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' REPLY IN SUPPORT OF THEIR MOTION TO LIFT THE SEPTEMBER 25, 2007 PROTECTIVE ORDER

Plaintiffs make the following points in reply to the opposition by defendant Feld Entertainment Inc. ("FEI") to plaintiffs' motion to lift the blanket protective order for all discovery that was issued by this Court on September 25, 2007.

A. Seattle Times, Co. v. Rhinehart Does Not Control The Issue Here Which Is Whether FEI Has Ever Demonstrated "Good Cause" To Warrant The Blanket Protective Order Issued By The Court.

FEI makes much of the fact that plaintiffs did not discuss Seattle Times, Co. v. Rhinehart, 467 U.S. 20 (1984), in their opening memorandum. See Defendant's Opposition ("Def. Opp.") at 12-13. However, plaintiffs have never argued that they have a constitutional right to disseminate all information obtained in discovery in this case unrestrained by Rule 26(c) – the only issue addressed in Seattle Times. Rather, plaintiffs have always asserted – and continue to assert – that the pertinent issue here is whether FEI has met the necessary requirements of Rule 26(c) to warrant the imposition of a blanket protective order for all information that has been

produced in discovery in this case since September 25, 2007.

Thus, defendant urges this Court to read the Supreme Court's decision in Seattle Times,, as standing for the proposition that all discovery materials are sealed unless those seeking to unseal them can demonstrate a compelling reason to do so. However, that is not the holding of that case. Rather, Seattle Times simply held that there is no unfettered First Amendment right to disseminate materials received in discovery, and that Rule 26(c) is a proper exercise of governmental authority to restrain such dissemination. See 467 U.S. at 34 ("judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context"); id. ("Rule 26(c) furthers a substantial governmental interest unrelated to the suppression of expression").

Therefore, as the en banc Court of Appeals for this Circuit has explained, "Seattle Times does not dictate a result"on this issue unless the Court determines there is "good cause" for a protective order under Rule 26(c). Tavoulareas v. Washington Post Co., 737 F.2d 1170, 1172 (1984) (en banc); see also New York v. Microsoft, 206 F.R.D. 19, 22 (D.D.C. 2002) (explaining that even in the wake of Seattle Times, "the party seeking to exclude others from pretrial discovery must establish that good cause exists for such exclusion") (emphasis added).

Indeed, in other cases involving matters of public policy – litigated after Seattle Times – courts have refused to issue broad protective orders prohibiting public disclosure of discovery materials when the movant failed to make the requisite showing of "good cause." See, e.g., Cipollone v. Liggett Group, Inc., 822 F.2d 335 (3d Cir. 1987) (tobacco product liability suit denying broad protective order for all discovery); New York v. Microsoft, 206 F.R.D. at 23

(antitrust case against computer software manufacturer in which media allowed access to deposition transcripts of corporate officials); Humboldt Baykeeper v. Union Pac. R. Co., 244 F.R.D. 560, 567 (N.D.Cal. 2007) (suit alleging environmental contamination in which court permitted plaintiffs to disclose information gathered about the site); Haber v. Evans, 268 F.Supp.2d 507, 509 & n.2 (E.D.Pa. 2003) (case involving sexual misconduct of a former state trooper in which court denied a protective order on the ground that the "public had a strong interest in the information since it related to public health and safety"); Felling v. Knight, 211 F.R.D. 552, 554-55 (S.D. Ind. 2003) (case involving allegations of misconduct by head basketball coach in which court permitted disclosure of deposition testimony because "any potential embarrassment the deponents may experience resulting from the release of the videotapes is outweighed by the public's right to know").[1]

As Judge Kollar-Kotelly explained in New York v. Microsoft, supra, "Rule 26(c)appears to balance the public's interest in open proceedings against an individual's private interest in avoiding 'annoyance, embarrassment, oppression, or undue burden or expense.'" 206 F.R.D. at 22 (citations omitted) (emphasis added). Thus, plaintiffs are not suggesting that there may not be some legitimate privacy, financial, or other comparable concern with respect to particular information that might warrant the imposition of an appropriate protective order under Rule 26(c). Indeed, as noted in their opening memorandum, plaintiffs voluntarily agreed to several such orders in this case upon a particularized showing of good cause, including a protective order

