UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, *et al.*,	)	
Plaintiffs,	)	
v.	)	
	)	Civ. No. 03-2006
	)	(EGS/JMF)
RINGLING BROTHERS AND BARNUM & BAILEY CIRCUS, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO COMPEL DEFENDANTS TO COMPLY WITH PLAINTIFFS' RULE 34 REQUESTS FOR INSPECTIONS AND OPPOSITION TO DEFENDANTS' CROSS MOTION

Introduction

Plaintiffs submit the following reply to defendants' opposition to plaintiffs' motion to compel defendants to comply with plaintiffs' Rule 34 requests to inspect the Asian elephants at issue in this case under the Endangered Species Act ("ESA"). As demonstrated in plaintiffs' opening memorandum and also below, the requested inspections fall well within the scope of Rules 26(b) and 34(a). Moreover, as plaintiffs have consistently explained, they are willing to work with defendants to fashion inspections that will provide useful information to plaintiffs, yet minimize disruption to defendants' daily operations.

However, if defendants refuse to allow any such inspections, then they should not be permitted to rely on the fact that their expert witnesses have physically examined the animals at issue in this case in defense of plaintiffs' claims. Rather, either both sides to the litigation should

have access to this obviously important physical evidence, or neither party should be permitted to rely on such evidence.

As also demonstrated, *infra* at 15-17, there is no merit to defendants' contention that, by serving the Rule 34 Request for Inspections, plaintiffs have somehow "violated" the parties' December 5, 2003 Joint Statement concerning "document requests, interrogatories, and/or requests for admissions." See Exhibit B to Defendants' Response In Opposition to Plaintiffs' Motion To Compel ("Def. Insp. Opp."). Accordingly, defendants' self-styled "cross motion to enforce prior court orders" should be denied.

A. Plaintiffs' Reply In Support Of Their Motion To Compel Defendants To Comply With Plaintiffs' Rule 34 Request For Inspections.

Plaintiffs make the following points in response to defendants' arguments in opposition to their request for inspections.

1. Contrary to defendants' insistence that plaintiffs must demonstrate "good cause" for the requested inspections, Def. Insp. Opp. at 11, the test that governs here is whether this particular discovery tool is calculated to produce "relevant" information that falls within the scope of Rule 26(b). See, e.g., McKesson Corp. v. Islamic Republic of Iran, 185 F.R.D. 70, 72 (D.D.C. 1999) ("[p]rior to 1970, 'good cause' was a prerequisite to any discovery under this provision . . . [h]owever, as amended, a party's request comes within the coverage of Rule 34(a)(2) 'if the proposed entry and inspection are within the scope of Rule 26(b)'") (internal quotations omitted).

As explained in plaintiffs' opening memorandum, there is no question that the requested inspections are calculated to obtain evidence in this case that is highly relevant both to plaintiffs'

claims and defendants' defenses. See Memorandum In Support Of Plaintiffs' Motion To Compel Inspections ("Pl. Insp. Mem.") at 5-8. For example, one of plaintiffs' claims in this case is that defendants' mistreatment of the elephants constitutes an unlawful "take" of an endangered species because that mistreatment "wounds" the animals. See 16 U.S.C. § 1532(19) (the definition of "take" includes "harass, harm [and] . . . wound"). However, apparently defendants do not make a written record of all such injuries on the elephants. See, e.g., USDA Inspection Report of the Ringling Bros. Circus (September 7, 2000), PL 05083 (attached as Plaintiffs' Inspection Exhibit ("Pl. Insp. Ex.") 8 (noting that "[t]here is no documentation maintained [by Ringling Bros.] on elephants that have minor lesions, scars or abrasions," and that "[c]areful examination of the elephants revealed some scratches or lesions that may have required medical care, but there is no documentation of treatments") (emphasis added). Therefore, although plaintiffs certainly understand why defendants do not want plaintiffs' experts to be able to physically examine the elephants to discover whether the animals bear wounds, scars, and other physical manifestations of their mistreatment, such evidence is clearly relevant to this case.

