

FEI has long sought a protective order, not to prevent plaintiffs from obtaining relevant information that could be used in this case, but merely to prevent them from using that information outside of the courtroom to attack FEI in plaintiffs' numerous publicity campaigns. For years, plaintiffs opposed FEI's requests for protection on the basis that FEI's allegations regarding plaintiffs' misuse of discovery materials were merely speculative. Yet, plaintiffs have since done precisely that. Notwithstanding an admonishment from this Court that the use of discovery materials to try this case in the media would not be taken lightly, plaintiffs have issued a series of press releases quoting from FEI's discovery documents, they have apparently distributed such documents to various media outlets, they have appeared on television reading from (and misrepresenting) such documents, they have sought to plaster excerpts of such documents on billboards, and they have used discovery materials in an attempt to interfere with FEI's contractual rights with third parties. Now that there is a Protective Order, plaintiffs insist that the Court vacate it for lack of good cause. The Court certainly had good cause to enter the Order in September 2007 and such good cause still exists today. Indeed, the fundamental premise of plaintiffs' motion (that they want to use the materials currently covered by the Protective Order to try the merits of their claims in the media) confirms that good cause exists to support the Order.

The motion demonstrates that this entire lawsuit is a public relations gambit. While plaintiffs have frequently accused FEI of delaying any resolution on the (lack of) merits, they have filed innumerable motions, including this one, that divert FEI and the Court from resolving this litigation. In doing so, plaintiffs have conveniently ignored binding Supreme Court precedent squarely contradicting the central premise of their motion¹ and have misrepresented

¹ Conversely, when plaintiffs are the ones seeking protection, suddenly they are able to cite to Seattle Times and recognize it as the binding authority it is. See Pls.' Mot. for Protective Order (4/25/07) (Docket No. 141) at 7.

the procedural history in this case, together with the Court's numerous admonishments to them on this very issue. Plaintiffs' motion confirms, not undermines, the Court's conclusion in September 2007 that good cause existed to enter a Protective Order that prohibits information subsequently produced in discovery from being used outside this litigation. Accordingly, plaintiffs' motion should be denied.

FACTUAL BACKGROUND

A. Plaintiffs' Actions Show That They Have Every Intention To Use Discovery Materials in the Media

When FEI first sought a protective order governing discovery in this case, it informed the Court that plaintiffs almost certainly would use information obtained in discovery to "attack" FEI in their "continuing publicity campaign." FEI's Mot. for Protective Order (10/8/03) (Docket No. 6) at 2-3. At the time, plaintiffs denied this and dismissed FEI's allegations as nothing more than "conclusory and stereotypical" assertions that did not warrant the requested protective order. Pls.' Opp. to FEI's Mot. for Protective Order (10/22/03) (Docket No. 10). Although the Court denied FEI's motion, it also permitted FEI to move at any time in the future "for a protective order with respect to particular specified information." Order (11/25/03) (Docket No. 15) at 2.

Pursuant to that Order, FEI subsequently moved for a protective order that would prohibit the use of its veterinary records outside of this litigation. See FEI's Mot. for Protective Order (2/15/05) (Docket No. 30). Again, FEI alleged that plaintiffs would use such materials to publicly, and misleadingly, accuse FEI of providing its animals with insufficient care, thereby causing undue embarrassment and injury to FEI. Id. at 1-2. Plaintiffs, however, insisted that FEI's allegations were "completely speculative and unsubstantiated" and argued that FEI did "not provide any evidence whatsoever for [its] self-serving assertion that plaintiffs will somehow

misuse the medical records at issue in this case.” Pls.’ Opp. to FEI’s Mot. for Protective Order (3/4/05) (Docket No. 34) at 10. In reply, FEI provided evidence to prove the allegations plaintiffs dismissed as “completely speculative and unsubstantiated.” Specifically, FEI informed the Court that plaintiffs AWI and Tom Rider had already used a videotape obtained in discovery as part of their public relations attacks against FEI. FEI’s Reply in Support of Mot. for Protective Order (3/16/05) (Docket No. 38) at 7 (citing press release describing videotape and alleging that “FEI tortures a baby elephant from the second it’s born”).

As a result of discovery in this case, FEI was forced to open its video library – without restraint – to plaintiffs and produce, inter alia, a copy of the videotape taken by FEI of an elephant’s (Riccardo’s) birth. This private property of FEI’s was then taken by plaintiffs and passed along to PETA. That videotape is now posted on PETA’s circus website under the incendiary title “Baby Killers.” See <http://www.circuses.com/feat/babykillers/shirley.html> (last visited on 5/19/08). Plaintiffs offer no explanation for this exploitation of FEI’s materials and why it was passed along to PETA despite being asked repeatedly by FEI for an explanation.² FEI’s veterinarians consider Riccardo’s birth to be an example of textbook success, yet PETA (another purported arm’s length third party) now flaunts it – completely inaccurately – under the “baby killers” section of its website. No litigant should have to endure the coerced rummaging of its private property through discovery by its adversaries and then turn around and watch as its confiscated property is used, not for the litigation, but for publicity purposes. The abuse that FEI has undergone in the discovery process in this case is not imaginary. FEI has provided the Court with repeated examples of how discovery is being taken for purposes unrelated to the litigation.

² Ironically, now that the tables are turned, and PETA must produce its own videos of elephants to FEI, PETA has demanded that a protective order be put in place to cover its materials just like the one issued in this case. Ex. 1, Hearing Tr. (Feld Entertainment, Inc. v. PETA, E.D. Va. 08-mc-04) (4/8/08) at 34.

Plaintiffs now ask that the Court condone their conduct and give them the green light to continue misusing the Court's compulsory processes.

