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.	:	

REPLY IN SUPPORT OF DEFENDANT'S CROSS MOTION TO ENFORCE PRIOR COURT ORDERS

Feld Entertainment, Inc. ("FEI"), through counsel, hereby submits its reply in support of its Cross Motion to Enforce Prior Court Orders:

Plaintiffs Conceded Several Points

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 (11/28/06) ("Reply") does not address or contest the following issues raised by FEI:

1. The March 30, 2004 deadline for written discovery contained in the 12/5/03 Stipulated Pre-Trial Schedule has never been altered or amended. See FEI's Response in Opposition to Plaintiffs' Motion to Compel Inspections and Cross Motion to Enforce Prior Court Orders at 2, 4 (11/9/06) ("Cross Motion").
2. The parties' Rule 16.3 Joint Statement has never been altered or amended. Id.
3. Plaintiffs' written discovery, entitled "Plaintiffs' First Set of Requests for Admission, Interrogatories and Requests for Documents" and served on March 30, 2004, actually

contained requests for inspection of tangible things – cauterizing agents and ankuses. Id. at 7 & Ex. A 14-15.

4. FEI personnel cannot be ordered to perform or participate in any tests or inspections plaintiffs seek. Id. at 16-17.

5. Videotaping FEI's employees for an inspection is an impermissible invasion of their privacy. Id. at 21.

6. FEI has been assaulted and threatened with violence by animal activists, and its property has been vandalized. At a minimum, a confidentiality order is necessary under the circumstances to ensure that security is not breached, and to prevent any threat or harm to FEI, its property, and its employees. Id. at 22.[1]

7. Plaintiffs have made no effort to account for the behavioral differences between male and female elephants, or those elephants that are unaccustomed to any interactions with strangers. Plaintiffs also present no protocol to ensure the safety of either the elephants or humans during their proposed inspection and testing. Id. at 23.

8. Plaintiffs must sign releases to indemnify FEI and hold it harmless for any damage or harm caused by the inspection and testing. Plaintiffs must bear the cost of the inspection, regardless of the fee-shifting provision contained in the ESA. Id. at 24-25.

These points are therefore conceded. Tnaib v. Document Technologies, LLC, 450 F.Supp.2d 87, 91 (D.D.C. 2006) (defendant's arguments that plaintiff failed to address were deemed conceded and three counts were dismissed accordingly); Tripp v. Dept. of Defense, 193 F.Supp.2d 229,

[1] Plaintiffs make a half-hearted attempt to address this issue by proclaiming that neither they nor their counsel are terrorists. (Reply at 13-14). That is irrelevant. Regardless of whether plaintiffs and their counsel would do FEI no physical harm, there are plenty of animal rights activists who support their cause that would. FEI presented the Court with abundant evidence of this, including one threat received from an ASPCA member. See Cross Motion at 19-21. Public dissemination of videotapes or photos depicting the physical layouts of Williston, the CEC, and FEI's traveling units, as well as its employees, is totally unacceptable in light of the risk of harm presented.

243 (D.D.C. 2002) (court deemed argument that plaintiff failed to respond to in any of her briefs as conceded and dismissed defendant accordingly).

Plaintiffs Raise Several New Issues for the First Time in Their Reply

Plaintiffs raise numerous matters for the first time in their reply rather than in their opening motion filed on 10/26/06, which FEI will now briefly address:

For the first time, plaintiffs claim in their Reply that they should be permitted to proceed with an inspection because a September 7, 2000 USDA Inspection report (attached as Ex. 8 to the Reply) indicated that "There is no documentation maintained on elephants that have minor lesions, scars or abrasions." (Reply at 3). They also attach for the first time an Investigation Report and Narrative prepared by the Humane Society of Santa Clara Valley[2] in September 1999 (attached as Ex. 9 to Reply), and two affidavits from Dr. Joel Parrot dated July 25, 2000 (attached as Ex. 10 to Reply) as support for their claim of harm from use of the bullhooks. ***All of these documents, however, were in plaintiffs' possession for at least six months prior to the issuance of plaintiffs' March 30, 2004 written discovery.*** All three of these exhibits are part of plaintiffs' self-styled "report," "Government Sanctioned Abuse: How the USDA Allows Ringling Brothers Circus to Systematically Mistreat Elephants," which is dated September 2003.

