UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MOTION TO LIFT THE
SEPTEMBER 25, 2007 PROTECTIVE ORDER

Plaintiffs request that the Court lift the Protective Order that it issued on September 25, 2007, requiring that "all information disclosed during discovery, including information disclosed or learned during the inspections, will be sealed." Order at 4, Sept. 25, 2007 (DE 195). In that Order, the Court expressly provided that after the Court-ordered inspections of the elephants were over, the Court would "permit the parties to brief the question of what, if any, disclosure there should be of information disclosed or learned during discovery, including during the inspections." Id.

As demonstrated in the accompanying Memorandum, defendant Feld Entertainment, Inc. ("FEI") has never shown any "good cause" to justify the imposition of a protective order for all materials obtained during discovery, as required by Rule 26(c). Indeed, Judge Sullivan has denied defendant's requests for a broad protective order on three separate occasions for that reason. Moreover, as also demonstrated in the accompanying Memorandum, FEI's treatment of the endangered Asian elephants in its care is a matter of significant and legitimate public interest and materials produced in discovery are essential if the public is to have an accurate and

balanced understanding of what is actually entailed in making the endangered Asian elephants perform in the circus. In addition, because the parties must now file many of their briefs in this case "under seal," the public is also prevented from even following the litigation of this matter of great public interest.

Accordingly, and for the reasons set forth in the accompanying Memorandum, plaintiffs respectfully request that the Court lift the September 25, 2007 Protective Order.

Respectfully submitted,

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Dated: May 6, 2008

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO LIFT THE SEPTEMBER 25, 2007 PROTECTIVE ORDER

INTRODUCTION

As the Court expressly authorized when it issued the September 25, 2007 Protective Order in this case, plaintiffs request that the Court now lift that Order requiring that "all information disclosed during discovery, including information disclosed or learned during the inspections, will be sealed." Order, Sept. 25, 2007 (DE 195). Although plaintiffs do not believe a protective order is warranted for any such information, plaintiffs would not object to maintaining the protective order for information that was obtained during the court-ordered inspections of the Asian elephants at issue in this case and that defendant Feld Entertainment, Inc. ("FEI") can demonstrate will, if disclosed, actually compromise its legitimate security interests. However, as Judge Sullivan has several times ruled during the pendency of this case, FEI has certainly never shown any "good cause" to justify the imposition of a broad protective order for all materials obtained during discovery, as required by Federal Rule of Civil Procedure 26(c).

Moreover, there is a significant public interest in the dissemination of information concerning FEI's treatment of the endangered Asian elephants in FEI's care. Indeed, FEI is continuing to provide the public with erroneous information concerning how the elephants are in fact treated and maintained and yet, because of the Protective Order, plaintiffs are foreclosed from providing the public with the other side of this issue of important public debate – i.e., what is actually entailed in making the endangered Asian elephants perform in the circus. Additionally, because, due to the Court's Protective Order, the parties – and particularly plaintiffs – must now file nearly all of their briefs in this case "under seal," the public is also prevented from even following the litigation of this matter of great public interest.

As described below, Judge Sullivan has on <u>three</u> occasions rejected defendant's efforts to litigate this case in secret. Consistent with these rulings, and because there is no legal or factual basis for continuing the sweeping Protective Order now in place, plaintiffs respectfully request that the Court lift the September 25, 2007 Order.

BACKGROUND

To place this motion in context, it is important to describe the ongoing public debate concerning the mistreatment of circus elephants, and defendant's unfettered ability to provide the public with its own – inaccurate – view of how it treats the elephants in its care.

A. The Public Interest In The Treatment Of Circus Elephants.

In this case plaintiffs challenge FEI's treatment of the endangered Asian elephants that are used in its circus performances throughout the country. Plaintiffs allege that a variety of practices that defendant uses to train and control the elephants – including the routine use of sharp "bull hooks" on the elephants, and leaving the elephants chained and confined for many hours each day – violate the prohibitions of the Endangered Species Act, 16 U.S.C. § 1531-1544.

In particular, plaintiffs allege that these practices violate the prohibitions against the "take" of the endangered elephants, because they "harm," "harass," and "wound" the animals within the meaning of the statute. See id. § 1532(19) (defining "take").

