

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

06-20772-CIV-Highsmith/McAliley

ARLIN VALDEZ-CASTILLO,

Plaintiff,

vs.

BUSCH ENTERTAINMENT CORPORATION,
d/b/a BUSCH GARDENS TAMPA BAY,
BOYKIN MIAMI HOTEL, L.P., BOYKIN
MANAGEMENT COMPANY, LLC, and
CONSERVATION AMBASSADORS, INC. f/k/a
ZOO TO YOU WILDLIFE EDUCATION, INC.
f/k/a
WILDLIFE ON WHEELS, INC.,

Defendants.

/

**DEFENDANT BUSCH ENTERTAINMENT CORPORATION'S
MOTION FOR SANCTIONS AND SUPPORTING MEMORANDUM OF LAW**

In direct violation of the Protective Order entered by this Court, Plaintiff handed over Busch Entertainment Corporation's confidential documents to a reporter for *The Miami Herald*. The newspaper then published information contained in one of the confidential documents in a front page article on September 24, 2008, which is also available online at MiamiHerald.com. Defendant Busch Entertainment Corporation ("BEC") respectfully requests this Court to enter sanctions against Plaintiff, including but not limited to a dismissal with prejudice of Plaintiff's claims against BEC. In addition BEC requests an Order requiring Plaintiff to retrieve all copies of BEC's confidential documents back from *The Miami Herald* and any other media outlets or unauthorized third parties to whom Plaintiff or her counsel have provided confidential documents, to provide BEC with a list of every entity or person to whom Plaintiff or her counsel

provided documents produced pursuant to the Protective Order, and to prohibit Plaintiff and her counsel from making any further comments to the media about this lawsuit.

I. BACKGROUND

The parties agreed to the entry of a Protective Order pursuant to Federal Rule of Civil Procedure 26(c). On July 18, 2006 Judge Highsmith entered the Agreed Protective Order Regarding Production of Confidential, Proprietary and Trade Secret Information to Plaintiff (“the Protective Order”). [Doc. 31]. The Protective Order specifically provides as follows:

Any confidential information of BEC obtained by any other party to this action pursuant to discovery in this action may be used only for purposes of this action and not for any business or other purpose whatsoever, and not for any other litigation. Plaintiff’s counsel shall not disclose any such “confidential” information to any person except in accordance with the terms of the protective order. Plaintiff’s counsel, his staff and his experts shall not, under any circumstances, sell, offer for sale, advertise, or otherwise publicize either the contents of designated confidential documents or information, or communicate the fact that they have obtained confidential documents and/or information from BEC except in accordance with the terms of the protective order.

[Doc. 31, ¶2]

The Protective Order includes a sanctions clause:

It is expressly understood and agreed that any person who violates the terms and conditions of this Order consents to the jurisdiction of this Court and may be subject to sanctions in the event of unauthorized use.

[Doc. 31, ¶2]

On August 30, 2006 BEC produced to Plaintiff the Animal Appearance and Travel Protocol Guidelines and Information (“the Travel Protocol”) subject to the Protective Order. This document is not part of the Court file. In fact, after Defendant Conservation Ambassadors, Inc. inadvertently filed the Travel Protocol with its Rule 26 Disclosures, on September 27, 2006 the Court entered an Agreed Order Granting Defendant Conservation Ambassadors, Inc.’s Unopposed Motion to Remove Documents Erroneously Filed in Conjunction with Federal Rule

of Civil Procedure 26 Disclosures from the Court File and Docket. [Doc. 62]. This Order directed the Clerk of Courts to remove the Travel Protocol from the Court file and docket and to return it to counsel for Conservation Ambassadors. [Doc. 62, ¶2]. The Order also required each attorney of record to mark the Travel Protocol as confidential and to handle the document in accordance with the Protective Order. [Doc. 62, ¶3].

On September 24, 2008, *The Miami Herald* ran a front page newspaper article about this lawsuit, quoting from the Travel Protocol.¹ During a telephone conference with BEC's counsel on September 24, 2008, Plaintiff's counsel John Hess admitted that he handed over the document to a reporter from *The Miami Herald* during an interview in Mr. Hess' office with the reporter and his client. Mr. Hess claimed he was not aware of the Protective Order.

The actions of Plaintiff violate the express terms of the Protective Order, undermine the integrity of the judicial process and are contradictory to the letter and spirit of the Local Rules for the Southern District and the Florida Rules of Professional Conduct. Because there is no way to undo the publication of BEC's confidential information, any sanction short of dismissal with prejudice would be too light a sanction for this willful and flagrant violation of the Court's Protective Order. This Court cannot make the readers of *The Miami Herald* forget what they have already read, and cannot prevent BEC's competitors from obtaining its confidential and proprietary information for their own use and benefit at absolutely no cost to them.

