UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 1:03-CV-02006 (EGS/JMF)**
RINGLING BROS. AND BARNUM & BAILEY CIRCUS, et al.,	:	
Defendants.	:	

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL INSPECTIONS AND CROSS MOTION TO ENFORCE PRIOR COURT ORDERS

Plaintiffs' lawsuit contests three practices: use of the bullhook, tethering, and weaning of baby elephants. See Memo in Support of Motion to Compel Defendants [sic] to Comply with Plaintiffs' Rule 34 Request for Inspection at 1 (10/26/06) ("Motion"); see also Am. Compl. ¶ 96. Nonetheless, Plaintiffs seek to compel entry onto land for purposes of "inspecting" and "testing" each and every one of defendant Feld Entertainment, Inc.'s ("FEI") elephants – fifty-three (53) in total – and to inspect two of FEI's traveling units and its two stationary facilities where the elephants are "maintained." (Motion at 2). Plaintiffs proclaim that they are "clearly entitled to such discovery under Rule 34," Cover Motion at 1, but the Motion is devoid of any articulated basis or proof to support that conclusion. See generally Motion (no requisite explanation of need and no supporting declarations attached). Plaintiffs propose to have an entourage of at least eight (8) persons present at the "inspections" but refuse to identify who those persons would be, what their purported credentials are that qualifies them to attend, inspect or test, and what exactly they plan to do for any tests on or inspections of the elephants. Id. at 3, 9. Plaintiffs further claim, but

cannot say for certain, that the photographers and videographers "could record the evidence for possible use at trial." (Motion at 3). Yet any such testing that occurs without advance notice to the opposing party of the persons and tests involved is inadmissible. See infra, § III at 12.

All of this comes belatedly, nearly ***three years*** after the Stipulated Pre-Trial Schedule established the deadline for written discovery: "The parties shall serve their document requests, interrogatories, and/or requests for admission on or before March 30, 2004." See Stipulated Pre-Trial Schedule at ¶ 3 (12/5/03); see also Ex. A, Plaintiffs' First Set of Requests for Admission, Interrogatories and Requests for Documents (3/20/04).[1] That March 30, 2004 scheduling deadline has never changed, and Plaintiffs have not moved the Court to alter it as required. See Ex. B, Joint Statement Pursuant to Local Rule 16.3, Civ. Action No. 1:00CV1641, at 5 (9/16/03) ("Rule 16.3 Statement") ("The parties agree to serve document requests, interrogatories, and/or requests for admission no more than 45 days after the Initial Disclosure Date, and the parties further agree that a party may serve successive Requests for Documents, Interrogatories, and/or Requests for Admission only upon showing that the predicate facts necessary to make such requests first became available to that party during the discovery process."). Plaintiffs elected instead to just ignore their Rule 16.3 Statement and the Court's subsequent Scheduling Orders, and pretend that the cutoff for written discovery, now approaching three years old, does not exist.

Consequently, Plaintiffs' Rule 34 Requests for Entry Upon Land & Inspection of Elephants and Facilities (8/11/06) (attached as Exhibit 1 to Motion) ("Request") procedurally violates this Court's Scheduling Orders, and substantively violates the Federal Rules of Civil Procedure and the law governing inspection requests. It should therefore come as no surprise to the Court that FEI hereby objects to the Request, opposes Plaintiffs' Motion and cross-moves the

[1] The March 20, 2004 discovery is Plaintiffs' first and only set of written discovery served in this case until they issued the Rule 34 Request for Inspection in August 2006.

Court to enforce its own Scheduling Orders. The Motion should be denied, written discovery should remain closed, and FEI should be awarded its costs and fees for having to respond to Plaintiffs' improper Motion.

I. CROSS-MOTION TO ENFORCE PRIOR ORDERS[2]

The plaintiffs wish to reopen written discovery that closed years ago without seeking leave of this Court and without making the showings required by the existing Scheduling Orders and Fed. R. Civ. P. 16. Plaintiffs have circumvented the Court's Scheduling Orders through issuance of the Request and Motion. Plaintiffs ignored their obligation to move the Court to re-open written discovery *before* lodging any further requests or motions to compel same:

> When a [Rule 16 scheduling] order is entered, a party will have to seek leave from the court to serve Rule 34 requests that seek production or inspection after the cut-off date, whether service is accomplished before or after the cut-off date.

7 MOORE'S FEDERAL PRACTICE § 34.10[3] (Matthew Bender 3d ed.).

The Court will recall that early in this litigation, the parties agreed in the -1641 action (prior to consolidation into the current -2006 action) that written discovery requests would be treated distinctly from the rest of discovery. The parties stipulated that written discovery would be served no more than 45 days after the initial disclosures and that successive requests could be served only "upon showing that the predicate facts necessary to make such requests first became available" during discovery. Ex. B, Rule 16.3 Statement at 5 (Sept. 16, 2003). The parties also submitted a proposed order with the Rule 16.3 Statement that set the "Deadline for Serving Document Requests, Interrogatories, and Requests for Admission" as "60 days after exchange of initial disclosures." Id. at Proposed Order (also stating that party may issue subsequent document requests, interrogatories, and admission requests "only upon showing that the

[2] Pursuant to L.Cv.R. 7(m) the undersigned hereby certifies that she conferred with counsel for Plaintiffs on October 24 and 25, and they do not consent to the relief requested.

predicate facts necessary to make such requests first became available to it during the discovery process.").

Pursuant to the Court's instruction at the November 25, 2003 hearing, the parties stipulated to a pre-trial schedule that required them to "serve their document requests, interrogatories and/or requests for admission on or before March 30, 2004." See Stipulated Pre-Trial Schedule (Dec. 5, 2003). Initial disclosures were then exchanged on January 30, 2004. Pursuant to the Stipulated Pre-Trial Schedule, the parties served their written discovery on March 30, 2004. See, e.g., Plaintiffs' First Set of Requests for Admission, Interrogatories and Requests for Documents (3/20/04); Defendants' First Set of Document Requests to Plaintiff Tom Rider (3/20/04).

