

**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., )  
 )  
Defendant. )  
 )

**EXPEDITED REQUEST TO MAGISTRATE FACCIOLA TO MODIFY HIS  
SEPTEMBER 25, 2007 ORDER REGARDING INSPECTIONS  
TO CONFORM TO JUDGE SULLIVAN'S PREVIOUS ORDER**

Plaintiffs respectfully request Magistrate Judge Facciola to modify his September 25, 2007 Order regarding plaintiffs’ right to conduct inspections to ensure that, in addition to physically inspecting the animals themselves, plaintiffs also have the opportunity to at least visually observe the animals in the actual areas where they are normally maintained, as Judge Sullivan held was appropriate in this case. See Aug. 23, 2007 Order (Docket No. 178) at 10 (hereafter “Discovery Order”). Thus, while plaintiffs accept the Magistrate Judge’s decision to allow defendant to bring the animals to a “designated area” of its choice for the purpose of having plaintiffs’ experts conduct the physical inspections of the animals, plaintiffs are concerned that the Magistrate Judge’s Order does not allow them to also collect evidence concerning the way in which the elephants are actually maintained by defendant or the behavior of the elephants – which Judge Sullivan also ruled was “highly relevant” and “material” to this case. *Id.* Because this Court has ordered the parties to meet and confer on these matters by

October 12, 2007, plaintiffs seek expedited consideration of this request. Plaintiffs' counsel has conferred with defendant's counsel who oppose this motion.

### **BACKGROUND**

In this case under the Endangered Species Act, plaintiffs challenge the way defendant treats the endangered elephants in its care as a violation of the "take" prohibitions of Section 9 of the statute, 16 U.S.C. § 1538(a). Specifically, plaintiffs allege that the following practices constitute a "take:" (1) the striking and beating of elephants with bull hooks and other instruments; (2) the chaining and confinement of the elephants for long periods of time; and (3) the forcible removal of baby elephants from their mothers before they are naturally weaned. See Complaint at 20-21 (Docket No. 1). Plaintiffs allege that these routine practices by defendant "wound" the animals and also "harm" and "harass" them within the meaning of the "take" definition of the ESA. See 16 U.S.C. § 1532(19).

In support of their claims, plaintiffs not only allege that these practices physically harm and wound these endangered animals, see e.g., Complaint ¶¶ 63, 68, but they also allege that this treatment "inflicts severe psychological injury" on these extremely intelligent and social animals, see Complaint ¶¶ 64, 69, 76, and that it also "disrupts the elephants' normal behavioral patterns, including their social relationships with other elephants." See Complaint ¶¶ 65, 77 (emphasis added); see also 50 C.F.R. § 17.3 ("harass" includes an "intentional or negligent act or omission which creates the likelihood of injury [to an endangered or threatened animal] by annoying it to such an extent as to significantly disrupt normal behavioral patterns") (emphasis added).

In furtherance of their efforts to obtain evidence in support of their claims, on August 11, 2006, pursuant to Rule 34 plaintiffs served defendant with requests to conduct physical and

behavioral inspections of the elephants and to inspect the facilities where they are maintained and the tools used on them. See Exhibit 1 to Plfs. Mtn. to Compel Inspections, Plfs. Rule 34 Requests for Entry Upon Land and Inspection of Elephants and Facilities (Docket No. 99) (hereafter “Plfs. Rule 34 Requests”); see also Fed. R. Civ. P. 34(a) (“[a]ny party may serve on any other party a request” (1) “to inspect . . . any tangible things which constitute or contain matters within the scope of Rule 26(b),” and (2) “to permit entry upon designated land or other property . . . for the purpose of inspection and measuring, surveying, [and] photographing . . . the property or any designated object or operation thereon, within the Scope of rule 26(b)”) (emphasis added). Plaintiffs honed their inspection requests to provide material evidence for this case and to provide plaintiffs’ experts with an understanding of what the elephants’ daily lives entail – i.e., behavioral and physical observations of the elephants, as well as evidence of the manner in which they are maintained and the tools that are used on them. See Plfs. Rule 34 Requests.

