.

7               THE COURT: All right. So I guess in answer to my  
8       question, you're of the opinion that a basis would exist then  
9       for the Court to be persuaded after seeing an in camera  
10      submission that a legitimate legal basis exists for a  
11      protective order then?

12              MR. GULLAND: I think --

13              THE COURT: I don't want to waste your time or mine,  
14      but I want to be fair about this.

15              MR. GULLAND: I appreciate that, Your Honor. My  
16      concern about the in camera process here is the ex parte aspect  
17      of it, if we would submit the documents to you and then submit  
18      an ex parte description.

19              THE COURT: That's done every day. That's routinely  
20      done every day, isn't it?

21              MR. GULLAND: I don't like ex parte. I much prefer,  
22      and I think it relieves a burden on the Court --

23              THE COURT: It's not burdening me at all. I'm just  
24      asking a question at this point. I ask a lot of questions.  
25      That's one alternative. It's not high on my list of

1 priorities, I can assure you of that. And it may well be that  
2 the better part of wisdom is just to produce all the documents  
3 subject to a protective order and let plaintiffs make their  
4 argument for dissemination of some or all to the public. Maybe  
5 that's the best way.

6 MR. GULLAND: I think that's an easier and fairer way  
7 of doing it.

8 THE COURT: No, but judges frequently engage in in  
9 camera scenarios with various parties because of these sort of  
10 sensitive issues that exist in litigation. There's  
11 alternatives to ordering someone very arbitrarily to produce  
12 documents that if produced may well inure to the detriment of a  
13 party. So it's not uncommon for a judge to do it. Is it high  
14 on my list of priorities? No. I prefer not to. But I was  
15 just asking questions because I was approaching it from another  
16 way. That would be one way.

17 But I'm concerned that your answer was that I may not  
18 be persuaded that a basis exists, though, to keep these  
19 documents subject to a protective order. It seems like it was  
20 coming through loud and clear. I think you recognize that an  
21 ex parte in camera submission is appropriate. But I never got  
22 a clear answer that, Judge, if you saw these documents, you  
23 would be persuaded to keep it out of the public purview.

24 MR. GULLAND: Well, Your Honor, I don't want to be  
25 misunderstood. It's not as if I think that the documents

1 contain any smoking gun, because I don't think they do. It's  
2 not like a case where you're --

3 THE COURT: You're concerned about them putting a  
4 spin on Katie Couric's show and Katie picks the phone up and  
5 says, well, now it's your time to come on.

6 MR. GULLAND: That's exactly right.

7 THE COURT: Has your client been spinning it on  
8 Katie's show? Because, if so, it's only fair that they have  
9 their opportunity to litigate this -- not litigate it, but to  
10 offer their view as to whether these documents exist.

11 MR. GULLAND: My client hasn't done any spinning on  
12 Katie Couric's show with respect to these medical records.  
13 It's true my client says, and I think with great justification,  
14 that it provides the highest degree of care to these animals.  
15 But litigation is not properly a vehicle for getting discovery  
16 of medical records enabling these plaintiffs to conduct a  
17 counter-public relation.

18 THE COURT: And I'm concerned about that. And said  
19 as much when I was talking to plaintiffs' counsel. I'm  
20 concerned about that. I'm concerned about the shift being in  
21 the public arena.

22 This case can proceed very quickly. It hasn't.  
23 We're stuck now in discovery, I assume. But after production  
24 there will be requests for depositions, et cetera. And then  
25 maybe we'll get to the point where potentially dispositive

1 motions will be filed on a basis exists for an evidentiary  
2 hearing or, heaven forbid, there will be a settlement of the  
3 case. I mean, that happens sometimes. But we're not at that  
4 point now.

5 Thank you very much, counsel.

6 As to Rider, though, I want to be clear, is it your  
7 argument that you're not protecting documents that you possess  
8 of Rider, the documents are in the possess of third parties  
9 that you're protecting?

10 MR. GULLAND: No, that's not quite right. Here's our  
11 position.

12 THE COURT: There are some documents in possession of  
13 third parties other than the defendant, though, regarding  
14 Rider, is that right? And you don't really possess those  
15 documents or that information, do you?

16 MR. GULLAND: Here's our position on the Rider  
17 situation.

18 we have produced, to the best of my knowledge, all of  
19 the employment and other records of Rider that are maintained  
20 by the client. Now, since this litigation has started and  
21 since discovery in this case has started, we lawyers at  
22 Covington and Burling have compiled information on Mr. Rider  
23 from publicly available sources about statements he's made,  
24 about places he's been, things that he has done, that, in my  
25 view, is clearly lawyer investigatory information that we have

1 gathered for the purpose of the deposition cross examination of  
2 Mr. Rider.

3 THE COURT: And you plan to use that in an effort to  
4 discredit him?

5 MR. GULLAND: That's right. And we don't see that  
6 that is properly discoverable in this case.

7 I mean, the third party, if you will, in those  
8 circumstances is us. It's not the client, it's the lawyer,  
9 although we may share the information with the client.

10 THE COURT: So your argument is that this comes under  
11 work product?

12 MR. GULLAND: Correct. And if we had to list all of  
13 that information day by day in realtime as we gather it in  
14 further privilege logs, that would reveal the information  
15 itself. And it's certainly not the custom in this court or any  
16 other court that I'm aware of for lawyers to do that.

17 I know that the plaintiffs regularly look at the  
18 internet and gather information about my clients and they  
19 haven't listed that on privilege logs. When I say plaintiffs,  
20 I mean plaintiffs' lawyers.