The March 30, 2004 deadline was not altered in any of the subsequent scheduling orders or agreements. See Second Stipulated Pre-Trial Schedule (July 12, 2004) (re-setting expert deadlines); Consent Motion to Amend Pre-Trial Schedule (entered 9/8/04) (re-setting expert deadlines and deadlines for close of all discovery). The parties adhered to the scheduling deadline until Plaintiffs violated it in August 2006. No written discovery had been issued since March 30, 2004. Indeed, the Court need look only so far as the motions practice to date to confirm the cutoff for written discovery. The parties have vehement differences of opinion as to what constitute "medical records" for elephants and have been litigating it for years, all of which could have been avoided if written discovery were not closed: Plaintiffs could have simply propounded new, additional written discovery for documents such as interstate transport records, rather than having to argue that such documents they desired to discover constitute "medical records."

FEI therefore objected to Plaintiffs' violation of the Scheduling Order. See Ex. C, FEI's Response and Objections to Plaintiffs' Rule 34 Requests for Entry Upon Land & Inspection of Elephants and Facilities at No. 3 (9/13/06) ("Objections"). The undersigned discussed this with Plaintiffs' counsel and was advised that Plaintiffs' position is that the Scheduling Orders are not being followed, and that Plaintiffs have no obligation to move the Court to re-open written discovery. The position is contrary to the Court's orders, the parties' stipulations, and the caselaw.

Plaintiffs have not shown good cause for modifying the March 30, 2004 deadline, as required by the Scheduling Orders and Rule 16(b). See Stipulated Pre-Trial Schedule at 5; Second Stipulated Pre-Trial Schedule at 1; Fed. R. Civ. P. 16(b) ("A schedule shall not be modified except upon a showing of good cause and by leave of the district judge[.]"). Nor can Plaintiffs show that they were diligent in seeking a Rule 34 inspection prior to the deadline but still could not reasonably meet the deadline. See Fed. R. Civ. P. 16 advisory committee's notes (1983 amendment) (explaining the standard for "good cause"); see also Bradford v. DANA Corp., 249 F.3d 807, 809 (8th Cir. 2001) (the "primary measure" of good cause is the diligence that the party seeking the additional discovery showed in trying to meet discovery deadlines). Plaintiffs agreed to the March 30, 2004 deadline but then waited for two and one-half years before making their Request. There is likewise no newly discovered evidence on which Plaintiffs base their Request. Mr. Rider had full knowledge and awareness of the existence of the Blue and Red Units, and the Williston and CEC facilities. See Ex. D, Rider Depo. at 242:11-244:8 (10/12/06); Ex. B, Rule 16.3 Statement at 5 (Sept. 16, 2003) (successive requests could be served only "upon showing that the predicate facts necessary to make such requests ***first became available***" during discovery) (emphasis added); see also Ass'n for Disabled Ams., Inc. v.

Claypool Holdings LLC, No. IP00-0344-C-T/G, 2001 U.S. Dist. LEXIS 23729, at *31-32 (S.D. Ind. Aug. 6, 2001) (plaintiffs knew from time of filing complaint that inspections "would be necessary or at least desirable," and thus there was no excuse for several month delay before serving a Rule 34 request); Gavenda v. Orleans County, 182 F.R.D. 17, 20 (W.D.N.Y. 1997) (disallowing discovery requests served near the end of the discovery period because it would impermissibly extend discovery; even if the requests only became necessary after recent depositions, the plaintiff could and should have taken the depositions earlier).

Plaintiffs' belated Request also violates Fed. R. Civ. P. 26. Rule 26(g)(2) prohibits discovery requests interposed to cause delay, and subsection (g)(3) allows for sanctions, including the imposition of costs and attorneys' fees, where discovery requests are improperly made. See Fed. R. Civ. P. 26(g); 7 MOORE'S FEDERAL PRACTICE § 34.10[3] (Matthew Bender 3d ed.) (Rule 26(g)(2) embodies a timeliness requirement that applies to Rule 34 requests). Here, plaintiffs agreed to the March 30, 2004 deadline, waited two and one-half years until lay discovery was nearly complete, and then served additional Rule 34 requests without seeking a court order and making the requisite showings. This is simply improper. See Goldboss v. Reimann, 55 F. Supp. 811, 821 (S.D.N.Y. 1943), aff'd 143 F.2d 594 (2d Cir. 1944) (where plaintiff had a previous opportunity to inspect books and records but failed to do so and then waited for several months to request an inspection, the request was made in bad faith and solely to prolong litigation).

To avoid the consequences of their own conduct, Plaintiffs claim without authority that a "Rule 34 inspection request [is not] 'written discovery.'" (Cover Motion at 1 & n.1). This is false, and is belied by Rule 34 itself as well as Plaintiffs' own discovery in this case. Rule 34 is entitled "Production of Documents and Things and Entry Upon Land for Inspection and Other

Purposes." It provides that "[a]ny party ***may serve on any other party a request***" to inspect, copy or test tangible things or to permit entry upon designated land. Fed. R. Civ. P. 34(a) (scope of Rule). The Rule itself thus contemplates that requests are to be written and served. Plaintiffs' Request was indeed written, entitled "Rule 34 Requests for Entry Upon Land and Inspection of Elephants and Facilities," and served on FEI as required by Rule 34. FEI then responded – in writing – within 30 days, again, as required by Rule 34. See Fed. R. Civ. P. 34(b).

Quite tellingly, Plaintiffs initial set of written discovery, entitled "Plaintiffs' First Set of Requests for Admission, Interrogatories, and Requests for Documents," included inspection requests: "(18) Produce representative units of any cauterizing agents that are described in response to Interrogatory No. 16, including, but not limited to a product known as 'Wonder Dust.'"; "(21) Produce an ankus used by a) Mark Gabel, and b) Pat Harned the week of March 22, 2004 without altering either of those ankuses in any way." See Ex. A, Plaintiffs' First Set of Requests for Admission, Interrogatories and Requests for Documents, § Requests for Production of Documents, at 14-15 (3/20/04). In 2004, Plaintiffs served written requests for inspection pursuant to the Stipulated Pre-Trial Schedule as part of their Request for Documents.[3] Plaintiffs' current argument that a "request for inspection" is not written discovery and that the written discovery cutoff did not pass years ago is contradicted by their own prior actions, and thus, is not credible.