Plaintiffs have not acted with the diligence required by law with regard to their request for inspection. See Cross Motion at 5-8 (outlining plaintiffs' untimeliness and lack of diligence

[2] Plaintiffs do not advise the Court that by 1999 the Humane Society of Santa Clara Valley was a private group that the City of San Jose, California had contracted with to perform animal control responsibilities. Unfortunately, the Humane Society of Santa Clara Valley was an animal activist group with a political agenda that diametrically opposed circuses, which it freely admitted in its position paper. See Ex. I, Position Statement, Position on Circus Animals (5/28/99) ("HSSCV disapproves of the use of non-domesticated animals in circuses."). The USDA investigated the allegations made by the Humane Society of Santa Clara Valley, and closed the file after determining that there was no violation of the Animal Welfare Act. Acting under police powers, this group of activists engaged in a witch hunt against Ringling Bros. Circus, and eventually one of its elephant handlers, Mark Oliver Gebel, was tried in 2001 on trumped-up criminal charges leveled by this group. Mr. Gebel was acquitted by a jury without even having to mount a defense. The City of San Jose has since ceased contracting with the Humane Society of Santa Clara Valley to perform animal control responsibilities. This horrendous situation exemplifies what happens when powers of state are granted to those who are unworthy, unqualified, and unable to use them responsibly.

regarding request for inspection). This information was known to plaintiffs back in 2003 before any written discovery even began in this case, and it is entirely disingenuous for them to now say that the "request for inspections was in fact prompted most recently by plaintiffs' extremely belated receipt of the medical records on the elephants." (Reply at 4-5). It is also untrue for plaintiffs to claim for the first time that "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 animal to the records that have been produced." They then cite to the *September 2000* USDA report as proof that FEI does not maintain documentation of minor abrasions, etc. Id. at 5. None of this is news to plaintiffs regardless of what is or is not in any medical record produced by FEI, and plaintiffs know this. The truth is that plaintiffs' failure to act on their desire to conduct an inspection until nearly three years past the discovery cutoff – without seeking leave of court – is nobody's fault but their own.

Plaintiffs now claim for the first time that they should be afforded the same type of discovery as occurs in employment discrimination cases. They attempt to analogize that body of law to support their argument that they should be permitted unlimited discovery to show "unlawful practices." (Reply at 6-7). However, unlike Title VII, the ESA has no pattern-or-practice cause of action. Cf. Bazemore v. Friday, 478 U.S. 385, 698 (1986) (pattern or practice discrimination claim arises under § 707(a) of Civil Rights Act of 1964). Evidence of treatment of others *may* be admissible in employment discrimination cases because the plaintiff in those cases carries the burden of proof regarding an employer's intent and motive in employment decisions. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (establishing the procedural paradigm for proof and burden-shifting in employment discrimination cases); see also Kelly v. Boeing Petroleum Services, Inc., 61 F.3d 350, 360 (5th Cir. 1995) (background evidence

in discrimination cases can be admissible for purpose of assessing employer's motive); Schrand v. Federal Pacific Electric Co., 851 F.2d 152, 156 (6th Cir. 1988) (testimony of other employees who were not similarly situated to plaintiff was irrelevant and unfairly prejudicial). The ESA contains no intent or motive element – either a defendant engaged in certain conduct or it did not, and either that conduct constitutes a taking or it does not. The defendant's intent is not part of any burden of proof or element of any claim under the ESA. The Court's jurisdiction reaches only to the seven elephants with which Rider claims an emotional attachment.[3] Discovery beyond that is not reasonably calculated to lead the to discovery of any evidence admissible *in this case*.