[1] In this regard, FEI's reliance on the government's tobacco litigation, United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 932 (D.D.C. 2006), Def. Opp. at 17, is completely misplaced. There, Judge Kessler simply referenced the fact that highly confidential marketing information could be maintained pursuant to "appropriate protective orders." Id. (emphasis added). However, FEI has made no showing that any comparable information is at issue here.

for medical records that would reveal research being relied on for scientific publications, see Order (DE 50 and DE 49), and protective orders regarding FEI's video recordings of rehearsals and performances. See DE 75.[2] Moreover, this Court long ago relieved FEI of the obligation even to produce any financial or public relations documents in this case on the grounds that the "marginal utility" of such information regarding defendant's credibility is "too far out of proportion to the sensitivity of the financial information sought and the burden that would be placed on defendants in gathering and producing such documents." See Order (February 23, 2005) (DE 59) at 9.

However, plaintiffs dispute that FEI has made the necessary "good cause" showing to overcome the "statutory presumption in favor of open discovery" with respect to all discovery that has been produced since September 25, 2007, John Does I-VI v. Yogi, 110 F.R.D. 629, 632 (D.D.C. 1986) – a presumption that has been recognized by courts, including this one, even after Seattle Times was decided. See, e.g., id.; see also Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 790 (1st Cir. 1988); Turick v. Yamaha Motor Corp. USA, 121 F.R.D. 32, 35 (S.D.N.Y. 1988); In Re "Agent Orange" Prod. Liab. Lit., 104 F.R.D. 559, 567 (E.D.N.Y. 1985).

In any event, FEI evidently agrees with this Court's conclusion in Roberson v. Bair, 242 F.R.D. 130, 133 (D.D.C. 2007), that the "good cause" determination that needs to be made here may be done with reference to the factors set forth in United States v. Hubbard, 650 F.2d 293, 317-22 (D.C. Circuit 1980), even though that case was decided before Seattle Times. See Def. Opp. 15. As plaintiffs have demonstrated, Pl. Mem. at 14-21, all of these factors weigh heavily

[2]Thus, contrary to FEI's representation that it "was forced to open its video library" to plaintiffs "without restraint," Def. Opp. at 4, most of the videotapes produced by defendant were done so pursuant to a protective order voluntarily agreed to by plaintiffs.

in favor of lifting the blanket protective order that was issued here.[3]

B. FEI's Desire To Continue To Control The Public Debate On This Issue Does Not Qualify As "Good Cause" Under Rule 26(c).

FEI has made no showing that all of the discovery exchanged since September 25, 2007 must be maintained under seal to protect an individual's personal privacy, or the confidentiality of trade secrets or other comparably sensitive information. Rather, relying on Seattle Times, FEI asserts that it has demonstrated the requisite "good cause" simply because any use of information obtained in discovery necessarily constitutes the "misuse" of such information. However, as demonstrated above, Seattle Times does not stand for that proposition – i.e. it did not reverse the burden of proof that applies here. Moreover, Judge Sullivan has already rejected this argument on several occasions, see Pl. Mem. at 6-11, and this Court should not overrule Judge Sullivan on this point, nor issue such a novel ruling that will have public policy implications that go far beyond this particular litigation.

Nor, as suggested by defendant, Def. Opp. at 3, have the plaintiffs ever "denied" that they would use information obtained in discovery in this case to inform the public about the mistreatment of the endangered Asian elephants used in FEI's circus. Rather, plaintiffs argued in the past – and continue to maintain – that defendant has failed to articulate "specific and particular facts showing good cause" for a protective order, as required both by Rule 26 (c) of

