

Dispositive Discovery

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October 19, 2004

Delivered By Hand

Eugene D. Gulland
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1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Re: ASPCA et al. v. Ringling Bros. et al.
Civ. No. 03-20006 (EMS)

Dear Mr. Gulland and Mr. Wolson:

Pursuant to Rule 37(a), this letter is intended as plaintiffs' initial good faith effort to confer with defendants (also referred to as "Ringling") regarding their failure to provide discovery in response to Plaintiffs' First Set of Requests for Admission, Interrogatories and Requests for Documents ("First Discovery Requests"). As further discussed below, defendants' responses to this discovery were woefully inadequate in almost every respect, making it extremely difficult for plaintiffs to fully prepare their case, and to provide their expert witnesses with important relevant information that is needed to prepare the expert reports, consistent with the requirements of Rule 26(a)(2)(B), Fed.R.Civ.P.

In addition, because defendants did not "identify" the records requested by plaintiffs, as defendants were specifically directed to do in many of plaintiffs' Interrogatories, and defendants' document production was not categorized in any useful way, it has taken substantial time for us to prepare this letter to provide a meaningful basis for us to pursue the discovery to which plaintiffs are entitled, either by conferring with you, or by means of a motion to compel.



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We set forth below the many deficiencies of defendants' discovery responses. Although in some places plaintiffs provide examples to illustrate defendants' failure to provide the requested discovery, these are only examples, and should not in any way be regarded as the only information that plaintiffs seek.

I. Defendants' Objections:

In paragraphs 1 and 6 of defendants' objections, you stated that defendants "are conducting a reasonable search" for the records requested by plaintiffs, and that defendants "will produce responsive records" if any are retrieved in that search. The use of this language suggests that the search for responsive records had not been completed as of the date defendants responded to Plaintiffs' First Discovery Requests. Accordingly, plaintiffs need to know the status of that search, and whether defendants have in fact produced all of the records requested by plaintiffs, or, alternatively, included on their privilege log all such responsive records that have not been produced.

In paragraph 10, and throughout defendants' discovery responses, defendants refused to produce any information that was generated or obtained prior to 1996. However, defendants did not state the basis for this objection, and, because plaintiffs' claims concern long-standing and continuing practices that plaintiffs allege violate the Endangered Species Act, plaintiffs are entitled to all relevant information within what they termed the "relevant time period" for purposes of this particular discovery, which was January 1, 1994 to the present. See also Judge Sullivan's Order (November 25, 2003) ("Plaintiffs are entitled to take discovery regarding all of defendants' practices that plaintiffs allege violate the Endangered Species Act and that statute's implementing regulations, including past, present, and on-going practices") (emphasis added).

Defendants objected to several of plaintiffs' definitions, including the definition of "ankus," "handler," and "Ringling," on grounds that lead plaintiffs to believe that defendants have not provided plaintiffs with all of the information requested in the discovery requests that use those terms, to which plaintiffs is entitled under Rule 26(b), Fed. R.Civ.P. Defendants must disclose whether their objections to these definitions has resulted in defendants' withholding of responsive records.

II. Defendants' Interrogatory Responses:

In response to Interrogatory No. 5, concerning all persons employed by Ringling since 1994 who worked with elephants in any capacity, defendants refused to provide information concerning any such individuals who worked at Ringling between 1994 and 1996, and, although defendants provided a list of 49 employees, defendants also failed to "describe each such person's responsibilities," as specifically requested by the Interrogatory, nor did defendants even

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articulate an objection for this specific instruction. In addition, the list does not appear to include anyone other than an elephant handler or a trainer, even though the Interrogatory specifically asks defendants to identify all employees who worked with elephants, including, for example the barn men. For example, we note that Tom Rider is not included on the list, even though he worked as a barn man for the elephants for two and a half years, and Abel Rivera is also not on the list, even though we know that he also worked with the elephants for some period of time. In addition to Mr. Rivera, defendants refused to identify any other individuals who were hired from Puerto Rico in April or May, 1999, even though we understand that Ringling made a concerted effort to recruit staff from Puerto Rico during this time period to work with the elephants. Accordingly, defendants should have some records concerning that effort.

In addition, defendants refused to provide any information concerning the identities of the elephants with whom each named employee worked, or any of the time-frames during which he/she had such responsibilities. Accordingly, this response is completely inadequate, and greatly hinders plaintiffs' ability to identify potential fact witnesses whom they may wish to call at trial.

