

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE  
PREVENTION OF CRUELTY TO  
ANIMALS, et al.,

Plaintiffs,

V.

RINGLING BROS. AND BARNUM &  
BAILEY CIRCUS, et al.,

Defendants.

Case No. 03-2006 (EGS)  
JUDGE: Emmet G. Sullivan

**MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL  
DEFENDANTS' COMPLIANCE WITH PLAINTIFFS' DISCOVERY REQUESTS**

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On June 9, 2004, defendants responded to plaintiffs' interrogatories, document requests, and request for admission by submitting 3,600 pages of documents, more than 20 pages of narrative responses to interrogatories, and various objections to plaintiffs' demands. That production required an enormous effort, including searches of files at multiple locations up and down the East Coast, reviews of records to obtain information for interrogatory responses, and interviews with numerous knowledgeable personnel.

For the next four months, plaintiffs were silent. They did not raise any discovery issues in late August when they secured a six-week extension of the date to exchange expert reports. Nor did they identify any discovery issues at a status conference in early September. Thus, until October 19, when plaintiffs first sent a letter about defendants' responses, defendants had no reason to believe that plaintiffs' deemed any of their discovery responses inadequate.

After receiving plaintiffs' letter, defendants immediately began good-faith negotiations with plaintiffs. Throughout the process, plaintiffs refused to accept a single objection about the burden and relevance of their discovery requests. They refused to consider any proposals that sought a middle ground to provide them the core of what they seek while reducing the burden imposed on defendants. And after defendants have agreed to conduct additional reviews of their files and to provide additional information, plaintiffs now complain of the pace at which that supplementation is occurring. Plaintiffs ignore that their own long delay in initiating the meet-and-confer process forced defendants, at the start of the year-end holiday season, to recreate much of the search that they performed early last year, a duplication of effort that could have been avoided if plaintiffs had initiated meet-and-confer discussions promptly.

Moreover, plaintiffs seek many categories of information that have little or no relevance to the issues in this case, and whose production is both burdensome and intrusive. For example, plaintiffs have demanded (a) detailed and competitively sensitive financial information, including the profitability of different lines of defendants' business, and (b) extensive information about defendants' advertising and marketing activities, including all draft copies of advertisements since 1994. Neither of these subjects has anything to do with the issues before this Court – whether defendants' care for their Asian elephants violates the Endangered Species Act (“ESA”). The real purpose of these requests appears to be plaintiffs' attempt to obtain information to be used in the

publicity and legislative campaigns that plaintiffs and their allies are conducting against the defendants.<sup>1</sup>

Plaintiffs have also served more than twice their limit of 25 interrogatories, including subparts, under standards for counting such subparts applied by Magistrate Judge Facciola. Defendants have been willing to refrain from a strict application of the rule in return for agreements on measures to reduce the burdens of complying with the excess interrogatories. But plaintiffs refused to consider any compromise.

Plaintiffs complain about defendants' refusal to produce information about plaintiff Tom Rider. But defendants are not withholding any information in their files or compiled in the regular course of business. Instead, defendants resist producing documents gathered by counsel for the purpose of cross-examining Mr. Rider. Plaintiffs admit (at 20) that they seek this information in order to prepare Mr. Rider for his deposition. Plaintiffs do not explain that they seek this information now because similar information (including prior public statements and criminal convictions) was used for impeachment at the deposition of Frank Hagan, whom plaintiffs had hoped to use as a star witness. There is no rule entitling plaintiffs to discover this information.

Defendants went back nine years – to 1996 – in conducting their search of files and responding to interrogatories. Plaintiffs say this is not good enough and demand a new search going back 11 years, without any showing of particular justification for such an unusually long period. Contrary to the Federal Rules of Civil Procedure

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<sup>1</sup> See, e.g., Pltf. Ex. R; Ringling Brothers Circus Brings Acts of Cruelty to Town (Mar. 15, 2004), *available at* <http://www.asPCA.org/site/News2?page=NewsArticle&id=15479> (last visited Feb. 15, 2005).

(“FRCP”), they further contend that it is not enough for defendants to object to the 11-year period, but that defendants were obligated to move for a protective order.

The Court should deny the motion to compel. In the alternative, it may be productive for the Court to assign the matter to a Magistrate Judge to supervise resolution of discovery issues and decide only those disputes that cannot be settled by the parties.

## **BACKGROUND**

### **A. The Parties’ Claims And Defenses**

Plaintiffs are three organizations and one individual who seek an end to the presentation of Asian elephants and other animals in circuses. In addition to waging an extensive publicity campaign against defendants, plaintiffs have brought this suit alleging that defendants abuse their Asian elephants in violation of the ESA, 16 U.S.C. § 1531 *et seq.* Specifically, plaintiffs’ complaint focuses on three practices that they attribute to defendants: (a) use of an ankus or bullhook, which plaintiffs characterize as “beating and striking” the elephants; (b) the process of weaning baby elephants from their mothers, which plaintiffs characterize as “forcibly removing” the elephants; and (c) what plaintiffs characterize as “chaining” of the elephants. (Plaintiffs’ Mem. at 2.)

Defendants denied the allegations in the Complaint and asserted defenses including failure to state a claim on which relief can be granted, plaintiffs’ lack of standing, lack of subject matter jurisdiction, statute of limitations, laches, and failure to name an indispensable party. Plaintiffs in many respects mischaracterize (at 3-4) defendants’ positions in this case as a means of arguing the merits in the guise of a discovery motion. No useful purpose is served by responding with our own arguments of the merits of the case in a dispute over discovery.



**B. Procedural History**

After initial disclosures, the parties exchanged discovery requests in March 2004. Plaintiffs served a single set of discovery requests, containing interrogatories, document requests, and a request for admission. Plaintiffs sought information not only about defendants' treatment of elephants but also about many confidential aspects of defendants' business having no genuine connection with the claims or defenses asserted in this case. For example, plaintiffs sought all documents relating to defendants' gross and net revenues, the revenues of a related entity called Sells-Floto, Inc., and Ringling Bros.' profitability. (*See* Pltf. Ex. A, Doc. Request No. 11.) Similarly, plaintiffs requested all documents relating to public relations and advertisements, draft copies of all advertisements, the amount of money that defendants have spent on advertising since 1994, and all documents relating to defendants' responses to negative publicity arising from campaigns by plaintiffs and other animal rights activists. (*See id.* at Doc. Request No. 6.)