B. Plaintiffs Are Admonished Not to Misuse Discovery Materials in the Media

In September 2005, the Court held a hearing to resolve various motions, including FEI's motion for a protective order concerning its veterinary records. When all relevant portions of the transcript (as opposed to merely those selectively attached to plaintiffs' motion) are considered, it is clear that Judge Sullivan did not condone plaintiffs' use of discovery materials to litigate their case in the media, instead of in the courtroom. Contrary to plaintiffs' representations, Judge Sullivan did *not* "express[] serious concern" or "recognize[] the inequity inherent" in a protective order. See Opp. at 8-9. Rather, the Court simply posed questions for the purpose of conducting its hearing and making its determination. See Ex. 2, Hearing Tr. (9/16/05) at 25 ("I'm just asking questions."). Indeed, Judge Sullivan similarly asked such questions of plaintiffs' counsel:

With respect to defendants' need for a protective order, though, what's your objection? Their concern is that they look at web sites maintained by plaintiffs and they say, you know, what's going to happen to us is that maybe we'll be harmed, maybe seriously harmed, by information that we produce that's in our files. Why isn't that a legitimate concern that they have to persuade a judge that they're entitled to a protective order? There's been no fact finding with respect to what, indeed, the photos or files or films actually mean and whether or not injuries were caused as a result of defendants' conduct or actions or inactions, et cetera. So if they produce a ton of information, they have some legitimate concerns that it will be used wrongly and injure to the detriment of them. (Pages 6-7)

Well, you just hit on a point, though, draw whatever conclusions. Is that fair to the defendant, though? Suppose the wounds were caused as a result of non-negligent acts on the part of the defendant. Is that really fair to have that information out in the media with the admonition go ahead and draw whatever conclusions you want? Is that really fair? ... Wait a minute. **Then you're litigating in a public forum, though.** (Page 25) (emphasis added)

And at some point the Court is going to resolve your complaint against, but it shouldn't shift to the public forum, should it, at this point? I think I disagree with

you when you say, sure, we may use them as our First Amendment right and the public can draw whatever conclusions they want to. Well, it's not up to the public to do that. It's not up to the public to look at some photos of an injured elephant and say, you know, damn Ringling Brothers, look at what they're doing to that elephant. Is that appropriate for the public to do it at this particular juncture absent a finding of malfeasance or misfeasance on the part of the defendants? I think that gets to the heart of the issue right before the Court. ... Why isn't that an accurately – Why isn't that a completely accurate statement of what this focus should be on as opposed to the public's focus at this time? **I don't want this to turn into litigation in the public arena.** (Pages 26-27) (emphasis added)

Plaintiffs' motion astoundingly omits any reference to these remarks by Judge Sullivan.

It is clear from the transcript (when read in its entirety) that Judge Sullivan did not condone plaintiffs' use of discovery materials in the media. Indeed, shortly thereafter, the Court granted FEI's motion in part and denied it in part. See Order (9/26/05) (Docket No. 50). In doing so, the Court explicitly "admonished" plaintiffs "that the purpose of discovery is to produce and seek evidence for use *in litigation* and the Court will not take lightly any abuse of the discovery process for purposes of publicity or to argue the merits of plaintiffs' claims in the media, as opposed to the Court." Id. at 2.

C. Plaintiffs Launch Repeated Attacks Against FEI Using Discovery Materials in the Media

Instead of heeding the Court's admonition, plaintiffs actually ramped up their attacks on FEI outside the courtroom by using (and misrepresenting) documents and information obtained in discovery.³ In Spring 2007, plaintiffs issued a series of press releases that referenced and quoted from documents FEI had produced in discovery. For example, plaintiff ASPCA issued a press release in March 2007 that discussed this litigation and claimed "[s]everal items have recently surfaced that shed new light on the inhumane treatment of these magnificent animals by

³ Thus, arises a double-standard: Plaintiffs insist that they be permitted to use the Court's compulsory discovery processes against FEI to fuel their media campaign, but then steadfastly refuse in discovery to answer any questions directed toward them regarding their media campaign. Plaintiffs should not be permitted to have it both ways, particularly when *they never raised, and thus, waived any objections to divulging correspondence etc. regarding their media strategy.*

the Circus, including new e-mails from Ringling employees.” See FEI’s Mot. to Enforce (6/11/07) (Docket No. 152) at 6-7 & Ex. 4 thereto (attached here as Ex. 3). The press release continued on to reference or quote from at least three documents that FEI produced in discovery. Likewise, plaintiff API issued a press release that referenced or quoted from the same discovery materials and also alleged that “[s]everal items of concern have recently surfaced during the ‘discovery’ process of this lawsuit that shed new light on the inhumane treatment of circus elephants including new emails from Ringling employees . . .” Id. at 7 & Ex. 6 thereto (attached here as Ex. 4).⁴ All of these press releases used documents produced in discovery to argue the “merits” of plaintiffs’ case in the media and to discourage people from attending FEI’s circus.

Plaintiffs’ misuse of discovery materials did not stop with their own press releases. On or about June 11, 2007 (coinciding with the pending opening of FEI’s circus in Las Vegas), plaintiffs apparently faxed discovery material to a local news station that subsequently aired a story based on the materials and posted such materials on its website. See FEI’s Reply in Support of Mot. to Enforce (7/3/07) (Docket No. 158) at 3-4. Plaintiffs had been admonished, however, not to use such discovery material “for purposes of publicity or to argue the merits of plaintiffs’ claims in the media, as opposed to the Court.” Order (9/26/05) (Docket No. 50) at 2. Tom Rider, moreover, appeared in yet another Las Vegas news story that month in which one of FEI’s discovery documents was shown on screen and in which Rider was shown reading from

⁴ Moreover, beginning in May 2007, HSUS (which merged with and/or assumed control of plaintiff FFA in January 2005) began to issue several press releases referring to and quoting from a discovery document produced by FEI and alleging that “[r]ecently released evidence exposes animal abuse by the Ringling Brothers and Barnum and Bailey Circus. . . . The documents recount trainers using painful bullhooks to subdue and discipline the circus’ performing Asian elephants during training. . . .” Id. at 8 & Ex. 8 thereto (attached here as Ex. 5). Of course, HSUS now pretends to be a stranger to this case, but it is interesting that this “stranger” ended up with discovery materials that were produced no place other than this case.

another FEI document (which happens to be Ex. 3 to plaintiffs' latest motion).⁵ See FEI's Reply in Support of Mot. to Enforce (7/3/07) (Docket No. 158) at 3-4. Importantly, while appearing on this show, Rider misrepresented that the document he was reading had been sent to FEI's Chief Executive Officer, when the document itself stated that it had not been.

