

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.

Civ. No. 03-2006 (EGS)

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL
DEFENDANTS' COMPLIANCE WITH PLAINTIFFS' DISCOVERY REQUESTS**

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INTRODUCTION

Faced with a motion to compel and having little defense on the merits, defendants resort to accusations that plaintiffs' "real purpose" is to use the discovery they have requested not for litigation, but rather for some vaguely identified – and nefarious – "publicity and legislative" campaigns to eliminate all animals from circuses. See Defendants' Memorandum in Opposition to Plaintiffs' Motion To Compel ("Def. Opp.") at 3. However, the mundane reality is that plaintiffs simply want to discover information directly pertinent to their claims that defendants' treatment of endangered Asian elephants violates the Endangered Species Act. As plaintiffs demonstrated in their Memorandum in Support of Plaintiffs' Motion to Compel ("Plfs. Mem."), all of the information plaintiffs have sought is directly relevant to these claims or to Ringling Bros.' defenses in this case, and hence, they are clearly entitled to obtain it under the Federal Rules of discovery.

Furthermore, regardless of whether defendants disagree with the positions plaintiffs have taken publicly with respect to Ringling Bros.' treatment of the elephants or on the broader issue of the use of wild animals in circuses, defendants certainly may not use that disagreement to withhold from plaintiffs – and the Court – information that is plainly relevant to this case. Plaintiffs have complied with their obligations under the Rules and have produced everything defendants requested, except for privileged documents that are meticulously identified on plaintiffs' privilege log; it is time for defendants to do the same. See Hickman v. Taylor, 329 U.S. 495, 507 (1947) (noting that discovery "is not a one-way proposition," and that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation").¹

¹ Defendants complain that plaintiffs did not initiate meet and confer discussions until October. See Def. Opp. at 1, 22. However, as plaintiffs have explained, see Plfs. Mem. at 7-12, because of the manner in which defendants responded to plaintiffs' requests – by withholding responsive documents based on broad general objections or other unstated rationales, without ever listing such withheld documents on a

In addition, all of the information plaintiffs sought, first in their meet and confer letter, and now in their motion to compel, is information that defendants were required to produce in June 2004. Thus, although defendants repeatedly refer to plaintiffs' requests for "new" searches, Def. Opp. at 3, "additional reviews," id. at 2, and "additional information," id., the information at issue was all expressly requested in plaintiffs' initial discovery requests. Therefore, if producing such information now causes any additional burden for defendants, defendants have no one but themselves to blame, since they unilaterally decided not to search for or produce this information when it was initially requested, almost a year ago. See Plaintiffs' First Set of Requests for Admission, Interrogatories and Request for Documents ("Plfs. Requests") (Exh. A to Plfs. Mem.) (dated March 30, 2004).

Defendants also repeatedly accuse plaintiffs of refusing to compromise during the meet and confer discussions. See, e.g., Def. Opp. at 2. However, and as the parties' correspondence plainly demonstrates, plaintiffs have attempted on numerous occasions to devise reasonable compromises, while at the same time preserving their right to obtain highly relevant and clearly discoverable information. For example, plaintiffs agreed to accept a subset of the videos they requested for purposes of avoiding a motion to compel and reducing the immediate burden on defendants. See Plfs. Mem. at 32-35. However, what plaintiffs did not agree to do was to forever waive their right to obtain additional relevant videos in the future. The same is true with respect to the identification of employees who work with the elephants. See id. at 21-24.

privilege log or seeking a protective order – it took plaintiffs time to understand the scope of what defendants had not produced. In addition, as defendants are aware, while plaintiffs were reviewing defendants' production and preparing their meet and confer letter, plaintiffs' counsel were simultaneously taking third-party depositions and moving to compel responses to third-party subpoenas in this case, as well as litigating other matters. Accordingly, four months to provide defendants with a thorough recitation of all of plaintiffs' concerns about defendants' discovery responses was hardly unreasonable. Defendants also wrongly state that plaintiffs failed to raise any of their concerns at the September 7, 2004 status conference, Def. Opp. at 1. See Transcript (Plfs. Supp. Exh. A) ("we have some pretty serious concerns about defendants' responses to our interrogatories and document production requests").

Therefore, for the reasons discussed in plaintiffs' opening memorandum and as further discussed below, plaintiffs request that the Court order defendants to produce the requested materials. Alternatively, should the Court agree, with respect to the dispute regarding video and other recordings, plaintiffs would be willing to have that particular matter assigned to a magistrate judge for resolution.²

ARGUMENT

A. Defendants Admit They Have Been Withholding Documents Concerning Tom Rider Without Having Asserted A Privilege For Such Records (Document Request 5).

Because Tom Rider is a plaintiff and key witness in this case, plaintiffs propounded an entirely predictable document request seeking all information defendants have in their custody or control related to Mr. Rider. See Plfs. Requests at 13 (Document Request 5). Such basic information is plainly relevant to plaintiffs' claims and Ringling Bros.' defenses in this case, and is well within the scope of Rule 26(b)(1). Indeed, defendants have already stated that they intend to challenge Mr. Rider's standing in this lawsuit, and will also seek to impeach Mr. Rider's

² Defendants' reliance on their insistence that plaintiffs exceeded the number of interrogatories permitted under the Rules, Def. Opp. at 13-15, 20-22, as a basis for defendants not producing requested information, is completely misplaced. First, this argument cannot possibly excuse defendants' failure to respond to plaintiffs' document production requests – for which there are no limits under the Rules – yet the great majority of plaintiffs' motion to compel is directed at defendants' failure to produce documents. Second, plaintiffs only served a total of eighteen interrogatories on both of the named defendants, although the Rules would have allowed them to serve 25 interrogatories on each of them, for a total of 50 interrogatories. See Fed. R. Civ. P. 33(a). In addition, because the sub-parts within each of plaintiffs' eighteen interrogatories are all “logically or factually subsumed within and necessarily related to the primary question” posed, there is no basis for counting them as additional interrogatories. Kendall v. GES Exposition Services, 174 F.R.D. 684, 685 (D. Nev. 1997). Third, even if plaintiffs were to be limited to a total of 25 interrogatories for both defendants, and the Court were to believe they have exceeded that limit, plaintiffs would be willing to forego responses to all of their interrogatory sub-parts requesting defendants to “identify” documents (which defendants have not answered anyway), if defendants would simply produce the requested documents in response to the corresponding document requests, or identify the documents on a privilege log. In addition, although defendants contend that “[w]here [they] have relied on Rule 33(d), they have identified the documents on which they are relying,” Def. Opp. at 22, n. 10, this simply is not correct. See, e.g., Defendants' Responses to Interrogatories 6, 8, 9, 11, and 18 (Exh. B to Plfs. Mem.) (defendants reference 33(d) but do not identify the documents upon which they rely).