The severe sanction of dismissal is warranted not only to remedy the wrongful conduct in the instant case but also to deter Plaintiff, Plaintiff's counsel, and parties in general from engaging in such errant, egregious conduct in the future. Accordingly, BEC respectfully requests this Court to enter an order dismissing Plaintiff's Complaint with prejudice as a sanction for the

¹ There is also available an online version of the article on MiamiHerald.com. The article contains a link to a document summarizing some of the protocols.

conduct of Plaintiff in allowing the public at large to gain access to confidential and protected materials that otherwise would not be available, and for potentially depriving BEC of its right to a fair trial. The Court should also order Plaintiff to recover all copies of BEC's confidential documents back from *The Miami Herald* and any other media outlets or unauthorized third parties to whom Plaintiff or her counsel have provided confidential documents, to provide BEC with a list of every entity or person to whom Plaintiff or her counsel provided documents produced pursuant to the Protective Order, and should expressly prohibit Plaintiff and her counsel from making any further comments to the media about this lawsuit.

II. MEMORANDUM OF LAW

A. Plaintiff's Conduct Warrants the Sanction of Dismissal.

To protect the integrity of the judicial process as a whole, a court has the inherent authority to sanction parties and lawyers for misconduct. *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1545 (11th Cir. 1993); *see also Bethel v. Escambia County Sheriff's Office*, Case No. 3:05-cv-376, 2006 U.S. Dist. LEXIS 87636, *4 (N.D. Fla. Dec. 4, 2006) (noting "pursuant to inherent power, courts may protect institutional integrity with contempt citations, fines, awards of attorneys' fees, and such other orders and sanctions as they find necessary, including even dismissals and default judgments")(internal citation and quotation omitted). Sanctions for such misconduct can include dismissal, the imposition of attorney's fees and costs, disqualification of counsel, and monetary penalties. *Arnold v. Board of Education of Escambia County*, Case No. 86-0928-B-C, 1990 U.S. Dist. LEXIS 14704, *5 (S.D. Ala. Sept. 6, 1990).

The violation of a protective order, which provides for the confidentiality of certain documents produced during discovery, is sanctionable conduct. *See McDonald v. Cooper Tire & Rubber Co.*, 186 Fed. Appx. 930 (11th Cir. 2006) (affirming sanctions when a party's attorney

provided documents subject to a protective order to unauthorized persons). Even the severe sanction of dismissal is permissible where an attorney's actions violate the express terms of a protective order. *Marrocco v. General Motors Corp.*, 966 F.2d 220 (7th Cir. 1992) (finding no abuse of discretion and affirming trial court's dismissal of an action as a sanction for the attorney's gross negligence in violating the protective order).

What constitutes an appropriate sanction is determined on a case-by-case basis, but the sanction should be "a direct response to the harm' that the sanctionable conduct causes," *McDonald v. Cooper Tire & Rubber Co.*, Case No. 8:01-cv-1306, 2005 U.S. Dist. LEXIS 34137, *5 (M.D. Fla. Dec. 12, 2005) (citing *Barnes v. Dalton*, 158 F.3d 1212, 1215 (11th Cir. 1998)), and should be sufficient to not only remedy the harm but also to deter parties in general from engaging in the same conduct in the future. *NHL v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976) (noting sanctions are used "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but [also] to deter those who might be tempted to such conduct in the absence of such a deterrent").

In the instant case, despite the directives of this Court's Protective Order, which prohibited the dissemination of BEC's confidential materials to unauthorized persons, Plaintiff provided *The Miami Herald* with BEC's confidential materials, which *The Miami Herald* subsequently published in a front page article on September 24, 2008 and posted on MiamiHerald.com. This article disclosed BEC's confidential and proprietary information to: (1) BEC's competitors, free of charge; and (2) members of the potential jury pool for this trial. *The Miami Herald* would not have access to the protected materials absent Plaintiff's disclosure of the same. *See McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 91 (11th Cir. 1989) (noting "an individual has no common law right to discovery material because those materials

are not judicial records or public documents” and providing that the right to access discovery materials in a civil proceeding is limited by Fed. R. Civ. P. 26(c)). The travel protocol discussed in *The Miami Herald* article was not part of the Court record and not otherwise available to the newspaper without Plaintiff disclosing it to the reporter.