Defendants responded to plaintiffs' discovery requests on June 9-10, 2004, with objections, detailed narrative interrogatory responses, and more than three-thousand pages of documents. Defendants expressly invited plaintiffs to meet and confer about objections and other requests about which defendants needed additional guidance for responding. (*See, e.g.*, Pltf. Ex. B, Response to Document Request No. 25.) Consistent with FRCP 34, defendants produced their documents as kept in the ordinary course of business.

Plaintiffs remained silent about defendants' discovery responses until October 19. During that time, the parties had other contacts during which plaintiffs could have raised discovery issues. For example, shortly before the parties were scheduled to

exchange expert reports in late August, counsel for plaintiffs sought a six-week extension of that exchange without mentioning any discovery problems. At a status conference before the Court on September 7, plaintiffs did not identify a single failing in defendants' discovery responses.

Plaintiffs now say that it took "significant" time (more than four months!) for them to realize that there were "deficiencies" in defendants' discovery responses. (*See, e.g.*, Pltfs. Mem. at 2, 11). But that assertion flatly contradicts their overheated charges that defendants' responses were so obviously flawed in multiple respects as to warrant sanction. (*See* Pltfs. Proposed Order. at 2.) In truth, defendants have made extensive, good faith responses, and plaintiffs now resort to hyperbole, innuendo, and name-calling to support their extreme positions.

### **C. The Meet-and-confer Process**

Once plaintiffs invoked the meet-and-confer process, defendants tried hard to resolve many of plaintiffs' concerns. Defendants have proposed compromises in an effort to reach reasonable accommodations. (*See, e.g.*, Pltf. Ex. F at 7 (defendants' offer to produce exemplars of advertisements); *id.* at 9-10 (agreement to produce requested materials); Pltf. Ex. G at 2 (agreement to search for additional materials); *id.* at 3 (agreement to produce documents relating to job qualifications); Pltf. Ex. I at 4 (offer to produce documents sufficient to show all projects in which defendants have engaged for conservation of elephants in Asia).)

Plaintiffs have refused to recognize any grounds for objecting to any of their discovery requests, nor accepted any compromises or limitations on their requests. Rather than reach agreement on any issue, plaintiffs have insisted that defendants begin responding in stages as a first step, with plaintiffs reserving the right to request additional

information at any time. For example, plaintiffs have asked for all video or audio recordings that “involve, concern, or record elephants or individuals who work with elephants.” (Pltf. Ex. A, Interrog. No. 17.) Defendants have explained that they do not maintain their video archive in a way that will allow them to readily identify such videos, and that the request would require a screening of more than 1,700 videos. (Pltf. Ex. B., Response to Interrog. No. 17.) The parties then focused on six categories of videos likely to involve the core of what plaintiffs seek, but plaintiffs were unwilling to agree that defendants’ screening and production of responsive videos in these categories would satisfy plaintiffs’ request. (*See* Pltf. Ex. J at 7.) Instead, plaintiffs insist that defendants must produce videos in the six categories they have identified as a first step, but that plaintiffs may still require screening and production of the rest. This is not a compromise. It is a rolling production.

Plaintiffs’ approach to Document Request No. 24 highlights the unfairness of their approach to the meet-and-confer process. That request instructed defendants to provide samples of commercial, publicly-available medicinal treatments for the elephants. Defendants identified for plaintiffs the manufacturer of each product and provided a telephone number. At the parties’ November 15 meet-and-confer conference, counsel for plaintiffs acknowledged that they might acquire their own samples of these products. (*See* Pltf. Ex. G at 4.) Yet plaintiffs once again insisted on “reserving” their right to compel the production of such materials at any time. (*See* Pltf. Ex. H at 5.)

Plaintiffs’ unwillingness to reach reasonable accommodations during the meet-and-confer process is the cause of this motion. Plaintiffs consistently seek

information – beyond what defendants have already provided – whose importance and relevance is far outweighed by the burden and costs associated with production.

### **ARGUMENT**

The scope of discovery has “ultimate and necessary boundaries.”

*Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Discovery must be “relevant to the claim or defense of any party.” FRCP 26(b)(1); *see also Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1570 (11th Cir. 1992) (“Discovery should be tailored to the issues involved in the particular case.”). This means that “[d]iscovery should be limited to the core issues in a case essential to its resolution.” *Clyburn v. News World Communications, Inc.*, 117 F.R.D. 1, 2 (D.D.C. 1987). In addition, courts must be mindful that “discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement of, the litigated disputes,” rather than for plaintiffs to advance their broader agenda against defendants. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (emphasis added).

In the context of this case, it is critical that FRCP 26(b)(2) limits the scope of discovery by applying a “proportionality test.” *Convolve Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 167-68 (S.D.N.Y. 2004). That rule provides that discovery “shall be limited by the court if it determines that: (i) the discovery sought is unreasonably duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive ... or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.” FRCP 26(b)(2).

Thus, “even in complex litigation, discovery does not require leaving no stone unturned.” *In re Linerboard Antitrust Litig.*, 223 F.R.D. 357, 363 (E.D. Pa. 2004). “Open ended fishing expeditions will not be tolerated.” *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108, 1111 (N.D. Ill. 2004).

The scope of the plaintiffs’ discovery requests and the tenuous connection that a number of these requests have to the claims and defenses in this case suggest that the plaintiffs’ purpose in obtaining certain documents is not solely to assist in litigating their claims. Instead, their discovery requests seem designed to gather information for their broader public relations campaigns aimed at ending any participation by any animal, including Asian elephants, in Ringling Bros.’ shows.

**I. PLAINTIFFS SEEK INFORMATION THAT IS IRRELEVANT.**

Plaintiffs demand sweeping information that is not relevant to the claims or defenses in this litigation, or even to the subject of this litigation more generally.

