UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF PLAINITFFS' MOTION TO COMPEL DEFENDANTS' COMPLIANCE WITH PLAINTIFFS' DISCOVERY REQUESTS

Pursuant to Federal Rule of Civil Procedure 37(a), plaintiffs, the American Society for the Prevention of Cruelty to Animals, the Fund for Animals, the Animal Welfare Institute, and Tom Rider, have moved to compel discovery responses from defendants Ringling Brothers and Barnum & Bailey Circus and Feld Entertainment, Inc. (collectively, "Ringling Bros." or "Ringling") in this case challenging Ringling Bros.' unlawful treatment of Asian elephants under the Endangered Species Act, 16 U.S.C. § 1538. As demonstrated below, defendants have blatantly violated the Federal Rules of Civil Procedure by refusing to produce or search for information that plaintiffs have requested that is plainly encompassed within the scope of Rule 26(b) and is critical to plaintiffs' preparation of their case. Instead, defendants have provided cryptic and evasive responses, broad and non-specific objections, and have unilaterally narrowed the scope of plaintiffs' requests without obtaining a protective order allowing them to do so.

Plaintiffs must therefore request that the Court order defendants to comply with their discovery requests.

As further explained below, defendants' failure to comply with their discovery obligations has seriously impaired plaintiffs' ability to identify potential crucial witnesses, and to provide their experts with information that is critical to the preparation of their expert reports, pursuant to Rule 26(e). Therefore, although the parties are continuing to engage in discovery pending the resolution of this Motion, plaintiffs request that the Court rule on their motion as expeditiously as possible.[1]

BACKGROUND

A. The Claims and Defenses Involved in This Litigation

This case involves plaintiffs' challenge to the methods used by Ringling Bros. to train, control, restrain, "discipline,"[2] and otherwise handle the endangered Asian elephants it uses in its circus performances. Plaintiffs allege in their Complaint, and intend to prove, that such methods – which include beating and striking the elephants with sharp "bull hooks," keeping the elephants chained by front and back legs without any freedom of movement for up to twenty hours a day or more, and forcibly removing nursing baby elephants from their mothers – constitute prohibited "takes" under the

[1] The night before plaintiffs' filed this motion pursuant to the schedule set by the Court and agreed to by the parties, see Transcript of January 11, 2005 Hearing, at 3-4 (Exhibit M), defendants faxed plaintiffs' counsel a letter reiterating their position on most of the matters addressed in this motion, and indicating that they intend to provide additional information in response to plaintiffs' discovery at some unidentified time in the future. Plaintiffs have informed defendants that, obviously, to the extent that defendants subsequently provide plaintiffs with information that is covered by the motion to compel, such information will no longer be in dispute, and plaintiffs will so inform the Court.

[2] This is the term used by defendants themselves. See Brief of Defendant-Appellee in the United States Court of Appeals for the District of Columbia Circuit, Case No. 01-7166 (Aug. 23, 2002), at 4.

Endangered Species Act ("ESA"), 16 U.S.C. § 1538(a), because they "harm," "harass," and "wound" these endangered elephants. See Complaint ¶ 96; see also 16 U.S.C. § 1532(19) (definition of "take"). Plaintiffs also intend to prove, as alleged in the Complaint, that defendants' actions also violate ESA regulations that require captive endangered animals to be maintained under "humane and healthful conditions," 50 C.F.R. § 13.41, and that they also violate Animal Welfare Act regulations governing the treatment of elephants used in circuses, which constitutes a separate violation of the ESA regulations. See Complaint ¶ 97; see also 50 C.F.R. § 13.48 (any person holding a captive-bred wildlife permit under the ESA must comply with "all applicable laws and regulations governing the permitted activity") (emphasis added).

In defense of this action, defendants intend to argue that plaintiffs, and, in particular, Mr. Rider, lack Article III standing. In addition, they intend to assert that they obtained many of the elephants before the enactment of the ESA in 1973, and hence are exempt from certain provisions of the Act with respect to such animals, even though the exemption on which defendants intend to rely does not apply to the "take" of an endangered animal, or where the animals are used "in the course of a commercial activity." 16 U.S.C. § 1538(b)(1). See Defendants' Supplemental Memorandum In Support Of Their Motion To Dismiss The Complaint (June 23, 2003) ("Def. Supp. Mem."), at 3-4. Defendants have also indicated that they will argue that, because they are operating under a "permit" from the Fish and Wildlife Service ("FWS") under Section 10 of the ESA to engage in activities that are otherwise prohibited by the ESA, where necessary to "enhance the propagation or survival" of the species in the wild, 16 U.S.C. § 1539(a)(1), none of the "take" prohibitions apply to defendants' activities

because they are "conserving" the Asian elephant by breeding it for use in their circus. See Def. Supp. Mem. at 5-7. Defendants have also made it clear that they intend to rely on the fact that the U.S. Department of Agriculture has exercised its discretion not to enforce the Animal Welfare Act ("AWA") against them in many instances, as an additional basis for asserting that they are not in violation of the "take" prohibitions of the ESA or the FWS's regulations that require them to comply with all other "applicable laws and regulations," including the AWA. 50 C.F.R. § 13.48; see Def. Supp. Mem. at 8-9.

This case was remanded to this Court on February 4, 2003 from the D.C. Circuit, see ASPCA v. Ringling Bros., 317 F.3d 334 (D.C. Cir. 2003), which held that plaintiffs had alleged sufficient Article III standing to proceed. This Court subsequently denied defendants' motion to dismiss, and further ordered the case to go forward. See Order (July 30, 2003).

B. The Parties' Discovery Disputes

1. Court Rulings and the Exchange of Discovery

At the outset of discovery, defendants contended that plaintiffs should not be permitted to take discovery concerning any information other than the specific instances of mistreatment of elephants described in the "notice letters" plaintiffs sent to defendants pursuant to the requirements of the ESA. See Parties' Joint Statement (Sept. 16, 2003), at 2-3; Plfs. Motion to Resolve Discovery Dispute and Supporting Memorandum (Sep. 26, 2003), at 1. In response, plaintiffs contended that, because the incidents described in the notice letter were merely illustrative of the ongoing pattern and practice of ESA violations that plaintiffs allege violate the ESA, plaintiffs are entitled to take discovery

concerning defendants' past, present, and ongoing treatment of their Asian elephants. See id. at 2. On November 25, 2003, this Court agreed with plaintiffs, and ordered 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 (Nov. 25, 2003) (emphasis added).

Defendants then moved for a blanket protective order that would allow them to unilaterally determine when particular documents are "confidential," putting the onus on plaintiffs to challenge each such designation. See Memorandum in Support of Defendants' Motion for a Protective Order (Oct. 8, 2003), at 1. The Court denied that motion, however, and ordered that "defendants may move for a protective order with respect to particular specified information that is to be produced in discovery, upon a showing of 'good cause,' as permitted by 26(c) of the Federal Rules of Civil Procedure," Order (Nov. 25, 2003). To date, defendants have not moved for any such protective orders.

The parties exchanged Fed. R. Civ. P. 26(a) Initial Disclosures on January 30, 2004, and served their first discovery requests on each other on March 30, 2004. Plaintiffs served one combined set of requests for admission, interrogatories, and document requests on both defendants Ringling Brothers and Barnum & Bailey Circus, and Feld Entertainment, Inc., see Plaintiffs' First Set of Requests for Admission, Interrogatories and Requests for Documents ("Plfs. Requests") (Exhibit A), although they could have served separate sets on each defendant. See Fed. R. Civ. P. 33(a). Defendants served separate requests for admission, interrogatories, and document

requests on each of the three organizational plaintiffs, and a separate set of discovery requests on Mr. Rider. On June 9, 2004, the day the parties agreed upon for the exchange of discovery responses, plaintiffs delivered to defendants in-depth interrogatory responses and a total of thirteen boxes of documents, as well as nineteen videotapes, in response to defendants' document requests. To assist defendants in sorting through plaintiffs' responses, plaintiffs organized their document production responses to correspond to defendants' requests, rather than producing the documents as kept in the ordinary course of business. Plaintiffs also provided defendants with a detailed privilege log, as required by Rule 26(b)(5), which identified over one hundred records that are being withheld in whole or in part under clearly identified privileges.

