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)
RINGLING BROTHERS AND BARNUM & BAILEY CIRCUS, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' SURREPLY MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

Defendants filed two new declarations with their reply memorandum in support of their motion for a protective order regarding the medical records for each of the elephants owned or leased by the Ringling Bros. circus. These declarations provide – for the first time – alleged support for defendants' argument that the mere possibility of public disclosure of any such records in this law suit will cause defendants' veterinarians to stop recording information that they now routinely record for each elephant. See Declaration of Ellen Wiedner ¶ 9; Declaration of Deborah Fahrenbruck ¶ 4. The new declarations also provide additional information concerning defendants' other previous arguments in support of their motion for a protective order.

However, for the following reasons, not only do those new declarations fail to support defendants' request for a protective order, but they actually demonstrate why such an order is completely unwarranted in this case.

1. To begin with, defendants' new declarations in support of their purported need for confidentiality for these medical records come far too late to justify defendants' failure to inform plaintiffs almost a year ago, in June, 2004 – when defendants responded to plaintiffs' discovery requests – that defendants were even withholding these records. Accordingly, as plaintiffs have demonstrated, see Plaintiffs' Opposition to Defendants' Motion for Protective Order ("Pl. Opp.") at 5, defendants have waived their belated claims of confidentiality. Athridge v. Aetna Casualty & Surety Co., 184 F.R.D. 181, 191 (D.D.C. 1998); accord Pulsecard, Inc. v. Discover Card Services, Inc., 168 F.R.D. 295, 304 (D. Kan. 1996).

Thus, as plaintiffs have explained, Pl. Opp. at 5, plaintiffs' March, 2004 discovery requests unambiguously requested "all" of the "medical records" for "each elephant that Ringling owned or leased from 1994 to the present." Nevertheless, when defendants responded, defendants did not produce, claim a privilege for, or even list on their privilege log, any of the medical records they now claim are "confidential." See Plaintiffs' Reply In Support Of Motion To Compel ("Pl. Reply") at 7-9. Nor did defendants even inform plaintiffs that they had withheld any of these records. Instead, without claiming that any such records were at all "confidential," defendants produced skeletal "medical histories" for the animals, and purported to have produced all of the requested medical records. See id.

In fact, it was only after plaintiffs made it clear that they intended to move to compel production of such records – in light of the paucity of medical records that defendants had produced – that defendants admitted that they "may" have more "detailed medical records." Id.; see also Letter from Joshua Wolson to Kimberly Ockene (January 4, 2005) at 3 (Plaintiffs' Exhibit I to their Motion to Compel). However, even then, defendants failed to provide any basis

whatsoever for their claim that all such records are somehow "confidential." Id. Instead, defendants waited until after plaintiffs moved to compel the production of such records to move for a protective order and assert any claim of "confidentiality."

As Judge Facciola held in a similar case, under such circumstances defendants have waived any claim for confidentiality they might have had. See Athridge, 184 F.R.D. at 191 (where defendant fails to lodge specific objections to discovery requests at the time it purports to comply with that discovery, it waives its right to object); see also Pulsecard, Inc. v Discover Card Services, Inc., 168 F.R.D. at 303 (party that failed to make specific objections to discovery within the time allowed waived its right to assert them at a later date).

Indeed, the new declarations in support of defendants' argument that disclosure of any such medical records will somehow result in their veterinarians and staff being less candid in recording their observations and ideas for treatment of the animals were presented for the first time in defendants' reply brief in support of their motion for a protective order. Yet, defendants have never explained, let alone demonstrated "good cause" for, their failure to raise this new claim of "confidentiality" in response to plaintiffs' original discovery requests. See Pulsecard, 168 F.R.D. at 303 ("[a]ny ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown") (emphasis added); see also id. at 303-04 (explaining that the same "good cause" rule applies to responses to document production requests).[1]

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[1]Defendants wrongly assert that Athridge is distinguishable because in that case Judge Facciola decided the merits of some of the defendants' objections, even though they were raised for the first time in the defendant's opposition to the plaintiff's motion to compel. See Def. Reply at 10. Not only did Judge Facciola recognize that a waiver is also appropriate under such circumstances, see 184 F.R.D. at 191 ("I could just as easily conclude that these objections were

Accordingly, particularly where defendants basically pretended that they had disclosed all of the medical records requested by plaintiffs, putting plaintiffs in the position of having to move to compel those records to dislodge the truth about their existence, defendants' new – and evolving – claims of "confidentiality" have been waived.[2]

2. Indeed, in light of the way that defendants have proceeded with respect to these clearly relevant materials, they certainly should not be rewarded with a broad protective order that allows them to keep all of these highly relevant records secret, particularly when there is a "strong presumption" in favor of open discovery proceedings. John Does I-VI v. Yogi, 110 F.R.D. 629, 632 (D.D.C. 1986).

