UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	
Plaintiffs,	Civ. No. 03-2006 (EGS/JMF)
v.	
RINGLING BROS. AND BARNUM & BAILEY CIRCUS, et al.,	
Defendants.	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' EXPEDITED MOTION TO STAY ALL DISCOVERY PENDING RESOLUTION OF MOTION FOR SUMMARY JUDGMENT

Defendants have already succeeded in delaying this case for many years through numerous procedural motions and obstructive conduct in discovery. Now, apparently dissatisfied that discovery is finally progressing at a reasonable pace, and that plaintiffs are obtaining information through that process that confirms the accuracy of plaintiffs' claims that defendants mistreat the Asian elephants in their custody, defendants are eager to find a new mechanism for continued delay. Accordingly, they are asking the Court to stay all discovery indefinitely until the Court resolves defendants' utterly baseless motion for summary judgment. The Court should not indulge defendants' transparent tactic to continue to delay final judgment on the merits of this long-standing case, especially because additional delay will result in severe prejudice to plaintiffs.

ARGUMENT

A. The Case Has Already Been Substantially Delayed Because Of Defendants' Tactics And Should Not Be Further Delayed Now That Discovery Is Finally Underway.

This case has already been substantially delayed by defendants' delay tactics. Plaintiffs originally filed their claims in July of 2000. See Complaint, Performing Animal Welfare Society, et al. v. Ringling Bros. and Barnum & Bailey, et al., Civ. No. 00-01641. Shortly thereafter, defendants filed a motion to dismiss the case on standing grounds, which this Court granted. In February, 2003, the Court of Appeals held that plaintiffs had alleged sufficient standing and remanded the matter to this Court for the case to proceed. See ASPCA v. Ringling Bros., 317 F.3d 334 (D.C. Cir. 2003).

Subsequent to the remand, defendants again attempted to delay the case through procedural motions. First, defendants sought to dismiss the case on the same grounds on which they are now basing their meritless motion for summary judgment. The Court denied that motion on July 30, 2003. See Order, July 30, 2003 (Civ. No. 00-01641). Defendants then filed a Motion for Judgment on the Pleadings, seeking to dismiss plaintiffs' Amended Complaint on the ground that the plaintiffs had not satisfied the sixty-day notice requirement of the Endangered Species Act, 16 U.S.C. § 1540(a). The Court ultimately dismissed that motion as moot, however, because plaintiffs filed a new Complaint based on additional notice letters. See Order, Nov. 25, 2003 (Civ. No. 03-2006).

Having failed to obtain a dismissal of the case, defendants turned their attention to restricting plaintiffs' right to take discovery. Accordingly, defendants contended that discovery must be strictly limited to the precise incidents listed in the 60-day notice

letters, see Joint Statement Pursuant to Local Rule 16.3 at 2-3, Sept. 16, 2003 (Civ. No. 00-01641), and also moved for a blanket protective order that would have allowed defendants to conduct discovery in this case in secret. See Defendants' Motion for a Protective Order, Oct. 8, 2003 (Civ. No. 03-2006). On November 25, 2003, the Court issued an Order rejecting both attempts by defendants to restrict plaintiffs' right to engage in full and open discovery in accordance with the Federal Rules. Order, Nov. 25, 2003 (Civ. No. 03-2006). In that Order, the Court denied defendants' motion for a blanket protective order, and authorized plaintiffs "to take discovery regarding all of defendants' practices that plaintiffs allege violate the Endangered Species Act and that statute's implementing regulations." Id.