It is impossible to undo the harm that has been caused by the publication of this confidential material because the bell can not be “unrung.” Unlike in *McDonald v. Cooper Tire & Rubber Co.*, Case No. 8:01-cv-1306, 2005 U.S. Dist. LEXIS 34137, where the harm for violating the protective order could potentially be cured by a court limiting the admissibility of the information wrongfully disseminated to another party in violation of a protective order, in the case *sub judice* Plaintiff has already wrongfully disseminated the confidential information to BEC’s competitors and the potential jury pool. Consequently, dismissal with prejudice is warranted not only to remedy the uncorrectable harm caused by Plaintiff in releasing these confidential documents to the media, but also because such a sanction would serve as the most effective deterrent to other litigants who seek to wrongfully disseminate confidential information in violation of Protective Orders in other cases.

B. Plaintiff’s Counsel Has Violated Local Rule 77.2 and Florida Rule of Professional Conduct 4-3.6.

In addition to violating the express terms of the Protective Order, Plaintiff’s counsel’s conduct also violated Southern District Local Rule 77.2 and Florida Rule of Professional Conduct 4-3.6. Local Rule 77.2 (“Release of Information in Criminal and Civil Proceedings”) provides, in relevant part:

7. A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of public

communication if there is a reasonable likelihood that such dissemination will interfere with a fair trial and which relates to:

(a) Evidence regarding the occurrence or transaction involved

* * *

(e) Any other matter reasonably likely to interfere with a fair trial of the action.

Similarly, Florida Rule of Professional Conduct 4-3.6 (“Trial Publicity”) states:

(a) Prejudicial Extrajudicial Statements Prohibited. A lawyer shall not make any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

(b) Statements of Third Parties. A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements that are prohibited under this rule.

By releasing BEC’s confidential materials to the media and soliciting media coverage of this case, Plaintiff and her attorney have violated the letter and spirit of both of these rules. Violations of these rules offer further support for the sanction of dismissal with prejudice. In addition the Court should order Plaintiff to retrieve all copies of BEC’s confidential documents back from *The Miami Herald* and any other media outlets or unauthorized third parties to whom she or her attorney have provided confidential documents, and to provide BEC with a list of every entity or person to whom Plaintiff or her counsel provided documents produced pursuant to the Protective Order. Furthermore the Court should expressly prohibit Plaintiff and her counsel from making any further comments to the media about this lawsuit.

III. CONCLUSION

Plaintiff flagrantly directly violated the Protective Order entered by this Court, exposing BEC’s confidential and proprietary information to its competitors free of charge. Plaintiff’s conduct has also seriously jeopardized BEC’s ability to receive a fair trial in this jurisdiction, and

has undermined the integrity of the judicial process by making a mockery of the Court's Order regarding the confidentiality of certain protected materials. Because Plaintiff willfully violated the express terms of the Court's Protective Order, as well as the Local Rules for the Southern District and the Florida Rules of Professional Conduct, the sanction of dismissal with prejudice is warranted under the circumstances of this case.

WHEREFORE, Defendant Busch Entertainment Corporation respectfully requests this Court to enter an Order providing for the following:

1. Sanctioning Plaintiff by entering an Order dismissing Plaintiff's Complaint with prejudice.
2. Awarding BEC its attorneys' fees and costs incurred in the filing and prosecution of this motion.
3. Directing Plaintiff to retrieve all copies of BEC's confidential documents back from *The Miami Herald* and any other media outlets or unauthorized third parties to whom Plaintiff or her counsel have provided confidential documents.
4. Ordering Plaintiff to provide BEC with a list of every entity or person to whom Plaintiff or her counsel has provided any documents produced pursuant to the Protective Order.
5. Prohibiting Plaintiff and her counsel from making any further comments to the media about this lawsuit.
6. For such other relief as the Court deems appropriate under the circumstances.

CERTIFICATE IN ACCORDANCE WITH
SOUTHERN DISTRICT RULE 7.1(A)(3)

BEC's counsel certifies that he has, in good faith, conferred with counsel for Plaintiff in an effort to resolve this Motion. In a telephone conference on September 24, 2008, Plaintiff's

counsel John Hess admitted to giving the travel protocol to *The Miami Herald* reporter, but would not agree to an Order dismissing BEC from the case as a sanction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 25, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: **John P. Hess, Esq.**, 3132 Ponce de Leon Blvd., Coral Gables, FL 33134, **Martin D. Stern, Esquire**, Kelley, Kronenberg, Gilmartin, Fichtel & Wander, P.A., 8201 Peters Road, Suite 4000, Ft. Lauderdale, FL 33324, Attorneys for Defendants Boykin Miami Hotel, L.P., and Boykin Management Company, LLC, and **Alan L. Landsberg, Esq.**, Bunnell, Woulfe, Kirschbaum, Keller, McIntyre, Gregoire & Klein, P.A., One Financial Plaza, Suite 900, 100 Southeast Third Avenue, Ft. Lauderdale, FL 33394, Attorneys for Wildlife on Wheels.

s/Robert L. Blank

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