Plaintiffs' claims are pending in the midst of an important public debate over the treatment of elephants in circuses. Indeed, as evidence has emerged over the last fifteen years concerning the way elephants are trained through force and fear to perform tricks, and as awareness has grown concerning the extraordinary intelligence and social nature of elephants, the public has become increasingly uneasy with the use of elephants in circuses and has begun to question whether forcing elephants to perform unnatural tricks is an appropriate form of entertainment. See, e.g., Petula Dvorak, On the Other Tightrope, Parents Weigh Animal Rights Ethics Against Kids' Enjoyment of the Circus, Wash. Post, Apr. 3, 2008, at B1, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/04/02/AR2008040203185_pf.html (describing the "moral debate" concerning "whether it's good or bad for kids to see circus animals doing tricks"); David Crary, Ringling Bros. battles to keep elephants, Associated Press, June 3, 2006, available at http://www.kxmb.com/t/dance/10752.asp (describing this lawsuit and noting that "[t]he lawsuit has coincided with protest campaigns urging a boycott of circuses that feature animals at a time when others, such as Cirque du Soleil, have developed animal-free productions").

As a result, numerous jurisdictions throughout the United States and Canada have enacted legislation to curtail the use of and regulate the treatment of elephants in circuses. Bans on the exhibition of elephants and other exotic animals have already been enacted in cities in California, Colorado, Connecticut, Florida, Indiana, Massachusetts, New York, North Carolina,

Virginia, Vermont, and Washington,[1] and in various localities in other countries.[2] Similar legislation is currently under consideration in various jurisdictions throughout the country,[3] and, in 1999, a bill was also introduced in the U.S. Congress that would have made it a federal crime to use an elephant "in a traveling show or circus" or for elephant rides. See Captive Elephant Accident Prevention Act of 1999, H.R. 2929, 106th Cong. (1999).

Moreover, some circuses have even voluntarily stopped using elephants, including The Big Apple Circus (in 2000) and Circus Vargas (in 2005). See Pamela Sommers, Big Apple Circus: No Lions but Lots of Laughs, Nsh. Post, Oct. 28, 2008, available at http://theorganiza %20tion.bigapplecircus.org/%20PressRoom/?article=10&oldQuery=year=2000 (noting that the Big Apple Circus was using dogs and horses, but no other animals, in its show); Joanna Smiley, Step Right up for Family Fun, Today's Local News, Sept. 2, 2006, available at http://www.

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[1] These jurisdictions include: in California – Corona (Chapter 6.16 Display of Wild or Exotic Animals), Encinitas (Ch. 9.22, Display of Wild or Exotic Animals), Huntington Beach (Municipal Code Chapter 7.14), Rohnert Park (6.40.030 Display of Wild or Exotic Animals Prohibited) and Santa Ana (Ordinance No. NS-2669); in Colorado – Boulder (Health, Safety, and Sanitation 6-1-4) and Estes Park (Initiative 200); in Connecticut – Stamford (Sec. 74-6. Prohibited Acts); in Florida – Hollywood (§ 92.60 Animal Displays or Exhibits) and Pompano Beach (Ordinance No. 2000-63); in Indiana – St. John (Sec. 3-11 Performing Animal Exhibitions); in Massachusetts – Braintree (6.04.180 Displaying Non-Domesticated Animals for Entertainment), Provincetown (Article 64, Ban Use of Exotic Animals for Public Entertainment), Revere (6.04.031 Nondomesticated animals displayed for public entertainment or amusement) and Weymouth (Order No. 02-109); in New York – Greenburgh (City Code Chapter 345) and Southampton (Resolution 2005-654, 150-8); in North Carolina – Orange County (Sec. 4-182); in Vermont – Burlington (Resolution 9.0 The Mistreatment of Circus Animals in Burlington); in Virginia – Richmond (Bill No. 02-26, An Ordinance of the City of Richmond Prohibiting the Display of Wild and Exotic Animals for Public Entertainment or Amusement); and in the state of Washington – Redmond (Chapter 7.08) and Port Townsend (Ordinance No. 2758, 9.44.010 Display of Wild and Exotic Animals Prohibited).

[2] See Circus Reform Yes!, Worldwide Legislation, http://crymn.org/Pages/world legislation.html (last visited Apr. 29, 2008).

[3] This includes bills pending in Massachusetts (S 2002), New York (A 7255), and West Virginia (H 4358). See http://www.api4animals.org/legislation_archive_state.php?cat= 14&m=2008.

todayslocalnews.com/?sect=lifestyles&p=1662 ("Circus Vargas does not use exotic animals, such as elephants or lions, in its show").