Moreover, the Court, as recently as February, has issued an order enforcing its prior limits on discovery. When granting plaintiffs' motion to add the Animal Protection Institute ("API") as a plaintiff, this Court specifically instructed that API was to "abide by all of the agreed-upon and ordered procedures in this case such as outstanding scheduling and discovery

[3] Plaintiffs' apparent position that "written discovery" means the object of the discovery must be "writings" is ridiculous in light of all of the litigation that Plaintiffs have fomented in this case over non-written items like videotapes and x-rays.

orders and agreements." Order, at 2 (Feb. 23, 2006). Thus, while Plaintiffs cavalierly take the position that Scheduling Orders do not have to be followed, the Court clearly has a different view. Not only have the plaintiffs, including API, ignored the outstanding Scheduling Orders and agreements by serving the additional Rule 34 Request, but plaintiff API has yet to abide by the February 23 Order. API has not produced initial disclosures or responded to FEI's outstanding interrogatories, requests for admission, and document requests. See Defendants' First Set of Document Requests to Plaintiffs ASPCA, FFA, AWI (3/30/04); Defendants' First Set of Requests for Admission (3/30/04); Defendants' First Set of Interrogatories to Plaintiffs ASPCA, AWI, and FFA (3/30/04).

The Request and Motion come too late and violate the proceedings in this case. FEI should not have been made to devote its time and resources to defending something that Plaintiffs had absolutely no right to propound in the first instance. The Court's orders in this case bind *all parties*, not just FEI. Plaintiffs should not be permitted to circumvent the Scheduling Orders in this manner. There is no justification for the belatedness of the Request, or the ill-conceived manner in which it was procedurally devised. Accordingly, the Court should deny the Motion, grant FEI's Cross-Motion to Enforce Prior Court Orders, and award FEI its costs and fees incurred in filing this opposition.

Alternatively, if the Court is going to permit Plaintiffs to proceed in this manner, then it must re-open written discovery for everybody – not just Plaintiffs. It would be fundamentally unjust and unfair to permit Plaintiffs to escape the Scheduling Orders in this case while simultaneously enforcing them against FEI. FEI must be provided with the opportunity to serve additional written discovery just as Plaintiffs have self-helped themselves to here. Re-opening written discovery will undeniably prolong this litigation by forcing the parties to go back and re-

litigate matters that are better left undisturbed, *i.e.*, depositions that have already closed. Yet if Plaintiffs are going to be permitted to proceed with re-opening written discovery to issue their Request, then FEI must be permitted an equal opportunity to do the same.

II. PLAINTIFFS LACK STANDING TO INSPECT ALL 53 ELEPHANTS

Should written discovery be re-opened, then there are numerous substantive issues in the flawed Request that require the Court's resolution. First and foremost is the issue of standing. Tom Rider, the only individual plaintiff, defines the standing that he and the other Organizational Plaintiffs have in this case. Standing here rests solely on the elephants to which Rider allegedly became "emotionally attached" when he worked for FEI. See ASPCA v. Ringling Bros., 317 F.3d 334, 337 (D.C. Cir. 2003). While employed by FEI, Rider worked with 15 elephants: Meena, Lechme, Kamala, Susan, Lutzi, Rebecca, Jewel, Sophie, Karen, Minnie, Mysore, Nicole, Roma, Benjamin and Shirley. See Ex. D, (Rider Depo. at 10:22-11:15). Meena, Kamala, and Lechme were elephants that were owned by the Chipperfields, and are no longer with FEI. (Rider Depo. at 38:19-39:7; 177:16-178:4; 272:5-273:13). Benjamin and Roma are deceased. (Rider Depo. at 271:17-272:4; Feld 11790-95). Sophie is now at a zoo in Illinois, and Minnie and Rebecca are in California. See Reply in Support of Defendant's Motion for Summary Judgment at 17 n.11 (10/27/06).

Thus, the total universe of elephants that plaintiffs have standing for in this case is ***seven***, not fifty-three: (1) Susan (CEC/pre-Act/1951);[4] (2) Lutzi (CEC/pre-Act/1950); (3) Jewell (CEC/pre-Act/1951); (4) Karen (Blue/pre-Act/1969); (5) Mysore (CEC/pre-Act/1946); (6) Nicole (Blue/pre-Act/1975); and (7) Shirley (CEC/CBW/1995). See Ex. C, Objections at No.6

[4] Parentheticals indicate current location, status (pre-Act exempted or CBW permitted), and birthdate. See DX 1 to Defendant's Motion for Summary Judgment (9/5/06).

& 6, 7, 9, 11, 12 (9/13/06) ("Objections").[5] Rider has had no contact with any elephants located at Williston or on the Red or Gold Units. Rider also admits that he has never been to Williston or the CEC in Florida or to the Red Unit. Ex. D, Rider Depo. at 242:8-244:8.

Standing is an Article III requirement that goes to the jurisdiction of this Court. It is a major obstacle for Plaintiffs that cannot be cured by avoiding the issue. Plaintiffs, however, attempt to do precisely that. Their only response to the standing issue is to state conclusorily that "the way in which defendants treat any Asian elephant in their possession is certainly 'relevant' [to the claims and defenses], since it would shed light on whether, as plaintiffs allege, defendants engage in the practices that are at issue here." (Motion at 7 n.4). However, elephants over which the Court has no jurisdiction due to Plaintiffs' lack of standing are no more "relevant" to this case than camels – neither are subject to the Plaintiffs' claims and could not be the subject of any relief that the Court has jurisdiction to issue. Plaintiffs' approach is not reasonably calculated to lead to the discovery of admissible evidence ***in this case*** much less anything relevant ***to this case***. The only thing that is relevant for this case is whether or not FEI has engaged in any "takings" of the seven elephants to which Rider allegedly is "emotionally attached" and for which he purportedly has standing. *Beyond that Plaintiffs have no standing to make any claim as to the other forty-six (46) elephants.* The Request is, on its face, grossly overbroad, irrelevant, and calculated to gather information for a political cause rather than this case. See Ex. C, Objections at Nos. 1 & 6.

[5] This number, of course, gives Plaintiffs the benefit of all doubt and presumes that they can survive summary judgment, which they cannot. Any purported inspection should therefore await the Court's ruling on summary judgment. See Ex. C, Objection at No. 2.

III. RULE 34 REQUIRES PARTICULARITY AND GOOD CAUSE

Rule 34 governs requests for inspection and provides in relevant part:

> "Any party may serve on any other party a request (1) ... to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring ... testing ... the property or any designated object or operation thereon, within the scope of Rule 26(b)."

Fed. R. Civ. P. 34(a). Rule 26(b), which was amended in 2000 to require a showing of good cause, thus defines the scope of Rule 34. See Fed. R. Civ. P. 26(b)(1) & advisory committee's notes (2000) ("The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery."). Rule 26(b)(2) vests the Court with authority to impose limitations on discovery for several reasons.