21 THE COURT: Have you asked for it?

22 MR. GULLAND: I think an awful lot of the information  
23 we've requested in discovery would extend to that by the way  
24 the document requests are framed. But we've never understood  
25 the document requests as reaching that kind of information.

1 THE COURT: Thank you, counsel.

2 Just a very few minutes.

3 My inclination is to get those documents in your  
4 possession sooner than later under a protective order and then  
5 litigate what, if any, should be released to the public.  
6 That's my inclination at this point.

7 What's wrong with that approach?

8 I haven't seen the documents. I know I could spend  
9 probably the next several months looking at 2,100 pages in an  
10 effort to determine just how the defendants could be harmed or  
11 prejudiced, et cetera, et cetera. The last thing in the world  
12 I ever want to be is arbitrary about anything.

13 It seems to me the better part of wisdom is to direct  
14 that they be produced. I want some answers, though, as to why  
15 they weren't produced.

16 That gets me on a separate track. I don't  
17 necessarily want to spend a lot of time on that track. But,  
18 nevertheless, I'm displeased about the fact that documents  
19 weren't produced through no fault of the attorneys.

20 MS. MEYER: I'm not so sure about that, Your Honor.  
21 If I could be heard on that.

22 Just to say, Your Honor, that the attorneys have an  
23 obligation when a discovery request comes in to go to their  
24 client and the logical people who would have the documents that  
25 are covered by the discovery request and ask them to put that

1 information together.

2 Mr. Gulland mentioned that the person who had the  
3 documents off-site is William Lindsey. He is their full-time  
4 veterinarian, Your Honor, and has been for years. He is  
5 Ringling Brothers' chief vet. He's been listed as a witness  
6 because of that by these same attorneys, Your Honor.

7 They had an obligation to go to their client and say  
8 the plaintiffs have asked for all of the medical records on  
9 each of the elephants. Dr. Lindsey must produce all of his  
10 records. Not to come here --

11 THE COURT: Because there's no privilege that  
12 attaches.

13 MS. MEYER: There's no privilege. And not instead to  
14 hide the ball. And now here we are a year and a half later and  
15 they're telling you -- we've never heard this before, by the  
16 way -- they're telling you the reason we didn't produce them is  
17 because Dr. Lindsey had them at his house and there was a  
18 disconnect.

19 That is just not acceptable, Your Honor, it's not  
20 acceptable. Dr. Lindsey is their vet, full-time vet. He's the  
21 guy who's there when the USDA inspectors come, he's the guy  
22 who's there that's always talking about how wonderful their  
23 care of their elephants is, he's the guy, he's the point man,  
24 he's their principal vet. They had an obligation to ask him  
25 for these records and not just rest on some disconnect about

1 some disjointed, you know, organization.

2 This is a huge corporation, Your Honor, a  
3 well-financed corporation. This just is not going to cut it  
4 there's some mom and pop disconnect here. William Lindsey,  
5 they've identified him as a witness in this case. So I don't  
6 buy it.

7 I understand you're trying to give them, you know,  
8 whatever deference they're due, Your Honor. But the notion  
9 that the lawyers had nothing to do with this. They have an  
10 obligation, just as we did, Your Honor. We produced -- you  
11 haven't seen a motion to compel from the defendants in this  
12 case, Your Honor. We took our discovery obligations seriously.  
13 we gave them everything they asked for. Anything that was  
14 privileged we put it on a privilege log. We detailed it, we  
15 told them what it was and we told them why it was privileged.  
16 we're entitled to the same from them and we have not received  
17 it.

18 The Tom Rider documents you just heard about, the  
19 same pattern and practice, Your Honor. Did not identify the  
20 records, did not list them on the privilege log. To this day,  
21 Your Honor, they have not listed any of those documents that  
22 Mr. Gulland just told you are, of course, all covered by the  
23 work product privilege on a privilege log. They're not listed.  
24 They're not identified, they're not listed.

25 They took the position, as they do with a lot of the

1 discovery -- and I really hope you read our papers on the  
2 motion to compel, Your Honor, because this is the big  
3 problem -- they took the position that since they made a  
4 general objection to the way we defined Ringling Brothers in  
5 our instructions, we found this out later, that because they  
6 don't agree that attorneys and agents and consultants should be  
7 allowed to be part of that definition, that anything in the  
8 possession of their attorneys was nonresponsive.

9 They didn't claim it was privileged. This is a new  
10 claim that it's privileged. They pretended it didn't exist, it  
11 was nonresponsive, because they had a general objection  
12 concerning how we defined Ringling Brothers. As I said  
13 earlier, Your Honor, the problem is they had ten general  
14 objections. They asserted all ten for every single discovery  
15 response.

16 So there is absolutely no way for us to know what  
17 have they not given us and why. And that's why it took us the  
18 time it took us to sift through it, figure it all out, press  
19 them, press them, press them, press them, and now they're  
20 piecemeal belatedly asserting privileges for these things.  
21 Under Athridge they're just not allowed to do that, they're not  
22 allowed to do it.

23 And if you give them a protective order, and here's  
24 my problem with the way you want to proceed, Your Honor, it  
25 shifts the burden to us. It gives them what they want, a broad

1 protective order, and then puts the burden on my clients to  
2 come forward and ask you with respect to particular  
3 information, please let that be lifted from the protective  
4 order.

5 That's not the way it's supposed to work, Your Honor,  
6 under the rules. The burden is on them, the burden is on them  
7 to show that something, that there's good cause to have  
8 something subject to a protective order. Otherwise, the  
9 presumption is that these proceedings should be open to the  
10 public.