FEI has actively participated in this public debate. It has responded to the increased public concern about the treatment of circus elephants by waging an extensive public relations campaign designed to convince the public that not only does FEI treat the elephants with the highest standard of care, but it is in fact the Asian elephant's best hope for survival, because without FEI's "Center for Elephant Conservation" ("CEC") – the breeding farm where FEI creates more elephants to stock its circus – the Asian elephant would become extinct. FEI disseminates its message via its website, circus brochures, and the media. See, e.g., Ringling Bros. and Barnum & Bailey, Animal Care FAQ 1, 2 (Jan. 2008), available at http://www. feldentertainment.com/pr/aca/Animal%20Care%20FAQ.pdf (stating that the elephants are trained "through a system of repetition and reward," and that trainers provide the elephants with a "stable, rewarding environment"); id. at 1 ("Our animal husbandry team provides a stable, stimulating and rewarding environment where animals thrive year-round.").

Indeed, FEI has ready access to the media, and is routinely featured on television and in print articles discussing its claimed commitment to humane treatment of the elephants. See, e.g., CBS News, Where Pachyderms Go to Pack It in, May 19, 2006, http://www.cbsnews.com/ stories/2006/05/19/ assignment_america/main1638027.shtml (CBS Evening News segment on the CEC quoting CEC caretaker as saying that the elephants are "like members of my family"); Geoffrey Norman, Where Do 31 Elephants Sleep? At a retirement home in Florida, Wall Street Journal, Apr. 19, 2006, available at http://www.opinionjournal.com/la/?id=110008257 (describing the CEC and stating that "[p]lainly, the CEC is good for the elephants"); Dvorak, On

the Other Tightrope, supra (FEI's head of communications stating that the "circus is a place to see animals and humans in 'a caring relationship'").

At the same time that it is actively publicizing its own self-serving message concerning its commitment to the well-being of the elephants, defendant discredits plaintiffs and others who speak out on behalf of the elephants, including by accusing them of lying when they say the elephants are hit with bull hooks and chained for most of the day. See, e.g., Fran Spielman, Ringling Bros. Denies Tales of Vicious Elephant Abuse, Chicago Sun-Times, Apr. 9, 2008, available at http://www.suntimes.com/news/politics/884949,CST-NWS-circus09.article (quoting FEI spokesperson stating that a former circus employee was nothing more than a "'sponsored witness of an animal-rights group'" when she testified about the elephant abuse that she witnessed); Elaine Hopkins, Circus elephants abused, Peoria J. Star, May 20, 2000, Pls.' Ex. 1 (attributing to FEI's spokesperson the statement that "[Tom] Rider is being used by the activist group and isn't telling the truth").

B. Judge Sullivan's Prior Rejection Of Sweeping Protective Orders.

In furtherance of its effort to keep the public in the dark about what actually goes on at the circus, and to continue to portray plaintiffs as fabricators of elephant mistreatment, FEI, from the beginning of this case, has sought to keep evidence that supports plaintiffs' position from ever reaching the public. Thus, prior to this Court's imposition of the September 25, 2007 Protective Order, defendant FEI had already sought a ruling from Judge Sullivan three separate times that would require all documents obtained in discovery to be kept "confidential." However, each time Judge Sullivan denied that request.

1. The Court Denied Defendant's Initial Request for a Broad Protective Order.

On October 8, 2003, prior to the commencement of discovery in this case, defendant moved for a broad protective order that would have covered any document produced in discovery that defendant unilaterally determined to be "confidential." See Mot. for Protective Order (DE 5). Judge Sullivan denied defendant's request, and instead held that "[d]efendant may move for a protective order with respect to particular specified information . . . upon a showing of 'good cause,' as permitted by Rule 26(c) of the Federal Rules of Civil Procedure." Order, Nov. 25, 2003 (DE 15) (emphasis added). Indeed, pursuant to that directive, plaintiffs have voluntarily agreed to abide by protective orders with respect to certain categories of information, including certain medical records for the elephants and videotapes depicting circus rehearsals or performances. See Pls.' Proposed Protective Order for Medical Records, Sept. 23, 2005 (DE 49); Joint Stipulated Protective Order Regarding Video Recordings, Aug. 8, 2006 (DE 75); Joint Stipulated Protective Order Concerning Recordings of Ringling Bros. and Barnum & Bailey Circus Performances, Aug. 15, 2006 (DE 77).

2. The Court Denied Defendant's Request for a Protective Order for all of the "Medical and Veterinary Records" for the Elephants.