Defendants refused to answer Interrogatory No. 8, concerning the extremely relevant history of each of the elephants owned and used by defendants, and the births and deaths of elephants, other than directing plaintiffs to unspecified records that defendants contend they produced. In addition, although plaintiffs specifically instructed defendants to "identify" each record that in any way relates to the information requested by this Interrogatory, so that plaintiffs could correlate the produced records with the information requested, defendants did not "identify" a single responsive record. In addition, as explained more fully below in the section addressing defendants' inadequate responses to plaintiffs' document production requests, we know, for a fact, that defendants' sole substantive response to this Interrogatory – *i.e.*, that "defendants will produce records for each elephant" – is completely deficient. For example, none of the records provided by defendants, including the document entitled "Elephants Born In Ringling Bros. Breeding Program" (Feld 02207), mention the baby elephant Riccardo, who was apparently born on December 5, 2003 – long before defendants provided their responses to plaintiffs' discovery.¹

Defendants also failed to provide the information requested in Interrogatory No. 9 regarding the employees who worked with elephants, and instead directed plaintiffs to unspecified records that it claims to have produced. However, defendants also failed to "identify" the records that reflect the specifically requested information, as defendants were

¹In addition, although we also now know that Riccardo died in August, 2004 – more than two months ago – defendants have yet to supplement their responses to this Interrogatory and the corresponding Document Production Request to provide plaintiffs with any information concerning Riccardo's death and the circumstances surrounding his death.

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expressly instructed to do. A review of the documents produced does not reveal records responsive to this request.

Similarly, in response to Interrogatory No. 11, defendants refused to “identify” the records that would contain the requested information concerning defendants’ breeding history with Asian elephants, but instead simply directed plaintiffs to unspecified records that defendants claim to have produced.

In response to Interrogatory No. 13, regarding defendants’ “practices and procedures with respect to the chaining of elephants when they are not actually performing and when they are not on the train,” defendants provided only general information regarding its practices at facilities that “permit” the use of “pens and tented areas during the day.” However, defendants did not provide responsive information with respect to the facilities that do not “permit” the use of such pens, for whatever reason. In addition, since defendants are uniquely in the position of knowing each of the facilities at which they perform, and which of those facilities “permit” the use of such pens, and which do not, it is incumbent on defendants to provide more specific information in response to this Interrogatory.

Defendants failed to provide information in response to Interrogatory No. 14 concerning defendants’ “practices and procedures for maintaining the elephants on the train when traveling from one venue to another.” For example, although plaintiffs specifically instructed defendants to provide information concerning “whether and how often the animals are taken off the train for exercise or for other reasons, whether the animals are bathed, and if so, how often and by what means, the longest period of time Ringling permits the elephants to be kept on the train without being taken off the train, and the average number of weeks each year the elephants are on a train,” defendants did not provide any information in response to these specific requests.

Defendants also refused to “identify” records in response to Interrogatory No. 15, concerning nine specific investigations by the United States Department of Agriculture, identified in a Report that plaintiffs attached to their discovery responses. While plaintiffs certainly do not need duplicates of documents that are already contained in that Report – unless such duplicates contain notations or other additional information that is not included on the copies that are contained in the Report – they are entitled to have defendants “identify” and produce all other such responsive records. In addition, defendants refused to “identify” all of the “videotapes, photographs, and copies of documents that were obtained by the USDA by means of a subpoena” in connection with each of the investigations included in the Report.

Defendants also failed to provide a complete response to Interrogatory No. 17, which asks them to describe “all” of their practices and procedures with respect to video, audio, or any other recording that may concern elephants or personnel who work with elephants, including for

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example, “whether Ringling videotapes training sessions, rehearsals, breeding, or performances.” (Emphasis added). Defendants also failed to “identify,” as they were instructed to do, “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.” Surely, at an absolute minimum, defendants have some inventory, catalogue, or other list of recordings that it has made and/or acquired over the years. Indeed, we note that the few video tapes that defendants did produce contain various excerpts from training sessions, rehearsals, and performances. See, e.g., Videotape labeled “Caring For Animals At The Greatest Show On Earth,” (Feld Video 04); Videotape labeled “CNN Piece On Tom Rider,” (Feld Video 09). Therefore, clearly, defendants are able to find particular footage from their inventory when they wish to use it in their own promotional materials or to provide it to the media. If defendants would either identify all of the information that is responsive to this Interrogatory or, alternatively, provide plaintiffs with a complete list of such information, plaintiffs could make an effort to narrow the information requested.

In response to Interrogatory No. 18, defendants also failed to identify all records concerning Ringling’s relationship with USDA personnel, and specifically all records regarding meetings, conferences, seminars, training sessions, social gatherings, or other functions that took place from 1994 to the present that involved both Ringling personnel and USDA personnel, even though such information is clearly relevant to Ringling’s defense that the USDA has consistently failed to find Ringling in violation of regulations administered by the USDA. For example, the extremely limited information provided by defendants in response to this Interrogatory does not include any information with respect to social gatherings attended by Ringling and USDA personnel.

