**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.** | |

**PLAINTIFFS' BRIEF REGARDING DEFENDANT'S**
**REQUEST TO BE EXCUSED FROM CONDUCTING CERTAIN DISCOVERY**

At the status conference on November 20, 2007, defendant's counsel asked the Court to rule that defendant need not take certain discovery concerning elephants who are currently traveling with the "Red Unit" of the circus operated by defendant Feld Entertainment Inc. ("FEI"), including the depositions of three former Ringling Bros. employees who left the circus last summer and who witnessed elephants being hit with bullhooks and chained for most of the day and night. See Decls. Archele Hundley and Robert Tom (Exhibit 1). Defendant asserts that such discovery would be a waste of its resources because evidence concerning the Red Unit elephants will be inadmissible at trial in this case in light of Judge Sullivan's ruling that plaintiff Tom Rider only has standing with respect to seven elephants who are currently located on either the Blue Unit, or at FEI's breeding facility, which defendant calls the "Center for Elephant Conservation" ("CEC"). See Hr'g Tr. 36-39, Nov. 20, 2007. This Court already rejected a similar argument with respect to discovery concerning the "captive-bred elephants" owned by FEI, and ordered one of defendant's employees to answer questions about those elephants notwithstanding Judge Sullivan's rulings regarding potential relief in this case. See Judge

Facciola's Order (Nov. 5, 2007).

As demonstrated below, this Court – which has been authorized to resolve discovery disputes – should not be granting motions in limine at this juncture, because defendant's assertion that such evidence will not be admissible at trial is completely premature, and, in any event, because evidence concerning the treatment of Red Unit elephants – like evidence concerning the treatment of any elephant used by FEI – is certainly relevant to both the claims and defenses in this case.

**Background**

The Endangered Species Act ("ESA") prohibits the "take" of any species listed as "endangered," including captive members of the species. See 16 U.S.C. § 1538(a)(1)(B). The term "take" is broadly defined to mean "harass, harm, . . . wound, kill, . . . or to attempt to engage in any such conduct." Id. § 1532(19). Plaintiffs contend that defendant FEI, which owns the Ringling Brothers and Barnum & Bailey Circus, is violating the "take" prohibition because it "routinely" (a) beats and hits endangered Asian elephants with sharp bull hooks and other instruments to train and "discipline" the elephants and keep them under control, and (b) keeps the elephants confined on chains for most of their lives. See Compl. (Docket No. 1) ¶ 1. Plaintiffs allege that "[t]hese unlawful actions are done on a routine basis, throughout the country, for the purpose of making the elephants perform in the circus and otherwise commercially exploiting these magnificent animals." Id. (emphasis added).

In February 2003, noting that "[t]he strongest case for standing" was presented by Mr. Rider – who worked with a number of the elephants over several years – the Court of Appeals ruled that Mr. Rider's allegations of injury were sufficient for standing purposes to survive a motion to dismiss, and that accordingly it need not decide whether the other organizational plaintiffs have standing "because each of them is seeking relief identical to what Rider seeks." ASPCA v. Ringling Bros. & Barnum &

Bailey Circus, 317 F.3d 334, 335, 338 (D.C. Cir. 2003). Since that time, plaintiffs have supplemented their Complaint by adding the Animal Protection Institute ("API") as an additional plaintiff. See Docket Entry ("DE") 180. There has never been any ruling regarding API's standing, nor any definitive ruling concerning the standing of the other organizational plaintiffs.

On November 25, 2003, Judge Sullivan denied defendant's motion for a protective order to limit discovery to only those examples of unlawful conduct that had been alleged by plaintiffs in their 60-day notice letters, finding that "Plaintiffs 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." Order (DE 15) (emphasis added). Since that ruling, plaintiffs have been taking discovery regarding their claims that defendant "routinely" beats and hits all of its elephants with bullhooks, and routinely keeps all of the elephants in chains for long periods of time.

In August 2007 Judge Sullivan denied defendant's motion for summary judgment with regard to the elephants in defendant's custody obtained prior to 1976 (the "Pre-Act elephants"), and granted defendant summary judgment with respect to the "captive-bred" elephants, on the sole ground that the citizen suit provision of the ESA does not permit plaintiffs to "enforce the terms of FEI's [captive-bred wildlife] permit." See DE 173 at 19. On the same day, Judge Sullivan granted plaintiffs' motion to compel inspections of the elephants, but limited the inspections to the Pre-Act elephants. See DE 178 at 10. On October 25, 2007, Judge Sullivan ruled that plaintiff Tom Rider may only obtain relief with respect to the "Pre-Act" elephants with whom he alleged a relationship that formed the basis of his Article III standing as previously upheld by the D.C. Circuit. See DE 213 at 6.