For the first time, plaintiffs cite the Berosini v. PETA case for the proposition that an inspection of animals is proper. (Reply at 9 & Ex. 13). Yet Exhibit 13 indicates that there was a Discovery Commissioner assigned to oversee discovery in that case, and that the identities of the examiners were known and included in the court order granting the inspection, which was limited to 2 hours. Ex. 13 at 2-3. The exhibit also undermines plaintiffs' overarching argument regarding the inspection, which is: "Just go ahead and order the inspection, judge, and we'll disclose the details later." This shoot first and ask questions later mentality violates the plain language of Rule 34 and its attendant caselaw. It apparently did not work well in the Berosini

[3] The organizational plaintiffs now argue that they would have standing independent of Mr. Rider. (Reply at 6-7). Here again, their cited authority does not support their argument. Both cases relied upon by plaintiffs involve challenges to government regulations and named governmental defendants. Plaintiffs deliberately have foregone naming any governmental entity in this lawsuit, and elected instead to sue FEI, a private citizen. In this Circuit, standing requires a direct conflict between the defendant's conduct and the organization's mission. An organization is not injured by expending resources to *challenge* the conduct – such self-inflicted harm does not give rise to standing. Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach, ___ F.3d ____, 2006 WL 3359334, *2 (D.C. Cir. Nov. 21, 2006); National Treasury Emp's Union v. United States, 101 F.3d 1423, 1430 (D.C. Cir. 1996). Plaintiffs' decision to challenge FEI's inclusion of elephants in its circus is borne entirely of their choice, and as such, is a self-inflicted harm that will not confer standing. Similarly, informational injury can occur when a party is denied information to which they are statutorily entitled. Cary, et al. v. Hall, et al., Civil Action 05-4363, 18-20 (N.D. Ca. Sept. 30, 2006) (attached to Reply). As a private citizen, FEI has no ability to deny plaintiffs access to any materials to which they may be statutorily entitled, and consequently, there is also no "informational injury" to them that would confer standing. The organizational plaintiffs have no injury in fact, and absent Mr. Rider, have no standing in this case. See HSUS v. Babbitt, 46 F.3d 93, 97 (D.C. Cir. 1995).

case either, because the filing indicates that a second examination will be sought for which the Court "will be requested to set appropriate conditions and guidelines." Id. at 2; cf. Cross Motion at 11 (inspection order must be formulated with "precision and care"). Plaintiffs state repeatedly that they are "willing to work with FEI" on an inspection, but somehow just cannot bring themselves to reveal to FEI or this Court who will be attending, what their qualifications are, and what they will be doing. (Reply at 10).[4] Such disclosures are mandatory in inspection requests. See Fed.R.Civ.P. 34(b) (request "shall specify a reasonable time, place and manner of making the inspection and performing the related acts"). If this type of obfuscation is plaintiffs' definition of "working with" someone, we would not want to see their definition of "working against" someone.

Plaintiffs attach for the first time numerous photographs to support their preposterous claim that all manner of strangers are permitted to have direct contact with FEI's elephants. This is false. In the first two photos, there is a fence rail separating the humans from the elephants (FEI 7724, 7723). In the next four photos, there is a handler standing directly next to the elephant and within feet of the visitors. (FEI 7867, 7870, 7288-89). The photo in FEI 18530 is cropped too closely to see the physical layout and who is in attendance, but again, there is a coiled rope separating the human from the elephant in the next two pictures. (FEI 18532-33). In the last picture, the woman is not making any contact with the elephants. (FEI 18535). FEI will permit people to pet *certain* elephants. This indirect contact, however, is in stark contrast to the direct contact that plaintiffs seek in their inspection: Nowhere in any of these pictures do you see a gaggle of 8 or more persons climbing into the elephant pen and freely standing

[4] Plaintiffs' compulsive need to hide the identity of their experts from FEI and this Court is bizarre. See Reply at 11 & n.2. Their fear of disclosure suggests that the "experts" are either not competent to perform any inspection or testing, or simply do not exist. See id. at 13 ("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.").

unaccompanied near the elephants to touch, poke, prod, test[5] or perform whatever other undisclosed procedures that plaintiffs have in mind. FEI's handlers are present and within immediate reach to control both the visitors and the elephants. Plaintiffs have no right to compel FEI's handlers to do the same for them by participating in their inspection. Cf., supra, Concession No. 4 (plaintiffs have no right to compel FEI's handlers to assist with and perform an inspection for their benefit). See, supra, Concession No. 4.[6] Nor have plaintiffs proposed any plan that evinces an effort to account for behavioral differences in the various elephants, or to ensure the safety of both the elephants and humans during any inspection. Id. at Concession No. 7.[7] Plaintiffs must sign releases to indemnify and hold FEI harmless for any damage or harm caused by the inspection and testing, as well as bearing any other costs related thereto. Id. at Concession No. 8.