Rule 34 also mandates that the "request ***shall specify a reasonable time, place and manner of making the inspection and performing the related acts."*** Fed. R. Civ. P. 34(b) (emphasis added); see also Fed. R. Civ. P. 34 advisory committee's notes (1970) ("***Problems peculiar to Rule 34 relate to the specific arrangements that must be worked out for inspection and related acts of copying, photographing, testing, or sampling.*** The rule provides that a request for inspection shall set forth the items to be inspected either by item or category, describing each with reasonable particularity, and shall specify a reasonable time, place and manner of making the inspection.") (emphasis added). Thus, any order relating to an inspection must be formulated with "precision and care." Becher v. Bassett Furniture Indus., Inc., 588 F.2d

904, 911 (4th Cir. 1978). The respondent has 30 days from service to respond and object. Fed. R. Civ. P. 34(b).[6]

The opposing party must be permitted to attend any testing and to know in advance what the proposed tests are. The failure to include such protections in an inspection is an abuse of discretion:

> We conclude that the district court exceeded its discretionary authority in departing from standard procedures and safeguards implementing Rule 34, to the extent that fundamental fairness is absent from the tests as authorized. The court presented no reason for barring petitioner from observing all the tests on his device, or from knowing in advance what tests are to be conducted. ***Such procedures are highly irregular, and taint the evidentiary value of the test results. We have been directed to no instance where they have been condoned.***

In re Newman, 782 F.2d 971, 974-75 (Fed. Cir. 1986) (emphasis added); see also Baugus v. CSX Transp., Inc., 223 F.R.D. 469, 470-71 (N.D. Ohio 2004) (procedural safeguards of Rule 34 include vesting ***court*** rather than a single party with deciding whether to permit entry, and where permitted, to ensure opportunity for opposing party to be present with counsel); Martin v. Reynolds Metals Corp., 297 F.2d 49, 57 n.1, ¶ A (9th Cir. 1961) (granting inspectee right to attend at all times).

As demonstrated, "[t]he right of a party under Rule 34 to enter upon designated land, inspect an operation thereon, and photograph is not unlimited." Long v. U.S. Brass Corp., 2004 U.S. Dist. LEXIS 14762, at *8 (D. Colo. June 29, 2004) (citing Micro Chemical, Inc. v. Lextron, Inc., 193 F.R.D. 667, 669 (D. Colo. 2000)). Inspections are intrusive, and the "good cause" requirement of Rule 26 (as opposed to a general relevance standard) requires greater scrutiny of the request as well as application of a balancing test:

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[6] Plaintiffs appear to be unfamiliar with this provision of Rule 34 as they complain that FEI followed it and asserted its rights rather than conceding to their faulty Request. See Motion at 4-5.

> Since entry upon a party's premises may entail greater burdens and risks than mere production of documents, a greater inquiry into the necessity for inspection would seem warranted. ***We therefore reject the plaintiffs' contention that the inspection in this case must necessarily be governed by the general relevancy standard of rule 26(b).*** Rule 26(c) expressly provides that 'for good cause shown,' the court may 'protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense' by either denying inspection or by appropriate restrictions on the inspection. Under this subsection, the degree to which the proposed inspection will aid in the search for truth must be balanced against the burdens and dangers created by the inspection.

Belcher, 588 F.2d at 906, 908 (denying request that identified expert but not credentials or areas of inquiry for inspection) (emphasis added); see also Fed. R .Civ. P. 26(b) (now requiring good cause). Plaintiffs' cited authority recognizes this balancing test imposing greater scrutiny of inspection requests. See Welzel v. Bernstein, 233 F.R.D. 185, 186 (D.D.C. 2005) (applying Belcher balancing test); McKesson Corp. v. Iran, 185 F.R.D. 70, 76 (D.D.C. 1999) (same).

Plaintiffs have the obligation here to justify their Request, and they must do so with more than the mere boilerplate found in their Motion. See Belcher, 588 F.2d at 907-08 (rules do not permit "blanket discovery upon bare skeletal request") (denying inspection where movant failed to specify any reason or need for inspection and merely relied on Rule 34); Johnson v. Mundy Indus. Contractors, Inc., 2002 U.S. Dist. LEXIS 19346, at *8-10 (E.D.N.C. March 15, 2002) (denying inspection request where plaintiff stated inspection "could help" rather than demonstrate necessity of it, and thus, did not meet "good cause" requirement of Rule 26); cf. Motion at 3 (videotaping and photographing "could possibly be used at trial"). Vague and general assertions are insufficient to obtain an inspection. The requesting party must demonstrate need, and should also submit a supporting declaration establishing facts necessitating an inspection. Keith v. Long Beach Unified School Dist., 228 F.R.D. 652, 659 (C.D. Cal. 2005) (inspection denied where facility to be inspected unrelated to gravamen of

complaint and requester did not demonstrate good cause); accord Schwab v. Wyndham Int'l, Inc., 225 F.R.D. 538, 539 (N.D. Tex. 2005) (denying overbroad request for unrestricted access to defendant's headquarters where plaintiff had not articulated, let alone proved, need for inspection and photographing of premises).

A. Plaintiffs Failed to Present Their Request with Particularity

Plaintiffs have not presented their Request with the particularity required by Rule 34. They have steadfastly refused to disclose what they seek to do and whom they want to do it, claiming instead that they cannot do so until the date of inspection is agreed upon. See Ex. A to Motion at 3 ("Once the date of the inspection is agreed upon, a more detailed description of the inspection team, including the identities and credentials of the experts who will be participating in the inspection, will be provided to counsel for defendants."). Plaintiffs blame their hide-the-ball tactics on scheduling "because the date and location of each inspection would affect the availability of the experts plaintiffs would use for each inspection." (Motion at 4). This is nonsense. There is obviously a finite group of individuals that Plaintiffs have in mind to perform their "inspection" and "tests," regardless of whether all of them can attend on a single day. Indeed, FEI had to reserve its right to further objections, because it has no idea of the persons or tests Plaintiffs intend to invoke, and thus, is not even able to fully respond at this time until Plaintiffs abide by Rule 34 and make such disclosure. See Ex. C, Objections No. 16 & 15-16.[7] This Court has already warned that it would not indulge such game playing, and Plaintiffs need

[7] Plaintiffs try to claim that they have "provided many more details" about the inspection by offering the name of each elephant, Motion at 2 n.1, which just happens to be every one that FEI owns. And they claim that they have provided the "areas of each facility they wish to inspect," id., which just happens to be all areas "where the elephants are kept or maintained," all areas related to the "maintenance of the elephants including, but not limited to, the veterinary offices, places where food is stored, and places where other elephant associated supplies are kept." Request at 4. Given that description, it is difficult to imagine what area would be *excluded* from the Request.

to be forced to stop it. See Hearing Tr. at 36:16-18 (9/16/05) ("Because I'm sick and tired of all these efforts by litigants to hide the ball. I've seen it time and time again and I'm tired of it.").

