Meyer & Glitzenstein
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009-1056

Katherine A. Meyer
Eric R. Glitzenstein
Howard M. Crystal
Kimberly D. Ockene
Tanya M. Sanerib

Telephone (202) 588-5206
Fax (202) 588-5049
meyerglitz@meyerglitz.com

January 10, 2005

Sent By Facsimile and First Class Mail

Eugene Gulland
Joshua Wolson
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Re: ASPCA v. Ringling Bros. and Barnum & Bailey Circus, *et al.*
Civ. No. 03-2006

Dear Mr. Gulland and Mr. Wolson:

We are writing in response to Josh's January 4, 2005 letter regarding plaintiffs' continuing concerns about the defendants' responses to Plaintiffs' First Set of Interrogatories and Document Production Requests (March 30, 2004). At the outset, we assume that if you did not address an issue raised in our December 22, 2004 letter, this means you have no disagreement with our position on that particular issue. We now turn to the items addressed in your letter.

Timing of Production

Our initial discovery responses were served on the defendants on March 30, 2004, yet we still have not received much of the basic information that was requested, and, in many instances, you have made it absolutely clear that you have no intention of providing the requested information. Accordingly, as we stated in our December 22, 2004 letter, we have no choice but to go forward with a motion to compel. We were simply letting you know that, as requested by Judge Sullivan, we intend to let him know this before we file the motion, and, since we have a status conference tomorrow, we intend to use that opportunity to let him know where we

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currently stand on these matters, and what information will – as of tomorrow – be covered in our motion. Obviously, to the extent that defendants provide us with additional information before we file our motion, such information will fall out of the matters covered by the motion to compel. Our current plan is to file our motion to compel by January 25, 2005.

Identification of Documents

There continues to be a misunderstanding about this matter. We stand by our position as articulated in our December 22, 2004 letter. We also note that defendants did not specifically object to the "identify" instruction, with respect to documents.

We also disagree that asking a defendant to "identify" the records that would reflect the answer to a particular interrogatory constitutes "a separate interrogatory" and hence takes plaintiffs beyond the interrogatory limit permitted by Federal Rule 33(a). Again, had defendants been more forthcoming with respect to their document production, this would not be as much of a problem. However, the defendants' lack of document production, coupled with its refusal to "identify" records that contain information requested in plaintiffs' interrogatories made it difficult for us to discern the precise extent of defendants' failure to comply with our initial discovery.

Indeed, in many instances, defendants state that they will produce documents to satisfy their answer to a particular Interrogatory. See, e.g., Response to Interrogatory No. 8. However, defendants do not specify which of the documents they have produced contain the responsive information, as required by Rule 33(d). See also, e.g., Fischer & Porter Co. v. Tolson, 143 F.R.D. 93, 96 (E.D. Pa. 1992) ("to the extent that plaintiff asserts that answers to 'identification' interrogatories . . . can be found with the documents already produced by defendants, plaintiffs must identify with specificity the location and identity of the document in which the relevant information can be found").

In other instances, in response to document production requests, defendants insist that they "will produce" responsive records, but no such records have been produced. See, e.g., Response to Document Request No. 18 (misnumbered 12). It is precisely because of this particular problem that plaintiffs specifically instructed defendants to "identify" such records, see Interrogatory No. 10, since, absent such identification, we are forced to move to compel production of records that defendants claimed they were producing, but which we are unable to find among the records that have been produced.

Accordingly, it is our position that, particularly in light of these demonstrable problems with defendants' discovery responses, in response to Interrogatories that specifically request defendants to "identify" documents that reflect the requested information, when defendants

contend that they have produced any such records, they must tell us which records they believe contain the requested information. On the other hand, if defendants do not have any such records that are responsive to such discovery requests, it is our position that they should make this clear, but not say they "will" produce such records. Otherwise, you will put us in the position of having to move to compel documents that may not exist.

Relevant Time Frame

We also continue to have a disagreement on this point, and we stand by the position articulated in our December 22 letter. Although you insist that plaintiffs "have yet to explain" the basis for our position, this is demonstrably not true. We explained it in detail in both our October 19, 2004 letter (at 2) and our December 22 letter (at 1-2). Indeed, in view of those previous explanations, as well as Judge Sullivan's November 25, 2003 Order, which we cited in our October 19 letter (at 2), your cryptic reference to the "period in suit" only fuels our concern about the overall reliability of your discovery responses.