**A. Sales And Marketing Information (Document Request Nos. 6 And 11).**

Plaintiffs demand all documents relating to defendants’ advertising and public relations efforts (Document Request No. 6) and all documents that reflect defendants’ gross and net earnings each year, as well as the gross and net earnings of a related entity called Sells-Floto, Inc. (Document Request No. 11). These requests are far afield from the question of whether defendants’ treatment of elephants violates the ESA. Plaintiffs therefore offer two pretexts for their requests: their supposed need for proof that defendants are engaged in a “commercial activity” and their desire to challenge certain unnamed witnesses’ “credibility.” Neither argument has any merit.

Defendants admit that their presentation of elephants in performances is a for-profit activity, and plaintiffs’ sweeping discovery demands are unnecessary to verify

that fact. “Commercial activity” under the ESA has a special meaning that is separate from and more limited than for-profit business activities. The ESA defines “commercial activity” to embrace “industry and trade . . .,” 16 U.S.C. § 1532(2), and the Fish and Wildlife Service (“FWS”) has long defined “industry and trade” to mean only “the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit.” 50 C.F.R. § 17.3 (2005). The D.C. Circuit has acknowledged FWS’ interpretation of these terms and has recognized that the training and presentation of elephants falls outside of FWS’ interpretation of the ESA. *See Humane Soc’y of the United States v. Babbitt*, 46 F.3d 93, 96 (D.C. Cir. 1995) (explaining that “commercial activity” excludes “transportation of an endangered species across state or national borders where there is no change in ownership or control of the animal.”).<sup>2</sup>

Defendants’ marketing and public relations documents, and documents showing defendants’ revenues and profitability, do not bear on the question of whether they are engaged in “commercial activity” within the meaning of the ESA. And the sweeping and intrusive document requests are unnecessary to prove the different point – which defendants have admitted in their Answer in this case – that the circus is a for-profit enterprise.<sup>3</sup>

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<sup>2</sup> FWS has long recognized that lawfully-held animals may be presented in circuses or other entertainment venues. *See, e.g.*, 58 Fed. Reg. 32,633 (1993); 44 Fed. Reg. 30,044 (1979). FWS’ interpretation of the term “industry and trade” is entitled to the broad deference accorded to administrative officials under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 865-66 (1984). *See also Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 708 (1995) (citing 16 U.S.C. §§ 1533, 1540(f) and holding that “[w]hen it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary [of the Interior].”).

<sup>3</sup> Nor do plaintiffs explain why they refused to accept defendants’ offer to produce examples of actual advertisements that they used from 2000 to the present. Plaintiffs rejected that offer out of hand, and insisted that they wanted all documents relating to

Plaintiffs also argue (at 39) that documents relating to defendants' profitability and sales revenues would show "defendants' bias and credibility, and defendants' witnesses' bias and credibility." Plaintiffs presumably want to impeach defendants' witnesses on the ground that defendants' profit motive may affect their testimony. But the acknowledged fact that defendants are conducting a for-profit business is all that plaintiffs need to make their point. Therefore, there is no justification for plaintiffs to obtain all of defendants' publicity documents, marketing materials, and financial statements just so they can seek to prove an issue of dubious relevance that is not even in dispute.<sup>4</sup>

Because of the potential for abuse, courts routinely refuse to compel parties to produce information relating to their profits and other financial information when it is not specifically related to a substantive issue in the case. *See Freeport-McMoran Sulpher, LLC v. Mike Mullen Energy Equip. Res., Inc.*, Nos. Civ. A. 03-1496, 03-1664, 2004 WL 764174, at \*8 (E.D. La. Apr. 7, 2004) (the party's "attempt to discover . . . the forecasting of possible gross and net profits . . . is nothing more than a fishing expedition the Court will not allow."); *In re Vitamins Antitrust Litig.*, 198 F.R.D. 296, 302 (D.D.C. 2000) (denying a motion to compel financial data). Plaintiffs have not shown, and could not show, that their sweeping demands for financial information relate

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public relations efforts, including draft copies of advertisements and documents that relate to or concern "efforts to counter negative publicity generated by animal rights and animal welfare organizations." That uncompromising stance is typical of plaintiffs' attitude toward discovery.

<sup>4</sup> During the meet-and-confer process, plaintiffs have compared their requests to questions we have asked during depositions to establish that third party witnesses have a financial relationship with one or more plaintiffs. But unlike defendants' status as a for-profit entity and its employment relationships with its employees, financial relationships between plaintiffs and third parties are not self-evident and must be established.

to the matters at issue. *See, e.g., Cornell Research Found. v. Hewlett Packard Co.*, 223 F.R.D. 55, 62 (N.D.N.Y. 2003) (party is entitled to discovery concerning revenues and profits for calculation of damages). Even in damages cases, courts require a showing that specific financial data is relevant and necessary to a particular issue before the court. *In re Vitamins Antitrust Litig.*, 198 F.R.D. at 302. Here, of course, there is no claim for damages.

**B. Information Regarding Tuberculosis (Document Request No. 8).**

The request for documents relating to possible elephant tuberculosis is outside the scope of this case. The complaint does not mention tuberculosis. At the status conference in this case on June 10, 2004, counsel for plaintiffs summarized plaintiffs' case as follows, without mentioning tuberculosis:

I would just say that the plaintiffs have always maintained that if the defendants would cease engaging in the practices the plaintiffs allege violate the Endangered Species Act, which is beating of the elephants with bull hooks, the constant chaining of the elephants, and the forceable removal of baby elephants from their mothers, the plaintiffs would be willing to settle the case on some basis.

(Transcript of June 10, 2004 Status Conference at 4 (Ex. 1 hereto)).