Plaintiffs complied scrupulously with their obligations under the federal rules to respond to defendants' requests, despite the tremendous inconvenience and burden that responding placed on plaintiffs — non-profit organizations and an individual of limited means. Indeed, defendants have not contested or otherwise complained in any way about plaintiffs' discovery responses.

Defendants, on the other hand, provided plaintiffs with only two boxes of documents, along with written responses to plaintiffs' discovery requests that contained blanket objections to every single specific discovery request, in addition to a host of non-specific "general objections" that apply to all of their discovery responses. See Defendants' Objections and Responses to Plaintiffs' First Set of Requests for Admission, Interrogatories, and Requests for Documents ("Def. Response") (Exhibit B). Moreover, defendants purportedly produced their documents as kept in the ordinary course of business, and did not provide any indication as to which documents are responsive to

plaintiffs' particular discovery requests. Defendants also provided plaintiffs with a privilege log that identified a total of only five documents that were being withheld as privileged. See Defendants' Privilege Log (Exhibit C).

2. Defendants' General Objections

Among their general objections to plaintiffs' discovery requests, defendants objected to "each request for admission, interrogatory, or document request to the extent that such information is within the categories for protection under Federal Rule of Civil Procedure 26(c), or the production of information or documents subject to protective orders, confidentiality agreements, confidential settlement agreements, and/or statutory provisions that bar the disclosure of those documents or of the information therein without the consent of third parties." Def. Response at 3. However, defendants did not move for a protective order with respect to any such information, or even indicate in response to specific discovery requests whether plaintiffs had in fact requested information that defendants believe falls within any of these categories. Instead, defendants apparently unilaterally determined whether plaintiffs' requests sought information for which defendants could have sought a protective order for under Rule 26(c), and withheld information on that basis.[3]

Moreover, because defendants made a general objection on this basis, they also apparently did not identify any such withheld records on their privilege log. Instead – in what has now become a discernible pattern – defendants apparently take the position that if they objected to producing records on some basis, then any records that they believe fall within that objection are deemed "non-responsive" to plaintiffs' discovery requests –

[3] Although plaintiffs have sought clarification on this point, see January 10, 2005 Letter, at 11, to date, defendants have failed to provide it.

and hence defendants are not only excused from producing such information, but are also not required to identify the requested material on their privilege log. Consequently, and because defendants never stated in response to specific discovery requests whether otherwise responsive information was in fact being withheld, plaintiffs have absolutely no idea whether, in fact, defendants have withheld any requested information on the basis of this – or any other – general objection, and are therefore forced to compel the production of any such information.[4]

In addition, defendants interposed general objections that unilaterally narrowed the scope of several of plaintiffs' requests that required defendants to "identify" individuals who would have information concerning the treatment and care of defendants' Asian elephants – information that is indisputably relevant to the central claims and defenses in this case. See Complaint, ¶ 1; Fed. R. Civ. P. 26(b). Thus, instead of identifying all of the individuals plaintiffs requested, defendants determined that they would only "identify their current and former employees and other individuals who have or may have substantial personal knowledge concerning the subject matter of the interrogatories." Def. Response at 4 (emphasis added). Plaintiffs, however, did not request the names and other identifying information only for individuals who defendants believe have "substantial personal knowledge," and defendants have not explained with any specificity why fulfilling plaintiffs' actual requests is unduly burdensome.

[4] Similarly, defendants objected to "requests for documents that are public or are otherwise readily available to plaintiffs," Def. Response at 3, again without ever indicating, in response to specific requests, whether defendants had in fact withheld information on this basis. Accordingly, to protect their interests, plaintiffs have to assume that material has been withheld on this basis as well, and are forced to move to compel all such information.

Accordingly, plaintiffs are moving to compel a complete response to these interrogatories as well.

Defendants also objected to providing documents within the reasonable 10-year time frame that plaintiffs requested for many of their discovery requests – *i.e.,* documents and information dating back to 1994 – despite this Court's order 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 (Nov. 25, 2003). Instead, defendants unilaterally determined that 1996 should be the applicable cut-off date for discovery, without moving for a protective order, but instead summarily stating that searching for information for the additional two years requested by plaintiffs would be "overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence." Def. Response at 5. Accordingly, plaintiffs must move to compel information withheld on this basis as well.

Defendants also objected to several of plaintiffs' "definitions," but again, did not state whether these objections actually resulted in the withholding of documents or information responsive to plaintiffs' requests, leaving plaintiffs again to assume that information has in fact been withheld on this basis. For example, defendants objected to plaintiffs' definition of "Ringling" to include defendants' agents and attorneys, see Def. Response at 6, but did not indicate whether defendants were withholding documents on this basis, see id. In fact, it was not until the very final stages of the parties' "meet and confer" discussions that defendants revealed they had withheld otherwise clearly responsive information on this basis, including information concerning plaintiff Tom

Rider. See January 19, 2005 Letter from Joshua Wolson to Katherine Meyer (Exhibit D). Indeed, it is now clear that defendants did not produce – or claim a privilege for – any documents that were in the sole possession of defendants' counsel, even though such documents are plainly within the "control" of defendants, within the meaning of Rule 34. Instead, as they did with respect to their other objections, defendants apparently considered all such records to be "non-responsive" to plaintiffs' discovery requests and hence they neither produced them nor listed them on a privilege log. However, because defendants appear to have withheld critical information on the basis of this broad objection, plaintiffs must also compel production of such withheld information.

Defendants also made the standard objection to providing any information protected by attorney-client, work product, or other privilege, see Def. Response at 3, but again failed to disclose whether any such information was in fact being withheld with respect to particular discovery requests, and only included five documents on their privilege log. Accordingly, plaintiffs must compel defendants either to disclose records withheld on this basis, or to provide a detailed privilege log that includes all such records so that plaintiffs will have some basis for determining whether such records are being legitimately withheld.

3. Defendants' Specific Objections

Defendants' specific objections to each discovery request were no more explicit as to their basis, nor useful in determining what in fact had been withheld from plaintiffs. Indeed, defendants objected to nearly every interrogatory or request for production on the grounds that the requests were "unduly burdensome," or "overbroad," without stating with any particularity at all why this was so. See generally Def. Response at 6-35.

Indeed, defendants objected on grounds of "overbreadth" to plaintiffs' request to provide all documents related to Tom Rider – a plaintiff and key witness in this case. Def. Response at 29.

Defendants also refused to comply with the request included in several of plaintiffs' interrogatories that defendants "identify" records related to the subject matter of the interrogatory. See, e.g., Plfs. Requests at 9, 10 (Interrogatory Nos. 10, 12, 13). However, defendants did not object to the requests to "identify" the relevant documents, nor state that no such documents exist; instead, defendants simply did not comply with this instruction. See, e.g., Def. Response at 18-22.

With respect to the substance of defendants' responses, and apparently because of defendants' broad-sweeping objections and unilateral narrowing of plaintiffs' requests, plaintiffs received a very small percentage of the relevant information they requested. However, because defendants refused to "identify" the records that were responsive to particular discovery requests, as instructed in plaintiffs' interrogatories, and because defendants did not organize their production according to plaintiffs' requests, nor even indicate instances in which no records could be located in response to a particular request, it took a significant amount of time for plaintiffs to sort through the responses and determine what has – and more importantly what apparently has not – been provided by defendants.

Indeed, defendants stated in their general responses that, even in instances where they responded to a particular request with the statement that they "will produce" or "have produced" responsive documents, plaintiffs should not assume that any responsive documents in fact exist, have been produced, or have been withheld on some basis. See

Def. Response at 2 ("A response that defendants have produced or will produce responsive documents is not a representation that responsive documents exist or are in defendants' possession, custody, or control, but that defendants have produced or will produce responsive documents, if any, retrieved in their search") (emphasis added). As such, it took time for plaintiffs to discern whether documents responsive to particular requests had in fact been produced, whether defendants are still planning to produce such records at some unidentified time in the future, or whether defendants simply do not have any such responsive records.

