UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

Plaintiffs oppose defendants Ringling Brothers and Barnum & Bailey Circus and Feld Entertainment, Inc.'s ("Ringling Bros.") motion for a protective order, which arbitrarily seeks to prohibit the public dissemination of the medical records concerning Ringling Bros.' Asian elephants, because defendants have failed to meet their burden under the Federal Rules to articulate "specific and particular facts showing good cause" for such an order. Avirgan v. Hull, 118 F.R.D. 257, 261(D.D.C. 1987). Indeed, due to the strong statutory presumption in favor of open discovery established by the Federal Rules, see John Does I-VI v. Yogi, 110 F.R.D. 629, 632 (D.D.C. 1986), without a more particularized showing that the release of specific medical records will cause "serious" harm to defendants' interests, a protective order is entirely

inappropriate. Campbell v. United States Dep't. of Justice, 231 F. Supp. 2d 1, 14 (D.D.C. 2002). Accordingly, plaintiffs ask the Court to deny defendants' motion.[1]

BACKGROUND

Plaintiffs challenge Ringling Bros.' treatment of endangered Asian elephants, that are used and displayed by defendants in circus performances throughout the United States. Plaintiffs allege that a variety of practices defendants use to handle and train the elephants – including such practices as beating the elephants with sharp, metal "bullhooks," leaving them chained throughout the day, and forcibly removing baby elephants from their mothers – violate the requirements of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq. In particular, plaintiffs allege that defendants' activities violate the prohibitions against the "take" of these endangered elephants, because they "harm," "harass," and "wound" the animals within the meaning of the statute. See id. § 1532(19) (definition of "take").

Before the parties initiated discovery, defendants sought from this Court a blanket protective order, which, if granted, would have prohibited the dissemination of all information obtained in discovery identified by defendants as "confidential." See Memorandum in Support of Defendants' Motion for a Protective Order (Oct. 8, 2003). Defendants contended that they needed a broad protective order to protect all of their discovery because the information they

[1]As explained infra at 14-15, plaintiffs are willing to consider a carefully tailored protective order for particular records if defendants can demonstrate that, consistent with this Court's order, researchers and staff are relying on "particular specified information" in specific medical records belonging to the animals as the foundation of discrete research papers that are intended for publication in the near future. See Order (November 25, 2003) (denying defendants' motion for a protective order).

would be producing "could be used" by plaintiffs "to publicly embarrass" defendants by presenting an "unfair and one-sided picture" of how defendants treat their elephants. Id. However, on November 25, 2003, this Court denied defendants' motion for a blanket protective order, ruling that defendants may move for a protective order "with respect to particular specified information that is to be produced in discovery, upon a showing of 'good cause,' as permitted by Rule 26(c) of the Federal Rules of Civil Procedure." Order (November 25, 2003), at 2 (emphasis added).

On March 30, 2004, plaintiffs served on defendants a combined set of requests for admission, interrogatories, and document requests. See Plaintiffs' First Set of Requests for Admission, Interrogatories and Requests for Documents (March 30, 2004) ("Plfs. Requests") (Exh. A to Plfs. Mem.). In Interrogatory Number 8, plaintiffs asked defendants to:

> For each elephant owned and leased from 1994 to the present, provide detailed information about each such animal, including the name of the animal, the circumstances under which Ringling obtained possession of the animal, whether the animal was born in the wild or in captivity, the date of birth of the animal, and whether the animal has died.

Plfs. Requests, at 8-9. In Document Request Number 8, plaintiffs further asked defendants, "[w]ith respect to each of the elephants identified in response to Interrogatory No. 8, [to] produce all medical records that pertain to the animal." Plfs. Requests, at 13.

In response, defendants did not indicate that any of the elephants' medical records were privileged or otherwise confidential, nor did defendants list any such records on their privilege log. Nor, for that matter, did defendants provide any indication to plaintiffs that they would not disclose the clearly relevant medical records of the animals. Rather, defendants simply responded to this discovery request by stating that they "will

produce responsive, non-privileged documents dated January 1, 1996, or later," Defendants' Responses to Plaintiffs' First Set of Requests for Admission, Interrogatories, and Requests for Documents (June 9, 2004), at 30. However, while defendants provided plaintiffs with some medical records, it clearly was not the vast majority of medical records they should have with respect to each of the elephants in their possession. Indeed, for some of the animals, no medical records were provided. See Plaintiffs' Memorandum In Support of Motion to Compel ("Plfs. Mem."), at 28. Thus, until plaintiffs pressed the issue, and threatened to file a motion to compel on this point, defendants purportedly had provided all of the medical records that were requested in plaintiffs' March 30, 2004 discovery request. See, e.g., November 8, 2004 Letter from Joshua Wolson, at 7 (Exh. F to Plfs. Mem.) (stating that the medical records that defendants produced "are complete in that they contain all of the pages in defendants' files") (emphasis added).

