

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FELD ENTERTAINMENT, INC.

Plaintiff,

v.

ANIMAL WELFARE INSTITUTE, et al.

Defendants.

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Case No. 07-1532 (EGS/JMF)

**PLAINTIFF FELD ENTERTAINMENT, INC.'S MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT OF ENTRY OF A PROTECTIVE ORDER**

EXHIBIT 1

COPY

1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY TO
ANIMALS, et al.,

Plaintiffs,

vs.

RINGLING BROTHERS AND BARNUM
BAILEY CIRCUS, et al.,

Defendants.

Docket No. CA-03-2006

Washington, D.C.

Friday, September 16, 2005

2:35 p.m.

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TRANSCRIPT OF A MOTION
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

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Proceedings recorded by machine shorthand, transcript produced
by computer-aided transcription.

1 PROCEEDINGS

2 THE CLERK: Civil Action 03-2006, American Society
3 for the Prevention of Cruelty to Animals, et al. versus
4 Ringling Brothers and Barnum & Bailey Circus, et al.

5 would counsel please identify yourselves for the
6 record.

7 MS. MEYER: Katherine Meyer for the plaintiffs. And
8 with me is Kim Ockene, Your Honor.

9 MR. GULLAND: Eugene Gulland for the defendant. with
10 me is Josh Wolson.

11 THE COURT: You have not been able to resolve this
12 discovery dispute yourselves.

13 Let me invite the principal attorneys to the
14 microphone.

15 Have you spent any time conferring about this dispute
16 just to see if you can resolve it yourselves?

17 MS. MEYER: No, Your Honor. Not until we filed the
18 motion to compel. There was a meet and confer effort prior to
19 that time. And some disputes, relatively minor matters, were
20 resolved. But the bulk of the information that is the subject
21 of the motion to compel we remain, continue to remain -- have
22 diametrically opposed views of what is required here.

23 MR. GULLAND: I think that's accurate. There was a
24 good deal of discussion before the filing of the motion to
25 compel.

1 privacy interests involved here of these animals --

2 MS. MEYER: No, Your Honor.

3 THE COURT: -- that have been referenced by some
4 court somewhere?

5 MS. MEYER: No, Your Honor, the elephants don't have
6 any personal privacy that I'm aware of.

7 THE COURT: I know you don't do this type of
8 litigation --

9 MS. MEYER: Some of my clients might disagree with
10 that statement.

11 THE COURT: -- but if this were litigation regarding,
12 say, wrongful death and we're talking about the medical records
13 of a plaintiff or medical records of a decedent --

14 MS. MEYER: Individuals.

15 THE COURT: -- you would agree that a protective
16 order would be appropriate?

17 MS. MEYER: Sure, probably, yes.

18 They haven't asserted privacy on behalf of the
19 animals.

20 THE COURT: I'm trying to figure out what the basis
21 is.

22 MS. MEYER: They've made three arguments.

23 One is we're going to misuse it in the media, which
24 I've already addressed.

25 Two is it's commercially sensitive because they might

1 want to rely on it for some study.

2 THE COURT: But your argument was that you were going
3 to use these documents in the media, not misuse them, but just
4 use them.

5 MS. MEYER: What's wrong with that? That's what the
6 public proceeding is all about. That's our First Amendment
7 right. Again, they go all over the country talking about what
8 they do and how wonderful their care is, et cetera. What's
9 wrong with my client saying, well, maybe, but look at this
10 document, it says this animal had all kinds of wounds, draw
11 whatever conclusions you want to.

12 THE COURT: Well, you just hit on a point, though,
13 draw whatever conclusions. Is that fair to the defendant,
14 though? Suppose the wounds were caused as a result of
15 non-negligent acts on the part of the defendant. Is that
16 really fair to have that information out in the media with the
17 admonition go ahead and draw whatever conclusions you want? Is
18 that really fair?