After the parties exchanged discovery materials in June 2004, it became clear that defendant had withheld numerous medical records for the elephants. Accordingly, after meet and confer negotiations were unsuccessful, plaintiffs moved to compel. In response, defendant moved for a protective order that would shield from the public what defendant described as the elephants' "detailed veterinary records," Def's Mot. for a Protective Order at 3, Feb. 15, 2005 (DE 30), insisting that (1) the records contained veterinary notes that, taken out of context, could "embarrass defendants and injure their reputation," and (2) the records would reveal confidential

information being used for "research papers and articles" on various topics of elephant behavior and physiology. Id. at 2. Plaintiffs opposed a broad protective order, but proposed an order that would keep confidential medical records for which defendant could make a "specific showing" that such records "form the basis of particular research papers that defendants intend to publish in the near future." Pls.' Opp'n. at 16, Mar. 4, 2005 (DE 34).

At a hearing on plaintiffs' motion to compel, Judge Sullivan expressed serious concern about keeping discovery documents sealed from the public if there were no compelling reason to do so. See Tr. of Sept. 16, 2005 Hearing at 43, Pls.' Ex. 2 ("Sept. 16 Tr.") ("[I]t may well be that if they're discoverable and there's no privacy interest and there's no otherwise recognized objection to production of these documents, I'm not quite sure they shouldn't find their way into the public purview."). Judge Sullivan also expressed concern that if a broad protective order were entered for all medical records, it would be difficult to litigate the case in the open, since such records were so clearly relevant to plaintiffs' claims in the case. See id. at 79 ("[G]iven the sheer volume of documents we're talking about, I [query] whether it's going to be consistent with the fair administration of justice to be involved in that type of scenario where everything is sealed from the public and documents are produced in secret and litigation proceeds in secret about what a document means and the public never knows.") (emphasis added).

In addition, Judge Sullivan recognized the inequity inherent in requiring large numbers of discovery documents to be sealed from public view, which would severely restrict plaintiffs' ability to counter Ringling Brothers' misleading statements to the public and press about the standard of care that it provides to the Asian elephants, especially when defendant also accuses plaintiffs and other former Ringling Brothers' employees of lying about defendant's mistreatment of the elephants. Thus, he observed:

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

Sept. 16 Tr. at 81-82 (emphasis added); <u>see also</u> <u>id.</u> at 81 (noting that if defendant continues to state publicly that it provides the best of care to its animals, "why shouldn't the plaintiffs be entitled to release production of the documents that may cast [a]spersions on [that] . . . . Why wouldn't that be fair?").

Judge Sullivan then issued an order granting plaintiffs' motion to compel the medical records, and entered the limited protective order proposed by plaintiffs – i.e., a narrow order that would bar public disclosure of records that are specifically being relied on in particular research papers. <u>See</u> Order, Sept. 26, 2005 (DE 50). Judge Sullivan added that "[p]laintiffs are admonished, however, that the purpose of discovery is to produce and seek evidence for use *in litigation* and the Court will not take lightly any abuse of the discovery process for purposes of publicity or to argue the merits of plaintiffs' claims in the media, as opposed to the Court." <u>Id.</u> (italics in original).

3. The Court Again Denied Defendant's Attempt to Prevent <u>Public Access to Documents Obtained in Discovery.</u>

Even after the Court ordered defendant to produce the medical records for the elephants, FEI still did not produce all such records, and plaintiffs therefore moved to enforce the Court's September 26, 2005 Order. <u>See</u> Pls.' Mot. to Enforce, June 9, 2006 (DE 69). In response, and before the Court ruled on plaintiffs' motion, FEI produced thousands of pages of additional

medical records that it had continued to withhold in the face of Judge Sullivan's Order. After the Court granted plaintiffs' Motion to Enforce on September 26, 2006, DE 94, FEI produced still more boxes of medical records that it had continued to withhold.

Many of these previously withheld records support plaintiffs' longstanding allegations concerning defendant's treatment of elephants. For example, one of the documents is an internal report from Deborah Fahrenbruck, Ringling Brothers' "Animal Behaviorist," stating that Ms. Fahrenbruck observed an elephant handler "hook Lutzi [one of the elephants at issue in this case] under the trunk three times and behind the leg once in an attempt to line her up for the T-mount," and that "after the act [she] stopped backstage and observed blood in small pools and dripped the length of the rubber and all the way inside the barn." Pls.' Ex. 3 (emphasis added). Ms. Fahrenbruck further stated that she had "seen Isham [a handler] hook [Lutzi] fairly severely," and that "we had an elephant dripping blood all over the arena floor during the show from being hooked." Id. at 2 (emphasis added).

In another document, a Ringling Brothers' veterinary technician reported that "[a]fter this morning's baths, at least 4 of the elephants came in with multiple abrasions and lacerations from the hooks . . . ." Pls.' Ex. 4. Another internal document revealed that Troy Metzler, the head elephant handler on the Blue Unit, "was observed hitting Angelica [a young elephant] 3 to five times in the stocks before unloading her and using a hand electric prod within public view after unloading." Pls.' Ex. 5.[4]

Because these records are extremely relevant to plaintiffs' claims, plaintiffs relied on them in opposing defendant's subsequent motion for summary judgment, and plaintiffs also made these records available to the public through their websites. See Pls.' Opp'n to Defs' Mot.