Once again, plaintiffs' real purpose in seeking discovery is to obtain information to be used in their public relations war against defendants – which has included a scare campaign that circus elephants may infect circus patrons with tuberculosis.<sup>5</sup> Like their demand for financial and marketing information relating to defendants' performances, plaintiffs are improperly using the discovery process in this

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<sup>5</sup> *See, e.g.,* Website of Plaintiff ASPCA, Report Reveals Government Routinely Ignores Violations of Animal Welfare Act by Ringling Bros. (Sept. 24, 2003), [www.aspc.org/site/News2?id=14402&news\\_iv\\_ctrl=-1&printer\\_friendly=1](http://www.aspc.org/site/News2?id=14402&news_iv_ctrl=-1&printer_friendly=1) (claiming tuberculosis in circus elephants is “highly communicable to humans”); *see also* Tuberculosis Risk, *available at* [www.circuses.com/tuberculosis.asp](http://www.circuses.com/tuberculosis.asp) (claiming circus elephants can transmit tuberculosis to elephants) (last visited Feb. 15, 2004).



case to aid their broader campaign to end any participation by any animal, including Asian elephants, in Ringling Bros. shows. These efforts fall outside the scope of Rule 26(b)(1). *Seattle Times Co.*, 467 U.S. at 34 (“discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement of litigated disputes.”) (emphasis added); *see also Hill v. Motel 6*, 205 F.R.D. 490, 493 (S.D. Ohio 2001) (“[U]nder Rule 26(b)(1), Plaintiff has no entitlement to discover all . . . files in the hope of developing a new . . . claim.”).

## II. PLAINTIFFS DEMAND RESPONSES TO MORE THAN 25 INTERROGATORIES.

FRCP 33(a) restricts parties to no more than 25 interrogatories. *See* FRCP 33(a). Parties cannot circumvent this limit by including numerous “subparts” within their 25 interrogatories. Subparts are counted as separate questions where they can stand alone as independent requests for additional information. *See Banks v. Office of the Senate Sergeant-at-Arms*, 222 F.R.D. 7, 10 (D.D.C. 2004); *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 685-86 (D. Nev. 1997); *Power & Tel. Supply Co. v. Suntrust Banks*, No. 03-2217MIV, 2004 WL 784533, at \*1 (W.D. Tenn. Mar. 15, 2004). Subparts need not be separately numbered or lettered to count as multiple interrogatories, or any party could easily circumvent Rule 33’s limitations. *See Safeco of Am. v. Rawstron*, 181 F.R.D. 441, 443 (C.D. Cal. 1998).

Plaintiffs numbered their interrogatories 1-18, but the subparts included within them bring the total to more than double their 25 interrogatory limit. One recurring example of plaintiffs’ use of subparts is their demanding a substantive response to a question, then adding a separate demand that defendants “identify” all documents that relate to the subject. Plaintiffs do this in Interrogatory Nos. 2, 6, 8, 9, 12, 13, 14, 17,

and 18. Magistrate Judge Facciola explained in *Banks* why this use of subparts demanding an identification of documents relating to another answer must count against the 25-interrogatory limit: the “first and most obvious example [of discrete subparts] is the combining in a single interrogatory of a demand for information and a demand for the documents that pertain to that event. Clearly, these are two distinct demands because knowing that an event occurred is entirely different from learning about the documents that evidence it occurred.” 222 F.R.D. at 10; *see also Kendall*, 174 F.R.D. at 686 (interrogatory requesting information about hiring criteria and identification of documents reflecting those criteria contained two distinct subparts). Thus, each of these interrogatories must be counted as having at least two separate subparts (and, in some cases, more than two).

Two other interrogatories ask questions about multiple topics, each of which should be counted as a separate interrogatory. For example, Interrogatory No. 15 refers to a highly argumentative “report” compiled by plaintiffs themselves addressing nine separate incidents of alleged elephant abuse, and it then instructs defendants to “identify” (1) all documents relating to each of the nine separate incidents and (2) all people having knowledge of those incidents. The nine incidents are unrelated but for plaintiffs’ joinder of them in their own “report.” Thus, the instruction to identify documents relating to nine separate incidents should be counted as nine discrete subparts, and the instruction to identify people should be counted as an additional nine subparts. Similarly, Interrogatory No. 2 instructs defendants to state the factual basis of, and then identify documents supporting, each of the eight affirmative defenses that defendants have asserted in their answer. Because the substantive question and the request for

identification each constitute separate questions, this Interrogatory really contains 16 discrete subparts – two for each affirmative defense. Other interrogatories pose additional, unrelated questions that can be answered independently of the other questions in the interrogatory. Attached at Tab 2 is the text of all of plaintiffs’ interrogatories, with each discrete subpart broken out separately. In total, plaintiffs have served 62 interrogatories, more than double the limit permitted by Rule 33(a).

Defendants objected to plaintiffs’ multiple subparts, but offered to work out a reasonable accommodation without waiving the objection (Def. Gen. Obj. 9). During the meet-and-confer sessions, defendants’ counsel repeatedly urged that the problem be resolved, *inter alia*, by plaintiffs’ agreeing to drop their request that defendants not only answer their substantive interrogatories, but also “identify” all related documents – where the same documents to be “identified” were being provided in response to plaintiffs’ document requests. Plaintiffs refused to compromise and continue to insist that defendants answer more than twice the limit allowed by FRCP 33. Accordingly, the Court should decline to compel any further answers to interrogatories.

### **III. ADDITIONAL PRODUCTION IN RESPONSE TO PLAINTIFFS’ REQUESTS WOULD IMPOSE AN UNDUE BURDEN ON DEFENDANTS.**

#### **A. Plaintiffs’ Requests For Videos (Interrogatory No. 17/Document Request No. 25).**

Plaintiffs’ Interrogatory No. 17 poses multiple questions, one of which demands that defendants “identify 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.” Document Request No. 25 then instructs defendants to produce all identified recordings. Defendants’ counsel have explained many times to plaintiffs’ counsel that defendants have thousands of videos that might

contain stray shots of elephants, and the only way to be sure is to screen each one. On the other hand, there is a much smaller number of videos that are most likely to contain substantial elephant footage, which defendants could more easily screen and produce. Compliance with plaintiffs' unmodified demands would require many thousands of man-hours and substantial costs. (*See* McDermott Decl. at ¶¶ 15-21.<sup>6</sup>)

Plaintiffs have also refused to narrow their demand for all videos showing individuals who "work with" elephants, even if the person is not "working with" elephants in that video. For example, video footage of a veterinarian who treats defendants' elephants must be produced even if the veterinarian is caring for a tiger, horse, or alpaca in the video. Similarly, if any of Ringling's elephant handlers or elephant trainers appears in a video, even just walking through the screen momentarily, then the video would be responsive. Or if a video shows a person's back, defendants would, under the terms of plaintiffs' requests, be required to determine whether that is the back of someone who "works with" elephants. Plaintiffs cannot justify this overbroad request, which would impose an impossible burden on defendants. (*See id.* at ¶ 10.)