Based on these numerous examples, FEI moved to enforce the Court's September 26, 2005 Order admonishing plaintiffs not to engage in such conduct. Although the Court denied this motion, it was not, as plaintiffs now claim, because the documents at issue "are extremely relevant to plaintiffs' claims" or because "plaintiffs relied on them in opposing defendants' subsequent motion for summary judgment." Opp. at 10. Nowhere in the Order does the Court make any such statement. Rather, the Court denied FEI's motion because it did not consider its earlier "admonishment" to constitute an Order that could be enforced. Order (8/23/07) (Docket No. 177) at 2 ("[T]he Court declines defendant's invitation to treat the Court's admonishment as a protective order."). However, the Court did not hold that plaintiffs' actions had been proper. The Court (again) noted that it was "sensitive to defendant's concern that plaintiffs might misuse discovery documents out of context to try their case in the media," and moreover, explicitly stated that its ruling should not be viewed as a "determination that disclosure of any document or other evidence obtained in discovery would always be proper." Id.

D. Plaintiffs Continue to Use Discovery Materials in the Media Despite the Court's Renewed Warnings

All of the evidence discussed above was on the record in August, 2007, when this case was referred to Judge Facciola for further discovery proceedings. Moreover, in connection with the September 19, 2007 hearing that ultimately led to the Protective Order being entered, FEI

⁵ This document (produced in discovery by FEI) also was referred to in an article coinciding with the arrival of FEI's circus in New York in April 2007. See The Villager, Activists want to rein in circus use of wild animals, available at http://www.thevillager.com/villager_205/activistswanttorin.html (last visited 5/19/08).

requested that the inspections of its elephants and facilities be subject to a protective order in light of “plaintiffs’ longstanding practice of improperly disseminating discovery materials produced in this case to feed their propaganda machine rather than using it for any legitimate purpose in this case.” Notice of Issues (9/19/07) (Docket No. 188) at 4.⁶ In that connection, FEI submitted further evidence of discovery abuse. Specifically, one day before the hearing, API issued yet another press release sub-captioned “Federal court documents spotlight critic’s claims as circus arrives in Sacramento.” Ex. 6, API Press Release and Attached Link. Astoundingly, this press release referenced, and linked to, a “report” by an alleged “journalist” based heavily, if not entirely, upon documents obtained by plaintiffs in connection with this case. See id. (“Documents discovered in the course of that lawsuit and others ...”) (“as revealed by court documents ...”) (“The documents indicate ...”) (“According to Ringling Bros. documents obtained during the course of this investigation ...”) (“One former Ringling Bros. employee said in an affidavit that ...”) (“Included in the documents provided in discovery were emails between circus veterinarians and top Ringling Bros. executives. The emails show that ...”) (“One email dated September 1999, written by Ringling’s lead veterinarian, William Lindsay, says that...”).

During the hearing, moreover, FEI again informed the Court of this issue and cited even further evidence in support of its concern. Ex. 7, Hearing Tr. (9/19/07) at 27-28 (Posting discovery material straight up to the internet has “been the pattern and practice in this case” for plaintiffs.) (“Now, our elephant experts that work with us are world-renowned. In their mind,

⁶ FEI also informed the Court that a protective order was necessary for the inspection in particular because “the layout and identity of FEI’s facilities, units and employees is a security issue.” Notice of Issues (9/19/07) (Docket No. 188). Specifically, FEI is concerned that, given plaintiffs’ now explicit intent to distribute FEI’s discovery materials to third parties and the public at large, groups who are opposed to FEI’s circus and who have a history of violence would learn non-public information about facilities that are intended to house FEI’s elephants and that include private residences of FEI employees. See FEI’s Opp. to Pls.’ Motion to Compel Inspection (11/9/06) (Docket No. 105) at 19-22. Plaintiffs would have never been allowed onto FEI’s property, and their access occurred only through Court Order. There is no basis to now release the video that shows the CEC grounds and facilities, which plaintiffs would have never obtained otherwise than through unlawful trespass.

that was a textbook birth. That videotape made its way up on to PETA's web site – they're not even a party to this case, supposedly - it is now under the heading of "Baby Killers." Why is that appropriate? We don't think it is."⁷ See also FEI's Opp. to Mot. to Compel Inspection (11/9/06) (Docket No. 105) at 22 n.9 (describing "baby killer" use of discovery materials). In response to FEI's request for a Protective Order governing the inspections, Judge Facciola promptly expressed concern about the publication of discovery materials in the media and noted at the hearing that "[M]ost fundamentally, under the Supreme Court's decision in the Seattle Times, discovery usually is not placed on the public record. In this jurisdiction, it's not filed at all." See Ex. 7, Hearing Tr. (9/19/07) at 18. Ironically, while the Court correctly cited the controlling case – Seattle Times – at the outset of the discussion, plaintiffs do not even acknowledge, must less try to distinguish, that decision. It was against this backdrop that the Court entered the existing Protective Order on September 25, 2007. See Order (9/25/07) (Docket No. 195) at 4. Importantly, the Protective Order does not restrict the amount or type of information that would be exchanged in discovery, only the use of such information outside of this litigation.