4. Meet and Confer

Once they finally finished piecing together defendants' extremely cryptic responses, to the best of their ability, plaintiffs determined that there were flagrant deficiencies in defendants' production. Therefore, on October 19, 2004, plaintiffs' counsel sent a detailed letter to defendants' counsel outlining the problems in defendants' responses, and initiating the "meet and confer" process required by Federal Rule of Civil Procedure 37(a). See October 19, 2004 Letter from Katherine Meyer and Kimberly Ockene to Eugene Gulland and Joshua Wolson (Exhibit E) ("October 19, 20004 Letter"). Plaintiffs further explained that, because defendants' discovery responses were woefully inadequate, this made it difficult for plaintiffs to prepare their case and for plaintiffs' experts to prepare their expert reports. See id.

Plaintiffs also enumerated the substantive failures in defendants' specific responses, including defendants' failure to provide any records related to plaintiff Tom Rider, failure to provide requested medical records and other historical information for the Asian elephants in their custody, failure to identify individuals with relevant

information, refusal to produce requested video and other recordings concerning the elephants, refusal to produce records or other information relating to the profitability of their commercial exhibition of Asian elephants, and defendants' refusal to produce information related to defendants' purported efforts to "conserve" Asian elephants. Id. Although defendants had not yet noticed the deposition of Mr. Rider, plaintiffs further explained that, until they provide the records plaintiffs requested concerning Mr. Rider – which defendants had neither provided nor claimed a privilege for – plaintiffs would not make Mr. Rider available for a deposition, since they wish to use all such records to prepare Mr. Rider for any such deposition.

Subsequently, the parties engaged in several rounds of correspondence and discussions, including an in-person "meet and confer" conference on November 15, 2004, to attempt to resolve their discovery disputes without court involvement. See Exhibits D-L.[5] However, ultimately, although the parties were able to settle a few of their disagreements, it became clear that the parties had fundamentally different views as to defendants' obligations under the Federal Rules of Civil Procedure, and that plaintiffs would need to move to compel defendants' compliance to obtain the information to which they believe they are entitled.

[5] These Exhibits are: November 8, 2004 Letter from Joshua Wolson to Katherine Meyer and Kimberly Ockene (Exhibit F) ("November 8, 2004 Letter"); December 3, 2004 Letter from Joshua Wolson to Katherine Meyer and Kimberly Ockene (Exhibit G) ("December 3, 2004 Letter"); December 22, 2004 Letter from Kimberly Ockene to Joshua Wolson (Exhibit H) ("December 22, 2004 Letter"); January 4, 2005 Letter from Joshua Wolson to Kimberly Ockene (Exhibit I) ("January 4, 2005 Letter"); January 10, 2005 Letter from Katherine Meyer and Kimberly Ockene to Eugene Gulland and Joshua Wolson (Exhibit J) ("January 10, 2005 Letter"); January 13, 2005 Letter from Katherine Meyer to Eugene Gulland (Exhibit K) ("January 13, 2005 Letter"); January 19, 2005 Letter from Joshua Wolson to Katherine Meyer (Exhibit D) ("January 19, 2005 Letter from Wolson"); January 19, 2005 Letter from Katherine Meyer to Joshua Wolson (Exhibit L) ("January 19, 2005 Letter from Meyer").

ARGUMENT

A. The Applicable Legal Standards

The scope of discovery is broad under the Federal Rules, which entitle a party to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." Fed. R. Civ. P. 26(b); see also Hickman v. Taylor, 329 U.S. 495, 507 (1947) (noting that the discovery rules "are to be accorded a broad and liberal treatment," and that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation"); Wyoming v. USDA, 208 F.R.D. 449, 452 (D.D.C. 2002) ("courts construe the scope of discovery liberally in order to ensure that litigation proceeds with 'the fullest possible knowledge of the issues and facts before trial'") (quoting Hickman, 495 U.S. at 501); Campbell v. U.S. Dep't of Justice, 231 F. Supp.2d 1, 13 (D.D.C. 2002) ("The federal rules caution seekers of protective orders that the scope of discovery is very broad").

Pursuant to Rule 33, parties are entitled to serve 25 interrogatories on every other party, which may relate to "any matters which can be inquired into under Rule 26(b)(1)." Fed. R. Civ. P. 33(c). Pursuant to Rule 34, a party may request another party to produce any designated records that fall within the scope of Rule 26(b) and "which are in the possession, custody or control of the party upon whom the request is served." Fed. R. Civ. P. 34(a). Thus, even if a responsive document is not in the possession of a party, it must nevertheless be produced – or identified on the party's privilege log – as long as it is within the party's "control." Id. Moreover, a party has "control" over a document, and

its production is therefore required, as long as the party has "the legal right to obtain the document[] on demand." Alexander v. F.B.I., 194 F.R.D. 299 (D.D.C. 2000) (internal citations omitted). This obligation extends to responsive documents in the possession of a party's counsel, which must be produced unless they are subject to a privilege, and such privilege is asserted and described on a privilege log or other comparable format. See, e.g., Axler v. Scientific Ecology Group, Inc., 196 F.R.D. 210, 212 (D. Mass. 2000) ("A party must disclose facts in its attorney's possession even though these facts have not been transmitted to the party . . . . Similarly, a party must produce otherwise discoverable information that is in his attorneys' possession, custody or control") (internal citations omitted).

Furthermore, if a party objects to a discovery request on grounds of privilege or some other basis, the objection must be made with specificity as to its grounds. See Lohrenz v. Donnelly, 187 F.R.D. 1, 5 (D.D.C. 1999), citing Fed. R. Civ. P. 33(b)(4) ("[a]ll grounds for an objection to an interrogatory shall be stated with specificity"); Chubb Integrated Systems v. National Bank, 103 F.R.D. 52, 59-60 (D.D.C. 1984) ("An objection must show specifically how an interrogatory is overly broad, burdensome or oppressive, by submitting affidavits or offering evidence which reveals the nature of the burden"); Ellsworth Assoc. v. United States, 917 F. Supp 841, 845 (D.D.C. 1996) ("A party opposing discovery bears the burden of showing why discovery should be denied").

Therefore, if a party makes only broad and ambiguous objections, the objections may be deemed waived. See, e.g., Athridge v. Aetna Casualty and Surety Co., 184 F.R.D. 181, 190-91 (D.D.C. 1998) (holding that defendant waived its right to object

where its objections to specific discovery requests were broad and ambiguous as to what was in fact being withheld on the basis of the objections).

As Judge Facciola explained in Athridge, broad and unspecific objections to discovery requests "hides the ball," because

> it leaves the plaintiff wondering what documents are being produced and what documents are being withheld. Furthermore, it permits the defendant to be the sole arbiter of that decision. Such an objection is really no objection at all as it does not address why potentially responsive documents are being withheld. The defendant, having no incentive to err on the side of disclosure, has arrogated to itself the authority to decide the question of relevance which is unquestionably the decision of the judge. . . . Asserting a relevance objection, then proceeding to agree to produce 'relevant, non-privileged' documents 'subject to and without waiving' that objection, serves only to obscure potentially discoverable information and provides no mechanism for either plaintiffs or the Court to review defendants' decisions.

Id. at 190; see also PLX, Inc. v. Prosystems, Inc., 220 F.R.D. 291, 294 (N.D. W. Va. 2004) (noting that "a general objection usually waives the right to object and requires a party to fully respond").

As demonstrated below, under these well-settled rules of discovery, defendants have failed to comply with their discovery obligations in many respects. Accordingly, they should be compelled to do so, as promptly as possible. Moreover, pursuant to Rule 37(a)(4), defendants should also be ordered to compensate plaintiffs' for their attorneys' fees and costs associated with this motion.

Plaintiffs first address the specific categories of information they are moving to compel, and then turn to defendants' "general objections" which, as discussed above, have also made it necessary for plaintiffs to move to compel complete responses to many of their other discovery requests.