Thus, by the end of 2003 plaintiffs had overcome numerous procedural roadblocks mounted by the defendants, and the stage was finally set for the parties to move forward with long-awaited discovery in this case. Unfortunately, more of defendants' delay tactics were yet to come, as defendants proceeded to do unilaterally what they had not been able to convince the Court to do for them – i.e., restrict plaintiffs' right to engage in discovery. Defendants have accomplished this by routinely withholding records that plaintiffs are clearly entitled to receive under the Federal Rules, forcing plaintiffs to push, prod and persevere – including by resort to judicial intervention – until defendants are finally forced to turn over the records. See, e.g., Plaintiffs' Expedited Motion to Enforce the Court's September 26, 2005 Order and for Sanctions Pursuant to Federal Rule of Civil Procedure 37(b)(2), June 6, 2006 (Civ. No. 03-2006) (Docket No. 69) ("Plfs. Motion to Enforce").

Thus, only recently have plaintiffs finally been receiving many of the records that

they should have received in June of 2004 – when the parties were originally required to exchange responses to each other's initial discovery requests. Indeed, as the Court is aware, defendants initially omitted the vast majority of the elephants' medical records from their discovery responses, and only began to produce the bulk of these records after plaintiffs obtained an Order from the Court compelling them to do so. See Order, Sept. 26, 2005 (Civ. No. 03-2006). Even then, defendants failed to produce large quantities of the elephants' records, requiring plaintiffs to seek the Court's intervention yet again, this time by way of a motion to enforce the Court's September 26, 2005 Order. See Plfs. Motion to Enforce.

However, even though defendants had previously insisted that they had produced all responsive records, after plaintiffs filed their motion to enforce seeking sanctions against defendants, defendants suddenly produced several boxes of medical records that should have been produced, at the latest, by the end of September 2005 in response to the Court's September 26, 2005 Order. Had plaintiffs not filed their original motion to compel discovery, or their subsequent motion to enforce the Court's Order, defendants would likely still be withholding these critical records. Indeed, as discussed in plaintiffs' Motion to Enforce, plaintiffs believe that additional records are still outstanding.[1]

Although it has taken a very long time to reach this point, other aspects of discovery are also finally underway. For example, as of January of this year – nearly two

[1] The Court has not yet ruled on plaintiffs' Motion to Enforce the Court's September 26, 2005 Order. If the Court grants the stay that defendants are now requesting – which includes a request to stay "any related motions practice," Expedited Motion to Stay All Discovery Pending Resolution of Motion for Summary Judgment at 2 ("Defs. Motion to Stay"), a ruling on plaintiffs' Motion will also be stayed, cutting off plaintiffs' opportunity to receive additional records to which they are entitled, and which they requested years ago.

years after plaintiffs requested them in discovery – plaintiffs are finally being granted access to the video recordings in defendants' custody that concern or depict defendants' Asian elephants. As the Court may recall, these videos were also a subject of plaintiffs' original motion to compel discovery, because defendants initially refused to produce the videos, or even to supply plaintiffs with an index of the videos so that plaintiffs could narrow their request. See Plaintiffs' Motion to Compel Defendants' Compliance with Plaintiffs' Discovery Requests at 33-34, Jan. 25, 2005 (Civ. No. 03-2006) (Docket No. 27), at 33-34. Ultimately, as the Court was poised to rule on plaintiffs' Motion to Compel, defendants agreed to allow plaintiffs to review the videos at the offices of defendants' counsel, so that plaintiffs could determine which ones they want to obtain. See Joint Status Report Regarding Discovery at 3-4, Sept. 23, 2005 (Civ. No. 03-2006) (Docket No. 47). Because defendants literally have thousands of videos that may be responsive to plaintiffs' discovery request, this review process is incredibly time-consuming, and plaintiffs have hired a paralegal whose time is devoted exclusively to this project. See Declaration of Patrick McLendon (Plaintiffs' Exhibit ("Plfs. Exh.") 1). Nevertheless, the review – which should have started in June 2004 – is finally proceeding at a reasonable pace and is revealing material that is highly relevant to both plaintiffs' claims and defendants' defenses.