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[4] This is just a sampling of the records that defendant had withheld.

for Summ. J. at 29-31, Oct. 6, 2006 (DE 96), Exhibits C and N; Notice of Filing, May 15, 2007 (DE 145), Exhibit OO; see also, e.g., Press Release, ASPCA, The Circus Comes to Town . . . and Brings a Lawsuit With It (Mar. 21, 2007), available at http://www.aspca.org/site/PageServer?pagename=press_032107_2.

Accusing plaintiffs of violating Judge Sullivan's September 26, 2005 "admonishment" concerning the use of discovery materials, defendant then sought an order from the Court demanding that plaintiffs "cease and desist" from sharing with the public "references to discovery material" "until the Court has an opportunity to reach the merits of the case," Def's Expedited Mot. to Enforce the Court's Sept. 26, 2005 Order at 2-3, June 11, 2007 (DE 152), which if FEI has its way will also never happen. Judge Sullivan, however, denied the motion. Order at 2, Aug. 23, 2007 (DE 177).

C. This Court's September 25, 2007 Order.

On September 25, 2007, this Court ruled on several matters that the parties had disputed concerning plaintiffs' pending request to conduct Rule 34 inspections of the Asian elephants at issue, including defendant's request that all of the information obtained during the inspection process be subject to a protective order because of a "security issue." See Notice of Issues for Status Conference at 4, Sept. 19, 2007 (DE 188); see also Tr. of Sept. 19, 2007 status conference at 17, Pls.' Ex. 6 ("Sept. 19, 2007 Tr."); Opp'n to Mot. to Compel Inspections at 19-21, Nov. 7, 2006 (DE 105). Although plaintiffs contended that such a protective order was unnecessary, see Sept. 19, 2007 Tr. at 17-21, Pls.' Ex. 6, the Court subsequently issued an order stating that, "[f]rom this point, all information disclosed during discovery, including information disclosed or learned during the inspections, will be sealed and both parties and their counsel are prohibited from disclosing it to any person who is not a party to this lawsuit or counsel to one of the

parties." Order at 4, Sept. 25, 2007 (DE 195). The Court added that after the inspections were over, it would "permit the parties to brief the question of what, if any, disclosure there should be of information disclosed or learned during discovery, including during the inspections." Id. On September 27, 2007, the Court granted plaintiffs' motion to clarify that its Protective Order did not pertain to any discovery that had been obtained prior to September 25, 2007. See Minute Order, Sept. 27, 2007 (granting plaintiffs' motion for clarification).

Now that fact discovery has ended, and in light of Judge Sullivan's repeated denials of FEI's requests for a broad protective order, and because defendant has never demonstrated good cause to justify such a sweeping order, plaintiffs respectfully maintain that the Court should lift, or at least significantly narrow, the Protective Order imposed on September 25, 2007.

ARGUMENT

A. Defendant Has Not Demonstrated "Good Cause" For A Blanket Protective Order.

"The Federal Rules of Civil Procedure create a statutory presumption in favor of open discovery, extending even to those materials not used at trial." John Does I-VI v. Yogi, 110 F.R.D. 629, 632 (D.D.C. 1986) (citations omitted); see also Pub. Citizen v. Liggett Group, Inc., 858 F.2d 775, 790 (1st Cir. 1988) ("It is implicit in Rule 26(c)'s 'good cause' requirement that ordinarily (in the absence of good cause) a party receiving discovery materials might make them public."); Turick v. Yamaha Motor Corp. USA, 121 F.R.D. 32, 35 (S.D.N.Y. 1988) ("The requirement of good cause is based upon one of the fundamental premises of discovery: Discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings.") (citation omitted); In Re "Agent Orange" Prod. Liab. Lit., 104 F.R.D. 559, 567 (E.D.N.Y 1985) (noting that "in the absence of such proof [of harm], the discovery is open to the public").

The presumption in favor of open discovery may only be overcome if a party meets its burden to establish "good cause" that a protective order is necessary to protect the party from "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). Moreover, the courts have required parties to "articulate specific and particular facts" demonstrating such "good cause" to subject discoverable information to a protective order. Avirgan v. Hull, 118 F.R.D. 257, 261 (D.D.C. 1987) (citation omitted); see also Exum v. U.S. Olympic Com., 209 F.R.D. 201, 206 (D. Co. 2002) ("the party seeking a protective order must show that disclosure will result in a clearly defined and serious injury to the party seeking protection") (citation omitted).