[3] Moreover, because plaintiffs have relied on information obtained in discovery since September 25, 2007 in support of their recently filed motion for a preliminary injunction based on their chaining claim, see DE 297, the final Hubbard factor, as applied by this Court in Roberson – i.e., whether the information produced in discovery will be used to support the merits of plaintiffs' claims, see 242 F.R.D. at 133-34 – weighs strongly in favor of lifting the protective order at an absolute minimum with respect to the information relied on in support of that motion. See also Hubbard, 650 F.2d at 317-22 (requiring the Court to take into consideration "the purpose for which the documents were introduced") (citations omitted).

the Federal Rules, see Avrigan v. Hull, 118 F.R.D. 257, 261 (D.D.C. 1987), and by Judge Sullivan's previous orders in this case. See, e.g., Plaintiffs' Opp. To FEI's Mot. for Protective Order (March 4, 2005) (DE 34) at 10; see also Order (Nov. 25, 2003) (DE 15) at 2 (denying FEI's request for a protective order for all discovery and permitting FEI to "move for a protective order with respect to particular specified information . . . upon a showing of 'good cause,' as permitted by Rule 26(c)") (emphasis added).

Plaintiffs assert – and Judge Sullivan apparently agreed since he has consistently denied defendant's request for a protective order on this basis – that there is nothing inherently wrong with disclosing relevant information obtained in discovery in an effort to further an important public policy debate, particularly when FEI itself not only actively participates in that debate by advocating its side of the discourse, but also tells the public that plaintiffs and others who contend that the elephants are routinely hit with bull hooks and kept in chains for much of their lives are lying. See Pl. Mem. at 6 .

For example, one of the documents that FEI uses repeatedly throughout its opposition as an example of plaintiffs' "misuse" of discovery is the January 8, 2005 report written by FEI's own "Animal Behaviorist," Deborah Fahrenbruck, to the General Manager of the "Blue Unit" of the circus, in which she reports the "hook[ing]" of an elephant that resulted in "an elephant dripping blood all over the arena floor." See Pl. Ex. 3. FEI complains that one of the plaintiffs, the Animal Protection Institute, has used this document as part of its public campaign opposing the mistreatment of Asian elephants in the circus and in support of legislation that would ban the use of "any implement that would result in physical harm" to an elephant. See Def. Opp. at 11; Def. Exhibit 8. However, not only has Judge Sullivan already denied FEI a protective order

based on this same argument, see infra at 7, but in the past FEI has disseminated to the public a videotape in which Ms. Fahrenbruck extols the high standard of care that FEI provides the elephants, as a basis for rallying the public to oppose legislation that would ban the use of elephants in circuses. See DVD entitled "Caring for Animals Final Cut," FEI 0021(Plaintiffs' Exhibit ("Pl. Ex.") 14).[4]

While plaintiffs do not begrudge FEI the opportunity to try to persuade the public that it is telling the truth about the care it provides the elephants, they do not believe that its desire to completely control this debate qualifies as appropriate "good cause" under Rule 26(c) – and, as plaintiffs demonstrated in their opening brief, Judge Sullivan has already agreed with plaintiffs on this issue on several occasions. See Pl. Mem. at 6-11. In fact, in its unsuccessful efforts to convince Judge Sullivan to issue protective orders in the past on this same basis, FEI relied on plaintiffs' dissemination of the very same documents it relies on here – including both the Fahrenbruck report and the videotape of the birth of the baby elephant Riccardo. See, e.g., Transcript of September 16, 2005 Hearing at 37-38 (referring to plaintiffs' dissemination of the Riccardo birth videotape); Order (Sept. 26, 2005)(DE 50) (denying motion for protective order on this basis); see also FEI's Expedited Motion to Enforce The Court's September 26, 2005 Order (DE 152) at 4 (again referencing dissemination of the Riccardo videotape) and 7-8 (referencing Fahrenbruck letter); Order (DE 177) (again denying FEI's motion on this basis). However, Judge Sullivan was unpersuaded that the use of either of these materials to inform the

[4] Without any citation, FEI insists that Tom Rider "misrepresented" that the Fahrenbruck report was actually sent to Mr. Feld in addition to the General Manager of the Blue Unit. See Def. Opp. at 8. There is no truth to this accusation and, in fact, Mr. Rider has always scrupulously explained – as the document itself reflects – that although Ms. Fahrenbruck drafted the letter for Mr. Feld she gave it only to the General Manager.