When defendant refused to allow any such inspections, plaintiffs moved to compel the requested inspections. See Plfs. Mtn to Compel Def. To Comply With Plfs. Rule 34 Request For Inspections (Docket No. 99) (hereafter “Plfs. Inspection Mtn.” or “Plfs. Inspection Mem.”). In support of that motion, plaintiffs explained that they sought to inspect the elephants as they were kept “in the ordinary course of defendant’s operations,” including on the train in which they are transported approximately 48-50 weeks each year, and in the primary enclosures where they are kept, because the actual manner in which the elephants are maintained is extremely relevant to plaintiffs’ “chaining and confinement” claim, as is the “behavior” of the elephants, in addition to

their physical condition. See Plfs. Inspection Mem. at 2; see also Complaint ¶ 65 (“[t]his treatment significantly disrupts the elephants’ normal behavior patterns”).

On August 23, 2007, Judge Sullivan granted plaintiffs’ motion, and ruled that the requested inspections – i.e., the physical and behavioral inspections of the animals themselves, as well as inspections of the facilities where they are maintained – are “highly relevant to the question of whether or not defendant’s treatment of its elephants constitutes a ‘taking’ under the Endangered Species Act.” Discovery Order at 10 (emphasis added). Indeed, Judge Sullivan also ruled that “evidence on how FEI’s elephants are *currently* treated is ‘material in any trial for the injunctive relief that plaintiffs seek.’” Id. (italics in original, underlining added) (quoting Def. Reply in Support of Def.’s Mtn. for Summ. J. at 2). However, in response to defendant’s stated concerns “regarding security for the inspectors and animal safety” and “because there are numerous issues that need to be resolved regarding the dates and parameters of the inspections, as well as the individuals who will be involved,” Judge Sullivan referred this matter to this Court “for purposes of overseeing the inspections, developing a framework under which such inspections will be conducted, and resolving any disputes concerning such inspections.” Id. at 10-11. Defendant did not seek reconsideration of Judge Sullivan’s ruling granting plaintiffs’ motion to compel the requested inspections.

On September 25, 2007, this Court issued an Order regarding plaintiffs’ right to physically inspect the animals by having defendant designate an area of its choice for the physical inspection. See September 25, 2007 Order at 1-3 (Docket No. 195).<sup>1</sup> However, the Order does

---

<sup>1</sup> The Order also allows plaintiffs to inspect “the tools or instruments used by defendant in the care and training of the elephants.” See id. at 3.

not provide a means by which plaintiffs may also observe the behavior of the elephants as they are normally maintained, nor allow plaintiffs to actually inspect any of those areas – both of which were important additional aspects of plaintiffs’ inspection requests that were granted by Judge Sullivan. Indeed, this Court’s Order actually prohibits plaintiffs from engaging in these two very important parts of the requested inspection by specifying that “[p]laintiffs shall not be permitted to inspect any of defendant’s other facilities, whether permanent or mobile.” Id. at 3. Accordingly, the Order appears to bar plaintiffs from observing the elephants in the areas where they are normally maintained and also from inspecting those facilities – e.g., the trains where the traveling elephants spend much of their lives, and the primary enclosures where the elephants are kept – all of which was calculated to produce important evidence for plaintiffs which Judge Sullivan recognized was “highly relevant” to their claims.

Therefore, while plaintiffs understand this Court’s decision to have all of the physical inspections of the animals take place in one “designated area,” as a way of dealing with the issues raised by defendant “regarding security for the inspectors and animal safety,” see Discovery Order at 10, plaintiffs respectfully submit that, in keeping with Judge Sullivan’s previous ruling on this matter, plaintiffs should, at a minimum, also be allowed to make visual behavioral observations of the elephants in the areas where they are normally maintained – i.e., the train on which the animals are transported and the primary enclosures where the animals are housed – that do not involve physically handling the animals in any way. Without some accommodation to these additional aspects of plaintiffs’ inspection requests – i.e. the right to conduct behavioral observations of the elephants as they are normally kept and to inspect those facilities, apart from

the physical inspection of the animals – plaintiffs will be denied a major part of the ruling that was already granted by Judge Sullivan.

### **ARGUMENT**

Plaintiffs do not wish to rehash the arguments they made in support of their motion to compel the requested inspections, since Judge Sullivan already granted that motion. Rather, plaintiffs request that this Court modify its September 25, 2007 Order to accommodate the parts of Judge Sullivan’s ruling that granted plaintiffs’ request to conduct behavioral observations of the elephants and to inspect the actual areas where the elephants are maintained – in addition to conducting a physical inspection of them. As noted above, in granting plaintiffs’ motion to compel the requested inspections – which included all three of these components – Judge Sullivan agreed that “such inspections are highly relevant” and “material” to this case. Discovery Order at 10 (emphasis added).