E. Plaintiffs Have Continued to Use Discovery Materials in the Press, *Including Those That Are Subject to the Court's Order*

Plaintiffs have unabashedly continued to attack FEI outside the courtroom with materials produced in discovery prior to entry of the Protective Order. For example, less than ten days after the Protective Order was entered (and after plaintiffs filed an "Emergency Motion" to clarify the Order), FEI learned that plaintiff API was attempting to purchase billboard space for an advertisement in Boston (coinciding with the arrival of FEI's circus there) that included a picture of an FEI elephant with a quote lifted directly (albeit out of context) from documents

⁷ This portion of the transcript (which contradicts plaintiffs' argument that the Protective Order was entered despite the lack of good cause) was omitted from plaintiffs' motion and its attachments.

produced in this case. See http://www.mspca.org/site/PageNavigator/adv_elephant_bill_2 (last visited 5/19/08). The billboard also was scheduled to coincide with a Massachusetts legislative committee hearing on a proposed bill that would ban the use of bullhooks. API, moreover, held a press conference opposing the legislation and referencing alleged “quotes from Ringling employees confirming elephant abuse.” Ex. 8, Media Advisory (10/5/07). Since then, API has now acknowledged that

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API also

wrote a letter to the Editor that was published in the Washington Post in April 2008 (coinciding with the opening of FEI’s circus here) that quoted from one document produced by FEI, referenced another, accused FEI of “abusing elephants with bull hooks and chains,” and insisted that “this is just the tip of the iceberg of information presented in [this] lawsuit.” Ex. 10, API Letter to Editor (4/5/08).

Further, plaintiff ASPCA launched a campaign in March 2008 intended to keep a television network (TNT) from airing an upcoming reality series that would take viewers behind the scenes of FEI’s circus performers. See Press Release, ASPCA Condemns Upcoming TNT Series, “Greatest Show on Earth”: Urges Cancellation of Unethical Programming by Network Executives (3/24/08), *available* at http://www.aspc.org/site/PageServer?pagename=press_032408_v2 (last visited May 15, 2008). See also TNT, Tell The Truth About Ringling Bros. Circus, *available* at <http://www.flickr.com/photos/smiteme/2502349344/> (last visited May 19, 2008). *In doing so, ASPCA violated the Protective Order by referring to the contents of depositions in this case that were taken under seal.* See Ex. 11, ASPCA Letter to TNT. (“In addition, depositions from

other former Ringling employees have shed new light on the inhumane treatment of these magnificent animals by the Circus.

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FEI does not share ASPCA's view of the import of these depositions. The important point, however, is that this was a direct reference to the contents of the depositions of Archele Hundley and Robert Tom, both of which were taken after the Protective Order was entered and were subject to its restrictions. One would think that since ASPCA is already in the midst of one contempt hearing, that it would not engage in conduct that would give rise to another one. In any event, this flagrant disregard of the Protective Order demonstrates the need to keep that Protective Order in place.

ARGUMENT

A. Plaintiffs Have No Right to Demand a Court Order Permitting Them to Misleadingly Use Materials Produced in Civil Discovery to Litigate This Case in the Media

Plaintiffs' motion affirms what FEI has argued for years: Plaintiffs intend to use any and all information made available to them in connection with this litigation to try the merits of their case, not in the courtroom, but in the media and in legislative campaigns around the country. Plaintiffs assert that the public has a right to access discovery materials, but omit any reference to the Supreme Court decision that squarely rejects their argument. In Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), the Supreme Court explicitly held that a litigant does ***not*** have a constitutional or common law right to disseminate information obtained in discovery. Id. at 33. Plaintiffs' failure even to acknowledge this well-settled principle, which has been explicitly applied by the D.C. Circuit, is inexcusable. See Boehner v. McDermott, 484 F.3d 573, 578 (D.C. Cir. 2007) (***en banc***) (“[p]arties to civil litigation d[o] not ‘have a First Amendment right to

disseminate, in advance of trial, information gained through the pre-trial discovery process”) (quoting Seattle Times).⁸ Plaintiffs, moreover, quote a D.C. Circuit decision that pre-dated Seattle Times for a principle that, according to Judge Facciola, did not survive Seattle Times. Compare Opp. at 14 (“the always strong presumption in favor of public access to judicial proceedings”) (quoting United States v. Hubbard, 650 F.2d 293, 317 (D.C. Cir. 1980)) with Roberson, 242 F.R.D. at 133 (“Any supposed presumption in favor of public access to discovery material, however, did not survive the Supreme Court’s conclusion in [Seattle Times].”). Of course, we are not here addressing a Rule 11 motion against plaintiffs. Yet, it is perfectly clear that the motion, which completely omits reference to controlling authority – authority that FEI, plaintiffs, and the Court itself has referenced on prior occasions – is “not warranted by existing law.” Fed. R. Civ. P. 11(b)(2).

There is neither a right nor a presumption that litigants can disseminate, and the public can access, any and all information produced in civil discovery. While the public has a right to access “judicial records,” such a right “is far from absolute.” McConnell v. FEC, 251 F. Supp. 2d 919, 925 (D.D.C. 2003) (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978)). As established in Seattle Times, the right of access does not extend to documents exchanged in discovery that have not been submitted to, or considered by, the Court. Seattle Times, 467 U.S. at 33. See also Anderson v. Ramsey, Civ. Act. No. 04-56, 2005 U.S. Dist. LEXIS 2935, at *5-6 (D.D.C. Mar. 1, 2005) (Facciola, J.) (“Hence, the district court unquestionably has discretion to seal documents produced in discovery that were not introduced into evidence and were not relied upon by the court in rendering a decision.”). That includes the

⁸ Plaintiffs’ omission of this principle is particularly egregious given that Judge Facciola immediately raised this concept and, namely, the Seattle Times decision, upon learning of plaintiffs’ desire to publish discovery materials. See Ex. 7, Hearing Tr. (9/19/07) at 18 (“[M]ost fundamentally, under the Supreme Court’s decision in the Seattle Times, discovery usually is not placed on the public record. In this jurisdiction, it’s not filed at all.”).

vast majority (indeed, virtually all) of the materials subject to the existing Protective Order and addressed by plaintiffs' motion.