You also say, for the first time, that requesting information for two more years than you are willing to provide would somehow result in "substantial cost" to defendants, apparently because of the way such information is kept. However, at the meet and confer conference, you did not make any such contention, but rather, very clearly stated that this was a matter of principle with defendants, i.e., that you did not believe that information dating back to 1994 was "relevant" to the lawsuit – a position that you continue to reiterate in your most recent letter. Accordingly, we intend to compel compliance with our discovery, for the time periods we requested.

Interrogatory No. 5

Under Rule 26(b), plaintiffs are clearly entitled to discover the names, other identifying information, and responsibilities of individuals employed by defendants to work with the elephants, as we requested in Interrogatory No. 5. In our October 19 letter, we pointed out that it was clear that defendants had failed to provide the information requested, and we mentioned two individuals who fall squarely into this category but had not been identified by defendants, including the plaintiff in this action, Tom Rider, who worked as a "barn man" for the elephants for 2 ½ years, and Abel Rivera, who also worked with the elephants for some period of time during 1997-99. At the November 15 meet and confer conference, we identified several other individuals who we understand worked as "barn men" for Ringling, but who were not identified in defendants' interrogatory response, including Brian Clark, Ray Cisneros, and several

individuals from Morocco.[1]

Therefore, it is true that we stated at the meet and confer conference that, for purposes of avoiding a motion to compel at this point, we would accept the information requested by Interrogatory No. 5 with respect to individuals who worked as "barn men, handlers, trainers, performers, wardrobe personnel, floor crew, and transportation personnel." However, we certainly have no intention of forever waiving our right to pursue additional information that is responsive to this interrogatory, should it later turn out that there are additional employees who worked with the elephants, who have relevant information, but who defendants do not believe fall into one of these specific employment categories. Accordingly, we have reserved our right to pursue such information in that event.

Indeed, in light of the fact that, although our interrogatory specifically requested information concerning individuals who worked as "barn men" for Ringling, defendants refused to do so. Therefore, defendants failed even to identify Tom Rider and other "barn men," who clearly "worked with" the elephants, and who also have information that falls within the scope of Rule 26(b). Accordingly, we would be remiss in <u>not</u> reserving our right to obtain additional information in the future, should it become clear that, for whatever reason, defendants have a <u>different</u> view of which categories of employees "worked with" the elephants than do plaintiffs.

In fact, we note that defendants have objected to identifying "every person who may have any degree of knowledge regarding the subject matter of the interrogatories," and have only agreed to identify current and former employees and other individuals who defendants believe have or may have "substantial personal knowledge" concerning the subject matter of the interrogatories. Defendants Responses at 4. However, please be on notice that defendants certainly may not unilaterally narrow the scope of plaintiffs' discovery requests, via their objections. Rather, absent a properly obtained protective order, Rule 26(b), not defendants' own perceptions of what should be discoverable, is the governing standard.[2]

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[1]We told you that we believe the names of some of these individuals are Heesham, Ackmed, Keefi, and Absola.

[2]Indeed, to the extent that defendants believe they have removed any information from the scope of plaintiffs' discovery merely by objecting to its production, please be advised that plaintiffs take a very different view. Again, Rule 26(b) governs the scope of discovery in this case. Therefore, to the extent defendants have additional information that is responsive to any of plaintiffs' discovery that they have not disclosed or produced, and that falls within the scope of Rule 26(b), defendants must either produce such information or include it on their privilege log.

In any event, if defendants give us the complete information requested by Interrogatory No. 5 with respect to the categories listed above – as we understand those categories of employment – this should obviate the need for any further discovery on this point at this time. However, until we are provided this information, we will not be able to agree on a discovery cut-off, since plaintiffs may very well want to depose some of these individuals.

But it certainly is not plaintiffs burden to know or use the precise term of employment that would dislodge the requested information – that is precisely why we asked the question in a more general way – i.e., "identify all persons who have been employed with Ringling for any period of time since 1994 who worked with the elephants," and then gave examples of the kinds of employment categories that we believed would be covered by this request (emphasis added). Therefore, if defendants are conditioning their further response to these discovery requests on plaintiffs waiving their right to pursue additional responsive information in the future, under any and all circumstances, then we will have no choice but to move to compel production of all of the information requested in the requests.