## ARGUMENT

### A. Defendant's Motion In Limine Is Premature.

The Court should deny defendant's request because motions in limine should be decided by the trial judge after discovery is completed, not before, and hence defendant's motion is premature. See, e.g., Jones v. Ebrahimi-Zanganeh, No. A. 87-0094, 1989 WL 4977, at *1 (D.D.C. Jan. 12, 1989) (denying as premature motion in limine regarding admissibility of evidence); Margiou v. Wick, No. 88-0658, 1988 WL 135054, at *1 (D.D.C. Dec. 9, 1988) (same); Infinity Prods., Inc. v. Premier Plastics, LLC, No. CIV.00-36, 2001 WL 1631423, at *3 (D.Minn. Aug. 20, 2001) (denying as premature motion to exclude evidence because: "[T]he 'better practice is to deal with questions of admissibility of evidence as they arise.' This is especially appropriate when the motions turn on facts to be developed at trial." (internal citations omitted)); Sperling v. Hoffmann-La Roche, Inc., 924 F. Supp. 1396, 1413 (D.N.J. 1996) (denying as premature motion in limine "because it is difficult to rule on the admissibility of pieces of evidence prior to trial" and "[i]t is often useful to wait to see how the trial unfolds").

Indeed, although the judge presiding over discovery matters has discretion under Federal Rule of Civil Procedure 26(c) to fashion protective orders designed to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," here defendant does not seek to be "protect[ed]" from any discovery. On the contrary, defendant wants this Court to rule that it need not conduct certain discovery that it otherwise would take, and to which plaintiffs do not object – i.e., the depositions of three individuals whom plaintiffs long ago informed defendant they intend to call as witnesses in this case.[1] Indeed, plaintiffs informed defendant more than eight months ago that they

[1]In fact, defendant recently served subpoenas on these three individuals for this purpose.

intend to call these former Ringling employees as witnesses, and also provided defendant with sworn declarations detailing their eye-witness accounts of defendant's mistreatment of elephants. See Hr'g Tr. 40, Nov. 20, 2007; see also Supplemental Filing Supp. Mot. Summ. J. (DE 113).

Moreover, the sole ground upon which defendant appears to be asking this Court to grant a motion in limine is its assertion that the evidence concerning Red Unit elephants will be found to be irrelevant by Judge Sullivan, and that therefore taking these individuals' depositions would be unnecessarily burdensome. However, not only is evidence concerning the treatment of the Red Unit elephants extremely relevant as demonstrated below, but an assertion that evidence is irrelevant does not ordinarily suffice as grounds for a protective order during the discovery phase. As this Court has observed, "[t]he premise . . . that it is an appropriate exercise of the judicial supervision of discovery to issue a protective order to prevent counsel from asking a question that is irrelevant" is flawed because "the federal courts do not permit a witness to refuse to answer a question that is irrelevant." Banks v. Office of Senate Sergeant-at-Arms, 222 F.R.D. 7, 18 (D.D.C. 2004); see also Univ. of Mass. v. Roslin Inst., 437 F. Supp. 2d 57, 61 (D.D.C. 2006) (denying defendants' motion for protective order where "the defendants' position confuse[d] admissibility with discoverability" (emphasis added)).[2]

Moreover, whether the burden FEI alleges it will suffer from taking these depositions is "undue" within the meaning of Rule 26(c) is completely speculative at this stage of the litigation – since Judge Sullivan may very well agree with plaintiffs at the appropriate time that evidence concerning the Red

[2] FEI's protestation that taking these depositions would be a burden is difficult to take seriously in light of FEI's recent notice that it intends to depose a non-party organization to inquire, for example, into that organization's "formation and corporate structure." See Subpoena to Wildlife Advocacy Project (Exhibit 2). Plainly, the testimony of eye-witnesses of elephant mistreatment is far more relevant to the "narrow" ESA issue in this case than much of the discovery on which FEI is electing to spend its time and resources. See Order (DE 176) at 6.

Unit elephants is both relevant and admissible – and hence FEI cannot meet the "good cause" requirement for a protective order. See, e.g., United States v. Int'l Bus. Machs. Corp., 453 F. Supp. 194, 195 (S.D.N.Y. 1977) (denying defendant's motion for protective order regarding depositions where "the apprehension of abuse from which defendant [sought] protection [wa]s merely speculative"); see also Fed. R. Civ. P. 26(c) (burden or expense must be "undue" to warrant protective order (emphasis added)); Roslin Inst., 437 F. Supp. 2d at 61 (a mere demonstration of burden or expense does not suffice for the necessary "good cause" showing under Rule 26(c)).[3]

**B. Evidence About Treatment Of Red Unit Elephants Is Extremely Relevant**

Granting defendant's premature motion in limine would also be inappropriate at this (or any) stage because evidence concerning how the Red Unit elephants are treated by FEI is extremely relevant to both the claims and defenses in this case, and hence falls well within the scope of both Rule 26(b) and the Rules of Evidence. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable . . . ." Fed. R. Evid. 401 (emphasis added); see also 1 Stephen A. Saltzburg et al., Federal Rules of Evidence Manual § 401.02 (9th ed. 2006) ("[t]o be relevant it is enough that the evidence has a *tendency* to make a consequential fact even the least bit more probable or less probable than it would be without the evidence" (italics in original)).