Indeed, an unannounced physical inspection of Ringling Bros.' "Red Unit" conducted in 1999 by the Santa Clara Humane Society of California and an officer of the San Jose Police Department revealed that many of the elephants had "lacerations behind and around the ears, and puncture wounds on their bodies" as a result of bullhook use by defendants' employees – the basis of one of plaintiffs' claims in this case. See Investigation Report, PL 04671 (Pl. Insp. Ex. 9) at PL 04673; see also id. (listing seven elephants who had "lacerations" on their bodies); see also Affidavit of Dr. Joel Parrott, D.V.M. (July 25, 2000), PL 04717 (Pl. Insp. Ex. 10) (stating that "[t]he majority of the wounds documented in these photographs are fresh, actively draining

puncture wounds caused by an ankus or hook").

Therefore, evidence obtained through a physical inspection of the elephants would clearly be relevant both to plaintiffs' claims, and to defendants' contention that they do not physically harm or wound the elephants with bullhooks. Moreover, in their recent summary judgment papers, defendants complain that plaintiffs rely on past evidence of mistreatment, and show a "complete lack of interest in discovering what actually goes on *currently* with the elephants." Defendants' Reply In Support Of Defendants' Motion For Summary Judgment (Docket No. 100) at 3-4 (emphasis in original). While this assertion has no merit, defendants certainly cannot have it both ways – they cannot complain that plaintiffs are not seeking evidence that the elephants are "currently" being taken in violation of the ESA, yet insist that plaintiffs may not physically inspect the elephants to collect additional evidence on this point.

Moreover, contrary to the arguments made by defendants, it is not necessary for plaintiffs to demonstrate any "newly discovered evidence" that has led to their request for inspections, since plaintiffs' inspection requests are not "document requests, interrogatories, and/or requests for admissions" that are covered by the parties' Joint Rule 16.3 Statement (September 16, 2003), Def. Exhibit B. See Def. Opp. at 5, see also *infra* at 14-15 . Nevertheless, the request for inspections was in fact prompted most recently by plaintiffs' extremely belated receipt of the medical records on the elephants. See e.g., February 2001 E-mail Message (Produced in July 2006) (Pl. Insp. Ex. 11) (noting untreatable "foot problems at Williston, that originated in the years that the elephants were on the road," and "several bloody spots").

As the Court well knows, plaintiffs asked for those highly relevant records over two and a half years ago, in their initial March 2004 discovery requests, and all such records should have

been produced in June 2004. However, plaintiffs have only recently been receiving these records as a result of plaintiffs' January 25, 2005 Motion to Compel, which the Court granted on September 26, 2005 (Docket No. 50), and in response to plaintiffs' June 9, 2006 Motion to Enforce the Court's September 26, 2005 Order, which plaintiffs were forced to file when defendants continued to ignore the Court's Order to produce these records, and which the Court also granted. See Order (September 26, 2006) (Docket No. 94).

Therefore, now that plaintiffs finally appear to have the majority of these records, they wish to have their experts conduct physical inspections of the elephants to compare the physical condition of the animals to the records that have been produced. Such discovery – i.e., a physical examination of the animals – simply cannot be obtained through written discovery, such as interrogatories and document production requests, particularly when, as the USDA has noted, Ringling Bros. does not "maintain[]" written documentation of "minor lesions, scars or abrasions" on the elephants. See Pl. Insp. Ex. 8. Accordingly, plaintiffs' request for inspections is completely permissible under Rule 34. Compare Belcher v. Bassett Furniture Indus., 588 F.2d 904 (4th Cir. 1978) (inspection not allowed in employment discrimination case where plaintiff can obtain information regarding work assignments through written discovery) with Welzel v. Bernstein, 233 F.R.D. 185, 186-87 (D.D.C. 2005) (allowing inspection of facility where it would produce evidence that would supplement testimony already obtained).[1]

2. Defendants' contention that plaintiffs may only conduct inspections of the elephants for which plaintiff Tom Rider has alleged standing, see Def. Insp. Opp. at 9-10, is also

[1]Although plaintiffs stated in their Inspection Request that they may want to perform certain "tests" at both Williston and the Center for Elephant Conservation ("CEC), see Inspection Request at 2, they have decided that this aspect of the inspections is not necessary.

wrong. As plaintiffs explained in their opening memorandum, how defendants treat any of the Asian elephants in their possession is clearly probative of whether they are likely to engage in the unlawful practices about which plaintiffs complain, just as an employer's past acts of discrimination against other employees are relevant to whether that same employer may have discriminated against a particular plaintiff. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05(1973) (in employment discrimination case "[o]ther evidence that may be relevant to any showing of pretext includes . . . petitioner's general policy and practice with respect to minority employment"); Bazemore v. Friday, 478 U.S. 385, 402 (1986) ("[p]roof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued . . ."); Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir. 1990) ("[a]s a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent").