11 Now, I've got to address what Mr. Gulland had to say  
12 about the Channel 2 report in San Francisco. It's true, that  
13 was a videotape that they released to us, never claimed it was  
14 confidential, never claimed it was privileged, our clients have  
15 it. And Mr. Rider, as I explained, he goes around the country,  
16 he tries to talk to reporters, tell them what's really going on  
17 behind the scenes, because it is an issue of great public  
18 debate. The only reason they're allowed to have these animals  
19 that's an endangered species, Your Honor, is because our  
20 federal government allows them to have them because they claim  
21 they're conserving them.

22 And one of the reporters say, well, do you have  
23 anything? You say they chain their elephants all the time,  
24 Ringling Brothers say they don't chain their elephants all the  
25 time. Do you have any anything that would show they chain

1 their elephants? Yeah, we have this videotape that shows a  
2 nine year old elephant chained on three legs giving birth to a  
3 baby. Here it is. They gave it to us in discovery, just as  
4 you suggested.

5 The correspondence that Mr. Gulland referred to, they  
6 even gave the reporter the correspondence from Mr. Wolson. Do  
7 you know why we gave him that correspondence? Because the  
8 editor called us up on the phone and said where did you get  
9 this, how did you get this? We said they gave it to us in  
10 discovery, here's the letter, here's the letter from their  
11 lawyer. That's why we gave it to them.

12 So we just said we got it in discovery, they gave it  
13 to us, it's their videotape. That's exactly what we did.  
14 That's all we did. There's nothing nefarious about that. And  
15 they don't want that kind of information to be made public,  
16 Your Honor.

17 I've got to say one other thing, Your Honor, again,  
18 about them controlling the debate. They go around the country,  
19 they issue, here's an example, colored brochures handed out.  
20 This one we got in April of this year, babies, babies, babies  
21 and more on the way. All about their wonderful conservation  
22 program. They're breeding more elephants for use in the circus  
23 and they say they're conserving them.

24 This is what they're handing out to the public, Your  
25 Honor. Now, they didn't bother to tell the public that three

1 of these baby elephants who are depicted here, Kenny, Benjamin  
2 and Ricardo, are dead, they're dead. We think the public is  
3 entitled to know that. These baby elephants all died when they  
4 were under the age of four in the care of Ringling Brothers.  
5 They don't tell the public that. They say, babies, babies,  
6 babies.

7 THE COURT: Is this a recent publication?

8 MS. MEYER: Yes, Your Honor.

9 THE COURT: And it's published post-death of those  
10 baby elephants?

11 MS. MEYER: Yes, Your Honor. We got it just in  
12 April, April of 2005. It was picked up at the circus. The  
13 three babies that are dead are at the bottom of the page. The  
14 two in the corner, Kenny and Benjamin, it tells you when  
15 they're born, it tells the public when they're born. It  
16 doesn't mention that they're dead. The other elephant is  
17 Ricardo. Here he is on the left-hand page. He's at the  
18 bottom. Ricardo, born 12-05-03. Well, Ricardo died last  
19 August. They don't mention that. This was handed out at the  
20 circus in April of this year in Washington, D.C.

21 THE COURT: I didn't go this year.

22 MS. MEYER: So they're allowed to do that.

23 THE COURT: Not because I didn't want to go. My  
24 grandkids didn't want to go.

25 MS. MEYER: The point is, Your Honor, I don't

1 begrudge them their right to issue things like this. I have no  
2 problem with that at all.

3 I do object strenuously, however, when they come to  
4 this Court and say the actual records about these animals,  
5 records that might show that Ricardo is dead, that Kenny is  
6 dead, that Benjamin is dead, oh, the public can't see those  
7 because those are confidential. They get to control the  
8 debate. That's not fair.

9 And that's my position, Your Honor.

10 Again, we are willing to entertain the notion that  
11 there may be some particular medical record that relates to  
12 some scientific study that they're working on.

13 Mr. Gulland kept talking about how they're so  
14 cryptic, they're cryptic, they're cryptic. I mean, I know in  
15 the Exemption 4 context under FOIA. If the information is so  
16 cryptic, there is case law that says, well, then how could it  
17 be of any commercial value to any competitor if it's so cryptic  
18 you can't understand it without additional information. It  
19 seems to be what he's taking. It's your cryptic.

20 But there's simply no basis for basically giving them  
21 what they want and again rewarding them for the practice that  
22 they engaged in here by a year and a half later giving them the  
23 protective order and making us have to come in document by  
24 document and explain to you why this should be made public.

25 We don't want to advocate that a particular document

1 should be made public. We may not rely on any of this  
2 information in the public domain, I don't know. The point is  
3 it shouldn't be held in secret, unless there's a good reason to  
4 hold it in secret.

5 I mean, I got to tell you, Your Honor, one of the  
6 other reasons that we want this information to be available to  
7 us is, frankly, the only way we've been able to figure out that  
8 there are documents that we asked for that we didn't get,  
9 because, again, they didn't tell us, they didn't list them on a  
10 privilege log, was, frankly, talking to other groups and  
11 talking to reporters. The way we found out about this baby  
12 Ricardo, we had no medical records on him at all, the baby who  
13 is dead, the way we found out about it is a Washington Post  
14 reporter wrote an article about a lion, a Ringling Brothers  
15 lion, a young lion that had died last summer. And in the  
16 course of writing that story he found out that Ricardo, a baby  
17 elephant --

18 THE COURT: You're saying three of these elephants  
19 are dead?

20 MS. MEYER: Correct.

21 THE COURT: When did this appear? When did this  
22 publication appear?

23 MS. MEYER: This was a souvenir program that was  
24 handed out by Ringling Brothers in April of 2005 at either the  
25 MCI Center or the Armory.