Plaintiffs Cannot Refute the Applicable Scheduling Orders[8]

Plaintiffs continue with their revisionist history of this case by refusing to admit that Rule 34 inspections are written discovery. They argue that "a Rule 34 request for an inspection is not

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[5] Plaintiffs are apparently withdrawing their request to conduct testing at Williston and the CEC, but not on the elephants on the Blue or Red Units. (Reply at 5 n.1).

[6] Plaintiffs' argument that animal control officers are permitted direct contact with the elephants is equally unavailing. Unlike plaintiffs, animal control officers are normally statutorily vested with powers of state to inspect.

[7] FEI presented the declaration of Dennis Schmitt, an expert in Asian elephants, in support of its Cross Motion. See Ex. E to Cross Motion. Dr. Schmitt is one of FEI's consulting vets that plaintiffs reference in their Reply at 13. The other consulting vets, as opposed to local vets, who will travel to the units, Dr. Lindsay and Dr. Isaaza, are also experts in Asian elephants. Plaintiffs presented no declarations whatsoever to support their request, and thus, have no credible basis to refute the clean bill of health requirement that Dr. Schmitt says should be presented. Cf. Reply at 13 n.3 (baldly and incorrectly stating there is no risk of human transmission of TB to the elephants).

[8] The undersigned is neither mistaken nor confused about the multiple conferences she had with plaintiffs' counsel regarding their request for inspection prior to the filing of plaintiffs' motion to compel. In one of the earlier phone calls, Ms. Joiner informed Ms. Sanerib of FEI's position that written discovery had closed and that the inspection was prohibited pursuant to the scheduling orders. During another telephone call with both Ms. Sanerib and Ms. Ockene, Ms. Joiner asked whether plaintiffs would be moving the Court to amend its scheduling orders, and was advised that they would not as plaintiffs maintain such a motion is unnecessary. Ms. Joiner then asked how the issue would be raised and what plaintiffs planned to do procedurally. Plaintiffs' counsel stated that they would move only to compel the inspection, and Ms. Joiner stated that she would then deal with the issue in her response. This is exactly what occurred, and plaintiffs cannot claim that the matter was never discussed with them.

a 'document request,' 'interrogatory,' or 'request for admission'" such that plaintiffs have not violated the Rule 16.3 Joint Statement. (Reply at 15). Plaintiffs cite no caselaw to support their untenable position that Rule 34 inspections are not written discovery. Moreover, their position cannot be squared with the plain language of Rule 34, see Fed.R.Civ.P. 34(a) (any party may serve on any other party a request "to inspect and copy, test or sample any tangible things"), plaintiffs' own conduct in this litigation, see, supra, Concession No. 3 (plaintiffs' "First Request for Admission, Interrogatories and Requests for Documents" included requests for inspection of tangible things), and plaintiffs' own case law upon which they now rely, see Reply at 9 citing Snowden by and through Victor v. Connaught Lab, 137 F.R.D. 325, 332-33 (D. Kan. 1991) (quoted language from case involving ***inspection of a document, rather than tangible thing).***

Indeed, plaintiffs' own argument undermines them: According to plaintiffs, if the only written discovery ever permitted in this case was requests for documents, requests for admissions, and interrogatories, and that these categories exclude a request for inspection, then the parties *never* contemplated and the Court *never* approved any kind of inspection as part of discovery in this case. If so, then plaintiffs still needed to seek leave of court to add this so-called new kind of discovery *never* previously permitted in the scheduling orders. This rationale would also render their prior "document request" that sought inspection of ankuses and Wonder Dust inappropriate. Plaintiffs are fully aware that they are not entitled to the type of self-help to which they have resorted to here, because when necessary in the past, they have sought leave of court to deviate from the scheduling orders. See, e.g., Reply at 16 (citing Plaintiffs' Motion for Extension of Time to Exchange Expert Reports & Minute Order granting same).

Notably, plaintiffs make no effort whatsoever to address the 12/5/03 Stipulated Pre-trial Schedule establishing the March 30, 2004 deadline for written discovery. See Reply at 15-18

(containing no reference to the Stipulation). This deadline was never altered or amended. See, supra, Concession No. 1. Plaintiffs try to blame FEI's medical record production as the basis for their circumvention of the Court's orders, but as FEI has demonstrated, the plaintiffs had the information known to them *before written discovery even commenced* that they now claim is the basis for the request for inspection. See, supra, at 3-4.

