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November 8, 2004

BY FACSIMILE AND FIRST CLASS MAIL

Katherine A. Meyer, Esq.
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1601 Connecticut Avenue N.W., Suite 700
Washington, DC 20009

Re: *ASPCA et al. v. Ringling Bros. and Barnum & Bailey Circus et al.*, Case No. 03-2006 (D.D.C.)

Dear Kathy and Kim:

We write in response to your letter dated October 19, 2004, in which you complain for the first time about supposed deficiencies in defendants' discovery responses in this case.

Before addressing the issues in your letter, we must state that we do not believe there is any good reason for you to have taken more than four months to initiate the meet-and-confer process. Many of the concerns that you raise in your October 19 letter should have been apparent to you from the face of the discovery responses that you received on June 9, 2004, and there is no reason to have allowed this process to sit in limbo for four months, until the week that the parties were scheduled to exchange expert reports. The long delay makes it more difficult for us and our client to re-canvass the files that are no longer fresh in our or our clients' minds.

Identification of Documents

Throughout your October 19 letter, you complain that defendants did not "identify" documents in their production that are responsive to each of plaintiffs' discovery requests. Federal Rule of Civil Procedure 34(b) permits a party to respond to a document request by producing documents "as they are kept in the usual course of business" or by "organiz[ing] and label[ing] them to correspond with categories" in a request. In the cover letter accompanying defendants' document production, we specifically informed you that defendants were exercising the first option and producing the documents "as kept" in the ordinary course of business. *See* Letter from Joshua Wolson to Kimberly Ockene dated June 10, 2004. Plaintiffs' interrogatories asking defendants to identify the records that relate to each request are an impermissible attempt to impose on defendants burdens greater than those required by the Federal Rules of Civil Procedure.

Defendants' Objections

Defendants completed their search for documents, and they have produced to you all responsive, non-privileged documents that they could locate after a reasonable search. If defendants locate additional, responsive documents, defendants will supplement their production seasonably, to the extent required by Federal Rule of Civil Procedure 26(e).

Defendants have explained in their objections and responses to plaintiffs' discovery requests that they object to plaintiffs' definition of a relevant time period dating back to 1994 because demands for information and/or documents dating back 10 years are overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. *See* General Objection No. 10. Defendants stand by that objection. This case is not likely to be heard before late 2005 or early 2006, and there is simply no reason to think that events more than a decade past will be relevant. In recognition of Judge Sullivan's Order of November 25, 2003, defendants have agreed to produce materials dating back to 1996, although they are not conceding that such information is relevant. Contrary to the assertion in your letter, nothing in Judge Sullivan's Order mandates production of material that is so manifestly beyond the temporal scope of these proceedings. Plaintiffs have offered no explanation for why they need older information, or why such information is sufficiently important to justify the burden of collecting it.

Defendants have properly objected to plaintiffs' definitions as vastly overbroad. For example, plaintiffs define "ankus" to embrace every "tool or instrument" having a handle with a metal head. Such a definition is overbroad: if read literally, it would include every rake, tire jack, and hammer, among other things, that defendants have ever purchased. It is also improper to mis-define "ankus" in this manner. Similarly, plaintiffs have defined "handler" in a way that goes well beyond its accepted definition and that would, if read literally, encompass every person who ever worked for the circus and came in contact with an elephant in the course of his or her duties. Defendants are not required to disclose whether they have withheld documents as a result of these objections, nor could they do so, given the extreme overbreadth and vagueness of the cited definitions.

Responses to Interrogatories Generally

Before addressing plaintiffs' specific concerns about interrogatory responses, we must renew our objection that plaintiffs' have vastly exceeded the 25 interrogatories permitted by Federal Rule of Civil Procedure 33(a). *See* General Objection No. 9. Plaintiffs cannot avoid this requirement by combining two separate questions into one interrogatory, regardless of whether or not they give the separate questions separately designated subparts. Thus, for example, every interrogatory that asks a substantive question and asks for identification of documents that relate to that subject is, in fact, two separate interrogatories. Defendants are under no obligation to respond to more than 25 interrogatories in this case.

Interrogatory No. 5

Defendants provided plaintiffs with a list of 49 individuals who have been "engaged to train, handle, discipline, physically lead, administer medical care to elephants, or present elephants during performances." *See* Defendants' Response to Interrogatory No. 5. Defendants stand by their objection that of a list of all people who "worked with" elephants is vague and would be vastly overbroad, and its assembly would impose on defendants an undue burden. For example, such a request would encompass transport personnel, wardrobe staff, security guards, and every performer who has ever been on the floor of a performance at the same time as an elephant, even if he or she was not handling or presenting the elephant. Defendants have attempted to provide plaintiffs with a list of individuals who are likely to have information relevant to this case.