Moreover, the mere submission of discovery materials to the Court does not automatically transform such materials into "judicial records" subject to the public's right of access. See United States v. El-Sayegh, 131 F.3d 158, 161 (D.C. Cir. 1997) ("not all documents filed with courts fall within [the right of access's] purview – at least not in this circuit"); In re Reporters Committee for Freedom of the Press, 773 F.2d 1325, 1335-36 (D.C. Cir. 1985) (no common law right of access to prejudgment records in civil cases). "What makes a document a judicial record and subjects it to the common law right of access is the role it plays in the adjudicatory process." United States v. El-Sayegh, 131 F.3d 158, 163 (D.C. Cir. 1997). The limited discovery materials that are subject to the existing Protective Order and have been submitted to the Court have played no role in the adjudicatory process of this litigation and, as such, plaintiffs are not entitled to disseminate them as they see fit.

Plaintiffs' motion seeks to vacate a Protective Order governing, not what is ultimately introduced at trial, but only that which is exchanged in pretrial discovery. Such an Order is squarely within the Court's authority. Courts have long recognized the need to ensure that the liberal discovery provided to civil litigants is used to resolve the litigation fairly, not to embarrass or harass the other party outside the courtroom. See Seattle Times, 467 U.S. at 34-35 ("Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. ... There is an opportunity ... for litigants to obtain – incidentally or purposefully – information that not only is irrelevant but if publicly released could be damaging to reputation and privacy.") (emphasis added); Int'l Products Corp. v. Koons, 325 F.2d 403, 407-08 (2d Cir. 1963) ("we entertain no doubt as to the constitutionality of a rule

allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another by use of the court's processes"). Litigants clearly are not entitled to disseminate information that has been "discovered," but "not yet admitted." Seattle Times, 467 U.S. at 33. Indeed, access to discovery material "must be balanced against the privacy interest of civil litigants and third parties" because "much of the information ... may be unrelated or only tangentially related to the underlying cause of action." Roberson, 242 F.R.D. at 133 ("Some of this information is not only irrelevant, but, if publicly released, could be damaging to the reputation and privacy of opposing and third parties.".)⁹

To determine whether documents submitted to the Court should be sealed from public access, the Court must consider various factors outlined by the D.C. Circuit. See United States v. Hubbard, 650 F.2d 293, 317-22 (D.C. Cir. 1980). As applied here, those factors support the Court's existing Protective Order. The "single most important" factor in Hubbard was the "purposes for which the documents were introduced." Id. at 321.¹⁰ There, the court entered a protective order, noting that the documents "were not determined by the trial judge to be relevant," they "were not used in the subsequent 'trial,'" and they were not "described or even

⁹ The parties have taken twelve depositions and have exchanged supplemental interrogatory responses under the existing Protective Order. Plaintiffs' motion asks the Court to lift the Order not just from documents produced in discovery, but from these materials as well. Such materials, however, have traditionally been held in private and not subject to mass dissemination by civil litigants. See Roberson, 242 F.R.D. at 133 ("Pretrial depositions and interrogatories, for example, which are not public components of a civil trial, were not open to the public at common law and are generally conducted in private as a matter of modern practice."). See also Seattle Times, 467 U.S. at 34 ("It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse.").

¹⁰ Because the documents that plaintiffs would like to misleadingly use in their media campaign have not been introduced for any substantive purpose, plaintiffs' motion misrepresents the test established by this factor, as set forth in Hubbard. Compare Hubbard, 650 F.2d at 321 (the sixth factor is "the purposes for which the documents were introduced") with Opp. at 15, 20 (the sixth factor is "the purpose for which the records have been used in the litigation – i.e., whether the records are relevant to the merits of the case or to a collateral issue") ("the purpose for which the records have been used and their relevance to the merits of the case"). In Hubbard, the D.C. Circuit never stated – or implied – that a protective order should be entered concerning documents that go to the "merits of the case." Rather, the focus is on whether documents have been *introduced* for the purpose of resolving the merits of the case. Documents exchanged in discovery and attached to pleadings concerning motions to compel are entitled to protection under Seattle Times or Hubbard, regardless of whether plaintiffs believe they go to the merits of the case.

expressly relied upon by the trial judge in his decision” on the motion to which they were attached. Id.

Likewise, the documents that plaintiffs would like to use for purposes other than this litigation have not been introduced, let alone relied upon by the Court, for the purpose of resolving this case on the merits. Indeed, it is highly speculative at this stage to presume which discovery materials will be deemed admissible at trial and, until then, plaintiffs’ insistence on mass dissemination of all discovery materials is baseless. Roberson, 242 F.R.D. at 133-34 (“[I]t is impossible to ascertain whether all of the information produced in discovery will ever be used to support or attack the merits of Plaintiff’s claims. Any public interest in the disclosure is, therefore, at its weakest at this stage of the case.”). See also Order (12/18/07) (Docket No. 239) at 2-3 (“It would be reckless for me to predict that Judge Sullivan will ultimately rule that evidence pertaining to the defendants’ treatment of elephants other than the ones in the class he created is inadmissible.”).¹¹

Plaintiffs’ prior attachment of certain unsealed discovery materials to the procedural and discovery motions that have been filed is irrelevant. Absent an indication that the Court relied on such attachments and that the Court did so for the purpose of resolving this case on its merits, such conduct (of plaintiffs’ own choosing) does not transform the underlying documents into “judicial records” subject to an automatic right of mass dissemination. Compare Opp. at 20 (“many of the documents have been relied on heavily in pleadings, yet the public is foreclosed from reading those”) with Willingham v. Ashcroft, 355 F. Supp. 2d 390, 391 (D.D.C. 2005) (Facciola, J.) (“As to the final factor, the documents were filed with the court in relation to discovery disputes. ... [I]t can be said that much of the information is irrelevant to the case and

¹¹ As discussed below, much of the discovery taken under the existing Protective Order pertains (over FEI’s objection) to elephants no longer subject to this lawsuit. Therefore, it is questionable at best whether such material will be admissible at trial, and therefore, part of the “judicial” record subject to the public’s “right of access.”