Moreover, although it is true that the Court of Appeals specifically held that Mr. Rider had alleged sufficient Article III standing in this case, ASPCA v. Ringling Bros., 317 F.3d 334, 337 (D.C. Cir. 2003), the Court certainly did not hold that the other plaintiffs had failed to allege sufficient standing. Rather, in keeping with well established Supreme Court precedent, the Court simply acknowledged that, having decided that Mr. Rider had alleged sufficient standing, it was unnecessary for the Court to decide the standing of the remaining plaintiffs, "because each of them is seeking relief identical to what Rider seeks." ASPCA, 317 F.3d at 338. Accordingly, defendants' bizarre assertion that this Court only has "jurisdiction" over certain elephants, Def. Opp. at 10, is seriously misguided. This Court has jurisdiction over all of plaintiffs' claims in

this case. See also Abigail Alliance for Better Access to Developmental Drugs et al., v. Eschenbach, No. 04-5350, 2006 WL 3359334 (D.C. Cir. Nov. 21, 2006) (organization alleging that unlawful conduct impedes its ability to carry out its organizational activities has standing under Article III); Cary v. Hall, No. C-05-4363 (N.D. Ca. September 30, 2006) (Attachment), Slip. Op. at 19-20 (plaintiffs who allege informational injury under Section 10 of the ESA satisfy Article III standing requirements).

3. Also wrong is defendants' assertion that the requested inspections of defendants' CEC, where they breed elephants to stock their circus, and defendants' "Williston" facility, where defendants house the elephants who have "retired" from the circus, cannot possibly yield any "relevant" information in this case. Def. Opp. at 18-19. Again, whether defendants mistreat any of the elephants – on the road, at the CEC, or at Williston – and whether any of these animals bear wounds, scars, or other signs of mistreatment, is certainly relevant to whether defendants are currently engaged in activities that constitute an unlawful "take" of any of these animals in violation of the ESA.

Also contrary to defendants' assertions, whether or not defendants are currently forcibly "weaning" baby elephants from their mothers, does not render the requested inspection of the CEC irrelevant. Def. Opp. at 18. Defendants have asserted their alleged "conservation" activities – most of which purportedly occur at the CEC – as a defense to plaintiffs' claims in this case. See Defendants' Summary Judgment Memorandum (Docket No.82) at 23-29; Pl. Insp. Mem. at 5-6. In addition, as one of Ringling's head elephant trainers recently testified, the CEC is where all of the baby elephants are "trained" to perform circus tricks. See Deposition Testimony of Troy Metzler at 200, 258 (explaining that Gary Jacobson and his assistant train all

of the baby elephants at the CEC). Therefore, plaintiffs' request to inspect elephants at both the CEC and Williston falls well within the scope of Rule 34.

For these reasons, and those set forth in plaintiffs' memorandum in support of their motion to compel the inspections, any notion that plaintiffs have "not justified" their request for all of the requested inspections, Def. Opp. at 15-19, is simply not true. There is ample justification for the requested inspections – again, both to help prove the validity of plaintiffs' claims in this case and to defeat defendants' proffered defenses.

