UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, *et al.*,	)	
Plaintiffs,	)	
v.	)	
	)	Civ. Nos. 00-1641, 03-2006 (EGS)
RINGLING BROTHERS AND BARNUM & BAILEY CIRCUS, *et al.*,	)	(Consolidated Cases)
Defendants.	)	

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO RESOLVE DISCOVERY DISPUTE

Introduction

In response to plaintiffs' motion to resolve discovery dispute, defendants have stated that the motion is somehow "defective" and improperly filed at this stage of the litigation, despite the fact that this Court directed plaintiffs to file the motion. See Transcript of September 23, 2003 Status Conference ("Transcript") at 17. However, much more troubling is that, in their response, defendants now appear to take an entirely new position with respect to the scope of discovery in this Endangered Species Act case that was not previously identified during the parties' Meet and Confer conferences or at the September 23 status conference. Although defendants' precise position it is not entirely clear, they appear to be arguing either that plaintiffs are only entitled to discovery concerning the "*abusive* use of the ankus, *harmful* chaining of elephants for extended periods, and *improper* procedures for separating mother elephants from their calves," or that plaintiffs are not entitled to discovery concerning any "mistreatment" of the elephants other than the precise kinds of mistreatment that are specifically detailed in the notice letters. Defendants'

Response to Plaintiffs' Motion To Resolve Discovery Dispute at 4 (emphasis added).

However, since defendants' response both conspicuously dodges the actual discovery dispute that the Court directed the plaintiffs to request a ruling on, and also reveals an additional view of discovery that is not consonant with the Federal Rules of Civil Procedure, plaintiffs respectfully request the Court to issue an order making it clear that, as permitted by Rule 26(b) of the Fed. R. Civ. P., discovery in this case extends to any matter, that is not privileged, that is "relevant to" plaintiffs' claims or defendants' defenses, including discovery that is "reasonably calculated to lead to the discovery of admissible evidence" and that such discovery includes both past and on-going practices of defendants with respect to their treatment of Asian elephants. Plaintiffs have submitted a revised proposed order for this purpose.[1]

To set the record straight concerning what has occurred here, plaintiffs provide the following background.

Background

During the Meet and Confer conferences held by the parties on September 5 and 11, 2003, defendants' counsel informed plaintiffs' counsel that the parties should notify the Court that there is a dispute about the scope of discovery in this case, because defendants take the position that plaintiffs are only entitled to discovery with respect to the specific detailed instances of alleged violations of the Endangered Species Act contained in the 60-day notice letters. Thus, defendants' counsel candidly explained that he realized that plaintiffs would take the contrary position that those instances were only examples of what plaintiffs believe are

[1]Plaintiffs have also made it clear that the Court's order concerning this matter applies both to plaintiffs' original case and to the new one that was recently filed, since the Court has now consolidated those cases. Although defendants have moved for reconsideration of the Court's consolidation order, plaintiffs will be filing an opposition to that motion.

routine practices and that, therefore, plaintiffs are entitled to discovery concerning all such practices as well as the specific examples. See also Transcript at 14-15. Defendants' counsel also specifically suggested that the parties notify the Court of this dispute in their Joint Report so that the Court could decide how to handle the matter. Plaintiffs' counsel took the position that the matter should be resolved before the parties embark on the initial disclosure requirements, since, otherwise, given the nature of the dispute, the parties would be operating under very different views about what was required to be disclosed pursuant to those requirements.

Therefore, on September 15, 2003 – more than a week before the September 23 status conference in this case – plaintiffs sent to defendants' counsel for inclusion in the Parties' Joint Statement plaintiffs' proposed position statement concerning the discovery dispute (Attachment A), which is substantially the same in content as the memorandum plaintiffs have now filed with the Court on this matter. In response, defendants' counsel suggested that, rather than detail the nature of the dispute in the Meet and Confer Report, the parties should just explain the dispute to the Court at the September 23 status conference and allow the Court to decide how best to resolve it. Plaintiffs' counsel agreed to that suggested course of action and, consequently, plaintiffs' position statement was not included in the Parties' Joint Statement. See also Transcript at 15. At no time, however, did defendants' counsel suggest that plaintiffs had somehow misconstrued the nature of the discovery dispute.

At the September 23 status conference, plaintiffs' counsel explained to the Court the nature of the dispute as it had been explained to her. See Transcript at 13-15. Defendants' counsel did not disagree with plaintiffs' explanation. Id. at 13-18. The Court directed plaintiffs' counsel to file a motion to have this dispute resolved. Id. at 17. Accordingly, pursuant to the Court's direction, on September 26, 2003, plaintiffs filed a "motion to resolve discovery dispute"

with an accompanying memorandum that was essentially the same in content as the position statement plaintiffs' counsel had provided to defendants' counsel on September 15. Thus, they explained that defendants took the position that plaintiffs were only entitled to discovery concerning the actual incidents of unlawful conduct detailed in the notice letters, and that plaintiffs took the position that they are entitled to discovery concerning what they believe are routine on-going violations of the Act, particularly because the notice letters specifically stated that "such treatment of elephants in Ringling Brothers' circus is by no means aberrational, but, rather, is business as usual," that defendants "routinely beat elephants" and "keep[] the elephants in chains for extremely long periods of time," and that defendants' "routine" methods for separating babies from their mothers also violate the Act. See Plaintiffs' Memorandum at 3-4, *citing* Notice Letters (emphasis added).

