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December 22, 2004

By Facsimile and First Class Mail

Joshua D. Wolson, Esq.
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, D.C. 20004

Re: ASPCA, et al. v. Ringling Bros. et al., Case No. 03-2006 (EGS)

Dear Josh:

This letter responds to your December 3, 2004 letter summarizing our November 15, 2004 meet and confer discussion regarding our discovery disputes.

Identification of Documents

You are correct that we acknowledged the defendants' decision to produce documents in the manner in which they were kept in the ordinary course of business, rather than categorizing them by Request. We simply emphasized this point to explain why it took us a while to ascertain what had not been produced. Nevertheless, we do reserve our right to compel responses to the interrogatories that specifically requested identification of documents. This is distinct from the issue of the manner in which you have produced the documents.

Relevant Time Frame

Plaintiffs stand by their request for documents from 1994 to the present, and will not narrow this request to "specific discovery requests" as you suggest. As we explained, documents dating back ten years (or more) are highly relevant to plaintiffs' claims that defendants are engaging in an ongoing pattern and practice of unlawful activity. Defendants have objected to the time-frame on the grounds that it is overbroad and unduly burdensome, but have not explained why that is the case. During our meeting you stated that defendants selected the cut-off date of 1996 simply because it "seemed to be easiest for the client," without any contention that it would actually be difficult or "unduly burdensome" to obtain documents back to 1994. As we stated during our meeting, unless defendants produce documents using the reasonable, 10-year time frame

plaintiffs requested, plaintiffs intend to move to compel those additional discovery responses.

Interrogatory No. 5

For purposes of avoiding a motion to compel at this point, we did agree to accept a list (and all requested identifying information) of all barn men, floor crew, wardrobe personnel, and transportation personnel who worked for defendants during our requested time period. However, we reserve our right to seek the requested information regarding additional Ringling Brothers personnel should we find it necessary to do so in the future.

We agree with your characterization of the meaning of “employees who were hired from Puerto Rico,” with the caveat that this would also include anyone who was living in Puerto Rico when he or she was recruited by Ringling Brothers for employment. If it will assist you in any regard, we believe Ringling Brothers hired several people from Puerto Rico while the Blue Unit was performing in Washington, D.C., in the Spring of 1999.

We also did agree to accept a list of all elephants traveling with each unit, by year, and a list of all employees’ work history, by unit and year. We agreed to accept this information in response to Interrogatory No. 9 as well.

We add that, for the employees whose names you have already provided but have not provided complete contact information or other information that we requested (e.g., job responsibilities), we continue to insist that you provide that information, which is requested in Interrogatory Nos. 3, 4, and 5.

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

You have agreed to determine whether there are any additional medical records. However, plaintiffs sought a much broader category of information and records concerning each elephant owned or leased by defendants, such as records concerning elephant births and deaths, offspring, and genetic relationships between elephants, which we continue to insist that defendants produce. Moreover, your search for additional medical records should encompass all veterinary records or any records related to the health or physical condition of the elephants. In addition, because plaintiffs have sought all such records for all elephants owned or leased by Ringling Brothers from 1994 to the present, your search for records for “additional elephants” should not be limited to any particular subset of elephants.

Interrogatory No. 11/Document Request No. 19

We appreciate your agreement to search for information responsive to these requests, and reiterate our clarification of the term “efforts” to include any information in any way related to the breeding of Asian elephants. We note that, although you stated during our meeting that there is “no way [you] could know how [your] client interpreted

the term ‘breeding efforts,’” it is your responsibility to ensure that your clients understand their obligation to comply with our discovery requests, and to ensure that they have undertaken an adequate and reasonable search for the requested documents and information.

Interrogatory No. 15/Document Request No. 23

You have misstated Interrogatory No. 15 and Document Request No. 23 as requesting information relating only to “USDA investigations identified in the various chapters” of plaintiffs’ Report. Instead, the plain language of the Interrogatory requests the identification of records “that concern or relate in any way to each of the investigations, cases, and fact-finding matters that are discussed in each of the ten Chapters” of the Report. This description is not limited only to “USDA investigations,” and plaintiffs insist that defendants respond to the Interrogatory and Document Request in full. In addition, we remind defendants that the Interrogatory and Document Request also sought identification and production of all “videotapes, photographs, and copies of documents that were obtained by the USDA by means of a subpoena” in connection with the investigations discussed in the Report. It does not appear that all such records have been produced.