4. Defendants' suggestion that the requested inspections are "unnecessary" because members of the public can view the animals as they walk to defendants' various performing venues, Def. Opp. at 21, is also not a reason to deny the requested inspections. Plaintiffs wish to conduct an actual physical inspection of the animals, and to uncover evidence of what goes on outside the public's view. Indeed, former Ringling Bros. employees have testified that the elephants are treated very differently in front of the public than when the public is not around. See, e.g., Affidavit of Archele Faye Hundley, Pl. Exhibit MM, Submitted in Opposition to Defendants' Motion for Summary Judgment (Docket No. 113), at ¶ 19 ("[t]he elephants are only unchained when the public is around. Whenever the public is not around, the elephants are chained up"); Deposition Testimony of Tom Rider (October 12, 2006), Pl. Insp. Ex.12 at 34 (explaining that when the Circus had an "open house" for the public, he was required to cover the chains with hay "so people could not see the chains") see also id. generally at 46-84 (describing daily abuse of elephants with bullhooks outside of public view); see also San Jose inspection documents, *supra* at 3-4 (unannounced physical inspection revealed "lacerations behind and around the ears, and puncture wounds on the[] bodies" of seven elephants). Indeed, defendants'

own internal documents demonstrate that the Circus places a premium on making sure that the public cannot see Ringling Bros. employees mistreat the animals. See, e.g., Memorandum from Deborah Fahrenbruck to Mike Stuart (January 8, 2005), FEI 15026 (Pl. Ex. C in Opposition to Defendants' Motion for Summary Judgment) (advocating that public videotape recordings of mistreatment of the elephants be "easily avoided . . . by putting up a tent wall" to block the public's view).

5. Defendants' assertion that the requested inspections should not be allowed because they are "unprecedented," Def. Opp. at 26, is also without merit. As plaintiffs demonstrated in their opening memorandum, the kinds of inspections they have requested fall squarely within the scope of Rule 34(a) and have been permitted in other cases involving the physical condition of animals. See Pl. Insp. Mem. at 7 (and cases cited therein). Indeed, in a case brought against an animal protection organization several years ago for allegedly libeling a nightclub owner by telling the public he beat endangered orangutans before taking them on stage to perform "tricks" for a paying audience, the court permitted a physical inspection of the animals as part of the organization's defense that in fact the animals were mistreated. See Bobby Berosini v. People for the Ethical Treatment of Animals, Case No. A-276505 (Dist. Ct. Nev.), Defendants' First Expert Report (Pl. Insp. Ex. 13), at 3 (describing results of the physical inspection of the orangutans that was conducted "pursuant to court order"); see also People for the Ethical Treatment of Animals v. Bobby Berosini, 111 Nev. 615, 895 P.2d 1269, 1272 (1995) (finding that since videotape shows Berosini "immediately before going on stage, grabbing, slapping, punching and shaking the animals while several handlers hold the animals in position," organization's statements were not libelous).

6. Defendants' insistence that plaintiffs' "steadfastly refuse" to provide any details of the requested inspection, see Def. Opp. at 14, 26 – like many of defendants' self-serving proclamations in this litigation about plaintiffs and their counsel – is demonstrably incorrect. Pursuant to the requirements of Rule 34(a), the Inspection Request includes extensive details about which facilities and which animals plaintiffs wish to inspect, as well as a detailed description of the nature and scope of each inspection plaintiffs wish to perform. See Inspection Request, attached as Exhibit 1 to Plaintiffs' Motion to Compel Inspections.

In addition, plaintiffs have consistently made clear their willingness to work with defendants to refine their request to fashion inspections that will provide plaintiffs with the evidence they wish to obtain, but also cause the least amount of disruption to defendants' operations. Thus, in their initial request for the inspections, plaintiffs stressed that they "are willing to work with defendants to find mutually agreeable dates for the inspections," Rule 34 Request at 8, and in their memorandum in support of their motion to compel, plaintiffs further stressed that they are "also willing to work with defendants to determine the appropriate conditions of each such inspection." Pl. Insp. Mem. at 9 (emphasis added). Indeed, plaintiffs are confident that, with the approval of the Court, the parties can work out the details of inspections that will both provide plaintiffs with relevant evidence, and protect defendants from any undue burden and expense. See also Minnesota Mining & Mfg. Co., Inc. v. Nippon Carbide Industries Co., Inc., 171 F.R.D. 246, 250-51 (D. Minn. 1997) ("[o]f course, we recognize that any plant inspection will [cause potential disruption], but the parties are capable of minimizing any distraction through advance preparation"), citing Snowden By and Through Victor v. Connaught Lab., 137 F.R.D. 325, 332-33 (D. Kan. 1991).