To be clear, plaintiffs are willing to forego their original request to actually conduct the physical inspections of the animals in the places where they are normally kept – even though this is the way inspections are normally conducted of defendant’s circus by the United States Department of Agriculture. See, e.g., USDA Exhibitor Inspection Guide Excerpt at 6.4.1 (attached as Exhibit A) (“[a]ccess to conduct an inspection includes . . . entry into all areas where regulated animals are housed or handled”) (emphasis added).<sup>2</sup> However, plaintiffs nevertheless wish to at least be permitted to have their experts spend some time visually observing the animals in those areas, including the trains on which the elephants are transported and the primary

---

<sup>2</sup> Plaintiffs will also be foregoing their request to inspect “those parts of the facilit[ies] that pertain in any way to the maintenance and care of the elephants.” Plfs. Rule 34 Requests at 2, 5 (emphasis added).

enclosures where they are kept, before they are moved to a designated area for the physical inspections. This would accommodate both of the other two aspects of plaintiffs' request at once – i.e. it would allow plaintiffs' experts to gather information about both the behavior of the elephants and the specific areas where they are maintained.

As explained above, plaintiffs challenge the “chaining and confinement” of the elephants, Complaint ¶¶ 75-78, 96, and they also allege that the elephants' behavior is adversely affected by all of the practices that plaintiffs allege constitute an unlawful “take” of the elephants. See id. ¶¶ 65, 66, 69, 76, 77. Therefore, without being able to actually observe the animals in the areas where they are normally maintained, plaintiffs will be denied the opportunity to obtain important evidence to support these claims. Indeed, as Judge Sullivan noted in granting plaintiffs' motion to compel the requested inspections, “evidence on how FEI's elephants are *currently* treated is ‘material in any trial for the injunctive relief that plaintiffs seek.’” Discovery Order at 10 (emphasis added). However, prohibiting plaintiffs from observing the elephants as they are normally maintained will definitely deprive plaintiffs of evidence about how they are “currently treated.”

For example, denying plaintiffs' experts the opportunity to at least observe the elephants on the trains at a new venue prior to de-training results in the exclusion of material evidence regarding how the elephants are chained on the train when moving from venue to venue. In fact, the elephants performing on the road spend considerable amounts of time chained on the train – e.g., as the attached schedule demonstrates, the Blue Unit will travel to six different venues between September 30 and November 18, 2007. See Plfs. Exhibit B. According to sworn affidavits of recent former Ringling Brothers' employees, the elephants are often on the train for

days at a time. See, e.g., Declaration of Robert Tom Jr. ¶ 17 (Plfs. Ex. C) (“[o]n a 3 or 4 day train run, they stop only once to let the elephants and horses off the train . . .”); Declaration of Archele Hundley ¶ 39 (Plfs. Ex. D) (stating that on a “3-day train ride” from Worcester, Mass. to Tulsa, Okla., the elephants “were only let out once for exercise”).<sup>3</sup>

Therefore, observations that can be made of the conditions on the train in which the elephants are chained are critical to plaintiffs’ chaining and confinement claim. See, e.g., Complaint ¶ 76 (“[t]he chaining and confinement of elephants for so many hours each day causes them physical discomfort, behavioral stress, and severe psychological harm, and also interferes with their normal postural and social adjustments”); id. ¶ 77 (“[t]he chaining and confinement of the elephants . . . disrupts their normal behavioral patterns, including their social relationships with other elephants”).

Similarly important is the manner in which the elephants are routinely kept in their primary enclosures, including the elephants who perform, as well as those housed at defendant’s breeding and retirement facilities in Florida – e.g., the size of those areas, the manner in which the animals are chained and confined, their ability to socialize with other elephants, and other factors are all extremely relevant to plaintiffs’ claims in this case. See Complaint ¶¶ 76-77; see also id. ¶ 96 (Ringling Brothers’ “chaining and confinement of elephants for many hours each day violate the ‘taking’ prohibitions of section 9 of the ESA”).