B. Specific Discovery Requests

1. Information Concerning Plaintiff Tom Rider (Document Request Number 5)

As discussed above, plaintiffs sought from defendants all records in their possession, custody, or control "that in any way concern or relate to Tom Rider." Plfs. Requests at 13 (Document Request Number 5). Despite the fact that Tom Rider, a former Ringling Bros. employee, is a plaintiff and one of the key witnesses in this case, defendants objected that this request was "overbroad." See Def. Response at 29. Therefore, other than a few media clips, defendants did not produce any records on Tom Rider, including any employment records for the two and one half years that he worked for Ringling Bros., any information generated or collected by defendants in an attempt to cast doubt on Mr. Rider's credibility, or any other information that discusses or refers to Mr. Rider. Nor did defendants' privilege log contain a single reference to documents related to Tom Rider. See Def. Privilege Log (Exhibit C). Nor, for that matter, did defendants assert that no such responsive records exist. Accordingly, in their October 19 meet and confer letter, plaintiffs explained that, until this particular discovery dispute was resolved, they would not make Mr. Rider available to be deposed – even though defendants had not yet even noticed Mr. Rider's deposition. See October 19, 2004 Letter, at 6. In response, defendants did not produce or identify any additional responsive records, nor state that no such records exist. Rather, they cryptically stated that they "had produced non-privileged documents in their possession relating to Mr. Rider," and that plaintiffs could not "withhold Mr. Rider in retaliation for perceived discovery failures." See November 8, 2004 Letter, at 6.

At the parties' meet and confer conference on November 15, 2004, defendants' counsel assured plaintiffs that defendants did not intend to play games or "surprise" plaintiffs with any impeachment documents at Mr. Rider's deposition. See December 22, 2004 Letter, at 4. Nevertheless, defendants counsel asserted for the first time defendants' position that documents that defendants' attorneys counsel had obtained concerning Mr. Rider were not "responsive" to plaintiffs' request. Thus, defendants made no claim of work product privilege or any other privilege for withholding such documents; instead, they simply deemed the records "non-responsive," and thereby neither produced the records nor identified them as privileged. The basis for this position was not made clear until several weeks later, when defendants' counsel asserted in a letter to plaintiffs' counsel that, because defendants had objected to the inclusion of defendants' attorneys within the definition of "Ringling," any documents in the custody of defendants' counsel that were not in the possession of defendants themselves – in other words any and all materials gathered by counsel on defendants' behalf – were deemed "non-responsive" to plaintiffs' discovery requests. January 19, 2005 Letter from Wolson (Exhibit D). Hence, such records were neither produced nor identified on a privilege log.

This explanation provided an important revelation as to defendants' overall tactics in responding to discovery, not only with respect to records concerning Mr. Rider, but as to all other categories of information to which defendants lodged an objection. Thus, apparently, whenever defendants asserted an objection – no matter how broad in scope or applicability, and without informing plaintiffs – they simply deemed the material covered by the objection as "non-responsive" to the discovery requests. In other words, defendants unilaterally narrowed the scope of plaintiffs' requests, without ever claiming a

privilege, and without ever obtaining a protective order pursuant to Rule 26(c). Indeed, this belated revelation about defendants' methodology for responding to plaintiffs' discovery explained the dearth of records – only five – listed on defendants' privilege log: because defendants had deemed all material in their counsel's possession "non-responsive," they decided there was no need to claim a privilege for any such material.

However, irrespective of plaintiffs' definition of "Ringling" to include agents and attorneys, the Rules of Procedure impose on defendants a clear obligation to provide all responsive records that are within defendants' "possession, custody or control," Fed. R. Civ. P. 34(a)(1) – an instruction that plaintiffs also specifically included in their discovery requests and to which defendants did not object. See Plfs. Requests at 2. Moreover, courts have defined "control" to mean "the legal right to obtain documents on demand." Alexander v. F.B.I., 194 F.R.D. at 301. Therefore, absent a contrary showing, defendants would certainly appear to have the legal right to obtain on demand documents that they have paid their lawyers to generate or collect on their behalf. See Axler, 196 F.R.D. at 213 ("A party must provide otherwise discoverable documents that are in his attorney's possession, custody, or control"). Thus, defendants are plainly obligated either to produce, or describe on a privilege log, all records pertaining to Tom Rider, including all those in the possession of defendants' counsel.[6]

[6] Indeed, at the January 11, 2005 status conference, defendants' counsel did not assert that such records fall outside the scope of Rule 34, as they now apparently contend. On the contrary, defendants' counsel specifically stated that the rationale for withholding documents gathered by counsel was based on the "work product" privilege. See Transcript of January 11, 2005 Hearing, at 7. However, again, no such records have been listed on defendants' privilege log.

Furthermore, many of the records plaintiffs seek, such as employment-related records concerning Mr. Rider, are clearly in the actual possession of defendants themselves. Yet, to date, defendants also have not produced any such records.[7]

Therefore, it is clear that defendants have been playing games with plaintiffs in an attempt to avoid producing documents that are clearly responsive to plaintiffs' requests. Moreover, because defendants have never asserted a work product, or any other, privilege with respect to any of these documents, any such assertion has now been waived. See, e.g., Lohrenz, 187 F.R.D. at 7 (requiring production of documents for which party failed to provide a privilege log); Bregman v. District of Columbia, 182 F.R.D. 352, 363 (D.D.C. 1998) ("plaintiff's failure to comply with Fed. R. Civ. P. 26(b)(5), requiring him to file a privilege log, bars in itself any claim of privilege, whatever its basis"). Accordingly, plaintiffs request that the Court order defendants to produce all of the documents in their "custody or control" that "in any way concern or relate to Tom Rider." Plfs. Requests at 13 (Document Request No. 5). Moreover, because plaintiffs are clearly entitled to such information to prepare Mr. Rider for any deposition that defendants wish to take, unless and until defendants provide plaintiffs with such information, Mr. Rider should be excused from being deposed in this case.[8]

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[7] Although defendants' counsel stated at the recent status conference that they told plaintiffs' counsel "that we'll give them all the employment records and that sort of stuff that we have about Mr. Ryder [*sic*]," Transcript of January 11, 2005 Hearing, at 6, in fact, defendants have never made any such representation to plaintiffs, nor, to date, have any such records been produced in response to plaintiffs' March 30, 2004 discovery requests.

[8] Even though defendants knew that plaintiffs would be addressing this issue in their motion to compel, see, e.g., Transcript of January 11, 2005 Hearing, at 8, defendants – for the first time – nevertheless served a notice of deposition on Mr. Rider four days ago. See Notice of Deposition of Tom Rider (Exhibit S). However, in a phone conversation held yesterday (January 24), defendants' counsel agreed to hold that deposition in abeyance pending the Court's resolution of plaintiffs' motion to compel on this point. Accordingly, plaintiffs are not now moving for a protective order with respect to this matter.

2. Identification of Individuals and Employment Responsibilities (Interrogatory Numbers 4 and 5)

Plaintiffs' Interrogatory Number 5 sought the identity of:

> all persons who have been employed by Ringling for any period of time since 1994 who worked with the elephants in any capacity, including, but not limited to, barn men, handlers, trainers, performers, wardrobe personnel, and floor crew, and describe each person's responsibilities, which elephants (by name) he or she worked with, and the time-frame during which he/she had such responsibilities. Specifically identify all such employees who were hired from Puerto Rico in April or May 1999.

Plfs. Requests at 8 (Interrogatory No. 5). Interrogatory Number 4 also sought identifying information, including job descriptions, of certain current and former employees. Id. at 7.

Defendants objected to Interrogatory Number 5 on several grounds, and provided plaintiffs with only the names of those individuals "who, since January 1, 1996, have been engaged to train, handle, discipline, physically lead, administer medical care to elephants, or present elephants during performances," Def. Response at 15, thereby unilaterally narrowing the scope of plaintiffs' request. For example, defendants refused to provide the names of individuals like Mr. Rider who worked as "barn men" – i.e. individuals responsible for cleaning up after the elephants – who clearly have information that is relevant to this case. Defendants compounded their discovery violation by refusing to identify anyone who, in their view, did not have "substantial personal knowledge" of the subject matter of the discovery request. See Def. Response at 4.

Moreover, even for individuals who defendants did identify, in most instances they provided only the names, and none of the other relevant information that plaintiffs had requested, such as the individuals' job responsibilities. See Plfs. Requests at 8. In other instances, defendants provided exceedingly limited information concerning an individuals' responsibilities, such as the person's job title (*e.g.*, "CEC handler"), but

nothing approaching a "description" of the responsibilities as plaintiffs had requested, and as plaintiffs – who cannot be expected to know defendants' internal terminology – need to understand what the person's job entails. Defendants also failed to identify information concerning which elephants particular employees worked with.

