UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al., | : | |
| Plaintiffs, | : | |
| v. | : | Case No. 03-2006 (EGS) |
| | : | JUDGE: Emmet G. Sullivan |
| RINGLING BROS. AND BARNUM & BAILEY CIRCUS, et al., | : | |
| Defendants. | : | |

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER**[1]

Defendants Feld Entertainment, Inc. and Ringling Bros. and Barnum & Bailey Circus move for a protective order under Federal Rule of Civil Procedure 26(c) to prevent public dissemination of confidential materials they will produce during discovery in this case. The accompanying proposed protective order is a standard form of order that would allow defendants to designate as "confidential material" particular information provided in discovery, and plaintiffs could challenge any designations that they believe to be improper. Defendants need such a procedural means of seeking protection because the information that defendants will produce in discovery in this case could be used, by plaintiffs or others, in a manner calculated to inflict on defendants embarrassment and economic injury of the kind specifically contemplated by Rule 26(c). The availability of

[1] Defendants are filing their motion for a protective order in this case, rather than in case no. 00-1641 because, as defendants explained in their motion for judgment on the pleadings in case 00-1641 and in their opposition to plaintiffs' motion to consolidate this case with case no. 00-1641, this Court should dismiss case no. 00-1641 and proceed with this case alone. The undersigned counsel certifies that counsel for plaintiffs has declined to agree to the entry of a protective order.

this procedure will also expedite discovery because defendants will not need to delay the production of information each time there is a request for production of sensitive information.

**BACKGROUND**

Plaintiffs are animal rights activists whose avowed goals include bringing an end to animal circus performances. Plaintiffs' tactics include adverse publicity, litigation and lobbying for legislation. Plaintiffs, and similar groups with whom they are allied, use information of the type likely to be obtained in discovery in their publicity campaigns, and they have declined to agree on restrictions that would protect information obtained in discovery in this case from such use. Information provided in discovery in this case could be used by plaintiffs and others to publicly embarrass defendants and cause them economic harm.

Only one day after the pretrial conference in this case on September 23, 2003, plaintiff ASPCA issued a press release describing this lawsuit and asserting that documents obtained from FOIA requests showed that defendants have a "cozy relationship" with USDA regulatory personnel responsible for monitoring the care and treatment of circus elephants. (*See* Ex. A hereto.) Plaintiffs selectively used the information obtained from their FOIA requests to present an unfair and one-sided picture of USDA's regulatory oversight of defendants, which is an important issue in this case. We of course acknowledge that information obtained in FOIA requests may properly be used for any purpose, but information obtained in discovery should be used only for the litigation itself. Plaintiffs' use of these documents provides a clear illustration of how similar information obtained in discovery in this case could be used to attack defendants

in the continuing publicity campaign that plaintiffs and others are mounting against defendants.

Other recent public attacks by plaintiffs on defendants include the following attempts to cause competitive and financial injury:

- Plaintiffs published Ringling Bros.' tour schedule with a note urging readers to "send a letter to the arena hosting Ringling and Barnum & Bailey Circus. Ask them to withdraw the invitation or, at least, not to invite the circus back next year." Ex. B.

- Plaintiffs acknowledged that their goal is to persuade the public to boycott defendants' circus. *See* Ex. C ("As long as people continue to buy tickets, Ringling will continue to torment elephants.").

- Plaintiffs solicited people in cities in which Ringling Bros. is scheduled to perform to "[u]rge your state representatives to support legislation to ban the use of elephants in circuses." Ex. C.

Plaintiffs' conspicuous refusal to agree to any limitations on their use of discovery information highlights why it is so important that defendants have some procedure by which they can seek protection of sensitive information before it is provided to plaintiffs. The purpose of discovery is to provide for exchanges of information necessary to litigation, and protective orders facilitate such exchanges by assuring parties that information they produce will not be misused. Rule 26(c) creates a protective order procedure designed to prevent parties from using discovery information for non-litigation purposes that would injure a party. This case presents the classic situation warranting entry of a protective order procedure of the kind requested by defendants.

**ARGUMENT**

"Liberal discovery is provided for the sole purpose of assisting in the preparation of trial, or the settlement of, the litigated disputes." *Seattle Times Co. v.*

*Rhinehart*, 467 U.S. 20, 34 (1984) (emphasis added). Courts should not hesitate to enter a protective order where there is "a significant potential for abuse" in which discovery information might be misused to invade "privacy interests of litigants and third parties." *Id.* at 34-35.

Rule 26(c) confers upon trial courts broad discretion to enter a protective order. *Id.* at 36; *see also United States v. MWI Corp.*, 209 F.R.D. 21, 27 (D.D.C. 2002). To obtain such an order, "movant must articulate a real and specific harm," *PHE, Inc. v. Dept. of Justice*, 139 F.R.D. 249, 252 (D.D.C. 1991) (citation omitted), including the prospect that information would be used to cause "annoyance, embarrassment, oppression, or undue burden or expense." *MWI*, 209 F.R.D. at 28 (quoting *United States v. Microsoft Corp.*, 165 F.3d 952, 959 (D.C. Cir. 1999)). Possible financial or competitive injury can constitute good cause. *Id.; Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653, 656 (D.D.C. 1986) (protective order proper where disclosure of confidential information would adversely affect business relationships). Similarly, requiring disclosure of private, internal records can constitute good cause. *See Seattle Times*, 467 U.S. at 32.

Here, plaintiffs do not deny their intention to use defendants' internal and confidential information obtained in discovery to advance their agenda — an end to the presentation of animals in circuses. This lawsuit is only one of plaintiffs' many tactical efforts to hinder or prevent animal circus performances, including publicity campaigns and boycotts. If the information that defendants produce in discovery can be disseminated in furtherance of those efforts, then this Court's discovery process will have

been abused for purposes other than the "preparation of trial, or the settlement of," this case. *Seattle Times*, 467 U.S. at 34.

This case is similar to *Seattle Times*, in which the Supreme Court upheld a protective order under a state protective order rule virtually identical to Rule 26(c). The plaintiff brought a defamation action alleging that the *Seattle Times* had published false statements about him. *Id.* at 22. The court found that the newspaper would probably "use information gained through discovery in future articles" about plaintiffs. *Id.* at 25. The trial court entered a protective order to preserve the confidentiality of information produced in discovery, and both the Supreme Court of Washington and the U.S. Supreme Court affirmed. The Supreme Court recognized the "public interest in knowing more about" the plaintiff (*id.* at 31), but held that the discovery process is a matter of "legislative grace" warranting protection of those compelled to provide discovery information. *Id.* at 32, 37.

Two additional factors make this an even stronger case for a protective order than *Seattle Times*. *First,* unlike the plaintiff in *Seattle Times,* defendants have been involuntarily haled before this Court as part of the plaintiffs' campaign against performance by elephants. *Second*, the parties seeking confidential information here are advocacy groups who are committed to using discovery information for partisan purposes. By contrast, the newspapers seeking discovery in *Seattle Times* had no demonstrated history of using discovery information for partisan, advocacy purposes.

As in *Seattle Times,* this Court should protect defendants from the injuries that will occur if plaintiffs are not prevented from disseminating confidential, internal information obtained in discovery. The proposed protective order will enable defendants

to produce sensitive information without delay, while enabling plaintiffs to challenge any confidentiality designations they believe to be overbroad.

**CONCLUSION**

For the foregoing reasons, this Court should enter the proposed protective order that is submitted herewith.

Respectfully submitted,

COVINGTON & BURLING

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