As to the employees that defendants did list in their interrogatory responses, defendants failed to provide all of the information requested by Interrogatories 3, 4, and 5, as well as the definition of "identify." Although defendants objected to the instruction that they provide the residential address, phone number, and social security numbers for such individuals, this deprives plaintiffs of adequate information to locate these individuals who may have relevant information for this case.

Although Interrogatory No. 4 specifically requests defendants to "provide a history" of the person's "employment responsibilities," defendants did not provide any such information with respect to any of the individuals who they listed as a "former employee."

In addition, although plaintiffs specifically asked defendants in Interrogatory No. 5 to "describe each person's responsibilities," defendants did not provide any of this information, nor object to providing such information, for the following individuals:

William Bonucci
Gary Boyle
Allison Case
Brian Christiani (French)
Karla Corral
Robert Curry
Deborah Fahrenbruck
Neill Fillhart
Mark Gautier

Hugh Patrick Harned
Steve Hart
Richard Houck
Sara Houck
Rob Lile
Dave MacFarland
Charles Meek
John Noonan
Gary Oxidine
Alex Petrov
Geoffrey Pettigrew
Adam Seidon
Ellen Weidner
Virgil Andrew Weller
Dave Whaley

For other individuals identified in response to Interrogatory No. 5, defendants provided only the most cursory information concerning their job titles, in response to either Interrogatory No. 3, 4, or 5, but did not "describe" their "responsibilities," as directed by Interrogatory 5. For example, stating that someone is the "CEC General Manager," does not adequately describe that person's responsibilities. The individuals who fall into this category include:

Pete Cimini
David Garcia
Mark Oliver Gebel
Samuel Haddock
Tom Hafner
Katerina (Katya) Harned
Michael Hayward
Sasha Houck
Gary Jacobson
Kathy Jacobson
Kirk Keef
Allison Keeley
William Lindsay
Henry Lopez
Troy Metzler
Sean Quinn
Robert Ridley
Dan Sabatis

Alex Vargas
Gary West
David Wiley
Ben Williams
James Williams
Trudy Williams

Interrogatory No. 8/Document Request Nos. 8 and 16

As we pointed out in our letters dated October 19 and December 22, and at our meet and confer conference on November 15, defendants have failed to provide us with the information requested concerning each of the elephants it has owned or leased from 1994 to the present, including, but not limited to, medical records, veterinary records, whether the animal was born in captivity or in the wild, records concerning births and deaths, the dates of death and cause of death, the locations of the animals, and which unit the animal performs with. Indeed, as we have further pointed out, defendants have not provided us any such information with respect to particular elephants whose names we provided. Nor have defendants ever contended that any such information is "confidential" in any way. Indeed, we note that defendants did not make any such claim in the privilege log that accompanied their discovery responses.

Nevertheless, in your January 4 letter, defendants now contend – for the first time – that any "additional or more detailed medical records" are considered to be "confidential," and hence defendants take the position that they will only provide plaintiffs with such information pursuant to a protective order. However, not only have defendants not raised this claim of "confidentiality" before, nor provided any basis for it, any such contention would appear to be entirely inconsistent with the fact that defendants have already purported to release medical records for many of the elephants without requiring any such protective order. Hence, we fail to understand why plaintiffs should have to agree to enter into a protective order with respect to the remainder of the medical records that they requested back in March, 2004, but have yet to receive. Accordingly, please be advised that plaintiffs intend to move to compel the production of all of the information requested by Interrogatory No. 8, and Document Request Nos. 8 and 16.

In addition, as we explained in our October 19 letter, and to the Court in our October 21, 2004 Motion to Suspend the Date For Exchanging Expert Reports, it is plaintiffs' position that until they have these records, as well as those requested by Interrogatory No. 11 and Document Request 19 (misnumbered 13 in Plaintiffs' Document Request), they are unable to complete the expert reports required by Rule 26(a)(2)(B). Accordingly, defendants' failure to provide this crucial information continues to seriously delay the process of this case. Indeed, until this specific matter is resolved, along with several other discovery disputes addressed in this letter, plaintiffs are unable to propose a new pre-trial schedule, since the completion of discovery is

dependent on the production of this extremely important evidence.