credibility. See Defendants' Answer, at 13 (Oct. 8, 2003); Def. Opp. at 23.³

Yet, it was not until February 10, 2005 – after plaintiffs filed their Motion to Compel and 8 months after the discovery responses were exchanged – that defendants for the first time produced any employment-related records concerning Mr. Rider, who worked for the circus for two and a half years. And they now apparently contend that all other records concerning Mr. Rider are covered by the work-product privilege, despite the fact that, as explained in plaintiffs' opening memorandum, see Plfs. Mem. at 17-20, defendants never asserted this privilege in response to plaintiffs' discovery requests, nor listed any records concerning Mr. Rider on their privilege log. Nor have they supplemented that log to include any such records. Defendants also now apparently contend, for the first time, that because such records are allegedly “work-product,” the records are not even subject to discovery at all because they are not within the defendants' “control.” Def. Opp. at 23. This circular objection must fail for several reasons.

First, defendants have waived any such objection – which is premised on the contention that the withheld documents are work-product – by failing to assert it in a timely manner. All work-product or other objections for producing documents must be asserted with specificity in the initial response to discovery requests, or in a motion for a protective order, and in any event, well before an opposition to a motion to compel. See Fed. R. Civ. P. 26(b)(5) (“When a party withholds information otherwise discoverable under these rules by claiming that it is privileged

³ Defendants' self-serving assertion that plaintiffs are seeking defendants' records concerning Tom Rider “because similar information . . . was used for impeachment at the deposition of Frank Hagan, whom plaintiffs had hoped to use as a star witness,” Def. Opp. at 3, is wrong, and plainly intended to prejudice the Court against one of plaintiffs' witnesses – a former Ringling employee who worked for the circus for ten years until July 2004, and who recently testified at a videotaped deposition that Ringling handlers frequently hit the elephants with sharp bull hooks and keep the elephants chained throughout the day and night. In fact, plaintiffs' completely predictable discovery request for all documents concerning Mr. Rider was served on defendants on March 30, 2004 – months before plaintiffs even knew of the existence of Mr. Hagan.

or subject to protection as trial preparation material, the party shall make the claim expressly.”); Anderson v. Marion County Sheriff’s Dept., 220 F.R.D. 555, 562, n. 5 (S.D. Ind. 2004) (“the time to make the showing that certain information is privileged is at the time the privilege is asserted, not months later when the matter is before the Court on a motion to compel”).

Indeed, not only have defendants never before asserted this novel objection – i.e., that the documents are not within defendants’ control for purposes of Fed. R. Civ. P. 34, see Def. Opp. at 23 – but, as explained in plaintiffs’ opening memorandum, defendants have in fact asserted shifting grounds for withholding the same records. See, e.g., Plfs. Mem. at 18-19; January 19, 2005 letter from Joshua Wolson (Exh. D to Plfs. Mem.) (contending that the documents concerning Mr. Rider were non-responsive because they fell within defendants’ general objection to the definition of “Ringling”). This moving target approach to discovery is impermissible, and should not be condoned by this Court. See, e.g., Moloney v. United States, 204 F.R.D. 16, 21 (D. Mass. 2001) (“it defies logic to permit counsel to assert one privilege so as to preclude testimony at a deposition, but thereafter research and claim an entirely different privilege in response to a motion to compel”) (emphasis added); Day v. Boston Edison Co., 150 F.R.D. 16, 23 (D. Mass. 1993) (finding waiver of privilege objections where plaintiff had not expressed the objections in a straightforward manner in his discovery response, and noting that “[i]f a document or object falls within a document request, it must be produced unless an objection based on relevance or privilege or some other ground is asserted in the response”).

Moreover, even if defendants had not waived this objection by failing to assert it in a timely manner, they have waived it in any event by failing to provide a privilege log listing the documents that are allegedly work-product, so that plaintiffs – and the Court – would have a basis for assessing whether in fact the privilege applies, and also whether there are grounds for

nevertheless allowing plaintiffs access to some of the information. See Fed. R. Civ. P. 26(b)(5); Lohrenz v. Donnelly, 187 F.R.D. 1, 6-7 (D.D.C. 1999); 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”); see also Fed. R. Civ. P. 26(b)(3) (party may obtain work-product under certain circumstances).⁴

Second, defendants’ argument fails on its merits. Documents defendants pay their counsel to gather on defendants’ behalf are clearly within defendants’ control, since defendants presumably have the right to demand access to those documents. See, e.g., Hobbey v. Burge, 2005 WL 121738, at *9 (N.D. Ill 2005) (“Documents in the possession of a party’s former attorneys are documents in that party’s control for purposes of Rule 34(a)”). The only case that defendants cite for the proposition that defendants do not have “control” over their attorneys’ work-product for purposes of Rule 34, First Am. Corp. v. Al-Nahyan, 1996 WL 170121, at 3, does not even speak to this question. See Def. Opp. at 23. Rather, that case stands for the proposition that a lawyer may assert the work-product privilege to prevent the release of a document even if the client has waived the privilege; the case has nothing to do with “control” for purposes of Rule 34. See First Am. Corp., 1996 WL 170121, at *3.