debate on this issue was a basis for imposing a protective order, and FEI has presented no new reason why Judge Sullivan's previous rulings on this issue should not be honored.[5]

Indeed, in Cipollone v. Liggett Group, Inc., 822 F.2d 335 (3d Cir. 1987), the Court of Appeals for the Third Circuit rejected the tobacco industry's argument that a protective order was necessary in a products liability lawsuit to prohibit the "slanted" dissemination of information obtained in discovery – precisely what FEI argues here. See 822 F.2d at 346. In upholding the district court's refusal to issue the protective order, the court explained that a business enterprise would "have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position." 822 F.2d at 345 (internal citations omitted) (emphasis added). As a consequence, the court upheld the district court's refusal to issue a protective order, ruling that evidence that the companies' stock values were sensitive to developments in the case was not a sufficiently "concrete example" that limiting discovery was necessary to "prevent particularized, significant injury to their financial and competitive position." Id. at 346 (emphasis added).

Here, FEI has presented even less evidence of significant harm to its business interests – especially when it is free to give the public its side of this debate and to characterize any information relied on by plaintiffs in any way it wishes. Thus, FEI's corporate interest in

[5] FEI also now complains about an additional article reporting the occurrence of tuberculosis in Ringling Bros. elephants. See Def. Opp. at 9 and Def. Exhibit 6. However, not only are none of the records relied on by the reporter who wrote that article subject to any protective order, but FEI itself has issued press releases informing the public that its elephants have tested positive for tuberculosis and that the State of Florida has placed its "Center for Elephant Conservation" under quarantine for this reason, in an effort to assuage public concern about this matter. See Pl. Ex. 15 ("Ringling Bros. And Barnum & Bailey Center for Elephant Conservation Announces Second Test Positive For Tuberculosis in Male Elephant") (September 5, 2006).

litigating this case in secrecy is a far cry from the kind of personal "privacy" interests that were at stake in Seattle Times and other cases involving private parties where courts typically enter Rule 26(c) protective orders. See Seattle Times, 467 U.S. at 29 (the protective order prevented disclosure of the identities of individuals who had contributed to a religious organization); see also United States v. Hubbard, 650 F.2d at 319 (in deciding whether to maintain protective order court must consider whether "a third party's property and privacy rights are an issue) (emphasis added). Indeed, as the D.C. Circuit observed in the immediate wake of Seattle Times, "[T]he Supreme Court has in no respect suggested that Fourth Amendment privacy interests [of corporations] mandated the Seattle Times protective order, but only, at most, that the First Amendment religious privacy interests at issue there reasonably might have constituted good cause to issue the order." Tavoulareas v. Washington Post, 737 F.2d at 1172 (citations omitted) (emphasis added).

While FEI seeks to rewrite history by contending that this Court intentionally overruled each of Judge Sullivan's previous determinations that the mere use of information obtained in discovery to further debate on an issue of important public policy is not sufficient "good cause" to warrant the issuance of a broad protective order under Rule 26(c), that is not what happened here. Rather, as plaintiffs explained in their opening memorandum, Pl. Mem. at 11-12, this Court entered the contested protective order as a way of facilitating the upcoming court-ordered inspections of the Asian elephants, after FEI insisted that revealing "the layout" of its "Center for Elephant Conservation" would cause severe security problems. See Def. Notice of Issues (September 19, 2007) (DE 188) at 3; Transcript of Hearing (Sept. 19, 2007) at 21 (Magistrate Judge: "I thought they were saying that people who are evil-intentioned and might want to hurt

the animals would like to know the layout of the facilities and they're concerned about that"); see also Judge Sullivan's Order (DE 178) (August 23, 2007) at 10 (referring the details of the inspections to the Magistrate Judge "[b]ecause defendants have raised valid concerns regarding security for inspectors and animal safety") (emphasis added). It was in that specific context that this Court issued the protective order and invited plaintiffs to seek to lift that order once those inspections were complete. See Order (Sept. 25, 2007) (DE 195) at 4.