Plaintiffs have also identified the expertise of the individuals who will provide each of the inspections – i.e., that these individuals will include "a board certified veterinarian, an elephant biologist, up to two animal behaviorists, and an expert in elephant training and management." See, e.g., Inspection Request at 3. However, because the date on which the inspections will actually take placed necessarily dictates which individuals will be available to perform the inspections, plaintiffs also informed defendants that, as soon as the parties agree on the dates of the inspections, plaintiffs will identify precisely which experts they wish to conduct the inspections and provide the qualifications of each such person. See, e.g., Inspection Request at 3 ("[o]nce 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"). However, in light of defendants' refusal to allow any inspections to take place, regardless of which experts would perform the inspections, the fact that plaintiffs are not yet able to identify the experts who will be available to perform such inspections is not a legitimate basis for denying the requested inspections at this juncture.[2]

---

[2]Should the Court deem it necessary for plaintiffs to identify each potential expert who may be available for the requested inspections in order to grant plaintiffs' request, plaintiffs are certainly willing to divulge this information. However, because fact discovery has not been completed in this case, the parties have not yet exchanged expert witness lists. See Plaintiffs' Motion for Extension of Time to Exchange Expert Reports (Oct. 21, 2004) (Docket No. 25); Minute Order granting Plaintiffs' Motion (Oct. 25, 2004). Thus, defendants insistence that it must know every possible expert who will be used to conduct the requested inspections – when defendants have refused to allow any such inspections for a whole host of reasons that have nothing to do with the identities of those experts – is clearly as an attempt to force plaintiffs to identify their experts before defendants are required to disclose theirs.

Therefore, while defendants continue to insist to this Court – without any citation whatsoever – that plaintiffs "steadfastly refuse" to provide any details to defendants about the requested inspections, and that plaintiffs "make no effort to tailor their request to this case or to reasonably limit the scope of it," Def. Opp. at 24 – these rhetorical statements are simply not true. It is the defendants in this case – not the plaintiffs – who are engaged in obfuscation and delay tactics. Thus, this Court's admonition at the September 16, 2005 hearing that it is "sick and tired of all these efforts by litigants to hide the ball" – which defendants quote twice in their opposition, see Def. Opp. at 15, 27 – was **directed solely at the defendants**, not the plaintiffs. See Sept. 16, 2005 Tr. at 36 (Court referring to fact that defendants failed to identify the existence of, let alone produce, medical records of the elephants that were requested by plaintiffs); see also id. (Court informs defendants' counsel that "someone is going to respond and tell me why [defendants] could not respond to a clear English request for production of all medical and veterinarian records . . . And if they don't . . . I'm going to hold them in contempt . . . [and] I'm not gong to rule out incarceration either").

7. Defendants' assertion that the requested inspections should not be allowed because defendants do "not permit strangers to have direct contact with . . . [the] elephants," Def. Opp. at 23, is completely belied by the fact that defendants frequently allow strangers – including members of the public, members of the media, local "consulting" veterinarians who have never met the elephants, and others – to have "direct contact" with the elephants. See, e.g., Photographs of members of the public interacting with Ringling Bros. elephants, FEI 7723, 7724, 7867, 7870, 7288, 7289 (Pl. Insp. Ex. 14); Deposition Testimony of Robert Ridley (an elephant handler for Ringling's Blue Unit), Pl. Insp. Ex. 15, at 71 (explaining that he used a particular

elephant for "touch tours for handicapped and blind children"); Electronic Email from Ringling Bros.' Public Relations Manager (October 28, 2003), FEI 18529 (Pl. Insp. Ex. 16) (forwarding photographs of two baby elephants taken "during our media tour," including photographs of a reporter "who was thoroughly enchanted" with the animals "petting" one of the elephants, and stating that "[t]he CEC staff could not have been more welcoming to us"); "Human and Animal Partnership," Feld 0004608 (Pl. Insp. Ex. 17) (explaining that members of the media are allowed "to go behind the scenes and observe all of the steps that are taken to ensure all animals are comfortably settled"); Letter from Michelle Pardo to Kimberly Ockene (May 12, 2006) (Pl. Insp. Ex. 18) at 5 ("[d]efendant has arrangements with consulting veterinarians to provide veterinary care to its animals").[3]

In addition, defendants sometimes have no choice but to allow "strangers" to have "direct contact" with the elephants, including state humane officers, such as those who conducted the 1999 inspection in San Jose discussed *supra* at 3-4. See also Photographs of San Jose Police Officer and Santa Clara Humane Officers conducting physical inspections of Ringling elephants, Feld 004756 - 64 (Pl. Insp. Ex. 19). Plaintiffs are confident that, once the Court grants the requested inspections, they will be able to identify experts who are eminently qualified to conduct those inspections.