As it stands, Plaintiffs' Request is a generic, non-descript effort to obtain a carte blanche search warrant of FEI's elephants, traveling units and its stationary facilities. Not even the USDA, which Congress has actually vested with the right to regulate and inspect Asian elephants, has this kind of search warrant power. The kind of carte blanche approach that Plaintiffs are after here raises constitutional due process issues, which Rule 34 is designed to prevent. The protocol for the inspections Plaintiff's seek is not identified, the tests are not identified, and the individuals slated to attend and their (non)qualifications have been hidden by Plaintiffs. This fails the safeguards mandated by Rule 34. See Fed. R. Civ. P. 34(a) (request must specify the manner of making the inspection and performing the related acts). No litigant can reasonably be expected to consent to such an inappropriate, defective Request. See Ex. C, Objections at Nos. 4, 5, 16 & 6, 8, 9-12, 15-16. And the law is clear that FEI need not. See In re Newman, 782 F.2d 971, 974-75 (Fed. Cir. 1986) (reversing district court that granted inspection without first requiring disclosure of tests and permitting party to attend); Belcher, 588 F.2d at 911 (denying request that "fails to identify the items to be inspected with any degree of particularity, fails to insure the reliability of the information to be gained, and provides inadequate protection for the defendant"). Cf. McKesson, 185 F.R.D. at 72 (disclosing party's expert who would attend and perform inspection) (cited by Plaintiffs); Morales v. Turman, 59 F.R.D. 157, 158-60 (E.D. Tex. 11972) (designated experts permitted to conduct study after testimony and evidence regarding proposed study presented to Court) (cited by Plaintiffs). Plaintiffs proceed as if this were a routine request to inspect the scene of a slip and fall at the

supermarket. However, as far as we are aware, no court has had the occasion to address a Rule 34 inspection request for Asian elephants held in captivity.

B. Plaintiffs Have Not Shown Good Cause

Nor do Plaintiffs have good cause for their Request. The Motion presents nothing but conclusory boilerplate as to why Plaintiffs should be permitted to proceed with the Request. See generally Motion. Plaintiffs state simply that the Request is "'relevant' both to plaintiffs' claim and to defendants' defenses in this action, within the scope of Rule 26(b)," Motion at 7, and clearly regard Rule 34 as their "entitlement." (Cover Motion at 1). Rule 34 requires a showing of need and facts that establish such need. Neither is demonstrated by Plaintiffs. For example, Plaintiffs do not and cannot state that they need the inspection to respond to FEI's motion for summary judgment. Summary judgment briefing has closed, and Plaintiffs did not mention any need for inspection or testing in their Rule 56(f) affidavit. See Ex. B to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (10/6/06). Nor do Plaintiffs state that they need the inspection for purposes of expert discovery. See generally Motion. Plaintiffs submit no declaration from an expert or otherwise establishing facts that necessitate the inspection. Id. In short, Plaintiffs say nothing other than they would like to take this discovery. That is insufficient to satisfy the good cause requirement of Rules 34 and 26. Schwab, 225 F.R.D. at 539; Keith, 228 F.R.D. at 659; Johnson, 2002 U.S. Dist. LEXIS 19346, at *8-10. In fact, it borders on abuse of process.

IV. FEI CANNOT BE COMPELLED TO PERFORM TESTING FOR PLAINTIFFS

Plaintiffs cannot compel FEI's personnel to perform or participate in whatever tests Plaintiffs may have in mind. "[Rule 34] does not authorize a court to order one party to conduct tests requested by the other party." 7 MOORE'S FED. PRACTICE § 34.15 (Matthew Bender 3d ed.).

Nor does Rule 34 grant any party the power to compel another party to do its testing for it. Sladen v. Girltown, Inc., 425 F.2d 24, 25 (7th Cir. 1970) (Rule 34 provides only for production of tangible item for testing; it does not empower court to order one party to conduct testing for another); Sperberg v. Firestone Tire & Rubber Co., 61 F.R.D. 80, 82-83 (N.D. Ohio 1973) (same); In re Air Crash Disaster at Sioux City, 1991 U.S. Dist. LEXIS 10372, at *2-3 (N.D. Ill. July 26, 1991) (nothing in federal rules required defendant to provide its own flight crew and aircraft to carry out in-flight tests devised by plaintiffs).

Plaintiffs ask that FEI "make available at each of these two inspections: (a) an officer, director, managing agent, or other person who is authorized to represent Ringling Brothers and who will identify the elephants at each facility during the inspection; and (b) those personnel who are necessary to ensure that plaintiffs' representatives are provided complete access to all of the elephants and facilities, as needed to perform the requested inspections." See Request at 3, 6. But this neglects to address the most basic consideration of any purported elephant inspections – who is going to interact with the elephants on Plaintiffs' behalf? It is clear that FEI personnel cannot be ordered to do Plaintiffs' inspection, and Plaintiffs fail to identify anyone else qualified to interact with Asian elephants in general, let alone FEI's elephants. ***The average veterinarian is not competent to perform any inspection or testing:*** Asian elephants are exotic animals that vary in many ways from any other mammals. They cannot be treated or diagnosed like a horse or dog. See Ex. E, Declaration of Dennis Schmitt at ¶ 2 (11/9/06) ("Schmitt Decl.").

Furthermore, the only apparent reason for an FEI "officer, director or managing agent" to be present is so that Plaintiffs can obtain a statement binding on FEI. However, the dialogue that Plaintiffs apparently expect to have with FEI personnel is not properly part of a Rule 34 inspection. Roving depositions at an inspection are impermissible. See Belcher, 588 F.2d at

907. FEI objects to performing any testing or inspection on behalf of Plaintiffs as beyond the power and authority of the Rules of Civil Procedure. See Ex. C, Objections at No. 12. & 10, 14.