Further, now that plaintiffs' attorneys are no longer devoting their time to forcing defendants to turn over basic records, plaintiffs have also begun to take depositions and engage in other, reasonable and limited discovery. Plaintiffs have recently taken two depositions of defendants' veteran employees, and anticipate taking several third-party depositions in the near future. Pursuant to Fed. R. Civ. P. 34, plaintiffs also have served

defendants with a request to inspect defendants' elephants – the very animals at the center of this case (which defendants have opposed). Finally, plaintiffs have noticed the deposition of plaintiff Tom Rider for the purpose of preserving his testimony in this case in light of defendants' efforts to delay the day when Mr. Rider will actually have the opportunity to present his testimony to the Court. This is the extent of the discovery that is proceeding at this time. None of this discovery is unreasonable or overly burdensome, yet defendants want to halt it in its tracks while they waste the Court's and plaintiffs' time resolving their baseless motion for summary judgment.

Moreover, in light of what has transpired here, it is completely disingenuous for defendants to state that "discovery has been ongoing for three years, during which time plaintiffs have had ample opportunity to take discovery," Defs. Motion to Stay at 5, and that "[t]here is no prejudice [to plaintiffs]" because "there was ample time for discovery before the motion for summary judgment was filed," id. On the contrary, as discussed, plaintiffs have had to expend much of their time and resources over the past couple of years forcing defendants to release basic records on the elephants. Defendants, on the other hand, did have time to take their own discovery while plaintiffs were preoccupied prying these highly relevant records from defendants' grip.

Defendants' continuing desire to delay discovery and postpone a ruling on the merits of this case is not surprising, since through that discovery plaintiffs are obtaining information that proves plaintiffs' claims that defendants are routinely harming, wounding, and otherwise "taking" Asian elephants in violation of Section 9 of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B). For example, the boxes of documents that defendants produced in July of this year – only after plaintiffs filed their

Motion to Enforce the Court's September 2005 Order – contain a host of electronic mail and other records in which several of defendants' veterinary employees recount episodes of harmful use of the bull hook on the elephants. See, e.g., Plfs. Exh. 2 (FEI 15025-15027) (veterinary technician stating that she observed "an elephant dripping blood all over the arena floor during the show from being hooked").

The depositions that plaintiffs have recently taken of defendants' employees further substantiate plaintiffs' claims. See, e.g., Transcript of Deposition of Troy Metzler at 342, 347 (Plfs. Exh. 3) (head elephant handler admitting that he routinely "bops" the elephants with the bull hook); Transcript of Deposition of Robert R. Ridley at 55 (Plfs. Exh. X) (elephant handler admitting that he observes "puncture wounds caused by bullhooks" on the elephants several times a month). Clearly, defendants would prefer to indefinitely bar plaintiffs from obtaining such information, or using it at a trial on the merits.

B. Plaintiffs Will Suffer Continued Prejudice If The Court Grants The Stay.

Granting defendants' motion for a stay of all discovery at this juncture would result in serious and continued prejudice to plaintiffs, who have already waited years to reach this stage of the case, and who are anxious to present this case on the merits to the Court. See Plaintiffs' Unopposed Motion for a Status Conference and Supporting Memorandum, Sept. 1, 2006 (Civ. No. 03-2006) (Docket No. 81). Plaintiffs – four non-profit organizations and a former Ringling Bros. employee – have already expended vast amounts of resources overcoming all of defendants' roadblocks, just to reach the point where they are finally able to take discovery and move the case toward trial. The efforts to obtain the medical records alone required plaintiffs to expend large amounts of

resources that they would have preferred to spend preparing their affirmative case.[2]

Additional delay in this case will continue to prejudice plaintiffs in a variety of ways. First, the longer the case is delayed, the longer plaintiffs – and the Asian elephants they seek to protect – are harmed by the ongoing "takes" of these endangered animals that plaintiffs allege occur on a regular basis. Plaintiffs allege, and intend to prove, that Ringling Bros. routinely engages in practices that violate the take prohibitions of the ESA – i.e., the use of bull hooks "and other weapons to train, control, and punish its elephants," the "forcible removal of baby elephants from their mothers," and the "chaining and confinement of elephants for many hours each day." Complaint for Declaratory and Injunctive Relief, ¶ 96 (Sept. 26, 2003) (Civ. No. 03-2006). Accordingly, the longer this case languishes unnecessarily, the longer these animals are subject to this unlawful treatment.