1 THE COURT: It ends, and when Asian elephants are  
2 content, they naturally make little Asian elephants creating a  
3 wondrous living legacy for many generations to come.

4 Endangered species? Not if we can help it. And  
5 three of these elephants are dead?

6 MS. MEYER: Correct, Your Honor. And they don't want  
7 the public to know that. And that's why they don't want us to  
8 have any of these records in public.

9 Again, Your Honor, the burden is on them, the burden  
10 is on them. They claim they're not privileged, they have some  
11 other basis for saying this information should be withheld from  
12 the public. Let them make a document by document  
13 demonstration. But don't put the burden on my plaintiffs to  
14 come forward and show that a particular document should be  
15 disclosed. That's just not the way the rules are supposed to  
16 work.

17 And I really think it really gives these defendants  
18 what they wanted and what their whole strategy was designed to  
19 get. And I really just don't, in the interest of fairness, in  
20 addition to the fact that that's not the way the rules work, I  
21 don't think that should be the outcome here.

22 I'm a little concerned that we haven't really  
23 addressed the motion to compel, because there are large  
24 categories of other records that we've never seen. There's  
25 videotapes. We asked for all the videotapes that depict their

1 elephants. They now have over time, as we pressed and pressed  
2 and pressed, they've said that there are thousands of such  
3 videotapes. We've only gotten twelve.

4 And we've suggested many different ways of dealing  
5 with this. They say there's so many videotapes it's just too  
6 burdensome. We said give us a list of what you've got, give us  
7 an inventory, give us an index, we'll go through and tell you  
8 what. No, we can't do that. We said, all right, let's start  
9 with these categories, can you give us these categories of  
10 videos and then we'll decide what else remains. They said,  
11 well, not unless you waive your right to receive all the other  
12 videos that might be responsive to your request. We said, no,  
13 we're not really willing to do that. We said we'll enter into  
14 a protective order so that we can watch all the videotapes that  
15 are responsive and then we'll decide which ones we want. No,  
16 they don't want to do that either.

17 THE COURT: Why not?

18 MS. MEYER: It's too burdensome. I don't know, Your  
19 Honor.

20 But the point is there are large categories of  
21 information that go to the core of our case and also the core  
22 of their defenses in this case they just haven't given us. And  
23 it's taken us a long time to figure out what it is that they  
24 haven't given us. Because, again, not listed on the privilege  
25 log or otherwise identified.

1           But we think we've pieced it together as best we can.  
2           And that's why we filed this fairly massive motion to compel  
3           last January, Your Honor. And we really need to get a ruling  
4           on it. And whatever way is best to proceed it would take a  
5           long time to go through each of the categories. We're willing  
6           to rest on our briefs. We're even willing, if you think it  
7           would be more expeditious, to have a magistrate deal with this  
8           matter.

9           THE COURT: No, I don't want to burden the  
10          magistrate. I use the magistrate judges for purposes of  
11          conducting settlement discussions. They're overworked, they're  
12          great, they're excellent, we only have three and why shift the  
13          work.

14          MS. MEYER: They haven't given us records on their  
15          conservation efforts, they haven't given us records on certain  
16          investigations that the USDA has conducted. The list goes on  
17          and on, Your Honor. And we, frankly, have been stymied at this  
18          point. They're continuing to take discovery from my clients  
19          and our witnesses.

20          But until we get these records we feel that we're  
21          kind of stalled in terms of taking discovery because these  
22          records would all be records that we would want to use in our  
23          depositions. And I don't want to have to take three rounds of  
24          depositions of the same person because we're getting piecemeal  
25          a document disclosure. I would rather just get the documents,

1 see what we have and then decide which depositions to take.

2 The notion that we have to subpoena Dr. Lindsey to  
3 take his deposition, I don't think so. Dr. Lindsey has been  
4 listed as a witness, he works for them full time, he's their  
5 vet. I think we're allowed to take his deposition pursuant to  
6 a notice of deposition. But I heard Mr. Gulland mention that  
7 we hadn't subpoenaed their veterinarians yet. And that causes  
8 me some concern.

9 Again, the way we defined Ringling Brothers includes,  
10 obviously, their veterinarians and their attorneys. They  
11 should have listed whatever documents they had that they're  
12 claiming are work product on a privilege log. That's what a  
13 privilege log is for, Your Honor.

14 THE COURT: That's why my second question was with  
15 the exception of the five documents I've seen, are there other  
16 privilege logs?

17 MS. MEYER: Their most recent supplemental production  
18 in June supplemented the privilege log with another 31  
19 documents. There's nothing on there that indicates any of  
20 those records have anything to do with Tom Rider, by the way.  
21 They said they gave us all their employment records. Again,  
22 originally they said you've got everything, no privilege, no  
23 documents are being withheld from you, we're not claiming a  
24 privilege. We knew this couldn't be all because he worked for  
25 Feld for two and a half years. Mr. Rider said, no, there's

1 some employment records.

2 You know, after pressing and pressing and moving to  
3 compel, finally they gave us some of the records. They're not  
4 giving us all of the records. And we continue to seek all of  
5 the records. Nor have they given us these other records that  
6 they now admit they have that they claim are work product, but,  
7 again, not listed on a privilege log.

8 That's what a privilege log is for, Your Honor. I  
9 don't want to belabor the point. But the whole idea of the  
10 privilege log is you go through -- ours is voluminous -- you go  
11 through it, you see, oh, there's a document, I think we can  
12 compel that one, no, these two are clearly attorney-client,  
13 this looks like clearly work product. That's what a privilege  
14 log is for. You know what a privilege log is for.