Indeed, under defendants’ theory there apparently would be no need ever to assert a work-product privilege in response to discovery requests, since all work-product in the possession of an attorney would fall outside the scope of discovery entirely because it is not in the “possession, custody, or control” of the actual party within the meaning of Rule 34. On the contrary, such material is clearly within the reach of Rule 34. See Hobbey, 2005 WL 121738,

⁴ Defendants wrongly assert that there is no waiver with respect to the documents concerning Tom Rider, “because defendants have asserted a valid objection to plaintiffs’ request for them.” Def. Opp. at 24, n. 11. In fact, the only objection defendants assert in their Opposition on this point goes to whether or not the documents are covered by the work-product privilege – precisely what must be asserted in a timely manner, and in a privilege log.

*9-10 (explaining that, under this theory, the claim of work product would be untestable because the existence of the documents would not be disclosed” and that, on the contrary, “both the letter and the policy of the Federal Rules require an express assertion of any claim of work product protection, so that such a claim can be tested”).

Accordingly, defendants must produce all of the documents concerning Mr. Rider that were requested in plaintiffs’ Document Request 5. At an absolute minimum, if the Court does not find that defendants have waived their opportunity to assert a work-product privilege at this late date, the Court should order defendants to immediately produce a detailed privilege log listing all of the withheld documents. See Fed. R. Civ. P. 26(b)(5); Pulliam v. Continental Casualty Co., 2003 WL 1085939, * 5 (D.D.C. 2003) (“if Continental withholds responsive documents on grounds of privilege, then it has a duty to prepare a privilege log setting forth the basis of the asserted privilege”); Avery Dennison Corp. v. Four Pillars, 190 F.R.D. 1, *1(D.D.C. 1999); see also Alexander v. FBI, 186 F.R.D. 102, 106 (D.D.C. 1998).⁵

B. Defendants Must Produce All Requested Records Concerning The Asian Elephants (Interrogatory Numbers 8 and 9, Document Request Numbers 8 and 16).

1. Defendants Must Produce All Withheld Medical Records, Including All Records Concerning Tuberculosis.

a. The Medical Records Must Be Produced.

Defendants now fully admit that they are withholding the detailed medical records concerning the Asian elephants in their custody, which are directly responsive to plaintiffs’ Document Request 8, see Def. Opp. at 25-28, despite the fact that, in response to plaintiffs’

⁵ For the same reasons, the Court should not indulge defendants’ belated attempt to avoid their obligation under the Rules by asserting that the preparation of a privilege log would itself reveal privileged information. Def. Opp. at 23. The whole purpose of such a log is to provide just enough information to allow the privilege to be tested, while not disclosing the protected material. See Fed. R. Civ. P. 26(b)(5) (when party asserts a privilege, it must do so “in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection”).

request, defendants asserted no claim of confidentiality, listed no medical records on their privilege log, and purported to be producing “responsive, non-privileged documents dated January 1, 1996, or later.” Def. Responses at 30. Defendants conspicuously omit from their Opposition any explanation of their failure to acknowledge the existence of these critical documents until months into the meet and confer process, and only after plaintiffs informed them that they were planning to file a motion to compel. See December 22, 2004 Letter from Kimberly Ockene (Exh. H to Plfs. Mem.), at 5 (stating that plaintiffs would be moving to compel); January 4, 2005 Letter from Joshua Wolson (Exh. I to Plfs. Mem.), at 3 (indicating, for the first time, that there are “more detailed medical records” and, for the first time, seeking plaintiffs’ consent to a protective order).

Instead, defendants now act as though they had asked plaintiffs from the start to agree to a confidentiality order with respect to these medical records. See Def. Opp. at 25 (“Defendants have also requested that plaintiffs agree to a confidentiality order that would restrict the use of detailed veterinary records”). On the contrary, however, even after plaintiffs raised the issue in their first meet and confer letter on October 19, defendants continued to assert that they had produced “complete” medical records on the elephants. See November 8 Letter (Exh. F to Plfs. Mem.), at 7 (stating that “the records that defendants produced to you are complete, in that they contain all of the pages in defendants’ files”). Thus, it was not until January 4, after plaintiffs had made clear their intention to inform the Court that they would be moving to compel production of these records, see December 22, 2004 Letter, at 5, that defendants finally admitted to withholding these critical records, and only then agreed to produce them, but only if plaintiffs would agree to a broad protective order. See January 4, 2005 Letter, at 3. Thus, if plaintiffs did not otherwise know that such records must exist and had not threatened to move to compel their

production, to this day defendants might never have revealed the existence of these clearly relevant records.

However, under the Rules, if defendants are withholding responsive documents they “must do so in a straightforward and forthright manner, not by artful phrasing that obscures more than it discloses.” Howard v. Sweetheart Cup Co., 2001 WL 721765, *3 (N.D. Ill).

Accordingly, defendants have waived any claim of confidentiality for such records, and the Court should order their immediate production. See Athridge v. Aetna Casualty, 184 F.R.D. 181, 190-91 (D.D.C. 1998) (finding defendants had waived objections where they had made broad, unspecific objections and agreed to produce “relevant, non-privileged” documents).⁶

Even if the Court were to decide that defendants’ unjustifiable delay in admitting the existence of the medical records and belated attempt to seek a confidentiality agreement does not waive any such claim of confidentiality, defendants have not remotely carried their burden to demonstrate “good cause” for issuing a protective order here. See Fed. R. Civ. P. 26(c). Indeed, as explained fully in Plaintiffs’ Opposition to Defendants’ Motion for a Protective Order, which is also being filed today and is incorporated here by reference, defendants have not stated with any of the requisite specificity why they would suffer “serious” harm by the release of the animals’ medical records. See Campbell v. Department of Justice, 231 F. Supp.2d 1, 13-15 (D.D.C. 2002). Therefore, for all of these reasons, as well as those set forth in plaintiffs’ opposition to defendants motion to compel, the Court should order defendants to produce the requested medical records.

