

EXHIBIT 2

Plaintiffs' Motion to Lift the
September 25, 2007 Protective Order
Civ. No. 03-2006 (EGS/JMF)

COPY

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:

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

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 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 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 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