15 we need that in order to pursue whatever documents we  
16 think we're entitled to see. But without a privilege log that  
17 identifies all of the documents that have been withheld from us  
18 we're at a loss. And I, frankly, think that since they've  
19 relied on this general objection theory to withhold large  
20 quantities of documents from us, that under Athridge they have  
21 now waived whatever right they have to claim a privilege.

22 But an absolute minimum, if you don't go that route,  
23 we need a detailed privilege log with respect to every single  
24 document we've asked for that we have not seen yet.

25 THE COURT: Yes, counsel, anything further?

1 MR. GULLAND: May I address the question of the  
2 videotapes?

3 I was surprised by what was said. We are perfectly  
4 willing, if they want to look through all of the videotapes, to  
5 allow them to do that at their expense. We have advised them  
6 that there's not an indexing system that allows to determine  
7 which of the videotapes show elephants in them. We have a good  
8 idea of which of the videotapes are the most likely, which  
9 are --

10 THE COURT: Why shouldn't the defendants go through  
11 those tapes and pull out the ones that pertain to elephants?  
12 Why should they have to rummage through that stuff at their  
13 expense?

14 MR. GULLAND: Because there are literally thousands  
15 of the tapes. And we're perfectly willing to allow them to go  
16 through and look at the tapes themselves.

17 THE COURT: That gets back to my point. Why should  
18 they have to do it in the first instance? You say they aren't  
19 categorized. But that's not their problem. They shouldn't  
20 have to just be exposed to a warehouse full of tapes and go for  
21 it in an effort to determine whether or not there are tapes of  
22 elephants.

23 MR. GULLAND: Well, Your Honor, we can provide, as in  
24 a document request, we can provide them copies of all of the  
25 files that are likely to contain the documents they're looking

1 for and they can conduct the search.

2 THE COURT: And that would be also producing copies  
3 of all the tapes then?

4 MR. GULLAND: Yes. But not at our expense. If they  
5 want copies of them, they've got to pay for the copies on their  
6 own.

7 The problem is one can identify the universe of --

8 THE COURT: How many tapes are we talking about? Are  
9 we talking about thousands of tapes?

10 MR. GULLAND: As I understand it, and Mr. Wolson can  
11 correct me if I'm wrong, we're talking about several  
12 subuniverses. First, there's, in the entirety, there are about  
13 10,000 tapes. And one can be fairly sure --

14 THE COURT: Some can be tapes of performances, I  
15 guess?

16 MR. GULLAND: That's right.

17 THE COURT: Aren't they categorized?

18 MR. GULLAND: But they're not categorized by whether  
19 they contain elephants or not. That's not the way they're  
20 recorded. One can have a sense of what tapes are likely to  
21 include elephants, because they might show performances where  
22 you know elephants performed.

23 THE COURT: Are all these tapes in a central  
24 location?

25 MR. GULLAND: No. The tapes are in a number of

1 locations, because some tapes are going to be tapes that are  
2 maintained by the touring, there are several touring circuses  
3 touring at any given time. Some of the tapes are going to be  
4 in the elephant retirement community. Some of the tapes are  
5 going to be in the elephant conservation center. So you've got  
6 a number of different places.

7 And there are a number of tapes that we're confident  
8 that contain elephants, and we're happy to turn those over. To  
9 the extent that plaintiffs want to then look through all of the  
10 other tapes to see if there are relevant elephant information  
11 in it, we're prepared to have them do that.

12 THE COURT: what about that? I don't want to spend a  
13 lot of time --

14 MS. MEYER: That sounds good to me, Your Honor. We  
15 would like the tapes that they're happy to give us that they  
16 know concern elephants.

17 THE COURT: well, you two can talk about the tapes.  
18 You can resolve that.

19 what other large category can you potentially  
20 resolve?

21 I saw that. I said I can't imagine they're arguing  
22 about tapes. Anyway, you were arguing about it. All right.  
23 You can work it out.

24 what other large category?

25 MS. MEYER: There are several, Your Honor. They

1 won't give us any of the records concerning conservation  
2 efforts.

3 MR. GULLAND: That's not true, Your Honor. It's  
4 simply not true that we're not providing the documents about  
5 the conservation records.

6 Do you want to address that, Mr. Wolson?

7 THE COURT: Let me do this. I'm going to take a  
8 short recess. Can I ask that counsel just talk among  
9 yourselves briefly about these fairly large categories of  
10 information that's discoverable. There's no doubt about it  
11 it's discoverable. Can you just talk for ten minutes. I'm  
12 going to take a short recess. Just talk about it among  
13 yourselves. You can work it out. I'll deal with the hard  
14 issues, but you can work out the issue of the tapes.

15 (Recess taken.)

16 THE COURT: I don't want to belabor the point of the  
17 files. I'm going to direct that counsel just continue to talk  
18 about the films and the other large categories for the next  
19 couple of days or so to see if you can work it out. If you  
20 can't work it out, let me know.

21 Here's my concern. I'm not going to rule today.  
22 Here's my concern. The documents will be produced. All the  
23 documents will be produced. My concern is whether or not it's  
24 pursuant to a protective order or not pursuant to a protective  
25 order.

1           And one legitimate concern I have, I guess, is the  
2 specter of future proceedings in this court, for instance, over  
3 documents. Suppose 2,100 pages of documents are produced.  
4 Then what's next when someone wants to argue about what a  
5 document means? Does that mean Carol has to run to the door  
6 and put the shades over the windows like we do in sealed  
7 proceedings and I ask everyone to step out of the courtroom?