19 MS. MEYER: We haven't even released any of this
20 information.

21 THE COURT: I'm just asking questions.

22 MS. MEYER: I think it's perfectly fair, Your Honor,
23 because they can say, well, no, that's not true.

24 THE COURT: Wait a minute. Then you're litigating in
25 a public forum, though.

1 MS. MEYER: No.

2 THE COURT: You're here before me because you've
3 alleged that they're not complying with the Endangered Species
4 Act.

5 MS. MEYER: Right.

6 THE COURT: These are allegations that I take
7 seriously, as I do allegations in all these cases. And at some
8 point the Court is going to resolve your complaint against, but
9 it shouldn't shift to the public forum, should it, at this
10 point?

11 I think I disagree with you when you say, sure, we
12 may use them as our First Amendment right and the public can
13 draw whatever conclusions they want to. Well, it's not up to
14 the public to do that. It's not up to the public to look at
15 some photos of an injured elephant and say, you know, damn
16 Ringling Brothers, look what they're doing to that elephant.
17 Is that appropriate for the public to do it at this particular
18 juncture absent a finding of malfeasance or misfeasance on the
19 part of the defendants? I think that gets to the heart of the
20 issue right before the Court.

21 MS. MEYER: Well, again, Your Honor --

22 THE COURT: Why isn't that an accurately --

23 why isn't that a completely accurate statement of
24 what this focus should be on as opposed to the public's focus
25 at this time? I don't want this to turn into litigation in the

1 public arena.

2 MS. MEYER: Your Honor, I was simply saying if any of
3 this information did make its way into the public forum, I
4 don't think --

5 THE COURT: You essentially told me it's going to
6 make its way into the public forum.

7 MS. MEYER: I don't know why they've saying that. We
8 haven't been using any of this information.

9 THE COURT: Basically you said, well, that's our
10 First Amendment right and the public can let the chips fall
11 where they may.

12 All I'm saying is should I allow that happen at this
13 junction as opposed to the juncture where I allow this
14 information to come in under a protective order and then I
15 resolve the merits of this case and then I let the chips fall
16 where they may as a matter of law and then the public can draw
17 whatever perceptions they can and say the judge was wrong, the
18 judge was right, this was outrageous, but not now. I don't
19 want this to turn into a media circus -- no pun.

20 Look, it's in this court now. Let me resolve the
21 issues. I think you're going to get a lot of this information.
22 In fact, I know you're going to get a lot of this information,
23 but query whether it should be protected at least at this time
24 until a determination of fault by this Court. I haven't made a
25 fault determination at all. It may be another year or two or

1 longer before I do that. I may never make a fault
2 determination.

3 MS. MEYER: Well, meanwhile we have Ringling Brothers
4 going around spending an enormous amount of money telling the
5 public what wonderful care they give their elephants and that
6 our clients are lying. That's what they're saying. What is
7 our response to that going to be?

8 THE COURT: The documents would show what, and your
9 editorial would show what, how Ringling Brothers has mistreated
10 elephants. That's what's going to happen. That's what they're
11 concerned about.

12 MS. MEYER: Your Honor, that's my other problem with
13 this. There's an assumption we're going to somehow take all
14 this information when we get it and somehow misuse it in the
15 media. We haven't used any of --

16 THE COURT: You keep saying misuse.

17 MS. MEYER: Or use it, whatever you want to call it.

18 Your Honor, the information I just passed up to you,
19 we haven't issued press releases on that. There's no -- why
20 would we? Again, what does it say?

21 I mean, I don't think this case should be litigated
22 in secret. I don't think there's any basis for Ringling
23 Brothers to control the debate should something make its way
24 into the public forum and someone want to draw a conclusion
25 from it. I'm not telling them what conclusion to draw. If

1 they want to, they do. That's what happens.