If plaintiffs' requests were narrowed to include only footage in which elephants are depicted, the burden would still be enormous. Defendants have more than 10,000 videos in their video archive. (*See id.* at ¶ 4.) Those videos are indexed only by title, which usually do not describe the video's contents. (*See id.* at ¶ 5.) For example, each year, from November to January, one of Ringling Bros.' touring companies goes to Tampa, Florida, for "Winter Quarters," during which a new show is designed and rehearsed. (*See id.* at ¶ 6.) Feld shoots a large amount of video footage during this time,

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<sup>6</sup> A copy of the Declaration of Suzanne McDermott, Feld's Vice President of Marketing Services, is attached at Tab 3.

and it is typically archived with a title such as “Blue 128 Winter Quarters.” There is no way to determine, without screening it, whether a tape titled “Winter Quarters” contains footage of clowns, trapeze artists, elephants, or anyone who “works with” elephants. (*See id.*) Thus, every tape would have to be reviewed. To put the scope of this effort in perspective, defendants have located 19 tapes titled “Blue 128 Winter Quarters” in their video archive, each of which would have to be reviewed. (*See id.*) Those are the videos only from 1998; there are similar numbers for other years. Even tapes from Winter Quarters that show elephants may display them only briefly or only in the background. This problem also arises for the hundreds of other titles in defendants’ archive.

After plaintiffs first served their discovery requests, defendants tried to estimate how many tapes in their archive might show elephants. Excluding videos whose titles suggested they probably would not include footage of elephants, (but which might include stray, incidental shots of elephants), defendants still located more than 1,700 tapes. (*See id.* at ¶ 7.)

Even narrowing the universe to 1,700 tapes would result in an enormously burdensome effort.<sup>7</sup> Assuming an average tape length of 35 minutes, the review process would require 1,038 man hours – or more than 25 employee work weeks. Defendants would need to hire additional personnel and rent equipment to review this footage. (*See id.* at ¶¶ 17-19) These costs would exceed \$68,000, not including the substantial cost of

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<sup>7</sup> For example, if a video is titled “128th Clowns,” it would seemingly be unresponsive to plaintiffs’ requests, and it would not have been counted. However, defendants have no way of knowing, based on the title, whether the video in question shows elephants performing or rehearsing immediately before, after, or one ring over from the featured clowns, or even just standing to the side. Thus, defendants would be forced to review a multitude of tapes that, based on their title, apparently have nothing to do with elephants.

duplicating the videos. (*See id.* at ¶¶ 17-19, 24-25.) There would also be substantial additional costs if employees were required to try to identify each person who appears on camera.

We have urged plaintiffs' counsel to consider the burdens associated with their broad demands and to agree on the screening of a smaller universe of tapes most likely to contain significant footage of elephants. Plaintiffs remain unwilling to compromise. At one point, plaintiffs appeared ready to narrow their requests to six categories of tapes that defendants estimated encompassed 150 videos. (*See* Pltf. Ex. G at 3.) Defendants believed (and still believe) that plaintiffs' offer could have formed the basis for a compromise, and sought to continue discussions about those specific categories, and the burden of reviewing them. Plaintiffs then reversed field and demanded that defendants immediately produce the 150 videos as a first step, without addressing whether defendants would still be required to screen all the additional tapes. (*See* Pltf. Ex. J at 9.) Plaintiffs cannot have it both ways.

**B. Information Predating 1996 Is Of Marginal Relevance, At Best, And Its Production Is Unduly Burdensome.**

Plaintiffs demand production of information dating back 11 years (to 1994), rejecting defendants' production as inadequate because it goes back 9 years (to 1996). Plaintiffs apparently believe that their allegation of a "pattern or practice of unlawful behavior" entitles them to go back as far in time as they wish, whatever the burden on defendants. They do not explain why 9 years is insufficient time to demonstrate a "pattern or practice" for a case filed in 2003.

Gathering information and documents from the past becomes progressively more difficult the farther back the search goes. And this compounded

burden cannot be justified in terms of any reasonable cost-benefit analysis. For example, as explained below, to answer interrogatories, defendants have had to recreate the employment histories of many of their employees based on the memory of staff, because they have no records containing the information sought by plaintiffs. It has been difficult enough compiling that information for 9 years; going back two additional years will increase the burden while adding very little to the record of this case. (*See* Shugerman Decl. at ¶ 15.<sup>8</sup>) Defendants have also had to review information about the past locations of each of more than 80 elephants, which required great time and expense. (*See* Jones Decl. at ¶ 3.<sup>9</sup>) Having to perform this task for two additional years will require defendants to recreate each previously identified elephant's movement over an additional two-year period beginning more than ten years ago as well as elephants that have not previously been identified. (*See id.* at ¶ 12.) Similarly, adding two more years to plaintiffs' request for videos would increase the number of videos defendants must review, and the corresponding burden, by 25 percent. *See* McDermott Decl. at ¶ 8.

Other requests that would needlessly impose such a burden on defendants are those that ask defendants' practices with regard to day-to-day animal husbandry, such as Interrogatory Nos. 6, 7, 10, 12, 13, 14, and 16, along with the corresponding document requests. Each of these requests poses questions about specific policies or practices relating to care for and handling of the elephants. If defendants were required to respond to these interrogatories, they would have to identify any ways in which their policies might have changed over a two-year period that began more than ten years ago. Plaintiffs

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<sup>8</sup> A copy of the Declaration of Harry Shugerman, Feld's Director of Human Resources, is attached at Tab 4.

<sup>9</sup> A copy of the Declaration of Kayleen M. Jones, a Senior Legal Assistant at Feld, is attached at Tab 5.

are unable to answer the most basic of questions: Why isn't the information from 1996 to date fully adequate for this case?