8           I can just see that coming down the path. And I'm  
9 very concerned about that, I'm very concerned about that.  
10 Granted, this Court and other Courts, we preside over sealed  
11 matters every today, more than not, involving criminal cases.  
12 And there are many civil cases for which protective orders are  
13 in place and there's some litigation associated with the  
14 utilization of protected materials.

15           But here, given the sheer volume of documents we're  
16 talking about, I inquiry whether it's going to be consistent  
17 with the fair administration of justice to be involved in that  
18 type of scenario where everything is sealed from the public and  
19 documents are produced in secret and litigation proceeds in  
20 secret about what a document means and the public never knows.

21           Is that consistent with the fair administration of  
22 justice? I mean, this case is about documents, essentially.

23           MR. GULLAND: I don't envision that happening, Your  
24 Honor. It seems to me that by the time we would get to a trial  
25 in this case, if we get that far, then the evidence that

1 actually appears in court and that is offered in court is not  
2 going to be subject to a protective order. We're not going to  
3 play that game where you have to close the courtroom as if it's  
4 a national security case. I just don't envision that  
5 happening.

6 I'm much less concerned when the whole universe of  
7 the 2,100 pages of documents is narrowed down to specific  
8 information that is being relied upon by one of their experts  
9 or something. And that's subject to cross examination, that's  
10 subject to an opportunity to try the case in court, rather than  
11 to try it in the press. And I don't have that problem at that  
12 point.

13 All I'm worried about right now is that this massive  
14 document is going to be turned over. And I think we've heard  
15 in this room about a desire to use that information in the  
16 press. And that's simply what we want to --

17 THE COURT: I think that's a natural reaction to what  
18 plaintiff said, is the desire on the part of the defendants to  
19 blast the plaintiffs' organization and also their tactics in  
20 the press. I'm not sitting here making a finding of fact one  
21 way or the other, but, by the same token, I have high regard  
22 for plaintiffs' counsel as well and I doubt that she would make  
23 those accusations if they weren't truthful.

24 MR. GULLAND: Well, I don't see that there has been a  
25 public attack that has been conducted against the plaintiffs in

1 this case. I quite agree that Ringling Brothers has stated  
2 publicly that it provides the best of care to its animals.

3 THE COURT: And if they continue to do that, why  
4 shouldn't the plaintiffs be entitled to release production of  
5 the documents that may cast dispersions on what you just said?  
6 why wouldn't that be fair?

7 MR. GULLAND: Your Honor, they don't need our  
8 documents to engage in a public dialogue on the best care of  
9 animals. I really think it's quite irregular when counsel  
10 passes up to you, without even giving me copies --

11 THE COURT: You didn't have a copy of this?

12 MR. GULLAND: No.

13 THE COURT: I can ask them to give you a copy.

14 But I'm going to get to this document. When was it  
15 published?

16 MR. GULLAND: I have no idea what it is. I've never  
17 seen it before this day. I don't know whether  
18 characterizations of it are accurate. This is a case that  
19 should be tried in court, according to the rules of evidence  
20 and according to usual procedure.

21 THE COURT: You raise a good point, though. If the  
22 defendants can go on TV and print reports that these  
23 allegations are not true and that plaintiffs' organization is a  
24 whacky animal rights organization and we have the best of care,  
25 why shouldn't the plaintiffs be able to say, you know, our

1 allegations are as follows and our allegations are confirmed by  
2 defendants' own records which show mistreatment, in our view,  
3 of elephants? why shouldn't they be afforded the opportunity  
4 if the defendants want to mouth off to the media and the press  
5 and toot their horn about how good they're treating elephants  
6 and other animals? why isn't that just fair? If you choose  
7 not to do that, that's fine. Maybe that's the end of it. But  
8 if you continue to do it, that's certainly a factor the Court  
9 is going to take into consideration.

10 MR. GULLAND: Because they're not allowed, Your  
11 Honor, to use discovery documents that aren't yet the subject  
12 of any adjudication and finding by the Court that are not  
13 subject to the rules of evidence and relevance, et cetera, that  
14 are not subject to being sponsored by a witness, to try the  
15 case in the press. We're not doing that. We're not taking the  
16 information that they have produced in discovery and going  
17 around to the press and trying to use that. That's what they  
18 want to do.

19 THE COURT: That's also not very helpful to your  
20 cause, I'm sure. If there are allegations of mistreatment,  
21 you're not going to print that stuff up in the press. If  
22 there's something useful, you would be using it, wouldn't you?  
23 Look what the whackos gave us. I mean, you would be using it,  
24 sure.

25 That's what concerns me, though, the specter of

1 further proceedings, you know, motions hearings, where we cover  
2 the doors and ask everyone to leave.

3 MR. GULLAND: well, I entirely agree. And I don't  
4 want to participate in a trial where we have to go through  
5 those hoops. And I know that I'm hearing from you that we're  
6 not going to.

7 THE COURT: Do you envision a trial in this case?

8 MR. GULLAND: well, I continue to hope that there's  
9 not going to be a trial in this case, because I believe that  
10 we've got a good solid ground for summary judgment on the legal  
11 issues. And I know you've put the issue to discovery before  
12 that summary judgment motion can be filed.

13 THE COURT: what about settlement, do you envision a  
14 basis existing for settlement?

15 MR. GULLAND: well, as I've said before, Your Honor,  
16 Ms. Meyer has said at this podium to you that the case is about  
17 three things. About alleged misuse of the ankus, which they  
18 call the bull hook, about chaining and about separation of baby  
19 elephants from their mothers. And I have said from this podium  
20 that on those three issues, if it's a question of how you deal  
21 with that, we can talk about settlement. But it's not about  
22 that.