Contrary to the claim in your October 19 letter, defendants provided job responsibilities and contact information for all individuals who had not been previously identified in discovery in this case. For example, defendants identified numerous individuals as handlers at the Ringling Bros. Center for Elephant Conservation ("CEC"). However, if an individual has already been identified with his or her job title, defendants did not duplicate that information.

Defendants objected to plaintiffs' request for identification of individuals "who were hired from Puerto Rico" in April or May 1999 as vague and ambiguous. Your October 19 letter states that you "understand that Ringling made a concerted effort to recruit staff from Puerto Rico during this time period to work with the elephants," but you still refuse to clarify what you mean by "hired from Puerto Rico" or "recruit staff from Puerto Rico." For example, these phrases could refer to individuals who lived in Puerto Rico when they were hired or who were of Puerto Rican ancestry, among other things. Moreover, you offer no support for your assertion that defendants "should have some records" concerning any effort they made. Defendants stated in their response to this Interrogatory that they do not maintain information in this manner, and you offer no reason to question that response.

Defendants stand by their objection to plaintiffs' request for a list of elephants with which each person worked. Plaintiffs have not offered any response to this objection – they have merely asserted that defendants' response is "inadequate." Yet as defendants explained in their response to this Interrogatory, defendants do not maintain such information in the ordinary course of business. The Interrogatory would therefore require defendants to conduct a special study implicating which elephants each of hundreds of employees "worked with" over a ten-year period. Performing such a study would impose an undue burden upon defendants, and it makes this Interrogatory overbroad. Moreover, it is not clear that defendants could reconstruct this information even if they had to do so. If plaintiffs want to identify specific elephants of interest to them, we can attempt to determine the presenters who have worked with those elephants.

Interrogatory No. 8

Defendants have not, as you assert, "refused to answer Interrogatory No. 8." Rather, defendants have answered Interrogatory No. 8 by producing documents identifying the elephants in its possession, the way it acquired each elephant, and each elephant's medical history, as permitted by Federal Rule of Civil Procedure 33(d). Defendants will supplement their production seasonably, as required by Federal Rule of Civil Procedure 26(e).

Interrogatory No. 9

Interrogatory No. 9 asks for a list of each person who worked with each elephant in defendants' possession. This is, in essence, the same request as Interrogatory No. 5, which asked for a list of each elephant with which each employee had any contact. As we explained in response to Interrogatory No. 5, defendants do not maintain this information in the ordinary course of business, and the request therefore imposes an undue burden upon defendants to perform a special study.

Interrogatory No. 11

In satisfaction of their obligation under Federal Rule of Civil Procedure 33(d), Defendants have produced records relating to their "efforts" to breed Asian elephants in captivity. *See, e.g.,* Feld-02204 – Feld-02209; Feld-03269 – Feld-03294. To the extent that plaintiffs are requesting additional information, you should be more specific about what you are seeking and not require defendants to perform a special study that would impose upon them an undue burden.

Interrogatory No. 13

Defendants have explained to plaintiffs their "practices and procedures" regarding tethering of elephants at facilities where defendants have an option whether or not to tether the elephants. At other facilities, defendants comply with whatever requirements are imposed by law or by the constraints of the facility. To the extent plaintiffs are seeking a facility-by-facility list of defendants' practices, they are going beyond the scope of what is requested in the Interrogatory and are seeking to impose an undue burden on defendants.

Interrogatory No. 14

Defendants' response to Interrogatory No. 14 describes, in depth, defendants' "practices and procedures" for transporting their elephants, and there is simply no basis for the assertion in your letter that defendants have "failed to provide information" in response to this Interrogatory. In addition to a lengthy narrative, defendants' response, *inter alia*, referred plaintiffs to the

Standards and Guidelines for Animal Care and Management – a document that has been produced in this case. *See* Feld-1705 – Feld-1733.

Plaintiffs continue to insist on answers to questions to which defendants have explained there is no clear answer. For example, defendants have explained that "[w]hen the elephants are exercised or taken off the train, and for how long, depends on a number of circumstances, including the length of the rail trip, weather conditions, and whether conditions near the train are appropriate for unloading." Similarly, the "longest period of time Ringling permits the elephants to be kept on the train without being taken off the train" varies based on the circumstances of the train ride, as described above.

Finally, this Interrogatory's request for the "average number of weeks per year the elephants are on a train" is vague, and plaintiffs have made no effort to clarify it. It is unclear whether plaintiffs want to know the total number of days, on average, that elephants are on the train each year, divided by seven, or whether each week in which an elephant spends even 1 hour on a train constitutes a "week … the elephants are on a train." In any event, defendants do not maintain any of this information in the ordinary course of business, and any requirement that defendants perform a special study to obtain this information would impose on them an undue burden.