Interrogatory No. 11/Document Request 19

We continue to want all of the records requested by these discovery requests – i.e., those records relating to Ringling's efforts to breed Asian elephants in captivity. Therefore, unless you can provide us with a date certain in the near future as to when such information will be provided, we intend to include this matter in our first motion to compel.

Interrogatory No. 15/Document Request No. 23

We intend to compel responses to these discovery requests. In addition, although you state in your recent letter that you "see no basis" for plaintiffs' request for information concerning elephants with tuberculosis, we specifically explained at the November 15 meet and confer conference that, particularly because tuberculosis is a stress-related disease, and one that does not normally occur in elephants in the wild, such information is highly relevant to plaintiffs' "take" claims in this case. Therefore, your apparent assertion that the health of the elephants, and, in particular, whether they suffer from a stress-related disease, somehow falls outside the scope of Rule 26(b), is patently absurd. Indeed, we doubt very much that defendants would stipulate that any assertion they may wish to make about the good health of the animals is irrelevant to this lawsuit – on the contrary, we suspect that defendants will rely very heavily on such contentions to defend this case.

Interrogatory No. 17/Document Request No. 25

As with your statement regarding Interrogatory No. 5, you have misrepresented our position with respect to our outstanding request for "all video, audio, and 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." To date, defendants have provided us with only eleven videotapes that are responsive to these requests, on the grounds that the request is "overbroad, unduly burdensome, and vague and ambiguous." In response, in our October 19 letter, we suggested that if defendants would comply with their separate obligation to "identify" all such records, as requested in Interrogatory No. 17, by providing us with a list or other inventory of the recordings covered by this request, we would attempt to narrow the production request as much as possible.

However, at the November 15 meet and confer conference you refused to do so, and instead suggested that we identify the categories of recordings we seek. We did so, and agreed that – for purposes of avoiding a motion to compel on this item at this juncture – if defendants would provide us with all responsive records that fall into those particular categories, we would

not include this matter in our motion to compel. However, we certainly did not waive – for all time – our right to obtain additional records that fall within our discovery requests and that are relevant to this case, simply because defendants may not regard them as falling within these particular categories.

Indeed, you have now disclosed in your recent letter – for the first time – that defendants have located 1,700 videotapes alone that may fall within the scope of plaintiffs' original request, yet defendants have determined that only 150 of them fall within the specific categories that we discussed at the meet and confer conference. This raises the obvious question of what is contained on those other 1550 videotapes, and whether they are in fact responsive to our original request. In addition, defendants have not provided us any information as to other "recordings" that are covered by this request, in addition to "video" recordings.

Therefore, we reiterate, that for purposes of our initial motion to compel, we will not request an order to compel information that is responsive to the full extent of our original request, if defendants will provide us with the information we agreed to at the November 15, 2004 meeting. However, we continue to reserve our right to seek additional information that is responsive to the original requests, should we discover that such additional, relevant information exists.

Therefore, if defendants' further response to these discovery requests is conditioned on plaintiffs' waiving their right to ever find out about or review any of the other 1550 videotapes, or other "recordings" covered by these requests, we will move to compel production of all of the information sought in the original requests.

Document Request No. 5

Although you contend in your recent letter that you "explained" at the meet and confer conference that "publicly available documents relating to Mr. Rider gathered by counsel as part of this case are not responsive" to our discovery request (emphasis added), you certainly have not made your position on this matter at all clear – i.e., if the documents relate to Tom Rider, then they are plainly "responsive" to our request. Indeed, in our December 22 letter, we specifically stated that it is our position that any such responsive records that "are in your client's custody or control" - which would include documents "gathered by counsel as part of this case," since they are certainly in the "control" of your clients – must be either produced or, alternatively, defendants must assert a privilege for such records. Defendants have done neither. Accordingly, plaintiffs will move to compel this information.

Document Request No. 6

Your statement that we have "offered no explanation" as to why the information covered by this request is relevant to this case is wrong. We provided you with a succinct explanation in our October 19 letter (at 6), and at the November 15 meet and confer meeting. Therefore, because defendants refuse to provide us with the information requested by this discovery request, we intend to move to compel such information.