Plaintiffs explained in their initial meet and confer letter to defendants that this response was completely unsatisfactory, and that, by unilaterally narrowing the scope of plaintiffs' request, defendants had omitted the identities of individuals with clearly relevant information to the issues in the case. See October 19, 2004 Letter, at 2-3; see also Fed. R. Civ. P. 26(b)(1) (stating that parties are entitled to discover "the identity and location of persons having knowledge of any discoverable matter"). Plaintiffs noted that because the list defendants provided did not even include Tom Rider, who plaintiffs know worked with the elephants for two and a half years, it was likely that there were a host of other individuals defendants also chose not to include, but who also worked closely with the elephants and would have information pertinent to this case. Indeed, plaintiffs were able to list several additional individuals who had worked as barn men for Ringling Bros., but who also had not been identified by defendants. See January 10, 2005 Letter, at 3-4. In addition, defendants failed to provide information that plaintiffs had requested in Interrogatory Number 4, concerning the employment history of certain former employees. See Def. Response at 11-12.

During their meet and confer conference, plaintiffs' counsel offered a list of the categories of employees that plaintiffs understood had regular contact with the elephants, to assist defendants in complying with Interrogatory Number 5 – most of which had already been specifically included in Interrogatory Number 5 – including barn men, floor

crew, wardrobe personnel, and transportation personnel. Plaintiffs noted that if they received adequate information concerning individuals falling into these categories, they would not move to compel on this topic for the time-being. Defendants agreed to search for and provide this information. However, to date, they have not provided any such additional information.[9]

Finally, to reduce the alleged burden on defendants in identifying the particular elephants with whom each employee worked, plaintiffs agreed to accept a statement as to which elephants traveled with each unit of the circus (e.g., "Blue," "Red," "Gold," or "Hometown Edition"), by year, and a statement as to which employees worked with each unit, also by year. Plaintiffs also agreed to accept this same information in response to a separate interrogatory – Number 9 – requesting similar information. Defendants agreed to search for such information. However, to date, no such information has been provided.

Defendants subsequently took the position that they would not disclose any additional names of employees within the above four categories unless plaintiffs agreed to accept such information in complete satisfaction of their discovery requests, regardless of whether plaintiffs subsequently learned of additional Ringling employees who worked with elephants, but who defendants had failed to identify because defendants did not regard them as falling within such job categories. See December 3, 2004 Letter, at 1-2. Plaintiffs informed defendants that, while they agreed to accept this more limited universe of information for purposes of avoiding an imminent motion to compel, they certainly did not intend to forever waive their right to obtain the identities of additional

[9] At defendants' request, plaintiffs also clarified what they meant by individuals "hired from Puerto Rico," and provided names of actual employees that plaintiffs understood were in fact recruited from Puerto Rico to work with the circus, to assist defendants in responding to the request. Although defendants also agreed to search for this information, to date they have failed to produce any such information.

individuals who also worked with elephants, should it later become clear that such additional individuals exist. See December 22, 2004 Letter, at 2.

Although defendants' counsel today (January 25) indicated that defendants will no longer insist on a waiver of plaintiffs' right to obtain additional responsive information in the future, to date, defendants still have not provided any additional information to plaintiffs in response to Interrogatory Number 5, even though such information is plainly encompassed by the broad scope of Rule 26(b) – permitting discovery of the identities of individuals who have "knowledge of any discoverable matter," Fed. R. Civ. P. 26(b).

Indeed, the names and other identifying information concerning defendants' employees who have worked with elephants are critical for plaintiffs to fully develop their case, since such individuals may have additional information concerning the manner in which defendants treat their Asian elephants. See Lohrenz, 187 F.R.D. at 3 (noting that it is a party's burden to demonstrate good cause to withhold legitimately requested information, and that the demonstration of "good cause under Rule 26(c) must be sufficient to overcome [the opposing party's] legitimate and important interest in trial preparation") (citations omitted); Athridge, 184 F.R.D. at 192 (ordering defendant to disclose names of current and former employees who may have information related to plaintiff's claims). Accordingly, plaintiffs request that the Court order defendants to respond in full to Interrogatory Numbers 4 and 5.

3. Information Regarding Asian Elephants in Defendants' Custody (Interrogatory Number 8; Document Requests Numbers 8 and 16)

Plaintiffs posed several discovery requests seeking information concerning the Asian elephants in defendants' custody or control, none of which defendants have adequately responded to. For example, plaintiffs' Interrogatory Number 8 stated:

> For each elephant that Ringling owned or leased from 1994 to the present, provide detailed information about each such animal, including the name of the animal, the circumstances under which Ringling obtained possession of the animal, whether the animal was born in the wild or in captivity, the date of birth of the animal, and whether the animal has died. If the animal has died, provide the date he or she died and the cause of death. If the animal is still alive, provide the current location of the animal, whether he or she performs with the "Red Unit," the "Blue Unit," is at the [Center for Elephant Conservation] or the Williston facility, or elsewhere, whether the animal has produced any offspring, and if so, the name of each such offspring, whether and how the elephant is genetically related to other Ringling elephants. Identify all records that in any way relate to the information requested by this Interrogatory.

Plfs. Requests at 8-9. Defendants also had two document requests related to the elephants – one (Document Request Number 8) requested all medical records pertaining to the elephants identified in response to the above Interrogatory. The other (Document Request No. 16) sought all records identified in response to the above Interrogatory. See Plfs. Requests at 13-14.[10]

With respect to Interrogatory Number 8, defendants did not provide a written response other than to object to the request, see Def. Response at 18 ("Defendants object to this interrogatory on the grounds of the General Objections and on the further grounds that it is overbroad and unduly burdensome"), and to state that "[s]ubject to and without waiving these general and specific objections, pursuant to Federal Rule of Civil Procedure 33(d), defendants will produce records for each elephant," id. However,

[10] Some of the document requests in plaintiffs' discovery requests were mis-numbered. The document requests on pages 14-15 that read 8-21, should instead read 14-27, respectively.

defendants did not identify which of the records it produced contained the requested information. See id. Thus, not only did defendants fail to comply with the instruction in the Interrogatory to "identify" records related to the requested information, but they also flagrantly violated Rule 33(d)'s requirement that, if a party chooses to produce records that contain the answer to an interrogatory, the party must specify such records in "sufficient detail to permit the interrogating party to locate and identify, as readily as can the party served, the records from which the answer may be ascertained." Fed. R. Civ. P. 33(d) (emphasis added); see also Fishcher & Porter Co. v. Toslon, 143 F.R.D. 93, 96 (E.D. Penn. 1992) ("to the extent that plaintiff asserts that answers to . . . interrogatories can be found within the documents already produced to defendants, plaintiffs must identify with specificity the location and identity of the document in which the relevant information can be found").

In addition, while defendants produced some records that contained responsive information, they certainly did not produce all of the information requested by Interrogatory 8. Instead, defendants produced several "animal censuses" listing animals currently housed at each Ringling Bros. facility, but which do not contain information concerning all elephants owned or maintained by Ringling Bros. since 1994, as requested. Defendants also produced skeletal "medical histories" of some of their elephants, which also do not provide all of the information requested in Interrogatory 8, such as the circumstances under which Ringling Bros. came to have custody of the animal, and whether the animal has died. See, e.g., Medical History for Reba (Exhibit N) (not stating animal's origin, or how she came into Ringling Bros. custody, or whether she has died, even though the record ends in 1998). Defendants also produced a list of baby

elephants born at defendants' "Center for Elephant Conservation" since 1992, which was demonstrably incomplete since it did not include an elephant named Riccardo, who was apparently born in December, 2003, and recently died in August, 2004.[11]

If the complete information requested by this Interrogatory is contained elsewhere in the document production, it is well-hidden – the opposite of what Rule 33(d) intends. Indeed, it would have been less burdensome for defendants to answer the Interrogatory instead of requiring plaintiffs to sift through various documents to find the requested information. See Fed. R. Civ. P. 33(d) (party may produce business records instead of an answer to an interrogatory only where "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served").[12]

Nor did defendants provide, in response to Document Request Number 8, the complete medical records for all of the elephants it has owned or leased since 1994 – information that is clearly relevant to plaintiffs' claims in this case. Rather, the only medical records that defendants produced are the "medical histories" noted above, and a handful of other documents with scattered and incomplete information about defendants' elephants. However, these "histories" are clearly not the actual detailed medical records defendants maintain for the animals, as they do not contain anything more than extremely cursory information about the animals' medical condition. See, e.g., Medical History for Sally (Exhibit P). Moreover, what little information is provided by the "histories," is not

[11] See Marc Kaufman, USDA Investigates Death of Circus Lion; Activists Challenge Ringling Brothers' Account, Say They Notified Federal Officials, The Washington Post, Aug. 8, 2004, at A3 (Exhibit O) (noting that Ringling Bros. reported to the Washington Post that "an 8-month elephant named Ricardo was euthanized . . . last week after falling off a low platform and fracturing its two hind legs").