⁶ Defendants meticulously assert that “defendants have never owned elephants named Luke, Roxy, or Bunny,” Def. Opp. at 25 (emphasis added). However, plaintiffs’ Document Request 8 sought records related to the elephants identified in response to Interrogatory 8 which, in turn, sought identification of each elephant “that Ringling owned or leased from 1994 to the present.” Plfs. Requests at 8, 13 (emphasis added). Notably absent from defendants’ Opposition is any claim that defendants have never leased elephants named Luke, Roxy, or Bunny. If defendants did lease these animals for some period of time, they must produce their records.

b. Information Relating to Tuberculosis is Discoverable.

Defendants continue to insist that all information of any kind related to whether the Asian elephants in their custody have tuberculosis is completely “outside the scope of this case.” Def. Opp. at 12. Defendants’ only legal rationale for this extreme position – for which they do not cite any caselaw – is that because tuberculosis is not specifically mentioned in the complaint, it is therefore not relevant to plaintiffs’ claims. See Def. Opp. at 12. As defendants know, however, the scope of discovery is broad, and “includes ‘any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.’” United States v. Network Software Assocs., 217 F.R.D. 240, 245-46 (D.D.C. 2003) (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)); see Fed. R. Civ. P. 26(b)(1). As plaintiffs explained in their opening memorandum, Plfs. Mem. at 30, the presence of tuberculosis in captive elephants is relevant to the issue of care and treatment of the animals, particularly because it is a stress-related disease, and is therefore relevant to plaintiffs’ claims that these animals are beaten, chained, continuously confined, and that the baby elephants are forcibly removed from their mothers before they are naturally weaned. Indeed, although plaintiffs have explained to defendants the relevance of these records on many occasions, including in their memorandum, Plfs. Mem. at 30, defendants conspicuously failed to respond to this point in their Opposition.

Moreover, any notion that records concerning tuberculosis are not relevant to this case is quickly dispensed with in light of the fact that defendants themselves sought precisely such records in their own discovery directed to plaintiffs. See Defendants’ First Set of Document Production Requests to Plaintiffs (Plfs. Supp. Exh. B), at 11 (seeking from all organizational plaintiffs “[a]ll documents that refer, reflect, or relate to the presence of tuberculosis in circus elephants.”) (emphasis added). Apparently, defendants believe that discovery is a one-way

street, allowing them to demand and discover all of plaintiffs' records regarding tuberculosis, but then to refuse to produce any such records of their own, on the grounds that such records are not "relevant." However, such a fundamentally unfair approach to discovery is not permissible. See Hickman v. Taylor, 329 U.S. at 507 ("Discovery . . . is not a one-way proposition"); Wardius v. Oregon, 412 U.S. 470, 476 (1973) ("It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed" to his opponent).

Plainly lacking confidence in their legal position that materials related to tuberculosis are irrelevant to the claims in this case, defendants are reduced to making accusatory assertions as to plaintiffs' "real purpose" in seeking this discovery, and contend that plaintiffs are "improperly using the discovery process" to assist in publicity campaigns. Def. Opp. at 12-13. Defendants protest too much. As plaintiffs' have repeatedly explained, they seek materials related to tuberculosis for the straightforward purpose of developing their claims in this litigation. Accordingly, the Court should order defendants to produce all records responsive to Document Requests 8 and 16, including all those pertaining to tuberculosis.⁷

2. Defendants Must Produce Other Requested Information on the Elephants (Interrogatories 8 and 9).

As plaintiffs explained in their opening memorandum, Plfs. Mem. at 21-24, defendants also failed to produce, in response to Interrogatories 8 and 9, other requested information concerning the elephants, such as their familial histories, the circumstances under which they came into Ringling Bros.' custody, and which elephants are in the Blue Unit, Red Unit, or Gold

⁷ The only support defendants cite for plaintiffs' hypothetical "misuse" of tuberculosis documents is a press release about the Enforcement Report plaintiffs prepared using documents obtained under the Freedom of Information Act. See Def. Opp. at 12, n. 5. The other webpage that defendants cite (www.circuses.com/tuberculosis.asp) does not belong to any of the plaintiffs in this case.

Unit of the circus.⁸ When confronted with a motion to compel, defendants now state that they are gathering and preparing to produce such information, which they admit they only started to do in December 2004 – nine months after the discovery requests were served, and five months after the responses were due. See Jones Decl. at ¶ 7 (Def. Exh. X); Def. Opp. at 25. Therefore, unless plaintiffs receive a complete response to these requests by April 7 (the day before the Court has scheduled oral argument on the motion to compel) – in which case plaintiffs will inform the Court that their Motion is withdrawn on this point – the Court should compel defendants to provide complete responses to Interrogatories 8 and 9.⁹

C. Defendants Must Produce Requested Information Concerning Current and Former Employees in a Timely Manner (Interrogatory Numbers 4 and 5).

Plaintiffs' interrogatories also sought the identification of employees who worked (or still work) with the elephants – i.e., individuals who would have information directly relevant to the issues involved in this case. However, as plaintiffs explained in their opening memorandum, Plfs. Mem. at 21, without seeking a protective order or otherwise informing plaintiffs, defendants unilaterally narrowed the scope of plaintiffs' request by not only limiting the categories of employees they would identify, but also identifying only those individuals defendants believed have "substantial personal knowledge" of the subject matter of this case. Def. Responses at 4. In so doing, defendants failed to identify numerous individuals who worked directly with the elephants and have information bearing on this case – including individuals such as Tom Rider. See Plfs. Mem. at 21.

⁸ As plaintiffs explained in their opening brief, plaintiffs agreed to accept information on the history of which units the elephants traveled with in response to Interrogatory 9, which sought information on which employees worked with which elephants. Plfs. Mem. at 23.

⁹ On March 1, a few days before plaintiffs' Reply was due, defendants served plaintiffs with two files of information that is ostensibly responsive to these requests. However, plaintiffs have not yet had an opportunity to review this information. Once plaintiffs review the material, they will determine whether their Motion on this issue is moot, and will so inform the Court and defendants.