In fact, granting the protective order requested by defendants will mean that much of the pre-trial proceedings in this case will have to be conducted in secret, since the animals' medical records constitute critical evidence concerning plaintiffs' claims that the elephants are routinely beaten, struck with bullhooks, chained for most of the day and night, and forcibly removed from their mothers when they are young. Thus, if the requested protective order is granted, depositions of defendants' lay witnesses that refer to any such records would have to be

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also waived"), but at least in Athridge the objections were made clear in opposition to the plaintiff's motion to compel. Again, here, the declarations relied on for this argument were not even produced until defendants filed their reply in support of their motion for a protective order.

[2]For the same reasons, because defendants asserted all ten of their extremely broad "General Objections" in response to every single Interrogatory and Document Request propounded by plaintiffs, without specifically stating whether they were actually withholding any responsive information on any of these bases, and without listing any such information on their privilege log, defendants have also waived their right to rely on any privileges with respect to any of that information, as well. See Plaintiffs' Memorandum In Support of Their Motion to Compel ("Pl. Compel Mem.") at 40-43; see also Athridge, 184 F.R.D. at 191; Pulsecard, 168 F.R.D. at 303.

conducted in secret, as would all of the depositions of plaintiffs' and defendants' expert witnesses that discuss any such records, and all of the pre-trial briefs, affidavits, and other filings that even refer to any such records would have to be filed under seal with the Court. See Defendants' Proposed Order filed with Defendants' Motion for a Protective Order at 3-4 (requiring all such filings to be made "under seal").

Such a result would not only fly in the face of the general "strong presumption" in favor of open proceedings, John Doe, 110 F.R.D. at 632, but would also amount in practice to defendants obtaining – through the guise of needing to protect the belatedly asserted "confidentiality" of medical records of the elephants – the same blanket protective order that this Court has already denied. See Court's Order (November 23, 2003) (denying defendants' motion for a broad protective order for all discovery and requiring instead that defendants make a "good cause" showing with respect to "particular specified information").

3. In their opposition to defendants' motion, plaintiffs' pointed out that defendants' assertions regarding the dire effect public disclosure of medical records will have on its veterinary staff were completely unsubstantiated. Pl. Opp. at 10. Therefore, as noted, defendants now present two new declarations – one from a Ringling Bros. veterinarian who asserts that the mere possibility of public disclosure of any of these records will make her "hesitant" to continue recording accurate information about the elephants in their medical records, Wiedner Declaration ¶ 9, and another from a "veterinary technician" who purports to present the hearsay testimony that certain unidentified other "staff" members will be "discourage[d]" from providing her with accurate observations about the elephants, see Fahrenbruck Decl. ¶ 4 . Thus, relying on these two new declarations, defendants state that the mere "prospect" of public disclosure of any of

these records would have an "adverse effect of the medical care that defendant can provide to its elephants." Def. Reply at 8.

However, these declarations are premised on defendants' previous, completely unsupported, self-serving assertion that plaintiffs will choose to somehow "mischaracterize" these particular medical records in the press – even though plaintiffs have not done so with respect to any of the other medical records that have been provided so far in discovery without any claim of confidentiality, and that also contain references to various diseases and wounds suffered by the elephants, as well as the staff's suggestions as to what may have caused such conditions. See Pl. Opp. at 10-11; see also *infra* at 8-9, note 3, and attached Exhibit B.

Moreover, this rationale makes absolutely no sense whatsoever in light of defendants' own veterinarian's insistence that "[m]aking a list of rule-outs is a standard part of accepted medical treatments in veterinary medicine," which "helps the treating veterinarian devise a diagnostic plan for the animal and helps keep track of which diseases or conditions have been eliminated as possible causes by the diagnostics," Wiedner Decl. ¶ 8 (emphasis added), and defendants' overall insistence that they provide their elephants the highest standard of care. See, e.g., **www.ringling.com/animals** (stating that "we're committed to the absolute highest standards of care for our animal performers"). Thus, defendants' own declaration completely undercuts defendants' rationale for needing a protective order.