will never be used to support or attack the merits of plaintiff's claims.”). See also Hubbard, 650 F.2d at 321 (sealing documents attached to pleadings that were not “described or even expressly relied upon by the trial judge in his decision” on the motion). The few discovery materials that have been attached to procedural and discovery motions have not been introduced for the purpose of substantively resolving this litigation. As such, they are not judicial records subject to widespread dissemination by the plaintiffs, notwithstanding plaintiffs’ use of the docket as a bulletin board. **REDACTED** **SEALED PURSUANT TO COURT ORDER**

Second, the need for public access to the documents at issue is limited. See Hubbard, 650 F.2d at 317. That plaintiffs believe their cause is one of tremendous import does not mean the existing Protective Order is *per se* inappropriate. Indeed, protective orders have been entered in litigation involving matters of demonstrably more substantial public interest. See, e.g., United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 932 (D.D.C. 2006) (information in lawsuit regarding a conspiracy to conceal from the public the harmful consequences of smoking would be “subjected to appropriate protective orders, such as have already been used in this litigation with no difficulties”). Moreover, a protective order is actually more justified, not less, in cases of public interest where a party alleges such information would be misused for publicity purposes because it is more likely, not less, that a party’s reputation could be damaged by the misleading use of materials outside the courtroom and not subject to cross-examination. As plaintiffs themselves have conceded, “this public debate – which specifically includes Ringling’s treatment of endangered elephants – will continue regardless of whether documents produced in discovery are made available to the public.” Pls.’ Opp. to FEI’s Mot. for Protective Order (10/22/03) (Docket No. 10) at 6. As such, the public’s need for information exchanged during discovery that may or may not be admitted at trial is *de minimis*.

Third, virtually all of the discovery material currently subject to the Court's existing Protective Order has never been accessible to the public before. See Hubbard, 650 F.2d at 318. Plaintiffs' argument that other material previously exchanged in discovery has been made accessible to the public has no bearing on the material currently subject to the existing Protective Order. See Opp. at 19. Nonetheless, it bears noting that virtually none of the approximately 75,000 pages produced by FEI prior to the existing Protective Order has been accessible to the public; only those select documents that have been attached to pleadings, most of which have been attached to plaintiffs' pleadings so plaintiffs can claim FEI's discovery materials are publicly available and, thus, posted for use by them and their allies in their media campaign.

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SEALED PURSUANT TO
COURT ORDER

Fourth, FEI is not the only party who has objected to the disclosure of documents produced in this case. Compare Hubbard, 650 F.2d at 319 (court should consider the "identity of those objecting to disclosure") with Opp. at 19 ("the party objecting to disclosure is the defendant in this case, not an uninvolved third party"). Several third parties have produced documents in response to plaintiffs' subpoenas only after being informed that their productions would be subject to the existing Order. See, e.g., Ex. 12, BNSF Railway letter to Meyer (2/7/08) ("It is our understanding that the enclosed documents are subject to a protective order that prohibits disclosure to anyone other than a party to this case or an expert witness retained by a party."). See also Ex. 13, Meyer Letters to Six Third Parties Enclosing Subpoenas (1/25/08) ("All of the discovery that is being produced in this case is currently subject to a protective order that prohibits its disclosure to anyone other than a party to this case or an expert witness retained by a party. Accordingly, the records that are covered by this subpoena will be subject to that protective order."). Norfolk Southern Corporation has already produced documents to plaintiffs

and has explicitly asked FEI that it be informed if a party moves to lift the Protective Order. Plaintiffs, thus, ask the Court to vacate an Order pursuant to which they, themselves, have obtained information that might not otherwise have been produced to them.¹² The motion also provides no evidence that plaintiffs have given notice to third-parties who produced documents in reliance upon the Protective Order, and whose rights would now be affected by the global relief plaintiffs seek. Indeed, plaintiffs' representation that FEI is the only party seeking protection is also astounding given that plaintiffs' ally, PETA, has insisted that any documents it is compelled to produce in response to FEI's subpoena be covered by a protective order (notwithstanding the existing Protective Order). Ex. 1, Hearing Tr. (Feld Entertainment, Inc. v. PETA, E.D. Va. 08-mc-04) (4/8/08) at 34 (PETA's Counsel: "I would ask for a protective order." COURT: "I'm going to incorporate the protective order that was entered in the underlying litigation. For the record, Judge Facciola entered an order on September 25th of 2007 which seals information disclosed through discovery from that date forward, and that there is a protective order, and there's a protective order in the case, as well."").¹³

Fifth, the strength of FEI's interests are substantial. See Hubbard, 650 F.2d at 320. The documents about which plaintiffs most loudly complain are those reflecting medical information related to FEI's animals. FEI, however, has a substantial interest in the welfare of its animals.

¹² The concept that third parties would only produce documents to plaintiffs subject to an appropriate Protective Order is not a recent one. Prior to the existing Protective Order being entered, the USDA also insisted that its documents be subject to a Protective Order before it would produce documents in response to the plaintiffs' subpoena. Plaintiffs, moreover, also omit that they, too, have benefitted from the Protective Order. Should it be lifted, FEI ought to be permitted to use the discovery information it has obtained to inform the public of the plaintiff-for-hire scheme that plaintiffs have going with Tom Rider and matters related thereto. See Peskoff v. Farber, 230 F.R.D. 25, 33 (D.D.C. 2005) ("The acrimonious tenor of the pleadings and motions in this action, more than any of the arguments proffered by the plaintiff or the defendant, convinces this Court of the futility of any confidentiality order that does not encompass both personal and business/commercial information.").

¹³ PETA insisted on such a protective order for its materials despite the fact that it received FEI's discovery materials from plaintiffs and distributed one of FEI's videos under the heading "baby killers." See supra p. 4. PETA and plaintiffs share information (including FEI's discovery documents) with each other in connection with their campaigns against FEI, yet now insist that only PETA's documents should be subject to a protective order.