Now, however, in response to plaintiffs' motion for a ruling on this issue, defendants do not address the initial dispute that they had so candidly identified during the Meet and Confer conference and suggested be presented to the Court at the September 23 status conference for resolution. Instead, defendants now appear to be arguing either that discovery is somehow limited to information that actually confirms plaintiffs' allegations of unlawful conduct – e.g., because it demonstrates that the defendants' use of the ankus is "abusive," that the chaining of the elephants is "harmful," and that the procedures for separating mothers from calves are "improper," or that plaintiffs are not entitled to discovery concerning any kind of "mistreatment" other than use of the ankus, chaining, or the forcible removal of babies from their mothers. See Defendants' Response at 4. However, because either suggestion is anathema to the basic rules that govern discovery here, the Court should reject defendants' suggestion to limit discovery in either way.

ARGUMENT

Since defendants' general use of the ankus, practices for chaining the animals, and procedures for separating babies from their mothers, as well as other practices included in the notice letters – e.g., the use of "clubs" and other "instruments" on the animals, the unlawful possession and transportation of animals that have been unlawfully "taken" – all form the basis for plaintiffs' claims in this case that defendants' routine treatment of endangered elephants violates the Endangered Species Act, there simply is no basis for limiting discovery in the drastic way that is suggested by defendants. See Rule 26(b) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party") (emphasis added). Indeed, defendants' suggestion that plaintiffs are only entitled to discovery that, in defendants' view, actually demonstrates that such practices are "abusive," "harmful," or "improper," was long ago abandoned by the drafters of Rule 26(b). See Rule 26(b) Fed. R. Civ. P. (Note to Subdivision (b)) ("[w]hile the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation"). Moreover, any evidence concerning the use of the ankus, chains, and separation process – whether proper or improper in defendants' view – is also clearly "relevant" to the defendants' defenses here. Accordingly, under the plain language of Rule 26(b), such information falls squarely within the scope of discovery, absent some particular showing by defendants that any such information is "privileged."

Similarly, evidence demonstrating other kinds of "mistreatment" of Asian elephants is certainly "relevant" to plaintiffs' claims that defendants are unlawfully "taking" endangered animals, e.g., by "harming" and "harassing" them, whether or not plaintiffs included each such kind of mistreatment in their notice letters. See 16 U.S.C. § 1532(19) (definition of "take"). For

example, evidence demonstrating that Ringling uses electric prods or whips on their elephants to make them perform, or that it withholds food from the animals for this purpose, would certainly be "relevant" to plaintiffs' claims that Ringling uses other forms of abusive and forceful treatment to make the animals perform, as is alleged in plaintiffs' Complaints. See, e.g., Rule 26(b) (Note to 2000 Amendment) ("A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type or involving the same product, could be properly discoverable under the revised standard [of relevance to "the claim or defense of any party"]). Indeed, it is not at all clear from defendants' response what kind of evidence of "mistreatment" defendants believe may exist that is either not relevant here nor "reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b).

Nor have defendants cited any authority for either of the propositions that they appear to be advancing. Indeed, the only case that defendants cite in support of their position that discovery is somehow limited to the precise allegations contained in the notice letters had nothing to do with the relationship between a notice letter and the scope of discovery, but simply states the obvious – i.e., that the concept of "relevancy" in Rule 26(b) "does not encompass discovery of information with 'no conceivable bearing on the case.'" Chaplaincy of Full Gospel Churches, 2003 WL 22048206 (D.D.C.) at *3, *citing* 8 Fed. Prac. & Proc. 2d § 2008 (emphasis added).

Here, however, there can be no legitimate dispute that defendants' routine "treatment" of endangered Asian elephants is directly relevant to plaintiffs' claims – and defendants' defenses – in this case, and that evidence of all forms of "mistreatment" are also relevant to plaintiffs' claims that defendants are unlawfully "taking" endangered elephants within the meaning of the

Endangered Species Act. Accordingly, there simply is no basis whatsoever for defendants' attempt to limit discovery in this case in the manner originally identified by defendants' counsel during the Meet and Confer conference or as now suggested in defendants' response to plaintiffs' motion to resolve discovery dispute.