Plaintiffs cite McKesson Corp. v. Iran, 185 F.R.D. 70, 77 (D.D.C. 1992) for the proposition that if they are foreclosed from inspecting the elephants, then FEI's own experts should be prohibited as well. Unlike here, however, the Rule 34 request in McKesson appears to have been timely made, and there were no objections raised in that case that the inspection was used for harassment, the information sought was irrelevant or unimportant, and the utility of the inspection could not be contested in good faith. Id. at 76. FEI has raised all of these objections here. Plaintiffs present no authority to support their position that the other party should be punished due to plaintiffs' own dilatory conduct. Moreover, plaintiffs' Reply suggests that the inspection they seek is purely for purposes of expert discovery. If so, the request is premature as this case should not survive summary judgment to proceed to expert discovery. Moreover, if plaintiffs' litigation experts are the ones actually conducting the inspections, then there is absolutely no excuse for the details of the inspection to be shrouded in secrecy before the Court rules on whether it should even proceed. Plaintiffs can disclose these individuals, their qualifications, and what their purported protocol will be so that FEI can make full and informed decisions about the inspections and so that the Court can make a full and informed decision when ruling on the matter.

Plaintiffs also cite McKesson for the proposition that "good cause" is no longer required for inspection requests. (Reply at 2). This is wrong. FEI traced the amendments to both Rules

34 and 26 for the Court. (Cross Motion at 11). Rule 26(b)(1) currently states "***For good cause,*** the court may order discovery of any matter relevant to the subject matter involved in the action." Id. (emphasis added). And as plaintiffs' own authority recognizes, courts apply not simply a generic relevance standard but a balancing test to requests for inspections due to their intrusive nature. See McKesson, 185 F.R.D. at 76 (citing Belcher v. Bassett Furniture Indus. Inc., 588 F.2d 904, 908 (4th Cir. 1978)); see also Cross Motion at 13 (applying Belcher and McKesson).

As FEI previously indicated, the Court's orders in this case bind *all parties*, not just FEI. (Cross Motion at 8). Plaintiffs apparently still do not recognize this. They clearly regard the Court's admonition to stop hiding the ball as inapplicable to them, (Reply at 12), and they do not regard the multitude of Scheduling Orders as binding on them. Id. at 15-17. As further example of this, they claim that API does not have to provide any discovery responses to FEI, because FEI has "not served API with any discovery" and because FEI's prior discovery contained the name of each organizational plaintiff (in the case at that time) in the caption. (Reply at 18 n.5). Yet throughout their Reply, plaintiffs are adamant that "document requests, interrogatories, and/or requests for admissions" are closed. (Reply at 17). How is FEI supposed to serve written discovery on API if it has closed (which FEI recognizes) – should it simply resort to self-help as plaintiffs do and now serve whatever written discovery it sees fit on API? Plaintiffs' argument would invalidate the Court's 2/23/06 Order requiring API to enter this case subject to "abid[ing] by all of the agreed-upon and ordered procedures in this case such as outstanding scheduling and discovery orders and agreements." It also ignores the fact that FEI served upon the organizational plaintiffs ***one collective request for documents*** and ***one collective request for interrogatories***. Thus, the interrogatories and document requests to each organizational plaintiff

were identical. The organizational plaintiffs, in fact, provided ***one collective response*** to FEI's request for documents. API should be required to submit its discovery responses to the same immediately.

There must be equality in this litigation, and what binds one party must bind the others. If plaintiffs are permitted to re-open written discovery to engage in this inspection, then written discovery should be re-opened for everybody – including FEI. The Court should not permit a one-way taking of discovery. FEI should then also be afforded the opportunity to take whatever other written discovery from plaintiffs that it deems necessary and appropriate to its defense.

For the reasons presented herein and in its Cross Motion, the Court should enforce its prior court orders, deny plaintiffs' belated request for inspection, and award FEI its costs and fees for having to respond to a request that was never properly issued in the first instance.

Dated this 8th day of December, 2006.

Respectfully submitted,

/s/

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