Even now, defendant continues to insist that the information obtained during the inspections of the elephants must be kept confidential to prevent "groups who are opposed to FEI's circus and who have a history of violence" from obtaining "video that shows the CEC grounds and facilities," including "private residences of FEI employees." See Def. Opp. at 9 (emphasis added). However, in reality, the video of the CEC inspection REDACTED

While plaintiffs certainly understand why FEI does not want the public to know REDACTED especially when it publicly denies that the elephants are kept in chains and instead touts the CEC as a "200-acre" facility with "prime meadow where elephants can roam and socialize to their heart's content," see PI Ex. 17, FEI's desire to completely manipulate the public's perception on this issue certainly does not constitute "good cause" for a protective order under Rule 26(c). See also Associated Press Article (May 22, 2008), Pl. Ex. 18 (In response to plaintiffs' motion for a preliminary injunction, FEI's spokesperson denies that elephants are chained for many hours each day, accuses plaintiffs of "exaggeration" on this point, and asserts that "[t]he elephants

spend the majority of their waking hours socializing, exercising – untethered").[6]

FEI's insistence that discovery in this case has already "stunted" its veterinarians' willingness to keep accurate records about the care of the elephants, Def. Opp. at 20, is also completely unsupported by any evidence in the record, and was also already rejected by Judge Sullivan as a basis for imposing a broad protective order for all of the veterinary records. Compare FEI's Reply In Support of Mot. for Protective Order (March 16, 2005) (DE 38) at 8 (arguing that a protective order is needed because otherwise "defendant's employees [will] be hesitant about providing or recording unfiltered observations that will be included in written records") with Order (DE 50) and Protective Order (DE 49) (only records that meet the "good cause" exception for a protective order are those for which defendant has an "identifiable commercial interest" because the information "forms the basis of a specific research paper that defendants intend to publish in the near future").

Such self-serving, completely unsupported assertions simply do not meet the requirements of Rule 26(c), as Judge Sullivan has already decided by denying FEI a broad protective order on this same basis. See id.; see also PHE, Inc. v. Department of Justice, 139 F.R.D. 249, 252 (D.D.C. 1991) ("conclusory statements" without evidentiary support fall far short of the requirements of Rule 26(c)); Exum, M.D. v. United States Olympic Committee, 209 F.R.D. 201, 206 (D.Co. 2002) ("the party seeking a protective order must show that disclosure

[6] This is not the first time that FEI has misrepresented the nature of what is at issue in an effort to obtain a protective order. It also told Judge Sullivan that the Deborah Fahrenbruck report of the "hooking" of an elephant that resulted in "an elephant dripping blood all over the arena floor" was a "detailed veterinary record" that, if released, could either interfere with FEI's ability to publish competitively sensitive scientific journals. See Pl. Mem. at 9-10; see also Plaintiffs' Opp. to Def's Expedited Mot. to Enforce the Court's Sept. 26, 2005 Order (DE 154) at 4-10.

will result in a clearly defined and serious injury to the party seeking protection"). Therefore, because FEI has never met its burden to demonstrate "good cause" with respect to all of the discovery that has been exchanged since September 25, 2007, there simply is no basis for continuing the blanket protective order.

Finally, although plaintiffs do not believe that any of the information they have subpoenaed from third parties – i.e. train records from railroad companies that reflect the number of hours the elephants spend chained on the train – warrants protection under Rule 26(c), they have no objection to keeping the protective order in place with respect to all such records at this time. However, this certainly is not a basis for keeping the protective order in place for all discovery produced by the parties since September 25, 2007.

C. The ASPCA Has Not Violated This Court's Protective Order.

In its attempt to keep the blanket protective order in place, FEI now falsely accuses plaintiff American Society for the Prevention of Cruelty to Animals ("ASPCA") of violating that order in a recent statement it sent to Turner Network Television opposing that station's decision to air a "reality" show produced by Kenneth Feld about the circus. Def. Opp. at 11-12. Contrary to FEI's assertions, the ASPCA's statement does not reference any document or deposition that is currently subject to the protective order. Rather, it simply states that Tom Rider's eye-witness accounts about the abuse he witnessed when he worked at Ringling Brothers for two and a half years in the late 1990's have now been corroborated by "depositions from other former Ringling employees." See ASPCA Letter to TNT, Def. Ex. 11.[7]

[7] The new "reality" show that will "take viewers behind the scenes of FEI's circus performers," Def. Opp. at 11, is yet another example of FEI's ability to ensure that its version of life at the circus is widely disseminated to the public.