8. Defendants' wild – and completely unsupported – assertions that these Rule 34 inspections should not go forward because plaintiffs are associated with "terrorists," Def. Opp. at 19-20, shows the depths to which defendants will go to prevent plaintiffs from presenting this

[3]The fact that defendants frequently allow other members of the public to have "direct contact" with the elephants also defeats defendants' contention that the inspections cannot be allowed because of the risk of transmission of TB to the elephants. See Def. Insp. Opp. at 23.

highly relevant information to the Court. Plaintiffs include the American Society for the Prevention of Cruelty to Animals – the nation's oldest and most respected animal welfare organization – and three other highly regarded animal protection organizations. None of these organizations constitute the "fringe factions" or "underground criminal group" to which defendants refer in their Opposition, at 19-20, nor do defendants cite any evidence to the contrary. The mere fact that the plaintiff organizations – and their members – abhor defendants' daily abuse of Asian elephants and other animals, speak out against that mistreatment, and want it to stop, does not make them "terrorists."

Moreover, plaintiffs' counsel are all officers of the Court and highly respected members of the legal community. Thus, there simply is no basis for defendants' specious claims that plaintiffs and their experts will somehow run amuck and wreak havoc on the security of defendants' operations if they are granted the Rule 34 inspections that have been requested here, and that are plainly allowed under the plain language of this rule of discovery.

9. Again, plaintiffs believe that the parties, with the approval of the Court, can fashion inspections that will provide plaintiffs with the evidence to which they are entitled under Rules 26(b) and 34(a), yet minimize unnecessary disruption to defendants' operations. However, should the Court nevertheless believe that, based on defendants' numerous objections to the requested inspections, it is imprudent to allow such inspections to proceed, then defendants should not be permitted to rely on the fact that their experts have inspected these animals as a basis for the opinions proffered by defendants' experts in this case. Rather, either both sides to this dispute should have the opportunity to inspect the animals, or neither side should be allowed to offer testimony on this point. See, e.g., McKeeson Corp. v. Islamic Republic of Iran, 185

F.R.D. 70, 77 (D.D.C. 1992) (stating that it is "patently unfair" to allow the defendant to inspect the facility at issue "but deny the same opportunity to the plaintiffs," since this "would seriously impair the ability of the court to reach a just determination . . .").

B. Plaintiffs' Opposition To Defendants' "Cross Motion To Enforce Prior Court Orders."

There is no merit whatsoever to defendants' contention that, by serving defendants with a Rule 34 request for inspections, plaintiffs violated the parties' September 16, 2003 Joint Statement Pursuant to Local Rule 16.3 – the basis for defendants' "cross motion to enforce prior court orders." The Joint Statement does not address Rule 34 inspections. Nor, contrary to defendants' assertions, Def. Opp. at 3, does the Joint Statement even refer to "written discovery."[4]

Rather, the Joint Statement very specifically states that:

> The parties agree to serve document requests, interrogatories, and/or requests for admissions no more than 45 days after the Initial Disclosure Date, and the parties further agree that a party may serve successive Requests of Documents, Interrogatories, and/or Requests for Admission only upon a showing that the predicate facts necessary to make such requests first became available to that party during the discovery process.

Joint Statement (Def. Exhibit B to Opposition to Motion to Compel Inspections) at 2 (emphasis added). Accordingly, since a Rule 34 request for an inspection is not a "document request," "interrogatory," or "request for admission," plaintiffs certainly have not violated this Joint Statement in any respect.

---

[4]Defendants' counsel's "certification" that she "conferred" with counsel on defendants' cross motion, see Def. Opp. at 3, n.2, is mistaken – no such discussion took place with either of plaintiffs' attorneys who participated in the phone conversations that are referenced by defendants.