Interrogatory No. 17/Document Request No. 25

For purposes of avoiding a motion to compel for now, we did agree to accept all “video, audio, or other recordings” responsive to the following six categories listed on Page 8 of our October 19, 2004 letter: (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.” However, we did not indicate that this would be “in full satisfaction” of our requests, and we reserve our right to compel compliance with the full extent of our original requests in the future.

Document Request No. 2

We appreciate your agreement to search for records responsive to this Request. As we indicated at the meet and confer meeting, if your search does not yield any such responsive records, we would be willing to accept a stipulation from defendants that no such records exist.

Document Request No. 5

We appreciate your agreement to search for additional records related to Tom Rider. As you know, you are required to produce all records related to Mr. Rider that are in your client's custody or control, including all such records that are in your or your clients' possession, or identify in a privilege log any such records as work product or otherwise privileged. If we do not receive any such additional records or a privilege log indicating that the requested records are privileged, we will assume that no such responsive records exist. We also appreciate your statement during our meeting that defendants have no intention of "surprising" plaintiffs during a deposition with documents that plaintiffs have never seen. However, we reiterate that until defendants have complied with this Request in full, we are not prepared to make Mr. Rider available for a deposition. Alternatively, we would be willing to accept a stipulation that you have no such records and, accordingly, will not use any such records in this case for any purpose.

Document Request No. 6

Plaintiffs stand by their request for these documents, and will move to compel their production.

Document Request Nos. 9-10

We are not willing to accept documents that defendants believe are "sufficient" to identify the projects in which defendants have engaged to "conserve elephant habitat in the wild in Asia" for purposes of satisfying Document Request No. 10. Rather, we have requested "all records concerning each project that Ringling has undertaken since 1994 to conserve elephant habitat in the wild in Asia." We also continue to insist that defendants provide information responsive to Request No. 9 concerning the amount of money defendants have spent on the conservation of habitat in the wild for Asian elephants for each year since 1994.

Document Request No. 11

Plaintiffs stand by their request for the financial information sought in this Request, as such information clearly bears on the credibility of defendants' witnesses, as well as whether defendants are engaged in a "commercial activity" for purposes of the Endangered Species Act. In addition, it is our understanding that defendant Feld Entertainment owns Sells-Floto, which provides the concessions for the Ringling Brothers circus, and hence defendants must also respond to this discovery request with respect to Sells-Floto.

Document Request Nos. 13-23

We reiterate that, because defendants refused to "identify" records as requested in Interrogatories 1, 2, 6, 8, 9, and 10-15, in some cases it is difficult for plaintiffs to

ascertain whether defendants have produced any, let alone all, records that are responsive to Document Request Nos. 13-23. We therefore note again that plaintiffs reserve their right to compel responses to the "identification" instruction in the Interrogatories. Alternatively, plaintiffs would accept a stipulation that defendants have produced all documents in their clients' custody or control – or stated that such documents are privileged – that are responsive to Document Request Nos. 13-23.

Document Request No. 24

We did agree to attempt to obtain our own samples of the products defendants have identified. However, we reserve our right to compel production of such samples from defendants, should we be unable to do so.

* * *

We look forward to receiving additional discovery responses from defendants. We note that, to date, more than five weeks after our meet and confer meeting at which you agreed to search for additional documents responsive to a number of our discovery requests, we have received only a handful of additional documents from you.

It is now clear that plaintiffs will be filing a motion to compel with respect to some of their discovery requests. Because Judge Sullivan has asked us to inform him of the scope of that motion before we file it, we intend to do so at the January 11, 2005 status conference. Therefore, if defendants have additional records to provide us, we request that you do so before January 11. In addition, we believe it would be prudent for the parties to present Judge Sullivan with a new proposed pre-trial schedule on January 11, as well. We will send you a proposed schedule as soon as possible after the holidays for your review.

Please let me know if you have any questions about this response to your letter.

Sincerely,


Kimberly Ockene