23 what this case is really about is an effort to end  
24 the use of elephants in circuses, not about attempting to reach  
25 some sort of common ground and agreement about those three

1 aspects of it.

2 As long as we can focus on three concrete allegations  
3 of mistreatment, there's a way to try to resolve the case. But  
4 when we're talking about an ideological fight about whether  
5 elephants should perform in circuses, those aren't  
6 circumstances that lend themselves to settlement of a case.

7 THE COURT: Is that all we're talking about, the  
8 three issues, or what are we talking about, the ultimate goal  
9 of plaintiffs to discontinue the use of performing elephants?

10 MS. MEYER: No, Your Honor. We've made it very clear  
11 that our complaint is that Ringling Brothers controls, trains,  
12 disciplines, in their word, their elephants with the bull hook  
13 by beating them, including baby elephants, that it keeps them  
14 chained most of the time and that it forcibly removes babies  
15 from mothers in order to get them ready to be trained to do  
16 tricks in the circus. And we take the position that all of  
17 those actions constitute unlawful takes within the meaning of  
18 the Endangered Species Act.

19 Now, if they can conduct their circus without  
20 engaging in those practices, then I think there would be a  
21 basis for a settlement. Their position, Your Honor, is they  
22 don't do any of those things, we're making that all up. So if  
23 they're suggesting they'll enter into a settlement where they  
24 say we won't do the things that we don't do, that's not going  
25 to work. That's what the discovery process is for, so we can

1 get the information that proves our claims and that defeats  
2 their defenses. That's what discovery is about.

3 And they are thwarting our ability to get that  
4 discovery. That's why we're here on a motion to compel  
5 virtually almost every category of records that we've tried to  
6 get that they won't give us. And that's the problem.

7 Your concern about secrecy, again, was one of our  
8 main concerns. And Mr. Gulland said, well, by the time we get  
9 to trial I don't envision that happening. But he's also  
10 talking about disposing of this case with a motion for summary  
11 judgment, which if they get their way will have to be done in  
12 secret.

13 Every single step of this case before a trial would  
14 have to be done in secret. All the depositions will have to be  
15 done in secret because we might refer to a medical record. All  
16 of the lay witness testimony concerning the medical records  
17 have to be done under some kind of protective order. Every  
18 procedural motion that is filed, every dispositive motion and  
19 brief in opposition to the dispositive motion, if it mentions a  
20 medical record will have to be done in secret.

21 And that's not the way civil procedure works. The  
22 presumption is open proceedings, unless there is a reason, a  
23 good reason, a really good reason, to have the process proceed  
24 in secret. And our position is they have not overcome that  
25 presumption with respect to the now 2,100 pages of records they

1 forgot to tell us existed a year and a half ago when we asked  
2 for them. And they should not be allowed to get a broad  
3 protective order that let's them keep all of those documents in  
4 secret and puts the burden on my clients to come forward and  
5 say that something should be released.

6 THE COURT: Is there a form of a protective order  
7 that over objection you could live with?

8 MS. MEYER: Yes.

9 THE COURT: I was going to invite you to propose it  
10 to the Court.

11 MS. MEYER: All right. Right now, off the top of my  
12 head?

13 THE COURT: Well, you're fast on your feet. Do you  
14 want to think about it over the weekend?

15 MS. MEYER: We could submit one to you.

16 THE COURT: That you could live with?

17 MS. MEYER: On the medical records? Yes. We've  
18 proposed it in our various pleadings on this matter, but I can  
19 put it in writing if that would help.

20 THE COURT: Sure.

21 MS. MEYER: Sure. I would be more than happy to do  
22 that, Your Honor. It's Friday. Can I give it to you on  
23 Monday? We're anxious to get on with this.

24 THE COURT: No. Noon tomorrow.

25 There could be a form of protective order that you

1 could live with. Have you shared that with --

2 MS. MEYER: We'll give that a shot.

3 THE COURT: Why don't you share that?

4 MS. MEYER: We'll, we've talked about it in general.

5 THE COURT: Have you really?

6 MS. MEYER: Well, we've proposed it in our briefs on  
7 the matter, but we can take a crack at it.

8 THE COURT: I think there may be. And I'm thinking  
9 of a way to craft something short of the typical form that we  
10 use in the hundreds and thousands of cases that come before us.  
11 It's the same, a protective order.

12 MS. MEYER: Right.

13 THE COURT: I invite you to propose it to counsel and  
14 see if you can get counsel's agreement. I think there probably  
15 could be --

16 Look, I want to get this litigation moving forward.  
17 I will never knowingly do anything arbitrary. It concerns me  
18 to say, you know, produce them all without a protective order.  
19 I don't know what the documents look like. There could be -- I  
20 could say give me the 2,100 pages. This isn't the only case I  
21 have.

22 Is that the most orderly way to proceed? No. It  
23 would be very easy to pick up the phone and call a magistrate  
24 judge, et cetera, and tell him or her to do it. I don't want  
25 to do that. But, I mean, those are all the factors that I'm

1 dealing with.

2 But I want you to have the discovery because next  
3 they'll be depositions. We're a year away from completing  
4 discovery, at least. That's my guess. That's my guess. So I  
5 don't want to spend too much more time on this issue.

6 And I invite you to submit, hopefully jointly, the  
7 terms of a proposed consent order that you could live with,  
8 recognizing that you always have the opportunity to try to  
9 persuade me that documents produced should be made available to  
10 the public.