To best care for those animals, FEI has a substantial interest in allowing its medical professionals to record whatever information they deem necessary in whatever format that best suits their needs without fear that it will be misused or taken out of context in the media materials distributed by FEI's opponents. See Declarations of FEI's Veterinary Staff (attached to FEI's Reply in Support of Mot. for Protective Order (3/16/05) (Docket No. 38)). Discovery in this case has stunted this. For example, FEI has stopped videotaping its elephant births because there is no point to creating more materials just so plaintiffs and their allies such as PETA can confiscate the materials through discovery and then publicly misinterpret them. The real travesty here is that currently instead of taking birth videos that could provide educational benefits to those who truly care about elephants, there is nothing.

Finally, as established by plaintiffs' history of misusing discovery material to further their public relations agenda, the possibility of prejudice to FEI is tremendous. See Hubbard, 650 F.2d at 320-21. Plaintiffs have already published prior discovery material to try the merits of their case outside of the courtroom. In doing so, they have misleadingly and inaccurately cited FEI's own documents. The good cause that FEI has previously articulated and was the basis for the Court's existing Protective Order remains as pertinent today as it was on September 25, 2007. Moreover, since the Protective Order was entered, additional evidence of plaintiffs' misuse of discovery materials has been uncovered, including evidence that they have violated the Court's Order by misusing evidence subject to it. See supra pp. 10-12. Each of these examples demonstrates the tremendous prejudice that could be inflicted upon FEI by plaintiffs' further misuse of discovery materials. Indeed, the sole purpose of plaintiffs' use of FEI's discovery materials is to put FEI out of business, whether by seeking to discourage people from attending FEI's circus, seeking to interfere with FEI's contractual relationships with other corporate

partners, or seeking to pass legislation making it impossible for FEI's circus to perform in certain jurisdictions. It is difficult to imagine how such an intent, as evidenced by the numerous examples discussed above, is not sufficient good cause to warrant a protective order.

Plaintiffs attempt to justify their desire to take discovery for the media by citing to FEI's own public statements regarding the well-being and care for its animals. There is no comparison. Unlike plaintiffs, FEI does not seek opportunities to comment publicly on the merits of this case or the discovery in it. Those are matters for the judge and jury. The parties' respective positions are clear: FEI says it cares for its animals, and plaintiffs say it does not. All of these statements can be (and have been) made publicly without having to divulge (and misrepresent) the discovery details in this case. Plaintiffs are not interested in the truth – they are interested in telling a story that comports with their own view that elephants should not be in captivity. The Fahrenbruck e-mail attached as Exhibit 3 to their motion is the quintessential example of this. Exhibit 3 has been attached to plaintiffs' court filings and waved about by them to the media *ad nauseum*. The document, however, was produced in July, 2006. At that time, plaintiffs had at least six depositions left, and the Court, *sua sponte*, granted the parties additional depositions in December 2007, leaving plaintiffs with eleven depositions after the document was produced. Plaintiffs, however, never deposed Ms. Fahrenbruck to question her about this draft or its content. Yet they saw fit to have Tom Rider take this document and portray it on the Las Vegas news as having been sent to the CEO, which it never was. Having to defend a lawsuit simply because one dares to own and exhibit animals is bad enough, but having to defend false statements made to the media regarding discovery documents is entirely another. Plaintiffs' conduct is indefensible.

The vast majority of the discovery materials that plaintiffs would like to use in their persistent efforts to try this case outside the courtroom have not been submitted to the Court and, as such, are not entitled to public access. The materials that have been submitted, moreover, have been attached to procedural and other discovery-related motions; they have not been introduced at trial and have not been relied upon by the Court in resolving the merits of the case. Accordingly, these materials also are not subject to public access. Plaintiffs' apparent belief that they are entitled to use discovery materials in their campaign outside the courtroom is sorely misguided. Seattle Times dictates otherwise.

B. The Existing Protective Order is Supported by Good Cause

The numerous examples of plaintiffs' use (and misuse) of discovery materials to attack FEI outside the courtroom demonstrate "good cause" supporting the Court's existing Protective Order. Indeed, by definition, the Protective Order is the result of Judge Facciola's conclusion that good cause exists to warrant entry of such an Order. Exum v. USOC, 209 F.R.D. 201, 206 (D. Col. 2002) ("the good cause requirement must be met even if the parties agree, in whole or in part, to a protective order"). The ruling was not erroneous. Plaintiffs' argument to the contrary, that no "good cause" exists, is an affront to the Court. Their argument, moreover, ignores the considerable evidence FEI already has submitted regarding plaintiffs' continued misuse of discovery materials to attack FEI outside of this litigation even after the Protective Order was entered. It also misrepresents the numerous findings and warnings issued by this Court and omits any reference to the numerous third parties who have produced documents only after being assured their documents would be subject to a Protective Order. Indeed, plaintiffs' motion, which explicitly affirms plaintiffs' desire to try this case in the media instead of a court of law, constitutes good cause to leave the Protective Order in place.

1. Plaintiffs' Prior and Ongoing Misuse of Discovery Materials Constitutes Good Cause

Plaintiffs pretend that Judge Facciola entered the Protective Order without any evidence of "good cause" other than FEI's argument that disclosure of information learned during inspections could pose a "security" issue." Opp. at 13. Plaintiffs conveniently ignore, however, the numerous instances in which they have misused discovery information outside of the courtroom in a manner that unnecessarily sought to harass and embarrass FEI. All of these examples demonstrate "specific and particular facts showing good cause" in support of the existing Protective Order, Avirgan v. Hull, 118 F.R.D. 257, 261 (D.D.C. 1987), and they all warrant the denial of plaintiffs' latest motion.