[12] For all the same reasons, defendants' response to Document Request Number 16 – which sought all records identified in response to Interrogatory Number 8 – is also inadequate.

provided consistently for each elephant. For example, many of the histories provide no information after 2003 – even though plaintiffs' discovery requests were served in March of 2004 – and many contain no information before 1998 or 1999. Indeed, because the "medical history" for the young elephant named Shirley does not extend past March 2003, it does not even indicate that she gave birth at the end of 2003 to Riccardo. See Medical History of Shirley (Exhibit Q).[13]

Moreover, defendants did not produce any records at all for Riccardo, other than a videotape of his birth, nor provide records for several other Ringling elephants whom plaintiffs were able to identify, including elephants named Luke, Roxy, Bunny, and Lecheme. See October 19, 2004 Letter, at 6.

Furthermore, although many of the records contain notations about testing for tuberculosis, defendants did not produce any of the actual testing results, which are clearly encompassed within plaintiffs' request, and which United States Department of Agriculture guidance and regulations direct defendants to maintain in their files. See http://www.aphis.usda.gov/ac/TBGuidelines2003.pdf, at 2; see also infra at 29 (discussing defendants' refusal to provide records relating to tuberculosis).

During the parties' meet and confer discussions, defendants initially agreed to search for additional records responsive to these requests. See December 3, 2004 Letter, at 2. However, defendants recently announced – for the first time – that they would not produce any "additional or more detailed medical records" without plaintiffs' consent to a

[13] There are many additional examples of the inadequacy of the medical records defendants produced. For example, the "history" for the elephant named Sally notes that she has given birth to a baby, but contains absolutely no information as to her post-partum health. See Medical History for Sally (Exhibit P). The same is true for all of the elephants who have notations in their records that they gave birth.

protective order, asserting that such medical records are somehow "confidential," see January 4, 2005 Letter, at 3, although no such records have ever been listed in defendants' privilege log, and despite the fact that other medical records were produced without any such claim of confidentiality. What is most disturbing about this recent announcement, and more telling as to the general nature and inadequacy of defendants' overall responses, is that defendants now admit that they have more responsive records that they were simply withholding, without a claim of privilege, and without even telling plaintiffs that they existed.

However, because defendants failed to claim a privilege or lodge a timely confidentiality objection for these highly relevant records, they have waived their right to assert that such records are now "confidential." See, e.g., Athridge, 184 F.R.D. at 191 ("Because [defendant] agreed to produce the documents and did not lodge specific . . . objections to these nine requests, I conclude it has waived its right to object"); Puricelli v. Borough of Morrisville, 136 F.R.D. 393, 395 (E.D. Pa. 1991) ("Generally . . . a party who fails to serve an objection to interrogatories within the time prescribed by Rule 33 waives the right to later raise that objection"); Avery Dennison Corp. v. Four Pillars, 190 F.R.D. 1, 2 (D.D.C. 1999) ("Failure to produce a privilege log may be deemed a waiver of the privilege"); cf. Western Trails, Inc. v. Camp Coast to Coast, Inc., 139 F.R.D. 4, 11 (D.D.C. 1991) (disclosure of confidential information waives privilege). Accordingly, defendants should be ordered to produce all of the records requested in Interrogatory 8, and Document Requests 8 and 16, without limitation.

4. Records Concerning Tuberculosis (Document Request Number 8)

Defendants have also refused to produce any documents related to tuberculosis – a highly contagious disease – on the grounds that such records are irrelevant to the claims in this case. See January 4, 2005 Letter, at 3. However, plaintiffs have already obtained several documents through the Freedom of Information Act requests documenting that several of the Ringling Bros. elephants have tested positive for Tuberculosis – a disease that elephants do not normally contract in the wild. See Government Sanctioned Abuse: How the United States Department of Agriculture Allows Ringling Brothers Circus to Systematically Mistreat Elephants ("Enforcement Report"), at Chapter 10 (Table of Contents and documents excerpted from Chapter 10 are attached as Exhibit R). Moreover, as plaintiffs have explained to defendants, and as plaintiffs' experts will testify, tuberculosis is a stress-related disease, and can be extremely indicative of the conditions under which the elephants are maintained. As such, information related to tuberculosis is clearly pertinent to the claims and defenses in this case. Accordingly, plaintiffs request that the Court compel defendants to produce, in response to Document Request Number 8, as well as Document Request Number 23 (which requests records related to plaintiffs' Enforcement Report), all records related to tuberculosis in the Asian elephants it has owned or leased since 1994.

5. Information Related to Plaintiffs' Report (Interrogatory Number 15; Document Request Number 23)

Plaintiffs Interrogatory Number 15 requested that defendants identify records that concern each of the investigations and other matters discussed in each of the ten Chapters in the Enforcement Report written by plaintiffs that was attached to their discovery requests, and to identify individuals with information related to these matters. Plfs.

Requests at 11; see Enforcement Report (Table of Contents attached at Exhibit R; full Report available at http://www.fundforanimals.org/library/documentViewer.asp?ID=1130&table=documents). The Interrogatory also sought the identification of individuals who took videotape or photographs of an elephant named Benjamin, who is the subject of a chapter of the Report. Plfs. Requests at 11. Plaintiffs' Document Request Number 23, in turn, sought all of the records identified in Interrogatory Number 15. Plfs. Requests at 14.

Nine of the chapters in the referenced Report relate to particular instances of allegations of mistreatment of defendants' Asian elephants that were the subject of various USDA investigations – many of which are also discussed in plaintiffs' Complaint – and thus are at the heart of the claims and defenses in this case. The tenth chapter relates to evidence that Ringling Bros.' elephants have tested positive for and/or have been exposed to other elephants with tuberculosis, which, as plaintiffs have explained, is also highly relevant to this case, and has also been the subject of USDA inquiries. See supra at 30. Nevertheless, and despite the fact that defendants intend to rely on the USDA's enforcement decisions as a defense to this action, defendants flatly refused to identify or produce any documents in response to these discovery requests, asserting that such information was "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence." Def. Response at 24.

In addition, defendants asserted that it was somehow "improper for plaintiffs to identify their own argumentative report, which alleges numerous so-called 'investigations,' 'fact-finding matters,' and 'cases,' and then demand information concerning or relating to their report and assertions therein." Def. Response at 24-25.

However, whether plaintiffs refer to their own Report or any other document to obtain information in discovery is not relevant to the propriety of the request; all that matters is whether the request seeks information within the scope of Rule 26(b) – which these requests plainly do – or whether the requests seek information that is protected by a privilege – which defendants have never asserted.

During the parties meet and confer discussions, plaintiffs clarified that they were not seeking copies of documents that were already contained in the Report. See December 3, 2004 Letter, at 2. Defendants indicated that they would consider producing additional responsive documents with respect to some of the matters discussed in the Report. However, to date, defendants have not produced any additional documents responsive to these requests. Accordingly, plaintiffs request that the Court order defendants to respond to Interrogatory Number 15 and Document Request Number 23 in full.

6. Video, Audio, and Other Recordings (Interrogatory Number 17; Document Request Number 25)

Plaintiffs' Interrogatory Number 17 sought information concerning defendants' practices with respect to video, audio, or other recording of defendants' Asian elephants, including "whether Ringling videotapes training sessions, rehearsals, breeding, or performances." Plaintiffs also sought the identification of "all video, audio, or other recordings that have been made by or for Ringling in the last ten years that involve, concern, or record elephants or individuals who work with elephants," Plfs. Requests at 11, and plaintiffs also requested the production of all such recordings. See id. at 15 (Document Request Number 25).

