

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiffs,

V.

Case No. 1:03-CV-02006 (EGS/JMF)

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

Defendants.

**EXPEDITED MOTION TO STAY ALL DISCOVERY PENDING
RESOLUTION OF MOTION FOR SUMMARY JUDGMENT**

Defendant Feld Entertainment, Inc. (“FEI”) hereby moves for a protective order pursuant to Fed.R.Civ.P. 26(c) to stay all discovery pending resolution of its Motion for Summary Judgment (9/5/06). *FEI asks that the Court consider and rule on the instant motion on an expedited basis due to the nature of the relief requested so that this motion is not mooted by the continuation of discovery during the passage of time.* As grounds for its motion, FEI states as follows:

FACTUAL BACKGROUND

On September 5, 2006, FEI moved for summary judgment. In its Motion, FEI asks this Court to enter final judgment on its behalf because all of its elephants are either “pre-Act,” or born in captivity and held pursuant to valid captive-bred wildlife permits. Hence, the elephants are not subject to any of plaintiffs’ claims filed under the Endangered Species Act, and the Court has been presented with the information it needs to make such a ruling. Further discovery at this point will not aide the Court in resolving the summary judgment motion, which, if granted, will

terminate this case in its entirety. Therefore, in response to plaintiffs' request for a scheduling order, FEI notified plaintiffs nearly a month ago by letter dated August 18, 2006 that it intended to file its motion for summary judgment. Counsel for both FEI and plaintiffs subsequently discussed the motion for summary judgment and a stay of discovery in person and exchanged further correspondence on the matter.¹

FEI asks that all discovery, including any related motions practice, be stayed immediately pending resolution of its motion for summary judgment. At this stage in the proceedings, Fed.R.Civ.P. 56(f) now controls what discovery, if any, should be permitted. It is plaintiffs' burden to make an appropriate application to the Court if they believe discovery is necessary to resolve the summary judgment motion. The Court will then decide whether such request, if any, is relevant to the motion or appropriate. In the meanwhile, proceeding any further with discovery in this case would be an unnecessary and expensive burden that is not warranted given the nature of the summary judgment motion on file. For example, plaintiffs have noticed the deposition of one of their own, Mr. Rider, and have lodged a massive request to physically inspect FEI's entire herd of 54 elephants. Similarly, FEI has moved to compel the production of documents from a third party, see Motion to Compel Documents Subpoenaed from the Wildlife Advocacy Project (9/7/06), and anticipates having to move to compel documents from plaintiffs themselves if discovery is not stayed. None of these discovery issues, however, relate to or will bear on the purely legal issue – the elephants' status *vis a vis* the Endangered Species Act – presented by the summary judgment motion. Moreover, expert witnesses have not yet been designated, produced or deposed in this case, and doing so would undeniably add an enormous expense component to this already costly litigation.

¹ Plaintiffs do not consent to the relief requested.

This case is now six years old. Discovery has been ongoing since 2003. FEI has produced prodigious amounts of materials in discovery, and through current counsel, has brought its document production up to date through approximately May 2006. It has also agreed, at plaintiffs' request, and produced two witnesses for deposition. The parties are deeply and bitterly divided in their political philosophies regarding the magnificent elephants at issue. That will never change. But before the parties undertake any more discovery or consume any more of the Court's time with this case, FEI asks the Court to stay all discovery until such time as it can rule on the motion for summary judgment. A stay would promote economic efficiency, prevent unnecessary cost in a case involving fee shifting, see 16 U.S.C. § 1540(g)(4), and would not prejudice plaintiffs. The stay of discovery is warranted under the circumstances and justified by the record in this case, and for these reasons, should be entered by the Court.

LEGAL ANALYSIS

It is well established in this Circuit that a stay of discovery pending resolution of a dispositive motion is appropriate. White v. Fraternal Order of Police, 909 F.2d 512, 516-17 (D.C. Cir. 1990) (trial court did not abuse its discretion by staying discovery over plaintiff's objection while motion for summary judgment pending); accord Keebler Co. v. Murray Bakery Prods., 866 F.2d 1386, 1389-90 (Fed. Cir. 1989); Petrus v. Bowen, 833 F.2d 581, 583 (5th Cir. 1987); Gilbert v. Ferry, 401 F.3d 411, 415-16 (6th Cir.), *vacated as to Part II(A)*, 413 F.3d 578 (2005); Janis v. Biesheuvel, 428 F.3d 795, 798, 801 (8th Cir. 2005). The Court, pursuant to Fed.R.Civ.P. 26(c) and its inherent authority, has broad discretion to stay discovery. White, 909 F.2d at 517 (stay of discovery reviewed under abuse of discretion standard); Chavous v. D.C. Fin. Respons. & Mngt. Assist. Auth., 201 F.R.D. 1, 2 (D.D.C. 2001) ("A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of

the case are determined.”) (citations omitted); Fed.R.Civ.P. 26(c) (court “may make any order which justice requires to protect a party ... from ... undue burden or expense”).

Moreover, the federal rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” See Fed.R.Civ.P. 1. A stay of discovery would accomplish that in this case because

[a] stay of discovery pending the determination of a dispositive motion ‘is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.’