To be blunt, it is simply not credible that defendants' veterinarians and other veterinary staff will, from now on, stop engaging in this "standard" accepted veterinary practice – and in turn risk the health and welfare of this endangered species – simply because they are afraid that the plaintiffs in this case might somehow "mischaracterize" a piece of information from the

medical records at some hypothetical point in the future. With all due respect, to borrow a phrase from the Honorable Abner Mikva of the D.C. Circuit, that argument is "as silly as it sounds." Public Citizen v. Steed, 733 F.2d 93, 102 (D.C. Cir. 1984). In any event, these new declarations certainly do not demonstrate the necessary "good cause" that is required to justify the broad protective order requested here.[3]

4. As plaintiffs have already demonstrated, there is also no legitimate basis for defendants' insistence that all of these medical records must be kept confidential to protect the value of certain unidentified "research" studies. See Pl. Opp. at 14-16. While defendants' previous declaration failed to explain precisely how public disclosure of these records would "greatly diminish" the scientific value of such studies, see Declaration of Bruce Reed ¶ 5, defendants' new declaration, by Dr. Wiedner, explains that "[p]remature disclosure of these records would prevent the publication of many, if not all, of these studies because scientific journals require that they be the exclusive source of publication, and public disclosure of such data will therefore impede publication in a scientific journal." Wiedner Decl. ¶ 11 (emphasis added).

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[3]Neither of the cases cited by defendants in support of this new argument, Def. Reply at 8, is remotely similar in facts to this one. Thus, Dow Chemical Co. v. Allen, 672 F.2d 1262 (7th Cir. 1982) involved a third party subpoena for "all of the notes, reports, working papers, and raw data relating to [certain] on-going, incomplete animal toxicity studies," id. at 1266, and In Re Cusumano, 162 F.R.D. 708 (1st Cir. 1998) involved the third party subpoena of the "notes, tape recordings and transcripts of interviews" by two professors who were on the verge of publishing a specifically identified book that relied on these precise materials, id. at 711. Here, however, according to the defendants' themselves, the materials at issue are simply the raw medical records of the elephants that are "routinely" recorded – i.e., the records do not include any draft research studies (Dow Chemical), nor any "pathbreaking work in management science" that is on the verge of publication (In Re Cusumano, 162 F.R.D. at 717). Accordingly, there simply is no reason why such materials should be maintained in secret throughout this litigation.

However, notably, the disputed discovery does not seek disclosure of any scientific "studies" that defendants may be working on. Rather, according to defendants themselves, Def. Reply at 1, the records in dispute are "chiefly" the hand-written medical records for each elephant – i.e., what is commonly referred to as the animal's "chart." . Defendants have simply failed to explain how the public disclosure of such raw, fragmented information – e.g., "healed wound on left upper forehead," "small healing abrasion on left axillary area," "probable infection of foot, "lesions on left side of face and hip" – could possibly "diminish" the value of any scientific study that defendants wish to submit to a scientific journal, let alone cause the kind of "clearly defined and very serious injury to [defendants'] business" that is required to obtain a protective order under Rule 26(c). Campbell v. United States Dep't of Justice, 231 F. Supp. 2d 1, 14 (D.D.C. 2002) (emphasis added); see also Cipollone v. Liggett Group, 785 F. 2d 1108, 1121 (3rd Cir. 1986) (company claiming need for confidentiality must show that dissemination of the information "would cause a significant harm to its competitive and financial position") (emphasis added).[4]

5. In their opposition to defendants' motion for a protective order, plaintiffs stated that they would be willing to consider agreeing to a protective order, if defendants could 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

[4]These examples are taken from the type-written "patient history" for an elephant named Zina, which defendants produced to plaintiffs last June when they purported to have provided all of the requested medical records. See Plaintiffs' PO Exhibit B (attached). These type-written summaries – which defendants provided for some, but not all, of the elephants – appear to be based, in large degree, on the hand-written medical charts for the animals, which defendants now claim must be kept confidential in their entirety.

substantially diminish the commercial value of those publications." Pl. Opp. at 16. However, in their reply, defendants not only insist that it is impossible for them to make this demonstration, Def. Reply at 5, but, without providing any more details, they also add three new – and incredibly broad – categories of "research" that would be compromised if any of these medical records are disclosed: "ophthalmology, surgery, and internal medicine." Wiedner Decl. ¶ 10. In light of the breadth of these categories – especially when added to the other broad categories of "gestation, parturition (birth) and infant-mother bonding, as well as studies of elephant physiology," which defendants previously identified, Read Decl. ¶ 4 – plaintiffs reiterate that any such showing of potential harm would have to be quite specific to warrant their agreement to a protective order.

Respectfully submitted,

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