In response, defendants stated that they have four cameras at the Center for Elephant Conservation that are continuously focused on elephants in the barn, but that because these are "closed-circuit feeds," they "do not contain videotape or audiotape." Def. Response at 26. However, defendants did not indicate whether the footage shot by these cameras is recorded in some other fashion, such as on a computer hard drive, or whether such information is otherwise producible in some tangible form. If so, plaintiffs are entitled to obtain any such relevant information.

Defendants further stated that their "employees shoot thousands of hours of videotape each year," id., but did not state whether employees shoot footage of "training sessions, rehearsals, breeding, or performances," as specifically requested by plaintiffs. See Plfs. Requests at 11. In response to plaintiffs' document production request, defendants stated that they had "identified more than 1,700 videotapes taken since January 1, 1996, that may include footage of elephants." Def. Response at 34. Nevertheless, defendants provided plaintiffs with a total of only eleven videotapes, and refused to provide more until plaintiffs narrowed their request. Id.

In response, plaintiffs suggested that, if defendants would provide plaintiffs with an index or inventory of the 1,700 videotapes that are responsive to their requests, plaintiffs could attempt to narrow their request. See October 19, 2004 Letter, at 5. In addition, plaintiffs provided defendants with the following six categories of recordings that they knew for sure they wanted to obtain and which fell within the scope of the discovery request: (1) recordings related to training sessions with any of the elephants, (2) recordings concerning training methods, (3) recordings of performance rehearsals, (4) recordings concerning any efforts to have mothers nurse and care for their offspring, (5)

recordings concerning the separation of baby elephants from their mothers, and (6) recordings of any attempts to breed elephants. Id. at 8. At the parties' meet and confer conference, plaintiffs agreed that, if defendants provided the recordings that fell within these six categories, plaintiffs would not move to compel discovery on this point at this time. See December 22, 2004 Letter, at 3.

Defendants agreed to search for these categories of recordings, but then refused to produce them unless plaintiffs agree that they will never request any additional recordings other than those that defendants decide fall within these particular six categories. January 4, 2005 Letter, at 3-4. However, although plaintiffs are willing to accept this more limited production for now, they are unwilling, and are not required, to forever waive their right to seek additional records that are clearly responsive to their requests, and clearly within the scope of Rule 26(b), should it become clear that such additional records exist that defendants have failed to produce, but which plaintiffs need to present their case.

Indeed, although defendants have stated that there are 1,700 videotapes that fall within plaintiffs' original request, they have now identified only approximately 150 that fall within the six categories plaintiffs identified during their meet and confer discussions. See January 4, 2005 Letter, at 3. However, without information concerning the remaining 1,550 videotapes, plaintiffs are unwilling to waive their right to obtain all such records at this point. Plaintiffs are particularly reluctant to do so when defendants almost certainly have some index or inventory of all of these recordings, but are unwilling to provide it to plaintiffs, and where defendants have yet to articulate with any specificity why responding to this clearly relevant request imposes an actual undue burden on them.

See Ellsworth, 917 F. Supp. at 844 ("A party opposing discovery bears the burden of showing why discovery should be denied").

Accordingly, because defendants have no basis for conditioning their release of clearly responsive records on plaintiffs' waiving their right to obtain additional relevant information in the future, plaintiffs must ask the Court to order defendants to respond to these requests.

7. Information Related to Defendants' Alleged Conservation of Asian Elephants (Interrogatory Number 11; Document Request Numbers 16, 9 and 10)

Plaintiffs' Interrogatory Number 11 asked defendants to, "identify all records that pertain in any way to Ringling's efforts to breed Asian elephants in captivity," since 1994. Plfs. Requests at 9. Plaintiffs' document request number 16 sought all records identified in response to this Interrogatory. [14]

Such information is clearly relevant to this case, since deficiencies in breeding and raising offspring can be indicative of treatment that constitutes a "take" under the ESA. See, e.g., 50 C.F.R. § 17.3 (defining "harass" to include activities that "disrupt normal behavioral patterns which include . . . breeding"). In addition, defendants have already indicated that they will assert as a defense to this action that they have a valid "captive-bred wildlife permit" to engage in otherwise prohibited activities under the ESA because they are engaging in activities that "conserve" the Asian elephants. See supra at

[14] Interrogatory Number 11 also sought, for each breeding effort, information concerning "how that effort was undertaken, when that effort was undertaken, whether artificial insemination or any similar method was used, the result of each such effort, the amount of money spent on each such effort, the outcome of each such effort, the identity of the mothers and resulting calves for each such effort, the complete medical history of the mother involved in each such effort, including both before and after such effort was undertaken, the complete medical history, up to the present, of each of the offspring that was produced as a result of each such effort, and the current age and location of each such mother and offspring of each such effort." Plfs. Requests at 9.

3; Def. Supp. Mem. at 7. Therefore, such information is clearly relevant to both the claims and defenses in this case.

Defendants objected to the term "efforts" as overbroad, and also objected that the requested information was not within the scope of Rule 26(b). Def. Response at 21. "Subject to and without waiving" those objections, defendants indicated that they would, pursuant to Rule 33(d), "produce records relating to their breeding program." Id. However, because defendants failed to specify what records contained the information responsive to this interrogatory – as required by Rule 33(d) – plaintiffs were again left to sort through the records and determine whether defendants did in fact produce any such responsive records. While the production did contain some records relating to defendants' breeding program, such as passing references to births in the elephants' "medical histories," it is not possible that defendants provided a complete response to this request, since – as defendants themselves note in their objection to the request, see Def. Response at 20 – defendants have an entire facility in Florida, called the "Center for Elephant Conservation," whose sole ostensible purpose is to breed Asian elephants.[15]

During the parties' meet and confer conference, plaintiffs clarified for defendants that the requests sought all information in any way related to the breeding of Asian elephants. Defendants agreed to search for additional responsive documents. However, to date, no such additional documents have been produced. Accordingly, plaintiffs have no choice but to request the Court to order defendants to produce these records.

To further explore defendants' defense that they are engaged in legitimate "conservation" of the Asian elephant, plaintiffs' Document Request Numbers 9 and 10

[15] The only other records produced by defendants that appeared to be responsive to this request are a chart that apparently tracked certain elephants' progesterone levels, and the aforementioned incomplete list of elephants born at the "Center for Elephant Conservation" over the past decade.

sought documents concerning the financial investment defendants undertaken to conserve elephants in the wild in Asia. See Plfs. Requests at 13. Defendant initially flatly refused to produce any such documents, based on the objection that the requests were vague and ambiguous, overbroad and unduly burdensome, and also sought information that was irrelevant to the case. See Def. Responses at 30-31. Once again, as with every other objection, defendants provided absolutely no explanation or elaboration concerning the justification for these objections.

However, defendants have now told plaintiffs that they are willing to produce "documents sufficient to identify the projects in which defendants have engaged to 'conserve elephant habitat in the wild in Asia,'" but, again, only if plaintiffs will accept what defendants determine is "sufficient," in full satisfaction of Document Requests 9 and 10. See December 3, 2004 Letter, at 3. However, especially given defendants' proven tendency to withhold from plaintiffs clearly relevant information, plaintiffs are not willing to accept such limited information on this point. Therefore, plaintiffs request that the Court order defendants to respond in full to Document Request Numbers 9 and 10.

8. Commercial Information (Document Request Numbers 11 and 6)

Defendants also refused to produce any records concerning the commercial aspects of their exhibition of endangered Asian elephants, even though the issue of whether Ringling is engaged in a "commercial activity" will undoubtedly be an issue before the Court in this case. See supra at 3. Indeed, defendants have already asserted as a defense to plaintiffs' claims the argument that many of the elephants in question were owned by Ringling prior to the enactment of the ESA, and hence are exempt from certain

protections of the statute. See, e.g., Defendants' Supplemental Memorandum In Support Of Their Motion To Dismiss The Complaint (June 23, 2003), at 3-4. However, even assuming that the factual predicate to this argument were correct, the exception relied upon by Ringling does not apply where the animal is used "in the course of a commercial activity." 16 U.S.C. § 1538(b)(1) (emphasis added).[16] Accordingly, evidence bearing on the commercial aspects of defendants' use of the elephants is highly relevant to this case. In addition, the profitability of the elephants is also extremely relevant to the credibility and bias of many of defendants' fact and expert witnesses, particularly those who are employed by Ringling Bros.