This point has been stressed throughout the meet-and-confer process. (*See, e.g.*, Pltf. Ex. F at 2.) In an effort to reach a compromise on this point, defendants have urged plaintiffs to identify any specific areas for which they believe they need such older information, so that defendants could evaluate plaintiffs' rationale. (*See* Pltf. Ex. G at 1.) Plaintiffs, however, have refused to consider such a request, choosing instead to insist rigidly that defendants provide information dating back to 1994 for every request. Applying the principle of proportionality here, it is clear that there is no basis to require defendants to produce documents dating back to 1994. To the extent that plaintiffs need information about defendants' policies or practices, they at most need only know what defendants have been doing since 1996. If defendants were doing something in 1994, but had stopped by 1996, it has scant relevance to plaintiffs' case, which was filed in Fall of 2003.

#### **IV. PLAINTIFFS' INTERROGATORIES REQUESTING THE "IDENTIFICATION" OF DOCUMENTS ARE IMPROPER.**

As noted above, plaintiffs served nine separate interrogatories instructing defendants to "identify" all documents relating to specified subjects. (*See* Interrogatory Nos. 2, 6, 8, 9, 12, 13, 14, 17, and 18.) At the same time, plaintiffs served a corresponding document request demanding the production of same documents. *See* Document Request Nos. 14, 15, 16, 17, 20, 21, 22, 25, and 26. The effect of such a one-two punch is to require defendants to prepare a detailed narrative description of the same documents that defendants are simultaneously producing.



Defendants have already shown (pp. 12-14, above) that the interrogatories demanding the “identification” of documents must be rejected because they exceed the 25-interrogatory limit of FRCP 33(a). Furthermore, FRCP 34(b) gives the producing party the option to produce documents “as they are kept in the usual course of business or [to] organize and label them to correspond with the categories of the request.” (emphasis added). The Rules do not impose additional requirements to “identify” documents produced in civil litigation, and it is irrelevant whether a party’s decision to produce documents “as they are kept in the usual course of business” might require the requesting party to sort through a large volume of documents. *In re G-I Holdings, Inc.*, 218 F.R.D 428, 440 (D.N.J. 2003) (production was “appropriately responsive” despite its large size “because the documents were produced as they are kept in the regular course of business.”). Consistent with Rule 34(b), defendants opted to produce documents to plaintiffs “as they are kept in the usual course of business.” (*See* Ex. 6 (letters to plaintiffs noting that the documents are being produced in this manner).)

Plaintiffs cannot deprive defendants of their option under FRCP 34(b) by serving an interrogatory imposing the additional, burdensome, and unnecessary requirement that defendants provide a detailed narrative “identification” for each document being produced. Yet that is precisely what plaintiffs are trying to do. Their interrogatories would require defendants to identify all of the documents that are being provided in response to each of the document requests. Defendants’ option to produce documents “as kept” would be overridden by burdensome obligations that are

inconsistent with the Rules. Plaintiffs are improperly attempting to use Rule 33(a) to circumvent the specific requirements of Rule 34(b).<sup>10</sup>

**V. THERE IS NO REASON TO COMPEL RESPONSES THAT DEFENDANTS HAVE ALREADY PROMISED OR DELIVERED.**

Much of plaintiffs' motion is devoted to attempts to compel defendants to provide additional information that defendants agreed to provide during the meet-and-confer-process. Plaintiffs' position can fairly be characterized as "wait and hurry up:" plaintiffs first waited four months to initiate any meet-and-confer discussions, and they now complain that defendants are taking too long in supplementing their responses. Much of the information is not maintained in the ordinary course of defendants' business, and defendants have had to reconstruct the information from memory. (*See* Shugerman Decl. at ¶¶ 7-8; Jones Decl. at ¶ 4.) Moreover, the delay in starting the meet-and-confer process forced defendants to conduct additional file searches and interviews in the November-January period, when defendants are developing and rehearsing their new show. This process requires key employees, whose knowledge is required to respond to plaintiffs' requests, to travel to Florida and to focus on the development of the new show.

Plaintiffs' impatience notwithstanding, defendants have been working diligently to gather much of the information that plaintiffs have requested. Among the requests to which defendants have responded or are responding are the following:

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<sup>10</sup> Plaintiffs may not rely on Rule 33(d) to require Ringling Bros. to "identify" documents as requested throughout their interrogatories. Rule 33(d) applies when the responding party refers to documents in order to answer an interrogatory, but it does not allow a party to impose an additional burden beyond the scope of Rule 34(b) by demanding that documents being produced under FRCP 34 also be specifically "identified." Where defendants have relied on Rule 33(d), they have identified the documents on which they are relying.

1. Document Request No. 5 (documents relating to Tom Rider).

Defendants have searched for and produced any information in their files or compiled in the regular course of business relating to Tom Rider. Plaintiffs, however, are not satisfied with that effort because what they really want is the production of publicly-available documents gathered by counsel for purposes of cross-examining Mr. Rider. (Pl. Mem. 19-20).

As plaintiffs concede, only documents within defendants' possession, custody, or control are discoverable. The documents at issue are counsel's work product in this matter – publicly available materials that were assembled in the course of counsel's preparation to depose Mr. Rider. Because the "work product privilege belongs to the attorney as well as the client," plaintiffs cannot regard documents defendants' counsel have gathered for cross-examination as being in the client's control. *First Am. Corp. v. Al-Nahyan*, Nos. 96-MS-25, 96-MS-24, 1996 WL 170121, at \*3 (D.D.C. Mar. 26, 1996) (attorneys may claim work product "even if the privilege has been waived by the client.") (citing *In re Sealed Case*, 676 F.2d 793, 809 n. 56 (1982)). If we were required to list the documents at issue on a privilege log, it would give plaintiffs insight into our thought processes and avenues and means of investigation.

There is no rule that requires litigation counsel to disclose the publicly available documents that it has acquired as part of its case preparation, nor should there be. Any such rule would enable opposing counsel simply to serve a document request and wait for his or her opponent to do the necessary work for him. The only case that plaintiffs cite in support of their novel position, *Axler v. Scientific Ecology Group, Inc.*, stands for the unremarkable proposition that "otherwise discoverable documents that are

in [an] attorneys' possession, custody, or control" are subject to disclosure. 196 F.R.D. 210, 212 (D. Mass. 2000) (emphasis added). Here, unlike in *Axler*, the documents for which plaintiffs seek production are documents gathered by litigation counsel in the course of this case to cross-examine a witness.<sup>11</sup> They are therefore not "otherwise discoverable."