As plaintiffs' also explained, during the meet and confer process plaintiffs attempted to devise a compromise by agreeing not to move to compel full compliance with the request if defendants would provide identifying information for certain more limited categories of employees. See Plfs. Mem. at 22-23. Defendants, however, took the position that they would not even provide these more limited categories of information unless plaintiffs would forever waive their right to seek the identification of additional employees who might also have relevant information, should it ever become apparent that such employees exist. See December 22, 2004 Letter, at 2. Since plaintiffs were unwilling to agree to such a waiver – particularly in light of defendants' proven penchant for withholding responsive information – they had no choice but to include such discovery with their motion to compel.¹⁰

In their Opposition, defendants contend that they are still gathering this information, Def. Opp. at 24. However, because this information was requested of defendants almost a year ago, plaintiffs are not willing to drop their motion to compel this vital information absent a finite date for its production. Accordingly, unless defendants produce the information responsive to plaintiffs' requests, as narrowed by the parties' agreement, by April 7, 2005 – in which case plaintiffs will inform the Court that they withdraw their motion on this point – the Court should compel defendants to produce this information. See Lohrenz v. Donnelly, 187 F.R.D. 1, 7 (D.D.C. 1999) (“parties may not “choose to produce information when [they] feel[] like it”).¹¹

¹⁰ Defendants disingenuously accuse plaintiffs of “ignor[ing] that defendants have produced documents setting forth official job responsibilities” in response to plaintiffs' request. Def. Opp. at 25. What defendants fail to point out is that they produced these documents on January 25, the very day plaintiffs filed their motion.

¹¹ On March 3, the day before this Reply was due, defendants served plaintiffs with supplemental responses to certain Interrogatories, including those related to the identification of employees. Plaintiffs have not yet reviewed these materials. As noted, should these materials resolve this or any of the other matters at issue in plaintiffs' motion to compel, plaintiffs will so inform the Court.

D. Defendants Must Produce Records and Information Related to Plaintiffs' Enforcement Report (Interrogatory Number 15, Document Request Number 23).

As plaintiffs explained in their opening memorandum, Plfs. Mem. at 30-32, defendants flatly refused to produce documents related to the USDA investigations and other matters discussed in each of the substantive chapters of plaintiffs' Enforcement Report – a compilation of material obtained from the USDA under the Freedom of Information Act. See Table of Contents (Exh. R to Plfs. Mem.). However, all of those matters bear directly on the central issue in this case – which defendants themselves define as “whether defendants’ care for their Asian elephants violates the Endangered Species Act.” Def. Opp. at 2.¹²

Tellingly, having no explanation for withholding these highly relevant documents, defendants do not provide any response to this issue in their Opposition. Indeed, there is no lawful basis for refusing to produce these highly relevant records. Accordingly, the Court should not permit defendants to delay production of this material any longer, and should order defendants to produce all records related to plaintiffs' Enforcement Report. In fact, since each substantive chapter of the Report relates to a particular incident, individual, subject matter, or USDA investigation (*e.g.*, “TX99237-AC”), the requested records should be fairly easy for defendants to locate.

E. Defendants' Must Produce Requested Video, Audio, and Other Recordings (Interrogatory Number 17, Document Request Number 25)

As plaintiffs have explained, in their March 2004 discovery requests they sought production of all “video, audio, or other recordings that involve, concern, or record elephants or

¹² The chapters in the Report include: The Death of 3-yr old [elephant] Kenny, Allegations of Abuse by Former Ringling Employees, The Forcible Removal of Baby Elephants from their Mothers, The Death of [elephant] Benjamin, The Santa Clara Valley Humane Society's Complaints of Routine Bullhook Use, Allegations by Former Ringling Bros. Employee Tom Rider, Abuse in San Francisco, Striking of [elephant] Asia with a Bullhook, and Tuberculosis. See Exh. R to Plfs. Mem.

individuals who work with elephants.” Plfs. Requests at 11. However, although defendants now admit that they have “thousands” of video recordings that may be “responsive” to this request, Def. Opp. at 15, to date, they have produced only eleven such tapes. And, while defendants complain that plaintiffs “remain unwilling to compromise” with respect to the production of these materials, Def. Opp. at 18, the record clearly demonstrates that, from the start of the meet and confer process, plaintiffs attempted to develop various methods of easing the burden on defendants, while still ensuring their own right to obtain clearly relevant materials. Thus, when defendants first stated that there were approximately 1700 videotapes that might contain footage of elephants, plaintiffs suggested that defendants provide plaintiffs with an inventory or index of the records so that plaintiffs could seek to narrow their request. See October 19, 2004 Letter, at 5. However, defendants have refused to do so, claiming that such a request amounts to an “unjustified fishing expedition,” November 8, 2004 Letter, at 5, and demanding instead that plaintiffs narrow their request in a vacuum.

In their Opposition, defendants still do not adequately explain why it would be unworkable for plaintiffs to view the index of recordings, and, based on that index, make an educated attempt to narrow their request.¹³ Indeed, even if the index only provides broad descriptions, such as “128th Clowns” or “Blue 128 Winter Quarters,” Def. Opp. at 17, that would still be a useful basis from which to select relevant materials, or at least to narrow the field. Indeed, as plaintiffs would have told defendants had they raised the issue prior to plaintiffs’

¹³ Although defendants claim that their index “usually do[es] not describe the video’s contents,” Def. Opp. at 16, defendants clearly have some method of identifying the basic contents of the videos, otherwise the recorded material would seem to be of little use to anyone, including defendants. Indeed, as plaintiffs noted in their initial meet and confer letter, and based on the very few recordings that defendants did produce, defendants are apparently able to find particular footage from their inventory when they wish to use it for promotional materials or to provide it to the media. See October 19, 2004 Letter, at 5. Moreover, defendants have apparently conceded that there is enough information on the labels to narrow the field from “thousands” of videos, Def. Opp. at 15, to approximately 150 videos, Def. Opp. at 18, based on the sub-categories plaintiffs identified.

motion to compel, which they failed to do, plaintiffs are clearly not interested in videos of clowns, nor are they interested in “video footage of a veterinarian who treats defendants’ elephants . . . even if the veterinarian is caring for a tiger, horse, or alpaca in the video.” Def. Opp. at 16. In fact, although defendants now assert that “[p]laintiffs 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,” Def. Opp. at 16, defendants did not even raise this issue during the meet and confer process, and use these extreme – completely irrelevant – examples to unfairly portray plaintiffs as being unreasonable on this point. Plaintiffs have been very clear about what they seek: any recordings that show or pertain to the treatment of Asian elephants. Thus, plaintiffs are not interested in footage of individuals who work with elephants if the particular footage has no relationship to defendants’ work with elephants.