V. PLAINTIFFS HAVE NO BASIS TO INSPECT THE FACILITIES OR UNITS

The Request is overbroad, harassing, and irrelevant because it seeks to inspect FEI's facilities and traveling units.[8] For Williston and the CEC, the Request seeks inspection of all areas where the elephants are kept, all areas associated with elephant maintenance, veterinary offices, food storage, and elephant supply storage areas. (Request at 4). For the Red and Blue Units, the Request seeks inspection of the train cars, the areas where elephants are maintained, rehearse and perform, the tents, picket lines, and hot wire pens, and all areas related to maintenance, food and medicine storage, tools and equipment. Id. at 7.

FEI objected to this because FEI's facilities, its veterinary offices, its animal food and medicine, its train cars, its tents, its picket lines and its hot wire pens are not at issue in this case. No reference is made to any of these things in the Complaint. See Am. Compl. (referencing only bullhook, chaining, and weaning); Objections at No. 4 & at 10, 15. Moreover, there is not any weaning that is occurring right now or for the foreseeable future. See Ex. E, Schmitt Decl. at ¶ 6. At the CEC, groups no larger than five are permitted to have contact with an elephant at any one time. Id. Yet Plaintiffs want to bring in a group of at least eight people that does not include any representatives from FEI such as counsel that will also attend.

Plaintiffs simply do not have a right to inspect areas or things that are unrelated to their case. EEOC v. United States Bakery, U.S. Dist. LEXIS 11350, at *10-11 (D. Or. Feb. 4, 2004)

[8] Plaintiffs have abandoned their request to inspect the Gold Unit, because they know that the two elephants who were on the Gold Unit at the time the Request was served (Mysore and Angelica) are now at the CEC and that no FEI elephants currently are on the Gold Unit. (Motion at 7 n.5). Cf. Request at 8 (requesting permission to inspect Mysore and Angelica, the elephants that were on the Gold Unit, wherever they are located at the time of the inspection); DX 1 to Defendant's Motion for Summary Judgment (9/5/06). Plaintiffs' effort to make themselves look reasonable by excluding the Gold Unit is entirely disingenuous.

(inspection denied where physical premises were not alleged as part of claims in complaint); Keith, 228 F.R.D. at 659 (inspection denied where facility to be inspected unrelated to gravamen of complaint and party objected to request); Schwab, 225 F.R.D. at 539 (denying overbroad request for unrestricted access to defendant's headquarters where plaintiff had not articulated, let alone proved, need for inspection and photographing of premises). Plaintiffs' fishing expedition was launched without need and should be denied.

As for Williston and the Red Unit, there are no elephants at either one that Plaintiffs have standing to complain about, and for that reason alone, should be excluded from any inspection. See supra at 10. Plaintiffs also candidly admit that the elephants at FEI's Williston retirement facility "are neither performing nor involved in breeding or training activities." (Motion at 2-3). Therefore, by Plaintiffs' own admission, the elephants at Williston are not related to Plaintiffs' claims and should not be subjected to any inspection or testing. See Objections at 6-7, 12. Moreover, Williston is leased from a third party, and the Red and Blue Units perform at venues pursuant to contract. FEI should not be required to permit entry onto the property, and videotaping and photographing of the same, if the respective property owners do not consent. That would place FEI in an impossible position of having to comply with a court order that is contingent upon the consent of a third-party over which FEI has no control.

VI. THE SECURITY OF FEI'S FACILITIES, ANIMALS AND EMPLOYEES MUST BE PROTECTED

One of the most serious issues arising from the Request is the security threat that it poses. FEI objected on these grounds, but Plaintiffs make no effort to address it at all. See Objections at No. 10. It is common knowledge that there are certain factions of the animal rights movement that are both dangerous and criminal. Neither Plaintiffs nor their counsel are able to state affirmatively that these fringe factions, often hiding behind the cowardice of anonymity, are

unrelated to them or, at least, do not sympathize with their cause. Mr. Kenneth Feld, FEI's Chief Executive Officer, testified at trial in March of 2006 and recounted some of the threats that FEI has received during the past 10-15 years. These include bomb threats, a smoke bomb detonated in FEI's New York office, gun shots fired at the building of FEI's public relations director (followed by an anonymous phone call from an animal rights activist), the FBI riding on the circus train in response to threats of harm, vandalism to its property, and threats to its employees. See Ex. F Kenneth Feld Testimony, PETA v. Feld, At Law No. 220181 at 2041-45 (March 9, 2006). FEI has also produced documents in this case containing threats that it receives through its website. See Ex. C, Objections at No. 10 (citing a sampling of the threats, which are attached hereto as Ex. G). One of the threats claims to be from an ASPCA member:

> I was just reading a very interesting article about your circus from the ASPCA website. I also watched a video showing how great your animal care is . . . . if you don't catch my tone, i am being sarcastic. . . .I think it is totally disgraceful, disgusting and dispicable how you have treated your elephants and other animals, if I had a hold of you guys I would love and enjoy whipping the shit out of you guys, i pray your business goes totally bankrupt, and believe me, what goes around, comes around, you will get yours in due time asshole, in due time.....sleep with one eye open. SPCA member and ringling brothers hater

Ex. G at FEI 38818. Another threat claims to be from the Animal Liberation Front, which is an underground criminal group that is on the FBI's domestic terrorist list. See id. at FEI 38776; Press Release, Federal Bureau of Investigation, Eleven Defendants Indicted on Domestic Terrorism Charges (Jan. 20, 2006), http://denver.fbi.gov/dojpressrel/2006/dv012006usa.htm; Testimony of James F. Jarboe, Domestic Section Chief, Counterterrorism Div., Federal Bureau of Investigation (Feb. 12, 2002) http://www.fbi.gov/congress/congress02/jarboe021202.htm (web printouts attached hereto as Exhibit H).