However, after plaintiffs questioned this representation and made it clear they would move to compel the clearly unaccounted for medical records, defendants for the first time admitted that they might have "more detailed medical records," but that they would not provide such records without plaintiffs' consent to a protective order, because the records were "confidential." See January 4, 2004 Letter from Joshua Wolson (Exh. I to Plfs. Mem.), at 3; see also December 22, 2004 Letter from Kimberly Ockene (Exh. H to Plfs. Mem.), at 5 (stating that "it is now clear that plaintiffs will be filing a motion to compel").

Now, in response to plaintiffs' motion to compel, defendants admit – nearly one year since plaintiffs first requested the documents – that, in fact, defendants only produced a "limited number" of the elephants' medical records, and that defendants are "in possession of additional veterinary records that are responsive to plaintiffs' document requests." See Motion for a Protective Order (February 15, 2005), at 1 ("Def. Motion") (emphasis added). However, defendants now seek a broad protective order with respect to all of those medical records before they will produce them.

ARGUMENT

A. Defendants Have Waived Their Claim of Confidentiality.

As explained in plaintiffs' Reply In Support of Plaintiffs' Motion to Compel Defendants' Compliance With Plaintiffs' Discovery Requests, which is also being filed today, because defendants did not assert any privilege for the animals' medical records in response to plaintiffs' initial discovery requests, defendants have waived any claim of confidentiality with respect to those records. See Reply In Support of Plaintiffs' Motion to Compel Defendants Compliance With Plaintiffs' Discovery Requests (March 4, 2005), at 7-9; see also Athridge v. Aetna Casualty & Surety Co., 184 F.R.D. 181, 191 (D.D.C. 1998) (finding waiver where company "agreed to produce the documents and did not lodge specific relevance objections to these nine requests"). Thus, as explained supra, at 3-4, in response to plaintiffs' straight-forward requests for these clearly relevant records, defendants neither asserted a privilege on the grounds of confidentiality, nor asked for a protective order as a condition to providing the records. Instead, they simply produced portions of records for some of the animals, and then pretended that they had provided all

of the requested records for all of the animals. However, even with respect to the medical records they did provide, defendants conspicuously did not assert that any of the records were privileged or otherwise confidential. Accordingly, at this late date, defendants have waived their right to make such a claim now.

B. Defendants Have Not Met Their Burden Under Rule 26(c).

1. Defendants Must Show "Good Cause" to Overcome the Presumption of Open Discovery.

Defendants also have not satisfied their burden to show "good cause" for this Court to override traditional discovery rules and issue a protective order restricting the use and disclosure of the elephants' medical records that are at issue in this case. Indeed, it is well-established that the Federal Rules "create a statutory presumption in favor of open discovery, extending even to those materials not used at trial." See Yogi, 110 F.R.D. at 632 (internal citations omitted); Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 790 (1st Cir. 1988) (recognizing that 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., 121 F.R.D. 32, 35 (S.D.N.Y. 1988) ("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") (emphasis added).

Under Rule 26(c), the "presumption in favor of open discovery" may only be overcome if an applicant meets its burden to establish "good cause" for issuance of a protective order. Fed. R. Civ. P. 26(c). The Federal Rules, therefore, allow an applicant

to seek a protective order only "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including "a trade secret or other confidential research, development, or commercial information not disclosed or be disclosed only in a designated way." Id.