III. Defendants’ Responses To Plaintiffs’ Document Production Request

In response to plaintiffs’ Document Request No. 1, requesting “all documents and records” identified in Defendants’ Initial Disclosures, defendants stated that they “will” produce “responsive, non-privileged documents.” As noted, plaintiffs need to know if defendants have, in fact, produced “all” non-privileged records requested. If not, all such records must be produced.

In response to plaintiffs’ Document Request No. 2, defendants refused to produce responsive records provided to their employees between January 1, 1994 and January 1, 1996. Plaintiffs are entitled to such records, as the district court has already ruled. See Order (November 25, 2003).

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In response to plaintiffs' Document Request No. 4, for "all documents and records that in any way concern or relate to Tom Rider," defendants objected that the request "is overbroad because it is without limitation as to time." Defendants have produced very few documents regarding Tom Rider. Please be advised that unless and until all records responsive to this request are produced, plaintiffs will not make Mr. Rider available to be deposited by defendants.

Defendants have not produced any records in response to plaintiffs' Document Request No. 6 for records about defendants' advertising and public relations for the circus, the copy for such advertising and public relations, the amount of money spent on such advertising and public relations, etc. However, such information is clearly relevant to defendants' credibility and bias, and the credibility and bias of their witnesses, and may clearly lead to the discovery of admissible evidence bearing on defendants' defenses in this action. It is also relevant to the issue of whether defendants are engaged in a "commercial activity" within the meaning of the Endangered Species Act, which is relevant to both the claims and defenses in this action.

Defendants have objected to the production of all records requested in plaintiffs' Document Request No. 7, even though all such records are clearly relevant to this action.

Defendants have also clearly failed to provide all records that are responsive to Document Request No. 8 concerning the elephants' medical records, even though all such records are highly relevant to this case. For example, there are no such records at all for either Riccardo or Lecheme, nor are there such records for other elephants identified in USDA inspection reports, including "Luke," "Roxy," and "Bunny;" for many other elephants, there are no records before 1999 or after 2002 or 2003. In addition, as to the scant medical records that were produced, they appear to be extremely incomplete, and provide only minimal information concerning the elephants' health status. In addition, there are no medical records concerning the health of five elephants after they gave birth at defendants' "Center for Elephant Conservation," including post-partum health, interactions with their offspring, including problems with attachment, nursing, or weaning, and no records concerning what defendants themselves have referred to as the "separation process." Likewise, there are no corresponding medical or other records regarding the offspring. For example, other than a single videotape provided by defendants, there are no records regarding the birth of Riccardo, nor, as claimed in Ringling's August 6, 2004 press release, the fact that Riccardo's mother, Shirley, "rejected" him at birth. In addition, although a record numbered Feld 0839 refers to the fact that an elephant named Seetna was euthanized during labor, there is no documentation concerning what happened to the fetus. The records produced are also incomplete as to testing for tuberculosis, and the results of such tests.

Defendants have refused to produce records in response to Document Requests Nos. 9 and 10, concerning its conservation of Asian elephants in the wild, even though such information is clearly relevant and calculated to lead to the discovery of admissible evidence bearing on

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defendants' defenses in this case, including its reliance on the Fish and Wildlife Service's "captive-bred wildlife permit" that is granted under Section 10 of the Endangered Species Act, 16 U.S.C. § 1539(a)(1)(A).

Defendants have also refused to produce records in response to Document Request No. 11 concerning the amount of money defendants' generate from their circus operations and the exhibition of elephants in particular, even though such records clearly bear on defendants' and their witnesses' credibility and bias. To the extent defendants contend that any such records are confidential or proprietary, plaintiffs would be willing to discuss entering into a protective order for such records.

Defendants have not produced all records requested in Document Request No. 12 for "all records that in any way relate to or concern allegations or concerns that Ringling has mistreated an elephant in any way," and with respect to the records that defendants have been willing to produce, they have refused to produce any records that are dated earlier than January 1, 1996. However, because all of the requested records are clearly relevant to this case, they must be produced.

As to Document Requests 13-17, defendants have failed to produce the documents requested. In some instances defendants have stated that they "will produce" responsive records, but, it is not clear whether all responsive records have been produced. Moreover, because defendants failed to "identify" such records, as they were instructed to do in Interrogatory Nos. 1, 2, 6, 8, and 9, it is difficult for plaintiffs to ascertain whether any, let alone all, such records have been produced.²

Similarly, as to Document Requests Nos. 18 -24, concerning records that plaintiffs specifically instructed defendants to "identify" in response to Interrogatory Nos. 10-16, defendants have failed to produce all such records, and, because they failed to "identify" such responsive records, it is impossible for plaintiffs to ascertain whether any of the records defendants have produced, and which ones, are responsive to these discovery requests.