11 MS. MEYER: I know. But, again, Your Honor, I'm  
12 worried about the delay too. I'm very worried about the delay,  
13 Your Honor. And we're setting up a system whereby we're kind  
14 of tabling things.

15 THE COURT: I'm going to rule on this in the next few  
16 days or so, I can tell you that. I want to get the case moving  
17 back on a track, to the credit of everyone. And I do have a  
18 high regard for the attorneys in your organization as well,  
19 just as I do for the attorneys who are with defense counsel.  
20 And I want to get the case moving. But I don't want to be  
21 arbitrary about this and in a very punitive way say produce  
22 everything without a protective order. I take that very  
23 seriously. But I want to give some more thought to the  
24 arguments over the weekend as well.

25 MS. MEYER: We could try to draft something, Your

1 Honor. But I would vote for getting it in as early as possible  
2 next week. And if there's not a meeting of the minds, you're  
3 going to have to --

4 THE COURT: Get it in by noon on Tuesday. That's  
5 workable, isn't it?

6 MS. MEYER: That's fine, Your Honor.

7 THE COURT: Is that enough time?

8 MS. MEYER: We'll either give you something or we'll  
9 tell you we can't agree on it.

10 THE COURT: If you can't do it, then submit your  
11 proposal.

12 MS. MEYER: Okay. We'll do that.

13 THE COURT: I invite you to try to get defendants'  
14 acquiescence. And the thing that defendants can't lose sight  
15 of the fact is that there was no privilege associated with.  
16 Now, I understand there doesn't have to be a privilege for a  
17 protective order to be applied. I recognize that. That it's  
18 just a case. I think there's a way to accomplish -- I think  
19 there's a way to satisfy everyone's objective, I think. And  
20 I'll give you a chance to persuade me that both sides can do  
21 it. If not, give me your proposal.

22 MS. MEYER: What are we going to do about all the  
23 other documents that are subject to the motion to compel? I  
24 know you've asked us to continue to talk. But assuming that we  
25 cannot reach a resolution on all of those, we really need to

1 get some help from the court.

2 THE COURT: Counsel should -- and, again, I don't  
3 want to order the attorneys to sit down and meet on Monday, but  
4 I'm strongly encouraging the parties to see if they can reach  
5 some agreement.

6 MS. MEYER: So we can let you know, it may not be as  
7 early as Tuesday at noon, what we've agreed on.

8 THE COURT: The discussion about the files for the  
9 parties to agree on the films, it took five minutes. If I had  
10 the time, I would keep you here longer today. I don't have the  
11 time. I spent two hours already on this. I can assure  
12 everyone I'm going to promptly rule on it. But I'll give you a  
13 chance to see if you can reach some accord with respect to the  
14 major files.

15 MS. MEYER: And hopefully some things will fall out.  
16 And then we'll just let you know what continues to be at issue.

17 THE COURT: All right. Tuesday at noon is fine.  
18 Thank you. Have a nice weekend.

19 Do you have another copy? I want to keep that. Can  
20 you provide defense counsel with a copy of that?

21 MS. MEYER: Yes.

22 THE COURT: When was that --

23 MS. MEYER: I think it was published last year.

24 THE COURT: I understand published, but when was it  
25 prepared, though?

1 MS. MEYER: One of our law clerks was able to get it  
2 at the April 2005, I think it was the MCI Center, or maybe the  
3 Armory. Wherever the circus was.

4 THE COURT: This is entirely misleading.

5 MS. MEYER: We think so, Your Honor.

6 THE COURT: It's even more misleading, and actually  
7 probably worse than that, that's probably not the correct word,  
8 if it was prepared subsequent to deaths.

9 MS. MEYER: It was definitely prepared subsequent to  
10 the deaths of Kenny and Benjamin.

11 THE COURT: I'm sorry, when did they die?

12 MS. MEYER: Kenny died in 1997 or '98 and Benjamin  
13 died in 1999.

14 THE COURT: Right. And one of these elephants was  
15 born in '02.

16 MS. MEYER: And Ricardo died last August.

17 THE COURT: How did they die? Do you know what the  
18 causes of death were?

19 MS. MEYER: There's a lot of dispute about that, Your  
20 Honor. Benjamin died while swimming in a pond. And you'll be  
21 hearing a lot about that in this case. Kenny died when he was  
22 presented for a third circus performance and had an acute  
23 digestive tract illness and he died from that. And Ricardo  
24 just died last August and, according to Ringling Brothers, died  
25 when he fell off a platform that he was playing on and broke

1 both of his back legs and had to be euthanized. There's a lot  
2 of dispute surrounding the circumstances of all three deaths,  
3 Your Honor.

4 MR. GULLAND: I guess I'm going to be the witness on  
5 the other side.

6 This pamphlet, which I haven't seen before, I read,  
7 address the success that Ringling Brothers has had in breeding  
8 baby elephants. And, indeed, the evidence in this case would  
9 show they've enjoyed greater success than any zoo or any other  
10 facility anywhere in the world.

11 As to the death of baby elephants, that's quite  
12 right, that there is a dispute about that. And it's a matter  
13 about which I'm confident will be evidence in this case.

14 THE COURT: All right. Have a nice weekend. Thank  
15 you.

16 (The hearing concluded at 4:45 p.m.)  
17  
18

19 CERTIFICATE OF REPORTER

20 I certify that the foregoing is a correct transcript  
21 from the record of proceedings in the above-entitled matter.  
22

23 Elaine A Merchant

24 ELAINE A. MERCHANT, RPR, CRR

25 Official Court Reporter