Here, defendant made no showing of any harm that it would suffer before the Court issued the September 2007 Protective Order, other than its assertion that certain unspecified information obtained during the court-ordered inspections might, if disseminated, somehow pose a "security issue." Notice of Issues for Status Conference at 4, Sept. 19, 2007 (DE 188). Nor, as Judge Sullivan has already ruled on three occasions, is FEI's general complaint that some of the discovery information may find its way into the public debate on this issue a basis for imposing a broad protective order. See Order, Nov. 25, 2003 (DE 15) (rejecting defendant's motion for a protective order in which it had argued that plaintiffs would use discovery information in support of their publicity campaigns, and permitting defendant to move for a protective order only "with respect to particular specified information . . . upon a showing of 'good cause'"); Order, Aug. 23, 2007 (DE 177) (rejecting defendant's request for an order prohibiting plaintiffs from making discovery materials available to the public).

In short, therefore, FEI has never made the threshold showing necessary for a protective order covering all discovery materials obtained after September 25, 2007. Accordingly,

consistent with Judge Sullivan's past rulings, the Protective Order should be lifted. At minimum, the Court should limit the Order to those specific inspection materials that actually pose some security risk for FEI's facilities, i.e., the narrow interest asserted by FEI before the Court imposed the Order.

B. The Public Has A Significant Interest In Obtaining Information Concerning FEI's Treatment Of Its Elephants, But There Is No Countervailing Interest In Cloaking This Litigation in a Veil of Secrecy.

Not only has defendant made no showing of harm that justifies the broad Protective Order that has been imposed in this case, but, as demonstrated supra at 2-6, there is a substantial public interest in the treatment of Asian elephants in the circus that weighs heavily in favor of lifting the Protective Order. Courts routinely take the public's interest into account when determining whether to place litigation materials, including discovery materials, under seal. See, e.g., United States v. Hubbard, 650 F.2d 293, 317 (D.C. Cir. 1980) (considering the "[n]eed for [p]ublic [a]ccess to the [d]ocuments at [I]ssue"); In Re "Agent Orange" Product Liability Litigation, 104 F.R.D. at 572 (noting, in connection with motions to lift protective orders, the "public . . . interest in learning more about the nature of the issues raised" by the litigation); Exum, 209 F.R.D. at 206 (in determining whether to prevent public access to litigation materials "[t]he court should also consider . . . whether the case involves issues important to the public" (emphasis added)).

Moreover, the D.C. Circuit has identified several factors that "bear upon the precise weight to be assigned . . . to the always strong presumption in favor of public access to judicial proceedings." Hubbard, 650 F.2d at 317 (emphasis added). Those factors include (1) the need for public access to the documents; (2) the extent to which the public has had access to the record prior to the protective order; (3) the identity of the party objecting to disclosure; (4) the strength

of the property or privacy interests involved; (5) the possibility of prejudice to the party opposing disclosure; and (6) the purpose for which the record have been used in the litigation – i.e., whether the records are relevant to the merits of the case or to a collateral issue. See id. at 317-22; see also Roberson v. Bair, 242 F.R.D. 130, 133 (D.D.C. 2007) (applying the Hubbard factors).

In this case, each of these factors weighs heavily in favor of lifting the Protective Order that encompasses all discovery materials generated since September 25, 2007. First, once again, the issue of whether elephants should be used in circus performances is one of substantial public interest and debate. See supra at 2-6. As also discussed, FEI is extraordinarily active in this debate, routinely touting its commitment to "conservation," and the high standard of care that it provides to the elephants, including its use of only positive reinforcement and "rewards" to make the elephants perform. See, e.g., Ringling Bros. and Barnum & Bailey, Animal Care FAQ 1, 2 available at http://www.feldentertainment.com/pr/aca/ Animal%20Care%20FAQ.pdf; Ringling Bros. and Barnum & Bailey Center for Elephant Conservation, A Commitment to Caring, http://www.elephantcenter.com (last visited Apr. 29, 2008) (proclaiming defendant's "commit[ment] to caring" for the elephants and that this is defendant's "number one priority"). Accordingly, as Judge Sullivan has previously recognized, the public has a particularly strong interest in hearing information reflecting both sides of the debate rather than in being exposed only to FEI's self-serving characterization of its treatment of the elephants that are made available for public viewing. See Sept. 16 Tr. at 81-82, Pls. Ex. 2 ("If [FEI] can go on TV and print reports that these allegations are not true and that . . . have the best of care, why shouldn't the plaintiffs be able to say, you know, our allegations are as follows and our allegations are confirmed by defendants' own records which show mistreatment, in our view, of elephants?").