Indeed, not only is such evidence “highly relevant” to this case, Discovery Order at 10, but denying plaintiffs the opportunity to observe the elephants in the areas where they are

---

<sup>3</sup> These declarations were submitted to Judge Sullivan as Exhibits LL and MM in support of plaintiffs’ opposition to defendant’s motion for summary judgment, see Docket No. 113.



actually maintained risks skewing the very evidence that plaintiffs seek to obtain in this case in two ways. First, moving the elephants from the areas where they are normally kept to a “designated area” may very well alter the behavior of the elephants. Second, only allowing plaintiffs to record the “designated area” as part of their inspections may result in aberrational evidence concerning the elephants’ actual environments. For example, at certain venues around the country, the elephants are kept indoors in underground parking lots for most of the time when they are not actually performing. See, e.g. FEI 11292-93 (Plfs. Ex. E). However, if, under this Court’s Order, defendant is allowed to move the elephants to an outdoor area for the physical inspections, plaintiffs would not only be unable to obtain and present important evidence to Judge Sullivan regarding their “taking” claims – i.e., the manner in which the animals are actually chained and confined – but the Court will be presented with a very different view of the elephants’ environment. Similarly, if at defendant’s breeding and “retirement” facilities in Florida the elephants are normally kept chained in concrete stalls, but for purposes of the physical inspection they are brought outside to open grassy areas, the Court will be presented with a false impression of how the elephants actually spend their time.<sup>4</sup>

---

<sup>4</sup> Indeed, the mere fact that plaintiffs will be conducting pre-arranged inspections will already diminish the value of this evidence for plaintiffs. See, e.g., Giese, Twenty Years Waster: Inadequate USDA Regulations Fail To Protect Primate Psychological Well-Being, 1 J. Animal L. & Ethics 221, 243-44 (2006) (“the USDA has routinely given facilities prior notice of imminent inspections, allowing facilities time to correct violations prior to the arrival of inspectors”); Swanson, Carte Blanche For Cruelty: The Non-Enforcement Of The Animal Welfare Act, 35 U. Mich. J.L. Reform 937, 955 (Summer 2002) (“Besides conducting an insufficient number of annual inspections, APHIS frequently gives prior notice to research facilities of an inspection, if not the precise date and time, allowing facilities to modify their operations in anticipation of the visit”) (emphasis added).

Again, while plaintiffs have no objection to the physical inspections being conducted in a designated area as a way of addressing concerns for the safety of the inspectors and the animals, such inspections should at least be coupled with some opportunity to view and record the actual daily environments of the animals and their behavior. Indeed, in view of the fact that this Court has placed all of this discovery under a protective order and that defendant frequently allows strangers – including members of the public, reporters, and others to actually have physical contact with the elephants – allowing plaintiffs’ experts to merely observe the animals in the areas where they are maintained should not present any significant safety or security issues. See FEI 37470, 37545 (Plfs. Ex. F).<sup>5</sup>

Plaintiffs believe that they can easily cover all of these grounds within the four hours allotted by the Court’s existing Order, with respect to the Blue Unit and Williston facility, which concern approximately four each of the “Pre-Act” elephants whom Judge Sullivan has ruled plaintiffs may inspect, but that they may need some additional time for these observations with respect to the Red Unit and Ringling Brothers’ breeding facility (“CEC”), which concern eight and fifteen of the “Pre-Act” elephants, respectively.<sup>6</sup>

---

<sup>5</sup> See also Plfs.’ Reply In Support of Their Mtn. to Compel Inspections at 12 (Docket No. 116-1), and Exhibits cited therein.

<sup>6</sup> According to the records provided by defendant the four Pre-Act elephants on the Blue Unit are Karen, Minyak, Nicole, and Jewell; the four such elephants at the Williston retirement facility in Florida are Calcutta I, Cora, Putzi, and Siam; the eight elephants on the Red Unit are Asia, Assan, Baby, Bananna, Banok, Sarah, Siam, and Toby; and the fifteen Pre-Act elephants at the Florida breeding facility are Alana, Emma, Icky II, Louie, Zina, Josky, Mala, Sally, Sid, Lutzi, Tova, Susan, Charlie, Rajah, and Vance.

**CONCLUSION**

For all of the foregoing reasons, plaintiffs respectfully request that their Expedited Request To Modify this Court's September 25, 2007 Order Regarding Inspections be granted. Plaintiffs are submitting a proposed Order with respect to their proposed modifications.

Respectfully submitted,

/s/ Tanya M. Sanerib  
Tanya M. Sanerib  
(D.C. Bar No. 473506)  
Katherine A. Meyer  
(D.C. Bar No. 244301)  
Kimberly D. Ockene  
(D.C. Bar No. 461191)

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

Dated: October 4, 2007

Counsel for Plaintiffs