Moreover, plaintiffs' Rule 34 Request for Inspections does not require defendants to produce anything in writing or to answer any questions in the nature of interrogatories or depositions. Hence, the Fourth Circuit case relied on by defendants simply does not apply here. See Belcher v. Bassett Furniture Indus., 588 F.2d at 904 (disallowing inspection "coupled with interrogations" of the company's employees, since the same discovery could be obtained through document production requests). Rather, the only involvement of defendants' employees that is required to comply with plaintiffs' inspection requests is that defendants make available an official "who will identify the elephants at each facility" and "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, e.g., Inspection Request, Exhibit 1 to Def. Opp., at 3.

Moreover, the Parties' Joint Statement also provides that "the parties agree that all discovery shall be completed not more than 45 days after the parties exchange rebuttal expert reports," Joint Statement at 5 (emphasis added) – an event that has not yet occurred, because defendants did not provide plaintiffs with the discovery they were required to produce in June 2004, including the medical records for the elephants. See Plaintiffs' Motion for Extension of Time to Exchange Expert Reports (October 21, 2004) (Docket No. 25) see also Minute Order granting plaintiffs' motion (November 16, 2004). Instead, as the Court well knows, plaintiffs had to move to compel the production of such records – which the Court granted on September 26, 2005, and then, when defendants still failed to produce those records, plaintiffs had to move to enforce the Court's previous Order, which the Court also granted on September 26, 2006.

Accordingly, since defendants' extremely belated production of the medical records has clearly informed plaintiffs' need for the requested inspections, see supra at 4-5, and the inspections are also integral to the preparation of plaintiffs' expert reports, the Rule 34(a) Inspection Requests are clearly permissible and appropriate under the plain language of the parties' Joint Statement. See also Rule 26(a)(2)(B) (parties must include in their expert reports "a complete statement of . . . the basis and reasons" for their expert opinions, as well as "the data or other information considered by the witness in forming the opinions" and "any exhibits to be used" to support those opinions). Furthermore, largely as a result of the delay tactics employed by defendants in this case, discovery has not been completed, nor has the Court even set a date for the close of discovery. See also Order Denying Defendants' Motion To Stay All Discovery (September 26, 2006) (Docket No. 94). Thus, plaintiffs certainly did not serve their inspection requests after any applicable discovery "cut-off date." Def. Insp. Opp. at 3.

Therefore, there simply is no basis whatsoever for defendants' "cross-motion" to enforce the Joint Statement against plaintiffs. In addition, the Court should decline to accept defendants' "alternative" invitation, Def. Opp. at 8, to reopen the discovery that is foreclosed by that Joint Statement – i.e., "document requests, interrogatories, and/or requests for admissions" – without the "showing" that is required, i.e. "that the predicate facts necessary to make such requests first became available to that party during the discovery process." See Joint Statement at 5. This "alternative" suggestion – like all of the other litigation tactics that have been employed to date by defendants – is clearly calculated to further delay a trial on the merits of this case, and hence the day of reckoning on how Ringling Bros. mistreats the Asian elephants it uses in its highly

profitable circus.[5]

CONCLUSION

For the foregoing reason, plaintiffs' motion to compel the requested inspections should be granted, defendants' cross-motion to preclude those inspections should be denied, and plaintiffs should be awarded their attorneys' fees and costs associated with this matter, pursuant to Rule 37(a)(4).

Respectfully submitted,

/s/
Katherine A. Meyer
(D.C. Bar No. 244301)
Tanya M. Sanerib
(D.C. Bar No. 473506)
Howard M. Crystal
(D.C. Bar No. 446189)

Meyer Glitzenstein & Crystal
1601 Connecticut Ave., N.W.
Suite 700
Washington, D.C. 20009
(202) 588-5206

November 28, 2006

[5]Defendants' suggestion that the newly added plaintiff, Animal Protection Institute ("API"), is somehow in violation of the Parties' Joint Statement, as well as the Court's February 23, 2006 Order allowing plaintiffs to add API as a plaintiff to the case, Def. Opp. at 7-8, is also wrong. To date, defendants have not served API with any discovery, and all of defendants' previous discovery was separately directed to each named plaintiff rather than to plaintiffs collectively.