In addition, plaintiffs sought to reduce the immediate burden on defendants by providing them with a list of six sub-categories of recordings related to elephants that plaintiffs knew they wished to obtain – *e.g.*, recordings related to training sessions with any of the elephants, and recordings concerning the separation of baby elephants from their mothers. See Plfs. Mem. at 33-34; December 22, 2004 Letter, at 3. However, plaintiffs never stated that they would forever waive their right to obtain additional recordings that also depict defendants’ elephants or other relevant material, in exchange for the right to view this subset of material. Although defendants object to this approach as a “rolling production,” Def. Opp. at 7, and insist that it amounts to an “unwilling[ness] to compromise,” plaintiffs believe it is an entirely reasonable approach, which could very well reduce the amount of responsive material that will need to be produced. Indeed, in light of plaintiffs’ attempts to resolve this issue, it is defendants who are unwilling to compromise, insisting that plaintiffs waive their right to obtain materials to which they are

entitled under the federal rules and holding other relevant materials hostage until they do so. Accordingly, plaintiffs request that the Court order defendants to produce the recordings that are responsive to the six sub-categories that the parties agreed to during their meet and confer discussions.¹⁴

Alternatively, and in light of the new representations as to the time and cost involved for defendants to review responsive video footage – representations which were never made with any particularity prior to defendants' opposition to the motion to compel – plaintiffs are also willing to review recordings under a protective order for purposes of determining which materials they wish to obtain for possible use in the litigation. This should reduce the review burden on defendants, and at the same time alleviate any concerns defendants have about confidentiality or privacy of individuals depicted in such recordings. If necessary, plaintiffs are also willing to have this particular discovery dispute referred to a magistrate judge for resolution.¹⁵

F. Defendants Must Produce Information Concerning Their Conservation Activities (Interrogatory Number 11, Document Request Numbers 9, 10, and 19).¹⁶

Defendants now flatly concede that they intend to rely on their Asian elephant “conservation” activities – including breeding at the “Center for Elephant Conservation”

¹⁴ In this regard, plaintiffs wish to note that their request sought “video, audio, or other recordings,” and that the request was not limited only to video recordings. Therefore, defendants must search for and produce all such responsive recordings. In addition, defendants have still not answered the question whether the footage shot by “closed-circuit” cameras is recorded in some fashion, such as to a computer hard drive. See Plfs. Mem. at 33. If so, plaintiffs are entitled to obtain these records as well.

¹⁵ Two days ago, in further support of their opposition to plaintiffs' motion to compel, defendants filed a new declaration from an individual who explained that he has some responsibility for videotaping performances, practices, and rehearsals, see Notice of Filing Declaration of Timothy Holst (March 2, 2005), and that he has more than 5,000 videotapes that “might be responsive to plaintiffs' request.” Holst Decl. ¶ 3. These videotapes appear to be in addition to the 1700 tapes that defendants' have already identified as being possibly responsive to plaintiffs' discovery requests.

¹⁶ In their opening memorandum, plaintiffs erroneously referred to Document Request No. 16, instead of No. 19. Plfs. Mem. at 35.

(“CEC”) and their alleged “efforts to conserve Asian elephants and their natural habitat” – to defend against plaintiffs’ claims in this case. See Def. Opp. at 29 (“Defendants expressly reserve the right to use this [conservation] information to rebut plaintiffs’ unfounded contentions in this case”). Accordingly, under Rule 26(b)(1), plaintiffs are entitled to obtain all non-privileged materials related to such “conservation” activities, including all activities related to the captive breeding of Asian elephants at the CEC, and all materials related to whether defendants are engaged in any conservation of Asian elephants in the wild. See Plfs. Mem. at 35-37.

Yet, despite their allegations to the contrary, defendants have not provided plaintiffs with even the “core” of information that plaintiffs seek in Document Request 16 concerning breeding activities at the CEC, Def. Opp. at 29, let alone provided all of the records requested by plaintiffs. Indeed, if defendants are actually engaged in a concerted effort to breed Asian elephants, as they contend, they must maintain records that monitor these efforts in far greater detail than is reflected in the minimal “summary medical records” and “charts of progesterone levels of fertile female elephants,” Def. Opp. at 29, that defendants have produced so far. Moreover, although defendants feign ignorance as to what sort of records plaintiffs are seeking related to breeding efforts, they certainly know that plaintiffs are not seeking “documents relating to the quantity and price of food, bedding, and climate control at the CEC,” Def. Opp. at 28, or any other documents that do not relate directly to breeding or reproductive efforts.

Rather, plaintiffs seek records that will reflect information such as, but not limited to, how many times Ringling Bros. has attempted to produce an elephant at its breeding farm, the outcome of each such attempt, the ages and identities of the animals used, whether the mother survived the pregnancy and labor, whether the calf survived the birth and is still alive, and whether and how the calf was “separated” from its mother. See also Plfs. Requests at 9-10

(Interrogatory 11) (listing examples of such records). However, since plaintiffs do not have access to defendants' records, they cannot possibly be expected to describe the totality of the records they seek – which is why plaintiffs phrased the request broadly.