Chavous, 201 F.R.D. at 2 (citations omitted). The potential harm by delaying discovery must be balanced against the possibility that the motion will be granted and eliminate the need for discovery altogether. Id. at 4. There is no prejudice to the party opposing a stay where, as here, there was ample time for discovery before the motion for summary judgment was filed. Zerilli v. Smith, 656 F.2d 705, 716 (D.C. Cir. 1981); see also Price v. Western Resources, Inc., 232 F.3d 779, 784 (10th Cir. 2000) (additional discovery denied where, as here, defendant had already answered interrogatories, produced documents and witnesses for deposition).

To justify any further discovery at this point in the proceedings, it is plaintiffs’ obligation to come forward and file a Rule 56(f) affidavit with the Court. See id.; Willoughby v. Potomac Elec. Power Co., 100 F.3d 999, 1003 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1197 (1997) (upholding refusal to allow further discovery where plaintiff had already conducted extensive discovery and did not file 56(f) affidavit); Fed.R.Civ.P. 56(f) (affidavit must state reasons why party cannot present “facts essential to justify” opposition to summary judgment); Rowland v. Riley, 5 F.Supp.2d 1, 3 n.3 (D.D.C. 1998) (summary judgment granted where no 56(f) affidavit filed “as required under the Federal Rules”).

Any discovery sought, however, through a Rule 56(f) affidavit must be relevant to and facilitate resolution of the summary judgment motion. See Chagnon v. Bell, 642 F.2d 1248, 1266 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 911 (1981) (upholding trial court's denial of 56(f) request for discovery that was irrelevant and immaterial to issue presented in motion for summary judgment); see also Zerilli, 656 F.2d at 716 & n.61 (request for 56(f) discovery properly denied where ample opportunity for discovery already permitted and information sought was already known to parties). The request must be particular and must explain why it is necessary or it will be denied. Strang v. US Arms Control & Disarmament Agency, 864 F.2d 859, 861 (D.C. Cir. 1989) (Ginsburg, Ruth B., J.) (additional discovery denied where no "specific reasons demonstrating the necessity and utility of discovery to enable her to fend off summary judgment" were provided). There must be a demonstrated nexus between the discovery sought and the motion at hand. Chavous, 201 F.R.D. at 4 (party not prejudiced by denial of discovery where no nexus existed between it and claims); Richardson v. NRA, 871 F.Supp. 499, 502 (D.D.C. 1994) (denying 56(f) request that asserted additional evidence could be obtained through discovery without demonstrating why that discovery related to summary judgment).


Staying discovery in this case is fair and just for multiple reasons. There is a strong likelihood of success on FEI's summary judgment motion, which if granted, would end this litigation. The case is six years old and discovery has been ongoing for three years, during which time plaintiffs have had ample opportunity to take discovery. It is inaccurate to say that there is now an urgent and sudden need to plow ahead full speed in the case. Expert discovery has not yet started, and may never be needed. Indeed, plaintiffs have delayed expert discovery when it has suited their own needs. See, e.g., Plaintiffs' Unopposed Motion to Suspend Date for

Exchange of Initial Expert Reports (9/2/04). Despite plaintiffs' assured protests to the contrary, they will suffer no real prejudice from the stay, particularly where discovery is not necessary to the Court's resolution of the motion. The benefits to a stay, however, are significant: the Endangered Species Act contains a fee-shifting provision that the losing party, including plaintiffs, could be ordered to pay. See 16 U.S.C. § 1540(g)(4) ("The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) *to any party*, whenever the court determines such award is appropriate.") (emphasis added). Proceeding with discovery would constitute a penalty under the circumstances. There is simply no need to inflict such financial burdens on the parties at this time.

For these reasons, the Court should exercise its sound discretion to immediately stay all discovery pending resolution of FEI's motion for summary judgment. Discovery, if any, should now be governed by the procedures set forth in Rule 56(f) of the Federal Rules of Civil Procedure. A proposed form of order is attached.

Dated this 14th day of September, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lisa Zeiler Joiner", written over a horizontal line.

John M. Simpson (D.C. Bar #256412)

Joseph T. Small, Jr. (D.C. Bar #926519)

Lisa Zeiler Joiner (D.C. Bar #465210)

Michelle C. Pardo (D.C. Bar #456004)

George A. Gasper (D.C. Bar #488988)

FULBRIGHT & JAWORSKI L.L.P.

801 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

Telephone: (202) 662-0200

Facsimile: (202) 662-4643

Counsel for Defendant Feld Entertainment, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

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

Defendants.

:
:
:
:
:
:
:
:
:
:
:
:
:
:
:

Case No. 1:03-CV-02006 (EGS/JMF)

ORDER

Upon consideration of Feld Entertainment, Inc.'s Expedited Motion to Stay all Discovery Pending Resolution of Motion for Summary Judgment ("Motion") and plaintiffs' response thereto, it is by the Court this _____ day of _____, 2006, hereby

ORDERED that the Motion is GRANTED; and it is further

ORDERED that all discovery and motions related thereto are STAYED until further notice of the Court.

UNITED STATES DISTRICT JUDGE