As to Document Request No. 25, which directs defendants to produce all video, audio, and other recordings that defendants were to "identify" in response to Interrogatory No. 17, defendants failed to do so, and instead invited plaintiffs to "meet and confer to narrow the scope of this request and/or devise a means of narrowing the necessary search." However, as discussed above, regarding defendants' response to Interrogatory No. 17, plaintiffs believe that defendants

²As defendants noted, Document Request Nos. 14-27 were inadvertently misnumbered Nos. 8-21 by plaintiffs. Plaintiffs here use the correct nos., as noted by defendants in their response.

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must have an inventory, catalogue, or other list(s) of the records that are responsive to this request. Accordingly, in an effort to further narrow the scope of this request, plaintiffs suggest that defendants first provide plaintiffs with such information.

However, there are certain records that are responsive to this request that plaintiffs know they want to obtain, and which should be produced immediately. For example, although defendants have produced a videotape labeled "Benjamin 7/26/99," this record appears to be an edited version of the videotape taken by Angela Martin on or about July 25-26, 1999, a copy of which was provided to defendants. See Document No. Feld 01829. Accordingly, pursuant to this Document Request, defendants must produce the unedited version of this record.

In addition, plaintiffs wish to obtain all video and other recordings that are responsive to this request that concern: (1) training sessions with elephants, and young elephants, including, but not limited to Juliette, Romeo, Kenny, Bonnie, Benjamin, Shirley, Kelly Ann, Doc, Angelica, Osgood, Sara, Gunther, Rudy, Asha, P.T., and Riccardo; (2) any and all elephant training methods, whether conducted by Ringling personnel or others; (3) rehearsals of elephants; (4) efforts to have mothers nurse and care for their offspring, including, but not limited to such records concerning Shirley and Riccardo; (5) the separation of baby elephants from their mothers; (6) attempts, both successful and unsuccessful, to breed elephants, including any such attempts that have involved artificial insemination, including the procedures used to collect semen from bulls and to insert it into female elephants.

In addition, a USDA Report produced by defendants, numbered Feld 02210-02317 refers to video footage that was taken during a research project by the USDA concerning "Transportation and Management of Circus Animals" (at page 20). However, no such video footage was produced by defendants.

These examples are by no means exclusive. Again, once defendants provide plaintiffs with a complete list of the records that are responsive to this discovery request, plaintiffs will be in a better position to identify the additional records that they wish to obtain.

Defendants have also failed to produce all records that are responsive to Document Request No. 26 concerning defendants' relationship with the USDA, even though such information is clearly relevant to defendants' defenses in this case.

IV. Additional Concerns

In a document produced by defendants, numbered Feld 0932, there is mention of a record entitled "Animal Husbandry Resource Manual." However, that document has not been produced to plaintiffs.

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None of the records produced pursuant to a *subpoena duces tecum* which is numbered Feld 01339 have been produced. If defendants have copies of such records, they must be produced.

A record numbered Feld 0565 indicates that, according to Ringling veterinarian William Lindsay, Ringling staff took photographs in connection with an investigation by humane officers for the Santa Clara Humane Society in San Jose in August, 1999. However, no such photographs have been produced.

A document concerning a state inspection contains the notation that material has been "redacted," however, there is nothing in defendants' privilege log that addresses this material. See Feld 01997. It is not clear whether such redactions were made by defendants or others. Please clarify this matter, and, if the redactions were made by defendants, please produce all of the redacted information.


Conclusion

As discussed above, we have serious concerns about the defendants' responses to plaintiffs' First Discovery Requests. We hope that defendants can address these concerns as soon as possible, by providing all of the requested information, without plaintiffs having to file a motion to compel. However, until we have obtained substantial compliance from defendants with our initial discovery requests, and, in particular, defendants have provided us with requested information regarding the histories and medical records of all of defendants' elephants, in addition to requested information regarding defendants' successful and unsuccessful breeding of elephants, and video and other responsive records concerning training, rehearsals, and the separation of offspring from their mothers, it will not be possible for plaintiffs to complete the preparation of their expert reports, consistent with the requirements of Rule 26(b). In addition, defendants' inadequate responses to our discovery make it difficult for plaintiffs to proceed with depositions of defendants' lay and expert witnesses, and, in many cases, to make their own fact witnesses available to be deposed. For example, as explained above, until we have obtained all records in defendants' possession concerning plaintiff Tom Rider, we will not be making him available for a deposition.

Accordingly, we request that defendants respond to our concerns as soon as possible, so that we will know what remains in dispute that plaintiffs will have to pursue by means of a motion to compel. In this regard, we note that there is currently a status hearing scheduled for November 16, 2004. Therefore, if possible, plaintiffs request a substantive response to this letter before that date, so that the parties will be in a position to advise Judge Sullivan of what must be done to resolve any remaining disputes about these matters.

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Sincerely,



Katherine A. Meyer



Kimberly D. Ockene