In addition, although defendants now claim that they “are willing to provide information detailing [defendants'] efforts to conserve Asian elephants and their natural habitat,” Def. Opp. at 29, defendants previously refused to provide any such “details,” and instead agreed only to provide records that defendants deemed “sufficient to identify” the conservation projects they have undertaken. See Plfs. Mem. at 37. However, plaintiffs want the records they requested, not defendants' own recitation of their “efforts to conserve,” the Asian elephant. Def. Opp. at 29. In addition, plaintiffs seek the production of records concerning resources defendants have actually spent on habitat conservation in the wild – information that is clearly relevant to defendants' assertions in this case that they are actively “conserving” this species. As plaintiffs have stated, Plfs. Mem. at 2, n. 1, obviously, to the extent defendants provide the information and records requested in plaintiffs March 2004 discovery requests – before the Motion to Compel is heard – such information will no longer be at issue. However, until the long ago requested discovery is produced, plaintiffs must ask this Court to order defendants to comply fully with these requests.

G. The Profitability of Defendants' Asian Elephants Falls Within the Scope of Rule 26 (Document Request Numbers 11 and 6).

As explained in their opening memorandum, Plfs. Mem. at 37-40, plaintiffs posed several discovery requests aimed at establishing the extent of defendants' reliance on Asian elephants for the success and profitability of their circus, including requests seeking financial and public relations materials related to defendants' exhibition of Asian elephants, and publicity efforts to alleviate public concerns about defendants' treatment of the elephants (i.e., concerns that might impair profits). As plaintiffs have explained, Plfs. Mem. at 39, these materials are all clearly

relevant to defendants' and their witnesses' credibility, and to whether defendants are engaged in a "commercial activity," as defined by the ESA – an issue that, contrary to defendants' assertion, Def. Mem. at 10, has not been decided by the D.C. Circuit.¹⁷ Moreover, contrary to defendants' specious accusation, these discovery requests are completely legitimate, and are not "pretexts" for obtaining information for hypothetical ulterior motives. Def. Br. at 10. Indeed, if it would alleviate defendants' concerns about public dissemination of financial information, plaintiffs are willing to accept any such financial information pursuant to a protective order.¹⁸

Defendants' acknowledgement that the use of elephants in the circus "is a for-profit activity," Def. Opp. at 9, does not address the extent to which defendants rely on the elephants for the circus' profitability, and the lengths to which defendants are willing to go to protect that enterprise. Therefore, plaintiffs are entitled to obtain this information to explore defendants' defenses and to test defendants' credibility. In addition, such information, when compared to the amount of money Ringling Bros. spends on conserving Asian elephants in the wild – information plaintiffs have also requested but defendants have refused to divulge, see supra at 18-19 – may

¹⁷ Thus, although defendants have cited Humane Soc'y of the United States v. Babbitt, 46 F.3d 93, 96 (D.C. Cir. 1995), for the proposition that the D.C. Circuit has already "recognized that the training and presentation of elephants falls outside" the term "commercial activity" within the meaning of the ESA, 16 U.S.C. § 1532(2), Def. Opp. at 10, this is not true. In fact, because the Humane Soc'y case was dismissed on standing grounds, this issue was not decided by the Court of Appeals, which also vacated the district court's decision on the matter. See id. at 101.

¹⁸ Although defendants assert that "courts routinely refuse to compel parties to produce information relating to their profits and other financial information," Def. Opp. at 11 (emphasis added), defendants rely on an unreported Eastern District of Louisiana case to demonstrate this "routine" practice. In any event, the cases defendants cite are distinguishable. In Freeport-McMoran Sulpher, LLC v. Mike Mullen Energy Equip. Res., Inc., 2004 WL 764174 (E.D. La. Apr. 7, 2004), for example, the defendant sought information beyond basic financial material, including "economic analyses, techniques and strategies which reflect the most intimate information obtained and compiled by [plaintiff]," which the court found amounted to trade secret information. Id. at *5. There, the defendant's need for the material did not outweigh plaintiffs' desire to protect trade secrets. See id. at *5. Here, plaintiffs have only sought basic financial data relating to defendants' profitability, in particular with respect to the use of Asian elephants in their circus, to test the extent to which defendants and their witnesses may be motivated by economic considerations and the extent to which defendants are using Asian elephants for a "commercial activity."

be extremely relevant to defendants' contentions that their activities are aimed at "conserving" this endangered species, rather than exploiting the species for commercial gain.

Indeed, defendants have sought analogous financial and public relations information from plaintiffs – all of which plaintiffs produced. See, e.g., Defendants' First Set of Interrogatories to Plaintiffs (Plfs. Supp. Exh. C), at 6 (requiring plaintiffs to "[i]dentify each resource you have expended" on advocacy matters); Defendants First Set of Document Requests to Plaintiff Tom Rider (Plfs. Supp. Exh. D), at 9 (requesting financial information). Once again, however, discovery is a two-way street. See Wardius, 412 U.S. at 475. Accordingly, the Court should order defendants to produce the materials requested in Document Requests 6 and 11.¹⁹

H. Defendants Have Not Carried Their Burden To Justify Preventing Plaintiffs from Obtaining Relevant Information From 1994.

Plaintiffs are entitled to discover any information, not privileged, that is relevant to their claim that defendants have engaged and continue to engage in a pattern and practice of activities that violate the Endangered Species Act. See Fed. R. Civ. P. 26(b)(1); Plfs. Amended Complaint, at, e.g., ¶ 96 (alleging that defendants "past and continuing routine beatings of its elephants . . . violate[s] the 'taking' prohibitions of section 9 of the ESA"); see also United States v. Network Software Assocs., 217 F.R.D. 240, 245 (D.D.C. 2003) ("discovery of relevant materials includes any matters that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case") (internal citations omitted). In light of

¹⁹ Defendants do not respond to plaintiffs' further argument concerning the production of documents in the possession of Sells-Floto, a subsidiary of Feld Entertainment (referred to by defendants as a "related entity," Def. Br. at 9). See Plfs. Mem. at 40. Plaintiffs reiterate that all of the requested documents in the possession of Sells-Floto are indisputably within the "control" of defendants and must also be produced.