This statement is easily supported with reference to materials that are not subject to the Court's protective order, including the depositions of former employees Gerald Ramos and Frank Hagan, who both testified, in 2007 and 2004 respectively, that Ringling Brothers' employees routinely hit elephants with bullhooks and keep the elephants chained most of the time.[8]

The ASPCA's statement is also supported by the sworn declarations submitted to the United States Department of Agriculture by former Ringling employees Archele Hundley and Robert Tom, Jr. – neither of which is subject to the Court's protective order, and both of which have already been relied on in this case in opposition to defendant's motion for summary judgment. See Declaration of Archele Hundley, API 6241, Pl. SJ Ex. LL (filed on November 22, 2006 (DE 113)) (describing vicious beating of an elephant and states that "[w]henever the public is not around, the elephants are chained up"); Declaration of Robert Tom, Jr., API 6235, Pl. SJ Ex. MM (stating that he has seen "members of the elephant crew hooking elephants behind the ear, on the legs and on the trunk and leaving bloody wounds," and that "handlers rub dirt into bloody bullhook wounds to conceal the wounds when people are around").

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[8] See e.g., Deposition of Gerald Ramos (Jan. 24, 2007), Pl. Ex. 19 at 11 (he saw the head elephant handler use the bullhook on the elephants "all the time"); id. at 93 (he saw him use the bull hook on a baby elephant like he was "swinging [a] baseball bat"); see also id. at 15-16 (except when the elephants are doing shows, they are "always chained"); see also Deposition of Frank Hagan (November 9, 2004), Pl. Ex. 20, at 14 (when the elephants "moved out of line," the head elephant handler "would usually whack them across the trunk or the foot" – i.e. "strike him with a bullhook"); id. at 15 (elephants who get out of line "usually get hooked or whacked"); id. at 16-17 (stating that, using the bull hook, Mr. Metzler hits both baby and adult elephants with "[a] baseball swing at the trunk"); id. at 18-19 (testifying that he has seen the head handler hit the elephants on "[t]he trunk, the chin, under the chin, the legs and the anus area"); id. at 36 (stating that the handlers hit the elephants "all the time") (emphasis added); id. at 85-90 (the elephants are chained all night long with a heavy chain with "no freedom of movement").

Indeed, it was the defendant, not the ASPCA, that identified Ms. Hundley and Mr. Tom's depositions as the source of the ASPCA's reference in its letter – in the public version of the opposition brief if filed with this Court. See Def. Opp. at 12 ("this was a direct reference to the contents of depositions of Archele Hundley and Robert Tom"). The ASPCA did not mention any names or quote from any document that is subject to this Court's order, and neither it nor any of the other plaintiffs have violated this Court's order, even though complying with that order has already made it extremely difficult for plaintiffs' to litigate this case on the public record. Indeed, because of the protective order, plaintiffs have had to file several briefs, including their motion for preliminary injunction and even this brief, in redacted form on the public record, simply because they refer to materials that were produced in discovery after September 25, 2007.

CONCLUSION

For the foregoing reasons, as well as those set forth in support of plaintiffs' opening memorandum, plaintiffs' motion to lift the September 25, 2007 protective order should be granted.

Respectfully submitted,

/s/ Katherine A. Meyer
Katherine A. Meyer
(D.C. Bar No. 244301)
Eric R. Glitzenstein
(D.C. Bar. No. 358287)
Kimberly D. Ockene
(D.C. Bar No. 461191)

Meyer Glitzenstein & Crystal
1601 Connecticut Avenue
Suite 700

Washington, D.C. 20009
(202) 588-5206

Counsel for Plaintiffs

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