Second, defendants want to drag this case out as long as possible so that they can argue that plaintiffs' evidence is stale and hence irrelevant. See, e.g., Defendants' Memorandum in Opposition to Plaintiffs' Motion to Compel Defendants' Compliance With Plaintiffs Discovery Requests at 18-19, Feb. 15, 2005 (Civ. No. 03-2006) (arguing, in 2005, that records predating 1996 are "[o]f [m]arginal [r]elevance"). Thus, even though none of defendants' abusive practices have changed over the years, and what occurred several years ago is still highly relevant to defendants' current practices, plaintiffs – who, unlike defendants, do not have vast financial resources – must still expend time and money on an ongoing basis to gather and update their evidence until the

[2] Plaintiffs have asked the Court to order defendants to reimburse plaintiffs for the costs and fees plaintiffs have expended in obtaining the medical records from defendants. See Plfs. Motion to Enforce, at 24-25.

case is finally tried.

Third, if the Court stays all discovery, including the extremely belated, but ongoing, video review, plaintiffs will need to terminate the employment of the paralegal they have hired specifically to conduct this task. This individual quit his former employment so that he could take the video-review job, and he will become unemployed if plaintiffs must now terminate that task. See McLendon Decl. (Plfs. Exh. 1). In addition, it was difficult for plaintiffs to locate someone to pursue the video review on a full-time basis. If plaintiffs must now terminate Mr. McLendon, there is no guarantee that they will be able to rehire him in the future, at which point he may have found alternative employment.

Fourth, plaintiffs have recently located at least one additional witness who may soon be leaving the country, and plaintiffs plan to serve this person with a Rule 45 subpoena in the next few weeks to secure this important testimony which may otherwise become unavailable. If discovery is stayed at this juncture, plaintiffs may never be able to obtain this testimony.

C. There Is No Basis For Staying All Discovery Because Defendants' Summary Judgment Motion Is Completely Without Merit.

Not only would granting defendants' motion to stay discovery reward defendants' continuing delay tactics, prejudice plaintiffs' ability to present their case, and postpone a trial on the merits that is already long-overdue, but there is no basis for defendants' motion in any event because it is premised entirely on the false assumption that they will prevail on their pending motion for summary judgment. However, as plaintiffs will more fully demonstrate when they file their opposition to that motion on October 6, 2006, defendants' summary judgment motion is completely without merit.

Indeed, the only two issues that defendants have raised in their motion for summary judgment – i.e., that defendants are exempt from the "taking" prohibitions of the ESA because all of the elephants in their custody are either "pre-Act" or are held pursuant to the Fish and Wildlife Service's captive-bred wildlife regulations – were already rejected by this Court when defendants raised them in their motion to dismiss over three years ago. See Defendants' Supplemental Memorandum in Support of their Motion to Dismiss the Complaint at 3, 5, June 23, 2003 (Civ. No. 00-01641); Amended Order, July 30, 2003 (Civ. No. 00-01641) (ordering "that the defendants' motion to dismiss is denied"). Significantly, defendants have not renewed these arguments based on any new evidence that they have obtained through discovery since the motion to dismiss was denied. On the contrary, both legal arguments hinge on facts that have long been in the exclusive possession of defendants.

More importantly, in order for the Court to resolve these issues on a motion for summary judgment, it must determine that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). However, as plaintiffs will demonstrate in their opposition to the motion for summary judgment, this standard is not even remotely met in this case.