2 I don't see anything nefarious or wrong about that.
3 They're free to respond to it. Right now they are out there on
4 a daily basis making all kinds of statements about the
5 wonderful care that they give their elephants, that they're
6 conserving them for the future and that our clients are lying,
7 Mr. Rider is lying about what he is saying about these
8 elephants being beaten all the time, chained all the time, that
9 we're lying about the babies being forcibly removed from their
10 mothers, that we are whacky animal rights activists, we cannot
11 be trusted. None of that is true. And they're controlling the
12 entire debate.

13 Now, if they're going to get to control the entire
14 debate, then perhaps we should get a gag order against them for
15 making those kind of statements and then we'll be on equal
16 footing. But I don't think that they should be able to use
17 that fact that one of these documents might make its way into
18 the public somewhere along the line and somebody might draw an
19 inference from it as a basis for getting a protective order.

20 THE COURT: I agree with you. There's no reason why
21 your organization ought be maligned. Especially if they
22 control the media, they can get on the Katie Couric show and
23 bad mouth your organization and call you whatever they're
24 calling you, I agree with you.

25 MS. MEYER: That's right. And what we have on the

1 other side, Your Honor, we have Tom Rider, a plaintiff in this
2 case, he's going around the country in his own van, he gets
3 grant money from some of the clients and some other
4 organizations to speak out and say what really happened when he
5 worked there. That's what we have on their side.

6 And they want to make sure that none of the
7 information that might actually shed some light on what's going
8 on, I'm not saying it necessarily does, but it might, I don't
9 know, not be ever disclosed to the public. We have to litigate
10 this case in secret so that they can control the debate.

11 And, again, Your Honor, the presumption is open
12 proceedings. They have to come forward with good cause to get
13 a protective order. They simply haven't met their showing.

14 The number one argument is that we're going to, they
15 say, misuse the information in the public. No showing on that
16 score.

17 Number two, they say the information relate, all of
18 the medical records, all of the detailed medical records,
19 relate to scientific research papers that they're working on
20 right now. We say, well, we doubt that all of the medical
21 records do, if you could show us particular records of
22 particular studies we might be able to willing to agree to a
23 protective order.

24 And their third argument that they came up with most
25 belatedly, I think it was in their reply brief on the motion

1 Now, I'm open to someone filing something, either
2 under seal or on the public record, in an effort to persuade me
3 that there's a need or a basis for a protective order in that
4 regard. And I'll just leave it at that. It may well be that a
5 basis will exist for the entry of such a protective order. And
6 it doesn't sound like plaintiffs seriously disagree with that
7 if an appropriate showing can be made.

8 But with respect to veterinarian records and medical
9 records, I want them all produced and I want them produced now.

10 MR. GULLAND: Your Honor, on the question of the
11 protective order, Ms. Meyer said --

12 THE COURT: The medical records and veterinarian
13 records?

14 MR. GULLAND: Yes. Focused on that.

15 Ms. Meyer said again and again that there's no basis
16 here to fear that the plaintiffs are going to misuse these.
17 Just last week, Your Honor, a San Francisco television station,
18 plaintiff Tom Rider appeared on that. Tom Rider appeared on
19 that station and provided a reporter on that station with
20 copies of tapes that were produced in this litigation.

21 In particular, there was a tape showing the birth of
22 a baby elephant. And Mr. Rider and other persons affiliated
23 with the plaintiffs made a commentary on that, very one-sided
24 in our point of view, showing the elephant chained while she
25 was having a baby in order to protect the baby elephant and

1 those around her. But they characterized the situation as one
2 of abuse.

3 There was no opportunity on our part to have somebody
4 respond. And it's a perfect illustration of exactly the kind
5 of thing we fear, the use of information here to attack
6 Ringling Brothers, which is quite unfair. And cases are not to
7 be tried in the media.

8 In addition, the reporter for that San Francisco
9 station was given a copy of Mr. Wolson's correspondence to
10 counsel for plaintiffs discussing the information and tapes
11 being turned over. So the point of the matter is that there's
12 a very real need for some protection here.