Interrogatory No. 15

Plaintiffs obviously already have the information that was used to compile the document that was attached to plaintiffs' discovery requests at Tab C, and there is no basis for plaintiffs to request such information from defendants in this case. It is improper for plaintiffs to request information pertaining to a "report" that was compiled and written by plaintiffs themselves. Moreover, this request seeks information about investigations conducted by the United States Department of Agriculture. In each investigation, the USDA has conducted its inquiry and made its determination, and plaintiffs may not relitigate those issues in this case.

Interrogatory No. 17

Defendants have provided information about their use of video cameras at CEC. Beyond that, defendants have explained that they shoot thousands of hours of videotape every year for use with video press kits, video programs for sale to the public, and commercials. Some of that video footage may include rehearsals or performances, though there is no definitive "policy" regarding taping such sessions. Plaintiffs' request for a list of all such videos before they narrow this overbroad request is an unjustifiable fishing expedition. If plaintiffs will narrow their request to explain what specific types of videos they seek, and help narrow the universe of potential tapes, then defendants can revisit the burden imposed on them.

Interrogatory No. 18

Defendants have provided plaintiffs with inspection reports for all USDA inspections of their facilities as well as USDA investigations of defendants, and they have provided detailed information about the additional professional events that have included personnel from both USDA and defendants. Plaintiffs' suggestion that defendants should provide plaintiffs with additional information in response to this Interrogatory is burdensome and irrelevant, as it would require defendants to investigate the social contacts that every one if its employees has had over the last ten years to determine if any employee has ever been in a social situation with someone who worked for USDA. Conducting such an investigation would impose an enormous, unwarranted burden upon defendants; moreover, it would invade the privacy of all of defendants' employees.

Document Request No. 1

Defendants have produced all non-privileged, responsive documents located after a reasonable search.

Document Request No. 2

Plaintiffs have shown no basis for their request for materials relating to training given to employees from 1990 to 1996. Such materials are dated and have, at best, only marginal relevance to this case. Even if plaintiffs could demonstrate the relevance of such materials, they cannot demonstrate that the documents' limited value justifies imposing on defendants the burden of locating such documents.

Documents Request No. 5[1]

Defendants have produced non-privileged documents in their possession relating to Mr. Rider that could be located after a reasonable search. As you know, Mr. Rider did not work for defendants before 1996, so no materials have been withheld on the basis of this objection.

Defendants do not accept your proposed limitation on the timing of Mr. Rider's deposition. Simply put, it is not plaintiffs' place to determine when defendants' production is complete, nor can plaintiffs withhold Mr. Rider in retaliation for perceived discovery failures.

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[1] Although your letter refers to this as "Document Request No. 4," it references the materials requested in Request No. 5.

Document Request No. 6

Even if the question of defendants' participation in a "commercial activity" is relevant to plaintiffs' claims in this case, this Request seeks information that has little or no bearing on that question. Rather than requesting actual copies of advertising sufficient to show that defendants are engaged in a commercial activity, the Request seeks all documents that "in any way relate to or concern advertising and public relations" for Ringling Bros., including "the amount of money spent on such advertising and public relations, planning concerning where and when to disseminate such advertising and public relations efforts, ... and other efforts to ascertain how to advertise, publicize, or educate the public about the circus, and documents and records that relate to or concern efforts to counter negative publicity generated by animals rights and animal welfare organizations." Such documents are unnecessary to and far broader than needed to show whether defendants are engaged in a "commercial activity." We are willing to produce exemplars of actual advertisements that defendants have used since 2000 if plaintiffs will accept this reasonable and more limited production in satisfaction of this Request.

Document Request No. 7

Defendants do not understand the statement in your October 19 letter that defendants have "objected to the production of all records requested in plaintiffs' Document Request No. 7 ...." Defendants' response to this Request states that defendants would "produce responsive, non-privileged documents dated January 1, 1996, or later." Defendants have produced such materials. *See, e.g.,* Feld-0891 – Feld-0892; Feld-1705 – Feld-1733.

Document Request No. 8

Defendants have produced to you more than 700 pages of elephant medical records. There is no basis for plaintiffs to demand records regarding trunk washes or other tuberculosis tests, as there is no claim or defense in this case relating to elephant tuberculosis. Moreover, the records that defendants produced to you are complete, in that they contain all of the pages in defendants' files. Defendants do not maintain written records of many of the issues you identify in your letter, such as elephants' "interactions with their offspring, including problems with attachment, nursing, or weaning," or records of the separation process.

As for the elephants whose records you contend are absent, we are consulting with our client to determine whether additional records exist. If so, and they are responsive, then we will produce them to you.