Moreover, the plaintiffs in this case have a particularly strong interest in conducting pre-trial discovery in full view of the public – as contemplated by the Federal Rules – unless there is a particular need for confidentiality. Indeed, the treatment of Asian elephants used in circus performances – a species that is listed as endangered with extinction and entitled to the strictest protections under the ESA – is an issue of great public interest and concern. See, e.g., Three-Ring Bind, Some Say Circuses and Animals Don't Mix, WASHINGTON POST, Apr. 11, 2002, at C14 (Attached here as Exhibit A) (noting that because of the "controversy" concerning the use of elephants in circuses, some cities in the U.S. as well as foreign countries ban the use of performing wild animals). Courts routinely deny motions for protective orders when, as here, a case involves issues that are "important to the public." See, e.g., Exum, M.D. v. United States Olympic Comm., 209 F.R.D. 201, 206-08 (D.Colo. 2002) (denying motion for protective order where press asserted "public interest in Olympic athletes' positive drug test results"); In re "Agent Orange" Product Liab. Litig., 104 F.R.D. 559, 573-74 (E.D.N.Y. 1985) (lifting protective order because "subject matter of [the] litigation certainly [had] a broad[] public interest element"), aff'd, In re "Agent Orange" Product Liab. Litig., 821 F.2d 139, 145-46 (2d. Cir. 1987).

2. All of the Factors The Court Must Consider Weigh Heavily In Favor Of Denying The Request For A Protective Order.

As the Court of Appeals for this Circuit has explained, the decision to grant a protective order involves the balancing of several factors, including: (1) the burden of producing the information, (2) the information's relevance to the litigation, (3) the requester's need for the information, and (4) the harm that disclosure would cause the party seeking a protective order. See Burka v. United States Dep't. Of Health & Human Serv., 87 F.3d 508, 517 (D.C. Cir. 1996). As demonstrated below, all of those factors weigh heavily in favor of denying defendants' motion for a protective order.

a. The First Three Factors Are Not In Dispute.

As a threshold matter, defendants do not contend that producing the elephants' medical records at issue would be burdensome. See Def. Motion. Nor do defendants contest that the records are highly relevant to the claims and defenses in the case – as they clearly are. Id. Indeed, medical records documenting the elephants' health and condition go to the heart of the issues in this case, and are clearly relevant to plaintiffs' claims that defendants are "harming," "harassing," and "wounding" the elephants within the meaning of the ESA, as well as to defendants' defenses – i.e., that their activities do not harm the elephants. In addition, since plaintiffs have no other means of obtaining this extremely relevant information, they clearly have a strong need for these records.

Therefore, all of the first three factors the Court must consider under Burka weigh strongly against granting the requested protective order.

b. Defendants Have Not Met Their Burden To Demonstrate That A Protective Order Is Needed To Protect Them From "Serious" Harm.

As to the fourth factor – the harm to defendants if the protective order is not granted, Burka, 87 F.3d at 517 – defendants have simply failed to meet their burden to establish that disclosure of the elephants' medical records would cause them sufficient harm to warrant issuance of the requested order. Thus, an applicant for a protective order must "articulate specific and particular facts showing good cause." Avirgan, 118 F.R.D. at 261-62; Phe, Inc., 139 F.R.D. 249, 252 (D.D.C. 1991). Under Rule 26(c), "stereotyped and conclusory statements" simply do not establish the requisite "good cause." Avirgan, 118 F.R.D. at 261-62. In addition, an applicant must "clearly define a serious injury" that will result from disclosure of the information. Campbell, 231 F. Supp. 2d at 14 (internal citations omitted) (emphasis added); Phe, 139 F.R.D. at 252 ("this standard demands that the company prove that the disclosure will result in a clearly defined and very serious injury to its business") (emphasis added).

Here, defendants proffer two vague reasons as to why a protective order limiting the use of the animals' medical records is necessary, neither of which comes close to furnishing the specific evidence of "serious" harm that is required under Rule 26(c), Campbell, or, for that matter, this Court's previous Order. See Order (Nov. 25, 2003), at 2 (requiring defendants to demonstrate that a protective order is warranted with respect to "particular specified information" that is to be produced in discovery) (emphasis added).

i. Defendants' Speculative Assertions of Potential Embarrassment Are Completely Unjustified.

First, as they asserted in support of their original motion for a protective order, defendants again assert that this Court should allow them to keep the medical records secret because plaintiffs will somehow use them in a nefarious way to "embarrass" defendants. See Def. Motion at 2. Thus, defendants insist that disclosure of the records "could" embarrass defendants and their veterinary staff and "injure" their reputation, if defendants' staff are "publicly accused of providing deficient care to elephants," and if the staffs' notes are "taken out of context" or "mischaracteriz[ed]" by plaintiffs. See id.