[3] FEI also asserts that if the testimony of these individuals may be allowed at the trial, defendant would be further burdened by having to "track down" a former employee, Sasha Houcke, who worked for the Red Unit and was observed beating an elephant with a bull hook by these individuals. See Hr'g Tr. 36-37, Nov. 20, 2007. However, Mr. Houcke, who was the Elephant Superintendent of the Red Unit, worked for FEI for many years, and, according to FEI employees, did not leave the circus on bad terms. See Dep. Alex Vargas 172-73 (Exhibit 3). Accordingly, there is no reason to believe that FEI would have any difficulty in locating Mr. Houcke and having him testify in this case, if necessary to FEI's defense.

The fundamental issue in this case is defendant's pattern of routine mistreatment of endangered elephants in violation of federal law. See, e.g., Compl. ¶ 96 ("Ringling Bros.' past and continuing routine beatings of its elephants; . . . its routine use of bull hooks, whips, and other weapons, to train, control, and punish its elephants . . . ; and its chaining and confinement of elephants for many hours each day violate the 'taking' prohibitions of Section 9 of the ESA" (emphasis added)). Accordingly, a pattern or practice of harm to any of the elephants is not only relevant, but is critical to proving that defendant is also harming the specific elephants with whom Mr. Rider formed a bond. Therefore, information about the abuse of other FEI elephants "is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the . . . routine practice," Fed. R. Evid. 406 – as Judge Sullivan previously recognized when he denied defendant's request to limit discovery to only those practices detailed in plaintiffs' notice letters. See supra.

Moreover, defendant has never taken the position that its elephants are treated any differently depending on which Unit they are on or when they were obtained by defendant. See, e.g., Dep. Gary Jacobson 179, 190-91. Indeed, the elephants – including some of the seven that Mr. Rider knows – are transferred from one facility to another, and hence the practices used at all of these facilities are pertinent to plaintiffs' claims that defendant systematically mistreats the elephants, including those as to which Mr. Rider has standing.[4] Therefore, just as an individual person alleging harm to himself is entitled to obtain evidence pertaining to harm to others in the same situation, evidence pertaining to the

[4] For example, Mysore was at the Blue Unit when Mr. Rider worked there, but was recently traveling with defendant's "Gold Unit," see Dep. Trans. Troy Metzler 116-24 (Aug. 8, 2006) (Exhibit 4), and is currently located at the CEC. Similarly, until some time in 2005 Lutzi was on the Blue Unit, see Dep. Alex Vargas 52-53 (Exhibit 3), but she is currently at the CEC. Nicole was on the Blue Unit when Mr. Rider worked for the circus, was then transferred to the CEC for some period of time, and is now back on the Blue Unit.

overall treatment of FEI's elephants is relevant to the treatment of the seven elephants Mr. Rider knows. See, e.g., Doe v. District of Columbia, 230 F.R.D. 47, 55 (D.D.C. 2005) (denying request for protective order because "[e]vidence that others placed in defendant's care . . . suffered abuse [was] crucial to plaintiff's establishing there was a policy or practice involved").[5]

Information about the overall mistreatment of elephants is also relevant because it tends to demonstrate that other evidence of abuse, including abuse of the seven elephants whom Mr. Rider knows, was not an aberrational event or mistake, but rather was done knowingly – often referred to as "prior bad acts." See Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts" may be admissible to show "intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." (emphasis added)). Indeed, here, defendant will undoubtedly assert that any specific incident of mistreatment that plaintiffs offer into evidence is aberrational, was committed by a rogue employee, or was taken out of context. Hence, evidence showing that the elephants are routinely mistreated in many different ways throughout the circus and by many of its employees, including those in both high and low level positions at all of Ringling Bros.' facilities, is clearly relevant to refute such defenses, and will also be valuable to plaintiffs' efforts to impeach likely defense witnesses – e.g., Ringling employees who testify that neither they nor others employed by FEI engage in abusive behaviors.[6]

---

[5] See also Morris v. Wash. Metro. Area Transit Auth., 702 F.2d 1037, 1045 (D.C. Cir. 1983) (in action alleging retaliatory discharge, information regarding past acts of employer were admissible because they "tend to show the existence of a 'custom or policy'"); Founding Church of Scientology of Washington, D. C., Inc. v. Kelley, 77 F.R.D. 378, 380 (D.D.C. 1977) (in sexual harassment case evidence of additional incidents of harassment is relevant to whether there was harassment at a prior time (citation omitted)).