Plaintiffs cannot dispute any of this, and the Court cannot ignore it. The threats and harm posed to FEI, its employees and its animals are real, not imaginary. They more than satisfy the

requirement of Rule 26(c) for a protective order. See Fed. R. Civ. P. 26(c) (protective order that discovery not be had or made only on specific terms and conditions appropriate for good cause to protect a party from annoyance, embarrassment, oppression or undue burden or expense). The outcome is not altered by the fact that FEI maintains a website devoted to the CEC that describes generally its five main buildings and displays aerial photos of the grounds. See Center for Elephant Conservation, Facts and Figures, http://www.elephantcenter.com/factsfigures.aspx (last visited Nov. 9, 2006). The website does not contain the CEC's address, any detailed information about the inside of the CEC, the ingress/egress/or access to it, the security systems there, or other such details, all of which would be susceptible to filming and distribution by Plaintiffs if they have their way. Neither Williston nor the CEC are open to the public. See Ex. E, Schmitt Decl. at ¶ 6. Moreover, FEI has personnel that live onsite at Williston, the CEC, and the Blue and Red Units. These locales are home not just for the elephants but also for those who care for them. For these reasons, FEI maintains that any photographing of its employees or facilities poses an undue security risk and should not be permitted at all. The footage would be an invasion of privacy and an unwarranted intrusion. Ex. C, Objections at No. 9; See Keith, 228 F.R.D. at 659 (facility could be photographed only when students were absent to prevent invasion of their privacy).

Indeed, the Request to videotape and photograph is unnecessary: All of FEI's elephant walks occur in public as does the train loading and unloading. Likewise both the Red and Blue Units have animal "open houses" in which the elephants can be observed by the public. Plaintiffs have already taken, and likely will continue to routinely take, footage of the elephants in these public locations. Permission to enter land and inspect is not necessary for Plaintiffs to observe or videotape the elephants. See Ex. C, Objections at No. 8 (objecting as duplicative and

citing to photos and videos produced by Plaintiffs depicting the elephants, their walks, and train unloadings). Discovery "shall be limited" if the court determines that "the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive," ample opportunity for the discovery has been had, or that the "burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2)(i), (ii) & (iii). All three of these provisions are met here.

FEI will not under any circumstances permit videotaping or photographing of its employees, its facilities or its train cars without at least the minimum protection of a confidentiality order from this Court that severely restricts dissemination of any videotape or photograph taken to this case and prevents it from becoming fodder on the web or otherwise disseminated to those who would harass or harm FEI, its property, and its personnel. See Ex. C, Objections at Nos. 9, 10, 14.[9] FEI also has proprietary, commercial rights to its rehearsals and performances, which are also not open to the public or permitted to be videotaped. See id. at 15. The parties have already entered into a confidentiality order to protect such materials from dissemination, see Joint Stipulated Protective Order Concerning Recordings of Ringling Bros. and Barnum & Bailey Circus Performances (entered 8/16/06), and FEI objects to any videotaping or photographing of its rehearsals or performances without subjecting such materials to the protections of the confidentiality order.

VII. THE REQUEST POSES SAFETY CONCERNS FOR THE ELEPHANTS

The CEC and Williston are not open to the public, and access to them is strictly regulated. It is a common misconception that elephants pose a risk of spreading tuberculosis to

[9] Plaintiffs have yet to explain how a video of an elephant birth that was made available to Plaintiffs through discovery in this case ended up on the PETA website. See PETA TV, Ringling Baby Killers – Riccardo's Story, http://www.petatv.com/tvpopup/video.asp?video=riccardo&Player=wm&speed=_med (last visited November 8, 2006).

humans. The opposite is true – humans pose the much greater risk of contaminating the elephants with Tb. See Ex. E, Schmitt Decl. at ¶ 7. FEI therefore objects to entry onto the premises or Units or to direct contact with any of its elephants by anybody who cannot first provide a clean bill of health, including a recent, negative tuberculosis test from a recognized, accredited laboratory. See id.; Ex. C, Objections at No. 11. FEI also objects to any part of the inspection or testing that would interfere with the elephants' daily husbandry, exercise, rest, feeding or other activities. Id. at Nos. 9, 11. Because Plaintiffs have refused to identify any protocol for their proposed inspection and testing and instead ask for six hours to roam each of FEI's facilities and units, FEI cannot be more specific in its objections at this time. Plaintiffs should not be permitted, however, to interfere with FEI's business operations or daily routines.

FEI can say at this time that it objects to any direct contact with its elephants. FEI does not permit strangers to have direct contact with or perform procedures on its elephants. See Ex. E, Schmitt Decl. at ¶¶ 3-4. Plaintiffs also do not appear to have given any thought to the differences in behavior between male and female elephants, and those of FEI's elephants that are accustomed or unaccustomed to interactions with strangers. Id. The Request contains no protocol for how Plaintiff would handle this to ensure the safety of both the elephants and themselves.[10] This is an entirely unacceptable way to conduct a Rule 34 inspection.

FEI objects to the requested length of the time of inspection as harassing, overbroad and unduly burdensome. Id. at Nos. 1, 9, 11 & 15. Plaintiffs do not need six hours at each locale to film. Their own caselaw restricted an inspection to one hour. See Welzel, 233 F.R.D. at 187. Nor do Plaintiffs offer any explanation as to why they should be permitted to touch, wash or wipe down any of FEI's elephants. Aside from the offending nature of this intrusive request,

[10] This is likely because Plaintiffs have no such protocol and do not know what they are doing. Plaintiffs themselves have no experience with Asian elephants, and they are thus incompetent to handle them.

there is no way to predict how the elephants would react to being touched, poked or prodded by strangers. The risk that could be presented by this is greatly intensified if the humans involved are not qualified. See Ex. E, Schmitt Decl. at ¶¶ 4-5. Plaintiffs make no showing whatsoever to address these realities. They simply state that they need not explain themselves until an inspection date is set. (Motion at 4). Rule 34 mandates otherwise.

VIII. PLAINTIFFS MUST INDEMNIFY FEI, HOLD IT HARMLESS AND BEAR THE COSTS OF INSPECTION

Plaintiffs and their representatives should also be required to sign releases holding FEI harmless for anything that occurs during testing or inspection. Plaintiffs provide no evidence that those attending the tests are competent to handle elephants and do not explain what the tests would entail. Plaintiffs do, however, seek to have direct contact with the elephants, which might not be well received by the elephants, particularly from a horde of strangers, depending upon the nature of the contact or tests involved. It could also pose a safety risk to Plaintiffs if they are seeking to enter the train cars while the elephants are on board. See Ex. E, Schmitt Decl. at ¶¶ 3-5; Ex. C, Objections at No. 13 & 10, 15. As FEI has demonstrated, even experienced handlers can be injured or killed when inspecting elephants. See id. at No. 13. FEI should also be indemnified for any damage or harm caused by the testing and inspection. Martin, 297 F.2d at 57 (party seeking inspection and testing required to pay for any damage done) (cited by Plaintiffs); id. at 57 n.1, ¶ I (ordering that party seeking inspection "will indemnify and hold [other party] harmless from any and all liability of [other party] to others arising out of sampling, examining, photographing and measuring by [party seeking inspection]").