However, as with their original motion for a protective order on this basis – which this Court denied as insufficient under Rule 26(c) – defendants' assertions are again both completely speculative and unsubstantiated. Indeed, defendants do not provide any evidence whatsoever for their self-serving assertion that plaintiffs will somehow misuse the medical records at issue in this case. Id. This omission is particularly glaring in light of the fact that, as explained supra, at 3-4, until plaintiffs pursued this motion to compel, defendants had purportedly already provided to plaintiffs the "complete" medical records requested by plaintiffs, see Exh. F to Plfs. Mem., yet defendants have not cited any evidence that plaintiffs somehow misused those records, or, for that matter, even publicized any of them since June 2004 when they were produced.

Rather, as they argued in support of their original request for a broad protective order, defendants cling to their bald assertion that there is something nefarious about plaintiffs exercising their First Amendment rights to publicly criticize defendants'

treatment of elephants in their circus because of they way they mistreat the elephants. See Memorandum in Opposition to Plaintiffs' Motion to Compel Defendants' Compliance with Plaintiffs' Discovery Requests (Feb. 15, 2005), at 27 n.13 ("Def. Opp.") (pointing to web sites showing that plaintiffs have advised animal protection groups not to patronize the Ringling Bros. circus). Therefore, whether defendants' veterinary staff will be "publicly accused" of wrongdoing, or whether notes from the elephants' medical records will be "mischaracter[ized]" or "taken out of context" if additional medical records are produced, is pure speculation without any basis in fact.

However, such unsubstantiated assertions simply do not satisfy the requirements of Rule 26(c). See Avirgan, 118 F.R.D. at 262 (rejecting as a "bald assertion of fact" movants' claim that disclosure would result in annoyance, embarrassment, and oppression); see also Phe, 139 F.R.D. at 251-52 (rejecting company's claim that independent reviews of company's product, including reviewers' notes, should be protected as confidential research because it was "wholly speculative" whether reviewers would be exposed to risk of civil litigation as a result of disclosure); Campbell, 231 F. Supp. 2d at 14 ("broad allegations of harm, unsubstantiated by specific examples, will not suffice").

Moreover, even taken at face value, defendants' broad allegations of potential harm fail to demonstrate a threat of injury to defendants' interests that is particularly "serious," as the Federal Rules and cases also require. Cipollone, 785 F.2d at 1108 (3rd Cir. 1988). Thus, defendants merely suggest that disclosure of the medical records "could . . . injure their reputation" if the records are subsequently "mischaracteriz[ed]" by

plaintiffs. Def. Motion, at 2. However, it is well settled that an applicant must demonstrate that disclosure of particular information will result in "serious" harm to defendants' business. See, e.g., Campbell, 231 F. Supp. 2d at 14 (internal citations omitted); Cipollone, 785 F.2d at 1121 ("because release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious") (citing Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982) (denying a motion for protective order based on broad allegations that disclosure of certain information would "injure the bank in the industry and local community").

Yet, even assuming the Court were to accept defendants' spurious allegations that plaintiffs intend to misuse this information, defendants do not provide a single concrete example of how any resulting damage to their reputation will be "serious," especially given that Ringling Bros. itself routinely publicizes its own self-serving assertions regarding its care and treatment of its elephants. See, e.g., Ringling Bros. and Barnum & Bailey Names Leading Zoo and Animal Park Expert as Vice President of Animal Stewardship, Press Release (Dec. 6, 2004) (claiming that Ringling Bros. is "committed to the highest standards of animal management and veterinary care for its animals 365 days a year" and provides "a healthy, safe and secure environment where humans and animals live and work together"),
at http://www.ringling.com/general/news/telescope/newsreleases.aspx. Therefore, should plaintiffs ever decide to use information obtained from the medical records in a manner

that defendants believe unfairly "mischaracter[izes]" the records, defendants would clearly have no trouble responding to the alleged "mischaracteriz[ations]" in the public arena. Id.

Indeed, in Cipollone v. Liggett Group, Inc. (Cipollone II), 822 F.2d 335 (3rd Cir. 1987), the Court of Appeals for the Third Circuit rejected a similar argument, put forth by the tobacco industry in a products liability lawsuit, that a protective order was necessary to prohibit the "slanted" dissemination of information obtained through discovery. 822 F.2d at 344. In upholding the district court's refusal to issue a protective order, the Court explained that a business enterprise "will 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." Cipollone II, 822 F.2d at 343 (quoting Cipollone, 785 F.2d at 1121) (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 interests." Id. at 346.