Thus, FEI actively promotes its message through various materials that it disseminates to its circus patrons, extolling FEI's commitment to "conservation" and the welfare of the elephants. For example, the circus disseminates pamphlets, as well as a souvenir program, with a full-page spread of photographs of baby elephants that have been born at the CEC, and the tag line, "Endangered species? Not if we can help it." Pls.' Ex. 7. What the materials do not tell the public, however, is that at least four of the featured baby elephants – Riccardo, Benjamin, Kenny, and Bertha – are dead, and all died before reaching the age of five. See Pls.' Ex. 8 (records provided by defendant in discovery indicating that each of these elephants is dead). During argument on one of defendant's motions for a protective order, Judge Sullivan noted that these materials were "entirely misleading" to the public. See Sept. 16 Tr. at 66-68, 91, Pls.' Ex. 2. The circus also shows the public a film during intermission that extols the virtues of the CEC, apparently promoting it as a "sanctuary" for endangered elephants. See Dvorak, On the Other Tightrope, supra ("Ringling Bros. denies mistreating elephants, and during the circus's intermission, it plays a short film extolling its elephant sanctuary and training program.")

As discussed, defendant also spends extensive resources getting its message out to members of the print and broadcast media, and it is quite successful in accomplishing this goal. See supra at 5-6. Defendant has even placed full-page advertisements in prominent newspapers featuring "open letters" to the public in which FEI proclaims, for example, that "at Ringling Bros., the 400 animals we care for around the clock, 365 days a year, live safe, stimulating and healthy lives." Pls.' Ex. 9 ("An open letter to the people of Boston"). According to one editorial, FEI spent $220,000 on one such "open letter" in the New York Times. See With the Greatest of Unease, Newsday, Feb. 24, 2002, at B7, Pls.' Ex. 10; see also "An Open Letter to Animal Rights Groups," Pls.' Ex. 11 (paid advertisement in the New York Times).

At the same time, defendant asserts that plaintiffs and others, including former Ringling Brothers' employees, who speak out on behalf of the elephants are making up stories when they say the elephants are abused. For example, a spokesperson for FEI was quoted recently in the Chicago Sun-Times asserting that one of plaintiffs' witnesses, a former Ringling Brothers employee, who testified before the Chicago City Council that she witnessed one particularly brutal beating of an elephant during which the elephant "screamed and . . . shrieked in pain as blood just dripped down her ear," was not to be believed because she was a "'sponsored witness of an animal-rights group.'" Spielman, Ringling Bros. Denies Tales of Vicious Elephant Abuse, supra; see also Kathy Steele, Ringling Bros. Applauded, Protested, Tampa Trib., Jan. 11, 2004, Pls.' Ex. 12 (quoting FEI spokesperson stating that plaintiff Tom Rider is "making a living parroting animal rights' rhetoric"); Elaine Hopkins, Circus elephants abused, Pls.' Ex. 1.

Plaintiffs, of course, vehemently disagree with FEI's representations to the public that it cares for the elephants humanely and trains them only through a system of "reward," and that its "CEC" is being used for anything other than producing more elephants to stock the circus in the future. However, the Protective Order that has been imposed in this case is foreclosing plaintiffs from effectively informing the public, as well as policymakers, about information bearing on the other side of this debate and that substantiates plaintiffs' allegations of severe mistreatment.

For example, among other records that would illuminate the public debate on the issue of how the circus elephants are treated, plaintiffs have obtained in discovery documents demonstrating REDACTED

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And yet the Protective Order prevents the public or the media from having access to any of these materials, which would assist the public in making an informed decision as to the propriety of making elephants perform in the circus. See Dvorak, On the Other Tightrope, supra (describing the "moral debate" facing parents deciding whether to take their children to the circus, and quoting one parent stating that "[n]ow that I think of it . . . if the elephants aren't treated well, I really don't want to go now."); Spielman, Ringling Bros. Denies Tales of Vicious Elephant Abuse, supra (quoting Chicago alderman stating that "[i]t comes down to a matter of, do I believe this one or do I believe that one" on the issue of how the elephants are treated).