Document Request Nos. 9-10

Similarly, your statement that we have "offered no explanation" as to why we need the information requested in these discovery requests is also wrong. We explained this to you in our October 19 letter (at 7) and at the November 15 meet and confer conference. We are not content to accept only the information that defendants believe should be "sufficient" for our purposes. Accordingly, we will move to compel this information.

Document Request No. 11

Your statement that our December 22 letter is "the first time" we have raised the issue of seeking Sells-Floto records is also wrong. This matter was specifically addressed in our discovery request. While it is true that we did not specifically refer to defendants' failure to produce any financial records from Sells-Floto in our subsequent October 19 letter or at the November 15 meeting, this is because defendants failed to provide any information in response to this request, and you have made it very clear that it is defendants' position that none of the financial information we have requested in this discovery request is relevant and, hence, that defendants will not be providing any of it to plaintiffs (see, e.g., your December 3, 2004 letter). Given your adamant position on this matter, there was no basis for discussing this particular subset of requested information.

Moreover, while we acknowledge that Sells-Floto is "not a party to this action," that does not address the much more relevant issue – i.e., whether the Feld Corporation, which is a party to this action, must nevertheless provide plaintiffs with the requested information because documents in the possession of Sells-Floto are nevertheless under Feld's control, and may be highly relevant to this case. See, e.g., Gerling International Ins. Co. v. Commissioner, IRS, 839 F.2d 131, 138 (3rd Cir. 1988) (Rule 33 requires a corporation to furnish such information as is available from the corporation itself or from sources "under its control"). If documents in Sells-Floto's possession are in fact not available to Feld, or under its control, then it is defendants' burden to assert that this is the case and to explain the basis for such an assertion. See, e.g., Cooper Industries, Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 919-20 (S.D. NY 1984) (defendant has submitted

"nothing more than conclusory statements to show that [the requested] documents are not in its custody or control"). Moreover, at an absolute minimum, Feld must produce whatever copies it has of responsive records that were generated by Sells-Floto.

Nevertheless, because defendants have refused to provide any of the information requested by this discovery request, plaintiffs intend to move to compel such information.

Document Request Nos. 13-23

Plaintiffs are entitled to all of the records requested by these requests. Therefore, with the exceptions noted above, they intend to move to compel such records.

Document Request No. 24

As plaintiffs have explained, we will not be moving to compel the items requested by this discovery request at this time. However, they certainly are not waiving their right to obtain such items from defendants in the future, should plaintiffs be unable to obtain the items through alternative means.

Additional Concerns

Defendants appear to have objected to producing – or even identifying in a privilege log – any information that could be covered by a properly obtained protective order pursuant to Rule 26(c), or that is currently 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." See Defendants' Responses to Plaintiffs' Discovery at 3. Please clarify whether this objection means that defendants have in fact not produced or identified in a privilege log any such information that is otherwise responsive to plaintiffs' discovery requests.

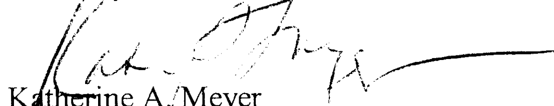
If, in fact this is the case, we ask that, at an absolute minimum at this juncture, you supplement your privilege log to include a list of any such information that has been requested and withheld, and a statement as to the basis upon which defendants are refusing to produce the information. Without some idea of a) whether there is any such information that is responsive to plaintiffs' discovery that defendants have failed to produce or identify, and b) the basis for defendants failure to produce any such particular information, plaintiffs are unable to ascertain whether they need to move to compel such information at a future date.

* * *

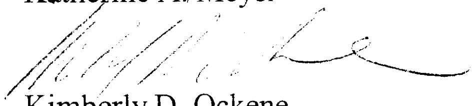
In closing, we hope that we have been clear as to what we intend to include in our upcoming motion to compel. Again, to the extent that defendants are able to provide us with additional information that is responsive to some of these outstanding discovery requests before we file that motion, we will adjust the scope of the motion accordingly.

However, as also mentioned, in plaintiffs' view, resolution of the motion to compel – particularly with regard to the identification of defendants' employees, and the medical and other records concerning the elephants owned and leased by defendants – is a necessary prerequisite to plaintiffs agreeing to a new pre-trial schedule. Therefore, we intend to address all of these matters at the status conference tomorrow.

Sincerely,



Katherine A. Meyer



Kimberly D. Ockene