Defendants have provided even less evidence of significant harm to their business interests here. Indeed, defendants do not specify at all, in their motion or in supporting affidavits, the damage they claim will occur as a result of disclosure of allegedly "embarrassing" information in the elephants' medical records. Instead, defendants merely hypothesize that the "possibility" that "publicity-hungry activists" would use veterinarians' notes against the staff "could make defendants' veterinarians gun-shy

about recording their speculative thoughts in their notes." Def. Opp., at 27. However, such speculation – without any concrete evidence whatsoever – is wholly insufficient to support a "good cause" finding under Rule 26(c). See Phe, 139 F.R.D. at 251-52 (company's potential inability to obtain independent reviewers because of "speculative" assertion that reviewers could be subject to litigation was not "good cause" for issuance of a protective order); Cipollone II, 822 F.2d at 344; Campbell, 231 F. Supp. 2d at 14.

ii. Defendants Have Failed to Make a Particularized Showing That Any of the Medical Records are Commercially Sensitive.

Similarly, defendants have failed to meet their burden to show "good cause" for issuing the protective order based on the alleged effect that disclosure of the records could have on their ability to publish unspecified research papers. See Def. Motion, at 2 (claiming that the elephants' medical records "provide the foundation for [] articles" that defendants' staff are preparing, and that if "data" from the medical records are released before publication, "the studies' value to both defendants and the elephant management community will be greatly diminished"); see also Campbell, 231 F.Supp.2d at 14 (applicant for a protective order must provide "specific" evidence of a "serious" injury resulting from disclosure).

First, again, although defendants now claim – for the first time in responding to plaintiffs' motion to compel – that the elephants' medical records form the basis of commercially valuable publications, they conspicuously failed to make any such claim in response to plaintiffs' original requests, or with respect to any of the medical records previously disclosed and represented as the "complete" medical records that were

responsive to plaintiffs' discovery request. See supra, at 4. Nor, for that matter, did they ever make any such assertions during the meet and confer process. See Exhs. D-L to Plfs. Mem.

Second, defendants point to no cases to support their assertion that a protective order is warranted because disclosure of data in the elephants' medical records will "greatly diminish" the ability of defendants to publish scientific studies. To the contrary, the Court of Appeals for the D.C. Circuit has rejected the notion "that there is an established or well-settled practice of protecting research data in the realm of civil discovery on the grounds that disclosure would harm a researcher's publication prospects." Burka, 87 F.3d at 521.

Moreover, to the extent that this Court should nevertheless choose to recognize such a privilege here, defendants have failed to make a specific showing that data from particular medical records are the foundation of any specific research papers that are intended for commercially-sensitive publication in the near future. See, e.g., Foltz v. State Farm Auto. Ins., 331 F.3d 1122, 1130 (9th Cir. 2003) ("A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted") (emphasis added) (internal citations omitted). Instead, the only declaration submitted in support of defendants' motion simply repeats defendants' broad assertion of harm with respect to all of the medical records that defendants have withheld, on the grounds that some of those records may be used for "an article on elephant gestation, parturition (birth), and mother-infant bonding, as well as studies of elephant physiology," with no more specific information as

to which medical records are being used for which particular scientific studies. See Declaration of Bruce Read at ¶ 4 (emphasis added). However, defendants' burden to overcome the presumption of public disclosure is far greater than this. See id.; Campbell, 231 F. Supp. 2d at 14 ("broad allegations of harm, unsubstantiated by specific examples, will not suffice") (internal citations omitted).

In short, defendants simply have not met their burden to demonstrate "good cause" for a protective order covering all of the elephants' medical records that defendants unilaterally chose not to identify in response to plaintiffs' original discovery requests. Accordingly, the defendants' motion should be denied.

Nevertheless, to the extent that defendants are able to make a specific showing that particular medical records form the basis of particular research papers that defendants intend to publish in the near future, and that disclosure of such data would substantially diminish the commercial value of those publications, plaintiffs would be willing to consider agreeing to a narrowly tailored protective order limiting the public dissemination of such records.

CONCLUSION

For the foregoing reasons, we respectfully request that this court deny defendants' motion for a protective order.

Respectfully submitted,

/s/

Kimberly D. Ockene
(D.C. Bar No. 461191)
Katherine A. Meyer
(D.C. Bar No. 244301)

Meyer & Glitzenstein
1601 Connecticut Avenue, Suite 700
Washington, D.C. 20009
(202) 588-5206

Counsel for Plaintiffs

March 4, 2005