Finally, the costs involved with traveling with inspectors, attorneys, videographers and photographers to four different locations to inspect FEI's entire elephant herd are enormous. Plaintiffs make no effort to tailor their request to this case or to reasonably limit the scope of it.

They should therefore be required to bear all costs of the inspection, regardless of the fee-shifting provision contained in the ESA. See Morales, 59 F.R.D. at 159 (plaintiffs ordered to bear all costs of inspection sought) (cited by plaintiffs); Martin, 297 F.2d at 57 & n.1, ¶¶ G-I (same) (cited by plaintiffs).

IX. THE BALANCING TEST DOES NOT FAVOR PLAINTIFFS

Plaintiffs identify no need for the inspection, do not direct it toward this litigation, and describe no benefits to their case that would come from it. Indeed, FEI is currently left to speculate as to the nature of what Plaintiffs' requested inspection and testing would entail because Plaintiffs refuse to disclose it. On the other hand, FEI has clearly identified the burdens and dangers posed by the Request: FEI's operations would be disrupted, its employees and elephants would be harassed, the security of its personnel and property could be jeopardized, and the health, safety and welfare of its elephants and Plaintiffs themselves could be compromised. The Request is grossly overbroad, exceeds the jurisdiction of the Rules and this Court, and is not linked to the issues in this case. Cf. McKesson, 185 F.R.D. at 76 (permitting inspection where, unlike here, opposing party did not object that inspection was harassing or that the information sought is irrelevant). Consequently, the anticipated benefits of the Request (if any) are outweighed by the significant disadvantages to FEI. Plaintiffs do not even acknowledge that such a balancing test is the governing standard, let alone do they try to satisfy it. The Request should be denied accordingly. See Belcher, 588 F.2d at 909 (denying inspection where dangers of it greatly outweighed slight benefit that could result from inspection).

Plaintiffs provide scant caselaw to support their Motion, which does not affect the outcome here. In Martin, 297 F.2d at 54-55, the objecting party challenged only the court's ability to order an inspection under Rule 34 but did not lodge any objections to the specifications

in the inspection request. The court actually had concerns about, but passed on, the constitutionality of some of the inspection provisions because the opposing party had not raised any objections. Id. Here, FEI has raised its objections in a timely manner as required by Rule 34.

In New York State Assoc. for Retarded Children, Inc. v. Carey, 706 F.2d 956, 958-59 (2d Cir. 1983), a consent judgment had been entered nearly a decade earlier and the parties were still litigating enforcement of that judgment. A special review panel was established to monitor (non)compliance with the terms of the consent judgment, and the judge that ordered the inspection had been intimately involved with the compliance efforts for years. Id. at 961. As a result, the post-judgment compliance issues were so unique that the court held the Belcher test did not apply. Id. In this case, there is obviously no consent judgment or compliance program that would warrant usurping the normal Rule 34 Belcher test.

Similarly, the Belcher case distinguishes Morales v. Turman, 59 F.R.D. 157 (E.D. Tex. 1972,) on the grounds that Morales involved constitutional issues and the inspection requested had already been done at the facility at issue. See Belcher, 588 F.2d at 910; see also Morales, 59 F.R.D. at 158 (court ruled heightened need for fact-finding due to "extraordinary" nature of case and permitted test that had previously been done 20 to 25 times at the facility). The Request at issue in this case is unprecedented. It involves exotic animals – Asian elephants – that lay persons and regular veterinarians are not even qualified to assess. Ex. E , Schmitt Decl. ¶ 2; cf. Norton v. Lindsay, 350 F.2d 46, 48 (10th Cir. 1965) (court notes perfunctorily only that inspection and operation occurred on horse that was alleged to have been surgically altered prior to its sale) (breach of contract/warranty case). There is no indication that what Plaintiffs seek to do, as ill-defined, grossly overbroad and unduly burdensome it is, has ever been permitted by any

court. Cf. Welzel, 233 F.R.D. at 186 (imposing temporal limit of one hour on inspection and restricting area plaintiff could inspect).

X. CONCLUSION

Plaintiffs' belated Request violates this Court's Scheduling Orders and the proceedings in this case. It should be denied for that basis alone. In addition, Plaintiffs wrote and served a Request that is grossly overbroad, irrelevant and harassing. It fails to provide any of the critical details such as the manner in which such a proposed inspection and testing would occur or who would be doing it. There is likewise no showing of any need for the inspection. See Objections at 15-16. Plaintiffs were asked repeatedly to make such disclosures, which they are obligated to do anyway, and they steadfastly refused. They have the obligation and burden here to disclose what they would like to do and justify why they need to do it. They declined to do so. The law requires much more, and this Court has said it will not tolerate litigants playing hide-the-ball. Plaintiffs' Motion should be denied accordingly regardless of whatever efforts they make to rehabilitate the Request in reply hereto. Therefore, in the event that the Court does not postpone a ruling on this Motion until after summary judgment, plaintiffs' Motion should be denied. At a minimum, any such inspection should be limited by the Court in accordance with the arguments stated above. Furthermore, FEI's Cross-Motion to Enforce Prior Court Order should be granted, written discovery should remain closed, and FEI should be awarded its costs and fees related to responding to Plaintiffs' defective Request and Motion.

Dated this ___ day of November, 2006.

Respectfully submitted,

/s/

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 1:03-CV-02006 (EGS/JMF)**
RINGLING BROS. AND BARNUM & BAILEY CIRCUS, et al.,	:	
Defendants.	:	

ORDER

Upon consideration of Plaintiffs' Motion to Compel Defendants to Comply with Plaintiffs' Rule 34 Request for Inspections ("Plaintiffs' Motion") and Feld Entertainment, Inc.'s Cross-Motion to Enforce Prior Court Orders ("Defendant's Motion") and the briefing and exhibits related thereto, it is by the Court this _____ day of _____, 2006, hereby

ORDERED that Plaintiffs' Motion is DENIED; and it is further

ORDERED that Defendant's Motion is GRANTED, and all written discovery shall remain CLOSED; and it is further

ORDERED that Feld Entertainment, Inc. shall submit a motion for its costs and fees incurred with regard to the above-mentioned motions.

_____
UNITED STATES DISTRICT JUDGE