Indeed, because of the breadth of the Court's Protective Order, plaintiffs are even foreclosed from providing pertinent information they have obtained in discovery to either the United States Department of Agriculture or the Fish and Wildlife Service – the federal agencies with regulatory jurisdiction over the treatment of the endangered Asian elephants. In addition, because all of the discovery materials obtained since September 25, 2007 must be kept confidential, plaintiffs have also had to file many of the briefs they have submitted since then under seal, and any rulings issued by this Court that rely on or refer to protected discovery materials will also have to be maintained under seal.

In sum, there is clearly a compelling public interest in the dissemination of materials reflecting FEI's treatment of its elephants, as well as in public access to the briefs and other proceedings in this lawsuit. Hubbard, 650 F.2d at 317.

Second, with regard to the extent of the public's previous access to the records, see Hubbard, 650 F.2d at 317, prior to this Court's imposition of the Protective Order, Judge

Sullivan had declined to prohibit the public's access to discovery materials on the grounds that FEI had failed to demonstrate the requisite "good cause" for such an order. See Order, Nov. 25, 2003 (DE 15). As a result, many of the same categories of documents have now been sealed that Judge Sullivan held did not meet the "good cause" exception to open discovery. For example, veterinary records produced prior to September 25, 2007 are not protected, but the same types of records produced after September 25, 2007 must be maintained as confidential. Indeed, the current protective order covers whole categories of documents that defendant never even contended were "confidential," such as the "Transportation Orders" that indicate how long the Asian elephants spend confined on chains on the train. See, e.g., Pls.' Ex. 13 (example of Transportation Order produced prior to protective order); see also Pls.' Mot. to Compel Discovery from Def. at 3, Feb. 5, 2008 (filed under seal; Notice of Filing at DE 265) (explaining information contained in the Transportation Orders). Nevertheless, under the current Protective Order, such materials produced after September 2007 must now be maintained – and even referred to in pleadings – in secret.

As for the third Hubbard factor –the identity of the party objecting to disclosure – the party objecting to disclosure is the defendant in this case, not an uninvolved third party. Cf. Hubbard, 650 F.2d at 319 ("We think that where a third party's property and privacy rights are at issue the need for minimizing intrusion is especially great . . . ."). Moreover, as demonstrated, FEI certainly does not refrain from being an active participant in the public discourse on these issues. On the contrary, it spends enormous resources touting its side of the story – i.e., that it treats the elephants with the highest standard of care, and is "conserving" them for future generations. As to the fourth and fifth factors –the strength of the property or privacy interests involved and the possibility of prejudice to the party opposing disclosure – FEI has not

demonstrated any harm that it would suffer if such materials were publicly available, as Judge Sullivan has previously ruled. See Order, Nov. 25, 2003; see also Avirgan, 118 F.R.D. at 261 (party must "articulate specific and particular facts" demonstrating "good cause" to subject discoverable information to a protective order).

With respect to the last factor – the purpose for which the records have been used and their relevance to the merits of the case – the majority of the records produced by defendant in discovery go to the very heart of the issues in this case – i.e., the treatment of the endangered Asian elephants. See Hubbard, 650 F.2d at 321 (noting that "[t]he single most important element in our conclusion that [the records should not be released] is the fact that the documents at issue were introduced by the defendants for the sole purpose of demonstrating the unlawfulness of the search and seizure," rather than relating to the merits of the case). Moreover, many of the records have been relied on heavily in pleadings, yet the public is foreclosed from reading those filings because every time the plaintiffs want to refer to a fact that they learned in discovery since September 25, 2007 – even completely innocuous facts that are completely uncontested by the defendant – they have to do so under seal. See, e.g., Pls.' Mot. to Compel Discovery from Def., Feb. 5, 2008 (filed under seal; Notice of Filing at DE 265).

In sum, given the public importance of the debate concerning the treatment of endangered Asian elephants, the fact that defendant itself is heavily engaged in promoting its side of the debate and in attempting to discredit plaintiffs, and because, as Judge Sullivan has previously found, defendant has failed to make the requisite showing of "good cause" to justify maintaining these records in secret, the Court's September 25, 2007 Protective Order should be lifted or, at the very least, substantially narrowed. As Judge Sullivan long ago ruled in this case, only when defendant can demonstrate "good cause" "with respect to particular specified information,"

Order at 2, Nov. 25, 2003 (DE 15), as permitted under Rule 26(c), should a protective order be issued.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court lift the protective order entered on September 25, 2007 over all discovery materials obtained from that date forward. While plaintiffs' disagree that any of the information obtained during the Court-ordered inspections of the elephants would in any way compromise FEI's security interests, to the extent the Court's September Order was premised on this particular concern, plaintiffs would not object to a narrowly crafted Protective Order continuing to control the dissemination of such information.

Respectfully submitted,

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Dated: May 6, 2008