Document Request Nos. 9 and 10

There is no basis for the assertion in your letter that documents relating to conservation programs in Asia are relevant to the claims or defenses in this case. The decision to grant

defendants a Captive Bred Wildlife permit is entrusted to the U.S. Fish and Wildlife Service, which is not a party to this proceeding. Plaintiffs cannot challenge that decision here. Moreover, even if plaintiffs could challenge it, the requested materials would not be relevant to that challenge.

Document Request No. 11

You offer no link between the materials you have requested and any claim or defense of any party to this case, claiming only that the requested information is related to "defendants and their witnesses' credibility and bias." Nothing about the revenues raised from Ringling Bros.' shows bears on the credibility of individual witnesses in this case, nor have you shown a basis for invading defendants' privacy for information that is only of marginal relevance. By plaintiffs' theory, in every case involving a corporate party, the company's profitability would be relevant. That is simply not the case.

Document Request No. 12

The only failure alleged with regard to this Request is that defendants have failed to produce documents that predate 1996. We have addressed that concern above.

Document Request Nos. 13-17

As explained above, defendants have produced all responsive, non-privileged documents that they located after a reasonable search. Moreover, there is no basis for plaintiffs to insist that defendants identify which documents are produced in response to which request, because the documents were produced as they were kept in the ordinary course of business.

Document Request Nos. 18-24

Contrary to the groundless assertion in your letter, defendants have produced all responsive, non-privileged documents in response to Request Nos. 18-22. These documents were produced as kept in the ordinary course of business.

Defendants have objected to Request No. 23 for the same reason that they objected to Interrogatory No. 15: it is overbroad, unduly burdensome, asks for discovery based on plaintiffs' own "report," and seeks documents that are not relevant to the claims or defenses in this case. Indeed, this Request seeks documents that relate to investigations that the USDA has already conducted, in which it has made its findings, and which plaintiffs may not re-litigate in this Court.

Finally, Request No. 24 seeks "representative units" of products that defendants use to care for their elephants. All of the products in question are available for purchase on the open

market, and defendants have identified the relevant supplier of each product. Plaintiffs can purchase these products just as easily as defendants. There is therefore no basis to impose upon defendants the expense of providing these products to plaintiffs.

Document Request No. 25

Plaintiffs suggestion that defendants provide them with a complete list of all videos in their library before plaintiffs will narrow this Request amounts to a fishing expedition. The Request is overbroad and unduly burdensome on its face. Accordingly, plaintiffs are obligated to offer some guidance to help defendants determine what plaintiffs are seeking before plaintiffs are entitled to any response.

In addition, plaintiffs' assumptions about the video taken by Angela Martin in July 1999 are incorrect. The video that defendants have produced is the most complete video they have, and it has not been edited by them in any way. Accordingly, defendants cannot produce an "unedited" version of this tape.

Plaintiffs also seek video footage referenced in a USDA report. However, as your letter acknowledges, that report was conducted by the USDA, and any video taken was taken by the USDA or its researchers. There is no basis to assume that defendants have a copy of such videos.

Document Request No. 26

Defendants have produced numerous documents relating to contacts that they have had with the USDA. It is unclear what additional information plaintiffs believe defendants have failed to produce, except that, as stated above, defendants will not, and are not obligated to, invade the privacy of all of their employees to determine whether those employees have had any social contacts with employees of the USDA.

"Additional Concerns"

The document that references the "Animal Husbandry Resource Manual" appears to be a letter written by someone not employed by or affiliated with defendants. There is therefore no basis for your assumption that defendants have such a document in their possession. Indeed, it is our understanding that this document is generated by the International Elephant Foundation. Nonetheless, we will inquire with our clients as to whether they have a copy and, if so, we will produce it.

Similarly, it is not clear that the subpoena referenced in Feld-1338 was served on defendants, as the addressee's name has been redacted by the USDA pursuant to FOIA. Moreover, the subpoena in question relates to elephant tuberculosis, a subject that is not at issue

in this case. In any event, defendants have produced to you responsive, non-privileged documents available after a reasonable search relating to any of the USDA investigations referenced in the Complaint.

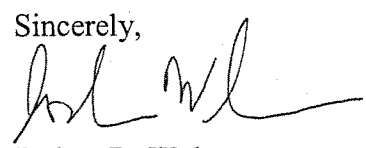
We will speak to Dr. Lindsay to determine whether he has, or ever had, the pictures mentioned at Feld-0565. If so, we will review them to determine whether they are responsive.

Finally, contrary to the statement in your letter, the two e-mails that have been redacted from Feld-01997 appear on defendants' privilege log, and they have been redacted because they are subject to the attorney-client privilege, as well as the work product protection in one case.

Conclusion

The foregoing responds directly to each of the complaints raised in your letter of October 19. We nevertheless are prepared to meet and confer on the issues in hopes that mutual compromises can narrow or even eliminate disputes. We thing it is important that the parties do so before the November 16th status conference.

Sincerely,



Joshua D. Wolson