[6] Similarly, such evidence is also relevant to defendant's contention that any particular incident of abuse was a violation of defendant's own policies, for which defendant should not be deemed responsible. See Jones v. Hosp. of Univ. of Penn., No. A.03-CV-4938, 2004 WL 1166585, at *3 (E.D. Pa. May 24, 2004).

Contrary to defendant's assertions, Judge Sullivan certainly has not ruled that discovery concerning elephants other than those whom Tom Rider knows is no longer relevant. Rather, his summary judgment rulings only bear on the scope of relief to which Mr. Rider is entitled, and his ruling limiting plaintiffs' inspections to the "Pre-Act elephants" tailored the inspections to accommodate defendant's concern that allowing plaintiffs to inspect any of its elephants would cause serious security problems and safety concerns for the elephants. See DE 178 at 10; see also McKesson Corp. v. Islamic Republic of Iran, 185 F.R.D. 70, 76 (D.D.C. 1999) (courts are to tailor Rule 34 inspections in a way that "balance[s] the degree to which the proposed inspection will aid the search for truth against the burdens and dangers created by the inspection").[7]

Finally, because Judge Sullivan has not issued a definitive ruling with regard to the standing of the organizational plaintiffs – nor could he have done so in light of the fact that defendant did not move for summary judgment on this basis – it is possible that the Court may ultimately find that one or more of the other plaintiffs also has standing and may obtain relief regarding elephants in addition to those for which Mr. Rider has standing. See DE 213 at 2 (a "district court may revise its own interlocutory rulings 'at any time before entry of judgment adjudicating all of the claims and the rights and liabilities of all the parties'"); see also ASPCA, 317 F.3d at 338-39 ("We . . . do not decide whether the other plaintiffs have standing because each of them is seeking relief identical to what Rider

[7] Nor did Judge Sullivan's ruling denying plaintiffs the opportunity to add the three former Red Unit employees as additional plaintiffs in any way mean that there should be no discovery with respect to the Red Unit elephants, as defendant will likely contend. Rather, Judge Sullivan simply held that adding three new plaintiffs to the case would "further complicate" this case, including by requiring "substantial additional discovery" as to these three individuals' standing to seek relief as to additional elephants. See DE 213 at 11. However, Judge Sullivan certainly did not suggest that these individuals could not be fact witnesses, let alone rule that discovery concerning how the elephants on the Red Unit are treated is not even "relevant" as an evidentiary matter to the claims that remain in this case.

seeks.").[8]

Accordingly, because the organizational plaintiffs have alleged standing sufficient to obtain relief with respect to all of the elephants, and those allegations may ultimately be deemed sufficient by Judge Sullivan and/or the Court of Appeals, the interests of judicial economy and efficiency also favor allowing the parties to continue to obtain discovery concerning the mistreatment of any elephants so that in the event one or more of these plaintiffs is determined to have standing, the Court will not need to reopen the discovery process to obtain that evidence.[9]

Respectfully submitted,

/s/ Katherine A. Meyer
Katherine A. Meyer
(D.C. Bar No. 244301)

Meyer Glitzenstein & Crystal
1601 Connecticut Ave., N.W.
Suite 700
Washington, D.C. 20009

[8] In fact, the Animal Protection Institute ("API") was not even a plaintiff to the case when Judge Sullivan issued his initial standing decision and has made standing allegations that are functionally identical to those that have been upheld in other recently decided cases – including that defendant's "taking" of the elephants in ways that have not been permitted pursuant to the process created by section 10 of the ESA violates API's statutory rights to obtain information, and that accordingly, "API must spend financial and other resources pursuing alternative sources of information about defendants' actions and treatment of elephants." Compare Supplemental Compl. at ¶ 6 (Docket No. 55), with Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach, 469 F.3d 129, 132-33 (D.C. Cir. 2006) (organization's allegations that defendants' conduct had "caused a drain on [its] resources and time because the organization has had to divert significant time and resources" from other activities was sufficient for standing under Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982)).

[9] Even if Mr. Rider is the only plaintiff who ultimately is found to have standing, it is also possible that the relief to which he is entitled may encompass more than the seven elephants he knows. For example, the Court could conclude that the elephants Mr. Rider personally knows can receive better treatment only if there is relief directed at FEI's systemic practices.

(202) 588-5206

Stephen A. Saltzburg
(D.C. Bar No. 156844)
George Washington University
School of Law
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7089

Counsel for Plaintiffs

Dated: November 30, 2007