2. Interrogatory Nos. 3, 4, and 5 (history of employee assignments).

Defendants' files, both paper and electronic, do not record the animals with which particular individuals work – they identify only the general job position that a person held. (*See* Shugerman Decl. at ¶ 4.) For example, while defendants may know that a person was employed as an "Animal Handler," they do not have a record of whether that person was handling elephants, tigers, or horses. (*See id.*) Nor do defendants' records identify the barn to which a "barn man" or other member of the animal crew was assigned. (*See id.*) Nonetheless, defendants have made great efforts to interview multiple individuals on their touring companies and as well as at their headquarters in an effort to reconstruct information about the persons who had direct responsibilities involving elephants dating back to 1996 and will produce that information to plaintiffs as soon as it is complete. (*See id.* at ¶ 9.)

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<sup>11</sup> Plaintiffs' suggestion (at 20) that defendants have waived any privilege attaching to the documents gathered by counsel is also unavailing. FRCP 26(b)(5) requires only that a party assert a privilege for documents that are "otherwise discoverable." The documents in question are not discoverable, because defendants have asserted a valid objection to plaintiffs' request for them. *See United States v. Philip Morris, Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003) (if a party's pending objections apply to allegedly privileged documents, the party need not log the document until the court rules on its objections). If this Court were to overrule defendants' objection, defendants would then assert a privilege for the documents, as appropriate.

In addition, although plaintiffs complain that defendants have not provided “job responsibilities” for the various individuals that defendants have identified (at 21-22), they ignore that defendants have produced documents setting forth official job responsibilities. Pursuant to FRCP 33(d), defendants have specifically directed plaintiffs to those documents in response to the portion of Interrogatory No. 5 that asks for information about job responsibilities. (*See* Letter to Kim Ockene of Jan. 25, 2005, Ex. 6.)

3. Interrogatory Nos. 8 and 9 and Document Request Nos. 8 and 16 (information and documents about elephants).

Like their request for employee staffing assignments, plaintiffs have asked for other information that is not kept in defendants’ business records – where each of more than 80 elephants was located during each year during the period 1994 to date. In an attempt to respond, defendants tried to reconstruct this information and will provide this information for the period 1996 to date to plaintiffs. (*See* Jones Decl. at ¶ 8.) In addition, defendants are gathering and will produce to plaintiffs information about how Feld acquired each of its elephants. (*See id.* at ¶¶ 9-10.) Contrary to plaintiffs’ insistence, defendants’ have never owned elephants named Luke, Roxy, or Bunny.

Defendants have also requested that plaintiffs agree to a confidentiality order that would restrict the use of detailed veterinary records about the elephants to this litigation. FRCP 26(c) contemplates the use of such protective orders where the discoverable information could be used to cause “annoyance, embarrassment, oppression, or undue burden or expense, including ... a trade secret or other confidential research, development, or commercial information ....” FRCP 26(c); *see also United States v.*

*MWI Corp.*, 209 F.R.D. 21, 28 (D.D.C. 2002). The records at issue fall squarely within the categories contemplated by FRCP because they contain the notes of defendants' veterinarians and animal care staff and could be used to embarrass defendants and their veterinarians and animal care staff. In addition, the records contain confidential information of value to defendants because defendants' employees are preparing to publish articles and research papers relying on those data.

The notes in question – compiled for the private use of veterinary professionals – can be taken out of context and used to embarrass defendants and their veterinary and animal care staff. For example, when an elephant appears ill, a veterinarian and/or staff will often note a list of “rule-outs” – possible causes of the observed symptoms that the veterinarian needs to eliminate as the cause – and other relevant observations. (*See* Read Decl. at ¶ 3.<sup>12</sup>) In other words, this list represents the staff's observations and the veterinarian's brainstorming about possible causes of symptoms – a key part of the diagnostic process that all veterinarians must follow. (*See id.*) These notes also provide an invaluable tool for reviewing and improving current and future diagnostic techniques. (*See id.*) Because the notes are compiled for the veterinarian's own personal use, the medical record does not explain that the listed disease(s) are only rule-outs.

Attribution to defendants of such illnesses in their animals could embarrass defendants and injure their reputation. It would also embarrass defendants' veterinarians and animal care staff, who will be publicly accused of providing deficient care to elephants based on mischaracterizations or out-of-context quotations of their

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<sup>12</sup> The Declaration of Bruce Read, Feld's Vice President of Animal Stewardship, is attached at Tab 7.

notes. Plaintiffs could misuse these notes in publicity campaigns to suggest that defendants' veterinarians have diagnosed multiple ailments that, in fact, were rule-outs. Indeed, plaintiffs' tactics, track record, and websites speak for themselves in their efforts to harass, embarrass, and financially injure defendants.<sup>13</sup> Moreover, the possibility that every one of their speculative notes could wind up as fodder for publicity-hungry activists such as plaintiffs could make defendants' veterinarians gun-shy about recording their speculative thoughts in their notes. Such an impact would inhibit the process and therefore interfere with their ability to provide the best possible care for the animals. *See Schreiber v. Society for Savings Bancorp, Inc.*, 11 F.3d 217, 222 (D.C. Cir. 1993) (expressing concern about chilling effect of document production on regulatory oversight activities and suggesting protective order to reconcile competing interests).

Of equal concern, many of the documents at issue form the basis of research papers and articles that defendants' employees and consultants are preparing, including an article on elephant gestation, elephant births, and mother-infant bonding, as well as studies of elephant physiology. (*See id.* at ¶ 4.) The publication of such articles and studies will be of great value to defendants' employees and the elephant community. (*See id.*) Preserving the confidentiality of the data in these records is vital to defendants' employees ability to publish these articles, and early publication of the data could cause harm to Feld's stature as a serious scientific institution in the captive breeding community. (*See id.* at ¶ 6.) While we recognize that defendants cannot force plaintiffs

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<sup>13</sup> See, e.g., "Ringling Brothers Circus Brings Acts of Cruelty To Town," available at [http://www.asPCA.org/site/News2?id=15479&printer\\_friendly=1](http://www.asPCA.org/site/News2?id=15479&printer_friendly=1); <http://www.actionforanimalsnetwork.org/tips.htm> (quoting ASPCA official as urging people not to attend circus); <http://www.idausa.org/vh/victories2002.html> (reporting that Tom Rider traveled at expense of In Defense of Animals to protest against circus).

to wait for peer review and publication of these articles before obtaining documents that are responsive to their requests, there is no reason for plaintiffs to be given the ability to publicize documents that could harm defendants and their employees or moot the scientific value of their publications. Such materials are precisely the type of “confidential research, development, or commercial information” contemplated by Rule 26(c).