For example, under defendants' legal theory, to resolve the issue of whether defendants' "captive-bred wildlife" permits authorize the practices that plaintiffs are challenging – i.e., routinely striking and otherwise harming the elephants with bull hooks, chaining and confining the elephants for many hours each day, and forcibly separating baby elephants from their mothers – the Court must decide that these practices are "normal husbandry practices." See Memorandum of Points and Authorities in Support of

Defendant's Motion for Summary Judgment at 27. However, there is a massive factual dispute on these issues. Indeed, defendants dispute that they even engage in these practices, and certainly have not proved that they constitute "normal husbandry practices."

Thus, while defendants contend that they use the bull hook only as a "guide" to gently direct the elephants, and that the elephants learn to perform tricks primarily through "positive reinforcement," see, e.g., http://www.feldentertainment.com/pr/aca/FAQ1.htm (stating that "the guide is used to lead the elephant at times when the noise of the crowd or distractions might cause the elephant to miss a verbal cue," and that "[b]ecause the trainers provide the animals with a stable, rewarding environment, the animals eagerly learn to repeat their behaviors in sequence and on verbal cue"), plaintiffs contend – and will prove with voluminous evidence – that defendants employ the bull hook to instill fear, intimidation, and pain in order to coerce these magnificent creatures to engage in unnatural behaviors such as standing on their heads and riding bicycles, and that such methods certainly are not "normal husbandry practices."

Similarly, plaintiffs will demonstrate that defendants' routine forcible separation of baby elephants from their mothers long before the baby is ready to be weaned is physically and emotionally harmful to both the baby and the mother, and is not a "normal husbandry practice," and hence also not authorized by defendants' captive-bred wildlife permits. See 63 Fed. Reg. 48634, 48636 (Fish and Wildlife Service noting that "[s]ince captive animals can be subjected to improper husbandry as well as to harm and other taking activities, the Service considers it prudent to maintain such protections, consistent with Congressional intent") (emphasis added).

These factual disputes – and numerous other such disputes that the Court must resolve before deciding the merits of the case – cannot be resolved through affidavits or exhibits alone, and certainly not at this juncture, where plaintiffs have only completed a portion of the discovery they intend to take. At an absolute minimum, plaintiffs must be permitted to continue to engage in discovery to offer additional evidence they need to further demonstrate the meritless nature of defendants' summary judgment motion. Toward that end, plaintiffs intend to submit an affidavit pursuant to Fed. R. Civ. P. 56(f) along with their opposition to defendants' motion.

Moreover, even if there were no outstanding issues of material fact to resolve, defendants' motion for summary judgment will still fail because defendants' legal theories also have no merit. Thus, as plaintiffs will explain in detail in their upcoming opposition, under the plain language of the ESA, the "Pre-Act" exemption upon which defendants rely for part of their motion for summary judgment simply does not apply to the statute's "take" prohibition that is the basis for plaintiffs' claims in this case. See 16 U.S.C. §§ 1538(b)(1); 1538(a)(1)(b).

Likewise, contrary to defendants' assertions, the Fish and Wildlife Service's "Captive-Bred Wildlife" regulations, upon which defendants also rely, do not exempt defendants from the "take" prohibitions of the statute that are at issue here. Rather, as the Fish and Wildlife Service has emphasized with respect to captive endangered species, "maintaining animals in inadequate, unsafe or unsanitary conditions, physical mistreatment, and the like constitute harassment," and therefore the "take" of such animals. 63 Fed. Reg. 48634, 48638 (Sept. 11, 1998) (emphasis added). Accordingly, the agency has explained that the ESA "continues to afford protection to [captive] listed

species that are not being treated in a humane manner," id. – precisely what plaintiffs contend is the case here. Therefore, because there is neither a factual nor legal basis for defendants' motion for summary judgment, that motion should not be a basis for staying the long-awaited discovery that is finally occurring and that serves to move this case forward to its ultimate resolution.

CONCLUSION

For all the foregoing reasons, plaintiffs respectfully request that the Court deny defendants' motion to stay all discovery pending resolution of the motion for summary judgment.

Respectfully submitted,

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