13 THE COURT: Is there any case anywhere directly on
14 point that deals with this precise issue where a public
15 interest group has attacked the manner in which an organization
16 either houses or cares for or raises animals and information is
17 produced and then it ends up in the public arena? I'm not
18 aware of any case directly on point.

19 MR. GULLAND: I'm not aware of a case that is that
20 specifically on point. But there are plenty of cases that
21 enter protective orders, which, if you'll recall, extend also
22 to matters of embarrassment, as well as commercial and
23 proprietary information on the view that information that's
24 produced in discovery should not be used to try somebody out of
25 court or to attack them out of court.

1 we're not going around -- our clients are not going
2 around attacking particular plaintiffs here. Our clients are
3 going around defending the care that they give the animals, but
4 they're not using discovery information.

5 THE COURT: Counsel didn't make that up. Have there
6 been characteristics of whacky animal rights organizations
7 alluded to this organization?

8 MR. GULLAND: I'm not aware of any attack on these
9 plaintiffs on the part of the defendants in this case. I'm
10 simply unaware of that.

11 But, Your Honor --

12 THE COURT: How could you be embarrassed by your own
13 files, by your own records? Let the public see them. What are
14 you concerned about?

15 MR. GULLAND: We're not embarrassed by them. We're
16 embarrassed by the misuse and out of context treatment of them.

17 If you take --

18 And we submitted affidavits in support of the
19 protective order.

20 THE COURT: Suppose the information is produced.
21 Well, it will be produced. But suppose the information is then
22 used by plaintiffs with an admonition to plaintiffs that if
23 they use this information in the public arena, they state only
24 that this information was produced pursuant to a request by
25 plaintiffs, period, without any editorial?

1 protective order, and then puts the burden on my clients to
2 come forward and ask you with respect to particular
3 information, please let that be lifted from the protective
4 order.

5 That's not the way it's supposed to work, Your Honor,
6 under the rules. The burden is on them, the burden is on them
7 to show that something, that there's good cause to have
8 something subject to a protective order. Otherwise, the
9 presumption is that these proceedings should be open to the
10 public.

11 Now, I've got to address what Mr. Gulland had to say
12 about the Channel 2 report in San Francisco. It's true, that
13 was a videotape that they released to us, never claimed it was
14 confidential, never claimed it was privileged, our clients have
15 it. And Mr. Rider, as I explained, he goes around the country,
16 he tries to talk to reporters, tell them what's really going on
17 behind the scenes, because it is an issue of great public
18 debate. The only reason they're allowed to have these animals
19 that's an endangered species, Your Honor, is because our
20 federal government allows them to have them because they claim
21 they're conserving them.

22 And one of the reporters say, well, do you have
23 anything? You say they chain their elephants all the time,
24 Ringling Brothers say they don't chain their elephants all the
25 time. Do you have any anything that would show they chain

1 their elephants? Yeah, we have this videotape that shows a
2 nine year old elephant chained on three legs giving birth to a
3 baby. Here it is. They gave it to us in discovery, just as
4 you suggested.

5 The correspondence that Mr. Gulland referred to, they
6 even gave the reporter the correspondence from Mr. Wolson. Do
7 you know why we gave him that correspondence? Because the
8 editor called us up on the phone and said where did you get
9 this, how did you get this? We said they gave it to us in
10 discovery, here's the letter, here's the letter from their
11 lawyer. That's why we gave it to them.

12 So we just said we got it in discovery, they gave it
13 to us, it's their videotape. That's exactly what we did.
14 That's all we did. There's nothing nefarious about that. And
15 they don't want that kind of information to be made public,
16 Your Honor.

17 I've got to say one other thing, Your Honor, again,
18 about them controlling the debate. They go around the country,
19 they issue, here's an example, colored brochures handed out.
20 This one we got in April of this year, babies, babies, babies
21 and more on the way. All about their wonderful conservation
22 program. They're breeding more elephants for use in the circus
23 and they say they're conserving them.

24 This is what they're handing out to the public, Your
25 Honor. Now, they didn't bother to tell the public that three