Thus, defendants have refused to produce any records responsive to plaintiffs' Document Request Number 11, which sought all records that:

> in any way reflect the amount of money that (a) Ringling and (b) Sells-Floto [a subsidiary of Ringling that operates concessions at the Circus] bring in each year, including both gross and net amounts, from (i) ticket sales and (ii) concessions, in connection with circus performances that include Asian elephants.

Plfs. Request at 13-14. This request also seeks "all documents and records that in any way relate to how profitable the circus is, how profitable the circus is because it uses and exhibits elephants, and the importance of elephants to the profitability or success of the circus." Id.

Defendants have also refused to produce any records in response to plaintiffs' Document Request Number 6, for all records that:

> [i]n any way relate to or concern advertising and public relations for Ringling's circuses, including, but not limited to, the copy for such advertising and public relations, records that relate to or concern the amount of money spent on such advertising and public relations, planning concerning where and when to disseminate such advertising and public relations efforts, documents that relate to

[16] Moreover, as discussed supra, defendants have failed to provide complete information concerning which animals were held in captivity in 1973.

> or concern surveys, questionnaires, focus groups, and other efforts to ascertain how to advertise, publicize, or educate the public about the circus, and documents and records that relate to or concern efforts to counter negative publicity generated by animal welfare organizations.

Plfs. Requests at 13.

Defendants refused to produce any documents responsive to these requests on the grounds of overbreadth, undue burden, and irrelevance. Once again, defendants provided no specific articulation as to the foundation for these objections, as the Rules require, and it is not at all clear why providing such information – which a major corporation like Feld Entertainment almost certainly maintains – would result in an undue burden. See Chubb Integrated Systems v. National Bank, 103 F.R.D. 52, 60-61 (D.D.C. 1984) ("An objection must show specifically how an interrogatory is overly broad, burdensome or oppressive, by submitting affidavits or offering evidence which reveals the nature of the burden"); Ellsworth., 917 F. Supp at 845.

Conversely, this information is directly relevant to whether defendants are engaged in a "commercial activity," as well as to defendants' bias and credibility, and defendants' witnesses' bias and credibility, since the highly profitable nature of using Asian elephants in performances – and the strong desire to avoid any restriction (as a result of this law suit or otherwise) on their ability to use the elephants -- is likely to influence whether defendants are completely forthcoming in their portrayal of their treatment of the elephants, i.e. whether they are engaging in activities that amount to unlawful "takes" under the Endangered Species Act.[17]

[17] Defendants agreed to produce "exemplars of actual advertisements that defendants have used since 2000" if plaintiffs would accept this offer in full satisfaction of their request for all records concerning defendants' advertising and public relations. However, plaintiffs are interested in obtaining more than "exemplars" of advertising chosen by defendants (and certainly "exemplars" dated earlier than 2000). Moreover, while plaintiffs might be willing to consider narrowing their

Defendants have also contended that any documents in the custody of Sells-Floto – the entity that provides concessions at the circus – are not responsive because Sells-Floto is not a "party" to this action. See January 4, 2005 Letter, at 4. However, as plaintiffs have explained to defendants, because Sells-Floto is a subsidiary of Feld Entertainment, Feld plainly has "control" over documents in Sells-Floto's possession, and thus, pursuant to Rule 34, defendants must produce such records or assert a valid privilege for withholding them. See, e.g., Gerling International Ins. Co. v. Commissioner, IRS, 839 F.2d 131, 138 (3rd Cir. 1988) (discovery rules require a corporation to "furnish such information as is available from the corporation itself or from sources 'under its control'"). Indeed, despite repeated arguments by plaintiffs that Feld Entertainment has sufficient "control" over the Sells-Floto records, defendants have yet to explain why documents in the custody of Sells-Floto are not within defendants' control, and hence subject to discovery. Accordingly, plaintiffs request an order compelling the production of these records as well. See Cooper Industries v. British Aerospace, 102 F.R.D. 918, 920 (S.D.N.Y. 1984) (noting that defendant had submitted "nothing more than conclusory statements to show that [the requested] documents are not in its custody or control").[18]

C. Defendants' General Objections

As discussed supra, at 7-10, defendants made several general broad and non-specific objections to plaintiffs' discovery requests, without ever stating, in response to

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request or accepting "exemplars" should defendants put forth a legitimate and specified basis for why complying with the original request presents an "undue burden," as of yet defendants have offered no such legitimate basis.

[18] As plaintiffs have also explained, defendants must, at an absolute minimum, certainly produce whatever copies they have in their possession of responsive records that were generated by Sells-Floto.

specific discovery requests, whether they were in fact withholding information on the basis of those objections, and without providing any notations concerning any such information on a privilege log. Accordingly, plaintiffs must assume that otherwise responsive documents have been withheld on the basis of these objections, and therefore must ask the Court to order the production of such information. See, e.g., Athridge, 184 F.R.D. at 190-191 (compelling production of information defendant had withheld on the basis of broad and unspecified objections and noting, inter alia, that "such general objections do not comply with Fed. R. Civ. P. 34(b) and courts disfavor them"). At an absolute minimum, the Court should order defendants to specify what documents have been withheld on the basis of these general objections, and to justify – with specific and concrete reasons – why any particular withholding is justified on the asserted basis. See Ellsworth, 917 F. Supp. at 845; Chubb Integrated Systems, 103 F.R.D. at 59-61.

Thus, plaintiffs request that the Court order defendants to produce, or specifically justify the withholding of: all documents and other information withheld on the grounds that any responsive documents fall within the "categories for protection under Federal Rule of Civil Procedure 26(c)," or call for "the production of information or documents subject to protective orders, confidentiality agreements, confidential settlement agreements, and/or statutory provisions that bar the disclosure of those documents or of the information therein without the consent of third parties," Def. Response at 3.

Similarly, plaintiffs request that the Court order defendants to produce – or specifically justify the withholding of – any "documents or objects that are public or are otherwise readily available to plaintiffs," Def. Response at 3. Indeed, courts have rejected any such claim of privilege. See Mid-Atlantic Recycling Technologies v. City of

Vineland, 222 F.R.D. 81 (D.N.J. 2004); Abrahamsen v. Trans-State Express, 92 F.3d 425, 428 (6th Cir. 1996). Moreover, here, defendants have not even asserted a privilege with respect to any such information.

Defendants must also be ordered to fully respond to plaintiffs' requests that sought documents and information from 1994 to the present. As plaintiffs explained to defendants throughout the meet and confer discussions, documents and information dating back ten years (or more) are highly relevant to plaintiffs' claims that defendants are engaging in a historic and ongoing pattern and practice of unlawful behavior. Defendants did not provide any specific explanation as to why obtaining documents back to 1994 – an additional two years – would result in an "undue burden" on defendants, other than to state that it would impose an additional cost. However, such a cursory and completely self-serving assertion is not adequate to sustain an objection based on "undue burden." See Chubb Integrated Systems, 103 F.R.D. at 60-61. Accordingly, unless defendants articulate, based on specific examples and evidence, precisely why it is unduly burdensome for them to produce an additional two years of documents and information relevant to the claims and defenses in this case, they must comply with plaintiffs' requests.

Defendants must also be compelled to produce – or justify the withholding of – any information withheld on the basis of defendants' general objection based on attorney-client, work-product, or other privilege, see Def. Response at 3, since, aside from the five documents listed on defendants privilege log, defendants did not disclose whether any such information was in fact being withheld with respect to particular discovery requests.

Finally, defendants must also be compelled to produce – or justify the withholding of – any information withheld based on the objections to plaintiffs' definition of "Ringling." Def. Response at 5-6. As the Court in Athridge stated, broad "general objections," such as those made by defendants here, "hide[] the ball," and "leave[] the plaintiff wondering what documents are being withheld. Furthermore, it permits the defendant to be the sole arbiter of that decision," a decision "which is unquestionably the decision of the judge." 184 F.R.D. at 190. Such an approach is not permitted under the Rules, and, accordingly, the Court should compel defendants to produce all information that has been withheld on the basis of these objections.

CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that the Court order defendants to comply with their discovery obligations under the Federal Rules, and to respond to plaintiffs' discovery requests in full, as set forth above, and in the attached proposed Order.

Respectfully submitted,

_____/s/_____
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