Respectfully submitted,

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Plaintiffs' position is that they are entitled to take discovery regarding all of defendants' practices that plaintiffs allege violate the Endangered Species Act and that statute's implementing regulations, including past, present, and on-going practices, and that discovery is not limited solely to the precise examples of violations provided in the notice letters that were sent to defendants. Rule 26(b)(1), Fed.R.Civ.P., provides that the plaintiffs may obtain discovery regarding any matter, not privileged, that is relevant to their claims that are contained in their Complaint, including:

> (1) that "Ringling Bros.' past and continuing routine beatings of its elephants, including its baby elephants; its forcible removal of baby elephants from their mothers; and its chaining and confinement of elephants for many hours each day violate the 'taking' prohibitions of section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B), the prohibition against the 'possession' and 'transportation' of an endangered species that has been unlawfully taken, id. § 1538(a)(1)(D), and the prohibitions against the transportation of endangered species in interstate commerce in the course of a commercial activity, except as permitted by the Fish and Wildlife Service, id. § 1538(a)(1)(E)."
>
> (2) that "Ringling Bros.' treatment of its elephants is inhumane and unhealthful for the animals, and violates the AWA regulations, and hence its treatment of the animals also violates the permit it was issued by the Fish and Wildlife Service, and the FWS's regulations implementing the ESA, 50 C.F.R. §§ 13.41, 13.48, which require any person holding a permit to comply with "all applicable laws and regulations governing the permitted activity."

Second Amended Complaint §§ 91-92 (emphasis added). Such discovery would include information that may not itself be admissible at the trial, but is "reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1).

It well established that the scope of discovery is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 350 (1978) (emphasis added), citing Hickman v. Taylor, 329 U.S. 495, 501 (1947); see also, e.g., Cofield v. City of LaGrange, Georgia, 913 F. Sup. 608, 614 (D.D.C. 1996) (noting that scope of discovery under Rule 26(b) is "exceedingly broad").

Moreover, the notice letters provided Ringling Bros. specifically informed the defendants that Ringling Bros. "is in violation of the prohibition against the 'taking' of endangered Asian elephants . . . since its elephant trainers and handlers routinely beat elephants, including baby elephants, in order to make them perform or behave in a particular way, and Ringling Brothers also keeps the elephants chained for extremely long periods of time." Notice Letter (December 21, 1998)

at 1 (emphasis added); see also id. at 2 ("the trainers use the bull hooks on many of the animals"); id. at 3 ("such treatment of elephants in Ringling Brothers' circus is by no means aberrational, but, rather, is business as usual for this exhibitor") (emphasis added); id. at 3 ("elephants are left chained hour after hour, each day . . . when the circus is traveling, the elephants remain chained in the stock cars for as long as 2-3 days consecutively,") (emphasis added). The notice letters also informed Ringling that it "is also in violation of 16 U.S.C. § 1538 because, for the same reasons, it is in possession of animals that have been unlawfully 'taken' and because it continues to transport those animals in interstate commerce." Id. at 1 (emphasis added).

The notice letters further informed Ringling that the use of force to separate nursing baby elephants from their mothers is part of Ringling's "routine 'separation process,'" and that this "also constitutes an unlawful 'taking' of endangered elephants in violation of section 9 of the Endangered Species Act, 16 U.S.C. § 1538, and the [FWS's] implementing regulations, because it 'harms' and 'harasses' the babies, and also 'harasses' their mothers . . .." Notice Letter (November 15, 1999) at 1-2 (emphasis added). The notice letters further advised Ringling that such treatment "is unlawful under the ESA," and also "violates the conditions under which Ringling Brothers holds a captive-bred wildlife registration – a separate violation of the ESA." Id. at 2 (emphasis added).

Therefore, in view of the fact that the notice letters specifically address on-going, routine violations of the ESA and that statute's implementing regulations, it is plaintiffs' position that they should be allowed to take discovery concerning evidence of all such practices, including past, present, and continuing practices. See Rule 26(b)(1); see also Idaho Sporting Congress v. Computrol, 952 F. Supp. 690, 693 (D. Idaho 1996) (because notice letter states that defendant "*is* in violation" of the statute, it "is broad enough to encompass ongoing violations") (emphasis in original); Public Interest Research Group of New Jersey v. Hercules, Inc., 50 F.3d 1239, 1250 (3rd Cir. 1995) (notice letter that includes list of specific violations provides sufficient information to encompass "violations of the same type . . . occurring during and after the period covered by the notice letter"); Atlantic States Legal Foundation v. Stroh Die Casting Co., 116 F.3d 814 (7th Cir.

1997) (notice letter that identifies specific violations is sufficient to put violator on notice of similar violations); Public Interest Research Group of New Jersey v. WITCO Chemical Corp., 1990 WL 512262 (D.N.J. 1990) (the requirement of pre-suit notification "was never intended to infringe on plaintiffs' right to take discovery").

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CERTIFICATE OF SERVICE

I certify that plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion to Resolve Discovery Dispute has been served on defendants by having a copy thereof mailed this 15th day of October, 2003 to defendants' counsel:

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