In addition, Defendants have never explained what they mean by producing "examples of actual advertisements," Def. Opp. at 10, n. 3, and, given defendants' track record of withholding clearly responsive materials, plaintiffs have been reluctant to allow defendants to self-select which "examples" they wish to produce.

their pattern and practice allegations, as well as this Court's order permitting plaintiffs "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), plaintiffs determined that a time period of ten years (from service of discovery) would constitute a reasonable survey of defendants' documents and activities. Defendants have simply not met their burden to demonstrate that this time-frame is neither relevant nor reasonable. See Alexander v. FBI, 194 F.R.D. 299, 305 ("once the relevance of the discovery sought is established, the burden is on the party objecting to the discovery to show why it should not be permitted").

Without informing plaintiffs and without seeking a protective order, defendants simply unilaterally selected 1996 as the cut-off date they used when searching for requested information. However, other than to complain that searching for material from additional years imposes additional burdens, defendants have never explained why they selected this cut-off. Indeed, unless defendants keep all their files organized by year (rather than by subject matter) – a position they have never asserted – this argument makes no sense. Indeed, courts have routinely found in analogous pattern and practice cases – such as discrimination cases – that a plaintiff is entitled to obtain discovery for many years into the past. See, e.g., Trevino v. Celanese Corp., 701 F.2d 397, 405 (5th Cir. 1983) ("While some of this information [dating back almost two decades] might be of questionable relevance to a simple action for failure to hire, much of it would be highly relevant in proving a continuing pattern of discrimination"); Southwest Hide Co. v. Goldston, 127 F.R.D. 481, 485 (N.D. Tex. 1989) ("the imposition of unnecessary limitations on discovery is especially frowned upon" in pattern and practice cases). Moreover, any burden that results from defendants needing to conduct a "new search" for the additional

two-years covered by plaintiffs' March 2004 discovery requests, Def. Opp. at 3, is self-imposed: in the absence of an agreement with plaintiffs or a protective order, defendants should have looked for all of these documents when they were conducting their initial searches. Accordingly, the Court should order defendants to comply with the reasonable time-frame incorporated in plaintiffs' discovery requests.

I. Defendants Must Disclose To Plaintiffs And The Court Whether They Are Withholding Additional Information Based On Their General Objections.

As plaintiffs explained in their opening memorandum, Plfs. Mem. at 7-10, 40-43, defendants asserted a number of "general objections" and, apparently, deemed all material falling within those objections "non-responsive" to plaintiffs' requests – without informing plaintiffs of this fact or listing any such withheld documents on a privilege log. Not surprisingly, it was not until the meet and confer process and as a result of plaintiffs' persistent inquiries about information that had been requested but not produced, that this pattern became clear. See, e.g., January 10, 2005 Letter, at 11.²⁰ Moreover, in response to plaintiffs' request that defendants list on a privilege log any documents withheld on the basis of defendants' General Objection 4, which objected to producing information "within the categories for protection under Federal Rule of Civil Procedure 26(c)," 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. Responses at 3, defendants counsel stated only that they would "take plaintiffs' request under advisement." January 24, 2005 Letter from Joshua Wolson (Plfs. Supp. Exh. X), at 4.

²⁰ Defendants contend that plaintiffs did not raise the "general objections" point until "nine months after receiving the discovery responses that asserted the objection," Def. Opp. at 29 (emphasis in original). However, January 10, 2005 is only seven months after June 9, 2004 (when discovery responses were exchanged).

Indeed, it is still not clear from defendants' Opposition whether, on the grounds of their general objections, they are in fact withholding documents that they did not disclose, either in response to specific discovery requests or in their privilege log. Thus, although defendants now state that they are not withholding any documents "solely" on the basis of the "publicly available" objection or their objection based on attorney-client or work-product protection, Def. Opp. at 39, defendants conspicuously do not respond at all to whether they are withholding documents based on General Objection 4, quoted supra (concerning information covered by, *inter alia*, protective orders and confidentiality agreements). Accordingly, plaintiffs request that the Court order defendants to reveal whether they have, in fact, withheld information or records on this basis, and, if so, to either produce such information or records, or supplement their privilege log to identify all such information or records.

In addition, defendants' contention that plaintiffs' definition of "Ringling," goes beyond the scope of documents within defendants' possession, custody, or control is plainly incorrect. Plaintiffs defined "Ringling" to include "all employees, independent contractors, agents, attorneys, and consultants" of Feld Entertainment and its related corporate entities, all of which are subject to defendants' control for purposes of obtaining documents responsive to plaintiffs' requests. See, e.g., Gray v. Faulkner, 148 F.R.D. 220, 223 (N.D. Ind. 1992) ("A party responding to a Rule 34 request cannot furnish only that information within his immediate knowledge or possession; he is under an affirmative duty to seek that information reasonably available to him from his employees, agents, or others subject to his control.") (internal citations omitted). Plaintiffs did not, as defendants misleadingly assert, include "former" employees and consultants. Compare Def. Opp. at 31, with Plfs. Requests at 6. Accordingly, the Court should also order defendants to disclose whether they are withholding – or whether they have simply

failed to search for – information responsive to plaintiffs’ requests based on this General Objection as well.²¹

Respectfully submitted,

/s/

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²¹ Defendants contend that plaintiffs should not complain about their use of General Objections because plaintiffs also lodged general objections. Def. Opp. at 31. However, plaintiffs’ general objections were far more limited than defendants’ general objections. *See* Plfs. Gen. Objections (Plfs. Supp. Exh. X) (lodging three general objections); Def. Responses, at 3-5 (Plfs. Exh. X) (lodging ten general objections). More importantly, however, plaintiffs did not withhold entire categories of otherwise clearly responsive documents based on any of the general objections without conveying this fact to defendants through the discovery responses or by way of plaintiffs’ extensive privilege log. The approach that defendants have taken here – to deem “non-responsive” any document that arguably might fall within any of their ten sweeping general objections – is not permissible under the Federal Rules. *See Athridge*, 184 F.R.D. at 190-191; *Howard v. Sweetheart Cup Co.*, 2001 WL 721765, *3 (N.D.Ill. 2001) (“If an attorney wants to withhold documents requested under the discovery rules, he must do so in a straightforward and forthright manner, not by artful phrasing that obscures more than it discloses”).