On the other hand, plaintiffs’ ability to prosecute this case will not be at all inhibited by entry of the confidentiality order that defendants have requested. Plaintiffs would still receive the medical records that they have requested, and they will still be permitted to use them in this litigation. They would simply be barred from disclosing them to the public. Plaintiffs have not provided a definitive answer to defendants’ request for a confidentiality order. Because their motion appears to reject that request, defendants are filing a motion for a protective order.

4. Defendants’ Conservation Activities (Interrogatory No. 11, Document Request Nos. 9, 10, and 16).

Plaintiffs seek all documents that “pertain in any way to Ringling’s efforts to breed Asian elephants.” (Pltf. Ex. A at Doc. Request No. 16 (emphasis added).) Taken literally, the request implicates all documents that relate in any way to fertile elephants at defendants’ Center for Elephant Conservation (“CEC”) – a facility in Florida focused on the care, scientific study, breeding, and retirement of Asian elephants. For example, documents relating to the quantity and price of food, bedding, and climate control at the CEC all “pertain” in some way to “breeding efforts.” But such documents



are not relevant to the issues of this case, and to the extent that plaintiffs are seeking them, their request is overbroad and out of proportion with any benefit they will provide.

In an effort to provide the core information that plaintiffs seek, defendants have produced summary medical records that show if an elephant is pregnant, charts of progesterone levels of fertile female elephants at CEC, and other miscellaneous documents.

In addition, despite their doubtful relevance to plaintiffs' claims in this case, defendants are willing to provide information detailing their efforts to conserve Asian elephants and their natural habitat. Defendants expressly reserve the right to use this information to rebut plaintiffs unfounded contentions in this case.

**VI. PLAINTIFFS' CONCERNS WITH DEFENDANTS' GENERAL OBJECTIONS ARE A RED HERRING.**

Plaintiffs raised a number of new issues for the first time shortly before or in their motion to compel, mostly relating to defendants' general objections. For example, plaintiffs complain (at 8 n.8) about defendants' objection to plaintiffs' request for publicly available documents, but this has never been the source of meet-and-confer discussions between the parties. Plaintiffs also complain (at 41) about defendants' objection regarding requests that call for the production of information subject to protective orders or confidentiality agreements. Plaintiffs first raised this issue in their letter dated January 10, 2005 (Pltf. Ex. J), more than nine months after receiving the discovery responses that asserted the objection, and only two weeks before they filed their motion. Because plaintiffs have made no effort to discuss these issues with defendants before raising them in their motion, they are not ripe for decision, and the

Court should direct the parties to discuss them. *See* LCvR 7(m).<sup>14</sup> However, if the Court sees fit to address these issues at this time, they offer no basis to compel further production.

First, defendants have not withheld any document solely on the basis of its being public.<sup>15</sup> For example, defendants have produced to plaintiffs documents that they obtained through the Freedom of Information Act, despite the fact that plaintiffs have obtained many, if not all, of the same documents through the same channels.

Second, to the extent that defendants have withheld otherwise responsive and discoverable documents on the basis of the attorney-client privilege, work-product protection, or some other privilege or protection, they have included those documents on their privilege log.<sup>16</sup> If defendants locate additional responsive, privileged documents while conducting the additional file searches requested by plaintiffs, they will supplement their privilege log accordingly.

Third, defendants cannot identify documents that they have withheld on the basis of an objection regarding the breadth of plaintiffs' definitions, such as the definition of "Ringling." Indeed, the very problem with plaintiffs' definition of "Ringling" is that its reach goes well beyond those whose documents are in defendants'

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<sup>14</sup> This Court's local rules require that parties, before filing any discovery motion, "discuss the anticipated motion with opposing counsel . . . in a good faith effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement." LCvR 7(m). *Sokos v. Hilton Hotels Corp.*, 283 F. Supp. 2d 42, 55 (D.D.C. 2003) (local rule "imposes a duty on counsel to confer with each other on nondispositive motions before such motions are filed.").

<sup>15</sup> Defendants have not produced publicly available news reports collected and assembled by counsel relating to Tom Rider. Were the Court to overrule defendants' objections relating to plaintiffs' request for documents relating to Mr. Rider, defendants will either produce or log those documents, as appropriate.

<sup>16</sup> Defendants have previously addressed the separate privilege issues relating to documents about Mr. Rider.

possession, custody, or control. For example, plaintiffs define “Ringling” to include all of defendants’ “employees, independent contractors, ... and consultants.” But defendants have no way of knowing what documents are in the possession of former independent contractors, consultants, or ex-employees, nor can documents in the possession of such people be cast as within defendants’ “possession, custody, or control.”

Although they profess indignation at defendants’ use of these general objections, defendants note that plaintiffs used many of the same general objections in their discovery responses, without making any effort to indicate how each general objection impacted the specific discovery requests to which they then responded. (*See e.g.*, Ex. 8 at 2-3 (Responses and Objections of Plaintiff Animal Welfare Institute to Defendants’ Discovery Requests).) Such general objections are standard reservations of rights commonly asserted in federal courts.

**CONCLUSION**

For the reasons stated herein, the Court should deny plaintiffs' motion to compel in its entirety.

Respectfully Submitted,

COVINGTON & BURLING

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ATTORNEYS FOR DEFENDANTS

February 15, 2005

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of February, 2005, Defendants' Memorandum in Opposition to Plaintiffs' Motion to Compel Defendants' Compliance with Plaintiffs' Discovery Requests was filed via the Court's CM/ECF system. Notice to all parties will be sent by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. In addition, a copy of the foregoing has been served as otherwise provided by operation of Local Rule on parties and/or counsel who have not registered on the Court's CM/ECF system.

/s/ Joshua D. Wolson