Ironically, plaintiffs allege that FEI has not articulated "specific and particular facts" to support the Protective Order. Opp. at 13. This is the very same argument plaintiffs made when FEI first alleged (in 2003 and again in 2005) that a protective order was warranted because plaintiffs would misuse discovery material in their media-related attacks. See supra pp. 3-6. Despite calling such allegations "completely speculative and unsubstantiated," plaintiffs have since done exactly what FEI told the Court plaintiffs would do. There can be little doubt, therefore, that FEI has offered more than just "stereotyped and conclusory statements" demonstrating ample good cause to support the existing Protective Order. Id. at 261-62.

2. The Court's Prior Rulings Reflect Admonishments and Concerns That Constitute Good Cause

Plaintiffs' motion not only ignores the record, it also misrepresents the Court's prior rulings. At no time has Judge Sullivan or Judge Facciola condoned plaintiffs' use of discovery materials to attack FEI outside of this litigation. Indeed, Judge Sullivan has admonished plaintiffs that any such attacks will not be taken lightly and has expressed his concern that FEI may be prejudiced by them. See Order (9/26/05) (Docket No. 50); Order (8/23/07) (Docket No.

177). Judge Facciola, moreover, immediately expressed concern upon learning of plaintiffs' attacks and entered the Protective Order less than one week later. See Ex. 7, Hearing Tr. (9/19/07) at 18; Order (9/25/07) (Docket No. 195). None of this prior history supports plaintiffs' revisionist history or their argument that FEI has never demonstrated good cause to justify the existing Protective Order. Not only have plaintiffs used discovery material to attack FEI outside of these proceedings, they have done so in the face of numerous Court warnings. Such brazen conduct establishes additional good cause to support the existing Protective Order.

3. Third Parties' Reliance on the Protective Order Constitutes Good Cause

As discussed above, several third parties have produced documents in response to plaintiffs' subpoenas only after executing their own protective order or being informed of the existing Protective Order. See supra pp. 18-19. Even PETA, an organization often aligned with plaintiffs, has insisted that any materials it is compelled to produce be subject to a protective order. Id. It is entirely improper, therefore, for plaintiffs to request documents under the assurances afforded by the Protective Order and then to file a motion seeking to lift that Order without apparently even notifying the third parties whose documents were produced pursuant to that Order. Nowhere in their motion do plaintiffs state that they have obtained the consent of these third parties for the relief that plaintiffs seek. Moreover, the fact that third parties have insisted that the documents they produce to plaintiffs be subject to a Protective Order further corroborates FEI's concerns that its documents should be subject to a Protective Order to avoid plaintiffs' misuse of them for purposes other than this litigation.

4. The Uncertainty Regarding the Admissibility of the Majority of FEI's Discovery Material Constitutes Good Cause

Good cause existed when the Protective Order was entered on September 25, 2007. Since then, the Court has narrowed this lawsuit to only seven of FEI's fifty-three elephants. Order (10/25/07) (Docket Nos. 212-213). Although FEI has argued that only evidence pertaining to those seven elephants should be relevant as this case proceeds, see FEI's Notice of Points and Authorities Regarding the Scope of Further Discovery in this Case (11/30/07) (Docket No. 230), discovery has been allowed to continue concerning elephants other than the seven that remain at issue. Nonetheless, the Court has acknowledged that predictions as to admissibility at trial should be not be made. See Order (12/18/07) (Docket No. 239) at 2-3 ("It would be reckless for me to predict that Judge Sullivan will ultimately rule that evidence pertaining to the defendants' treatment of elephants other than the ones in the class he created is inadmissible.").

The trade-off for such broad-based discovery, far greater in scope than actual trial admissibility, is that the litigants have their privacy protected. See generally Seattle Times. Accordingly, plaintiffs have been afforded a scope of discovery that is likely far broader than what will be admissible at trial – which has been facilitated by the existence of the Protective Order. In light of that, additional good cause exists to support the Protective Order. FEI has never suggested that a trial in this case (if there is one) will not be public. But we are not there yet procedurally. To permit plaintiffs to invoke the discovery powers granted to them *solely* for litigation purposes and then abuse those powers by using the materials for non-litigation purposes is unacceptable and premature. Plaintiffs have no constitutional right to disseminate pretrial discovery materials. FEI, however, has a constitutional right to a fair trial, which plaintiffs' abuse of discovery is interfering with. Evidence in this case will be presented and

weighed at trial, if there even is one. In the meanwhile, plaintiffs would do well to use discovery to litigate this case in this court rather than in the media. See Seattle Times.¹⁴

CONCLUSION

For the reasons set forth herein, FEI respectfully requests that plaintiffs' Motion be denied, and that the Protective Order be left in place for the good cause shown herein. A proposed form of order is attached.

Dated this 20th day of May, 2008

Respectfully submitted,



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¹⁴ Plaintiffs' claim that they must litigate this case in secret because of the Protective Order is false. FEI has scrupulously adhered to the Court's confidentiality rulings, and has undertaken a line-by-line redaction of briefings so that the vast majority of filings is unredacted on the public record. This stands in stark contrast to plaintiffs' wholesale, unnecessary sealing of filings that presumably occur only because of the mechanical ease of so filing. The Protective Order does not require this.

CERTIFICATE OF SERVICE

I, George A. Gasper, do hereby certify that on May 20, 2008 the foregoing **Opposition to Plaintiffs' Motion to Lift the September 25, 2007 Protective Order** was served on the following in the manners stated below:

FILED PUBLICLY IN REDACTED/UNSEALED FORM VIA ECF to:

All ECF-registered persons for this case, including plaintiffs' counsel

FILED WITH THE CLERK OF COURT UNDER SEAL IN UNREDACTED FORM to:

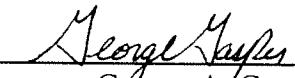
Clerk's Office
U.S.D.C. for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Ave., N.W.
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SERVED VIA HAND DELIVERY UNDER SEAL IN UNREDACTED FORM to:

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COURTESY COPY TO CHAMBERS OF HON. JOHN M. FACCIOLA UNDER SEAL IN UNREDACTED FORM:

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George A. Gasper