**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.	:	

REPLY IN SUPPORT OF EXPEDITED MOTION TO STAY ALL DISCOVERY PENDING RESOLUTION OF MOTION FOR SUMMARY JUDGMENT

In their Response in Opposition to Defendant's Expedited Motion to Stay All Discovery Pending Resolution of Summary Judgment (9/20/06) ("Response"), plaintiffs' primary objection to the Expedited Motion to Stay Discovery ("Motion") is that it constitutes "delay" because they would like to continue on with unlimited discovery.[1] Since entering this case in March, however, FEI's current counsel have accelerated everything – including the motion for summary judgment. Contrary to plaintiffs' protest, the truth is that FEI is now apparently moving too fast for them. Indeed, this entire case can be concluded by year's end due to the motion for summary judgment without ever spending any further time, money or court resources on discovery.

Plaintiffs admit that a Rule 56(f) affidavit is crucial to any further discovery at this juncture, and they have advised the Court of their intent to file one. See Response at 12. The Court need not read any further and can grant the stay of discovery on this admission alone.

[1] It is rather ironic for plaintiffs to claim undue delay while simultaneously sitting on their filing until almost midnight on the response date ordered by the Court, particularly when the brief is devoid of any legal authority on the matter at hand.

Tellingly, plaintiffs make no effort to respond to the caselaw presented in the Motion, and they do not cite any legal authority to support their endless request for irrelevant discovery. Moreover, plaintiffs do not provide the requisite nexus between the types of discovery mentioned in their Response and the motion for summary judgment as required by Rule 56(f). See Motion at 4-5. There is no mention whatsoever of the cost involved or the fee-shifting statute that applies here. Cf. id. with Response. As demonstrated below, much of the Response is a recitation of the procedural history of the case, of which the Court is aware, and which is also irrelevant to whether a stay should be issued. Both the circumstances of this case and the law dictate that the Court should enter a stay of all discovery forthwith. Plaintiffs admit that Rule 56(f) now controls, and do not respond to the caselaw presented in the Motion. Accordingly, FEI asks the Court to enter a stay immediately for the reasons set forth here and in its Motion.

I. THERE HAS NOT BEEN UNDUE DELAY

Plaintiffs' version of the procedural history of this case does not recognize the critical distinction in litigation between the pleadings phase (motion to dismiss) and the *evidentiary* phase (summary judgment). Motions to dismiss and for judgment on the pleadings test only allegations, not evidence. See, e.g., Plaintiffs' Opposition to Defendant's Motion to Dismiss at 1 ("[T]o grant defendants' [sic] motion, this Court would have to violate the fundamental rule of civil procedure that, in deciding such motions, the Court must assume the facts as alleged by plaintiffs in their Complaint."). At summary judgment, however, nothing that plaintiffs claim must be accepted at face value. Instead, the proof is in the evidentiary pudding, so to speak, and there will be no trial absent a valid legal claim or real evidence to support a valid legal claim. That FEI has previously moved on the pleadings is irrelevant to a motion for summary judgment. See, e.g., Columbia Casualty Co. v. Columbia Hosp. for Women, 633 F.Supp. 697, 700 n.2

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(D.D.C. 1986) (granting summary judgment after denying motion to dismiss on the same grounds: "denial of a motion to dismiss does not preclude a later grant of summary judgment") (*citing* Brownfield v. Landon, 307 F.2d 389, 393 (D.C. Cir.)) (affirming summary judgment on the basis of further discovery after previous summary judgment motion was denied), cert. denied, 371 U.S. 924 (1962)); see also Richardson v. U.S., 22 Fed.Appx. 4 (D.C. Cir. Oct. 29, 2001) (unpublished opinion) (denial of motion to dismiss did not preclude court from revisiting the issue "under the more demanding standards governing motions for summary judgment"). Moreover, the Motion for Summary Judgment has nothing to do with the jurisdictional requirement of a 60-day notice letter. Plaintiffs scoff at these legitimate proceedings as "delay tactics," which borders on the frivolous. Under their own rationale, they "delayed" this case for two years while it was on appeal.

Plaintiffs rehash tired arguments regarding their efforts to compel documents from FEI, because they "believe that additional records are still outstanding." See Response at 3-4. This is false, as FEI has shown already to the Court. See generally FEI's Response in Opposition to Plaintiffs' Expedited Motion to Enforce (7/7/06). Plaintiffs apparently believe that their own document production is in pristine condition. See Plaintiffs' Status Report Regarding Discovery (9/12/05) (representing that plaintiffs have "either produced all of the information requested by defendants, or identified responsive privileged information on a detailed privilege log"). Reasonable minds could differ. None of this, of course, has anything to do with the pending motions for summary judgment and to stay discovery. FEI simply asks that before it has to undertake its own motion to compel against plaintiffs, the Court consider the motion for summary judgment first.

II. PLAINTIFFS CANNOT DEMONSTRATE ANY PREJUDICE BY A STAY AND DO NOT IDENTIFY ANY DISCOVERY RELATED TO SUMMARY JUDGMENT

Plaintiffs next complain that they have not completed their review of thousands of videotapes. From the outset, FEI objected to this request as overbroad, unduly burdensome and irrelevant, and invited plaintiffs to meet and confer to narrow the request. See Response and Objections to Document Request No. 25. Pursuant to the Court's order, the parties then agreed on a process for reviewing videotapes. See Joint Status Report Regarding Discovery at no. 6 (9/23/05). This again was proper procedure. Indeed, plaintiffs have now suggested that they are probably not going to review all of the hundreds of performance tapes demanded, ***thereby underscoring the validity of FEI's initial objections***.[2] Plaintiffs also fail to inform the Court that their review pace for approximately the first six months was a leisurely two tapes per week. FEI cannot be faulted for that. It is also unclear why anybody would leave his or her current employment to take a *temporary* job as a video reviewer as Mr. McLendon declares he has done. (Response at 9). Ensuring Mr. McLendon's gainful employment, however, is neither related to summary judgment nor the responsibility of this Court.

Plaintiffs recite examples of their other discovery requests, such as an inspection, the deposition of their own Mr. Rider, and some undisclosed but "recently located" mystery witness, and state that they are neither "unreasonable or overly burdensome." Id. at 6, 9.[3] Even assuming for purposes of this issue that plaintiffs are correct in their characterization, which they are not,

[2] The utility of these tapes, if any, is marginal at best, which plaintiffs confirm in their brief. See Response at 5 (stating that "defendants literally have thousands of videos that *may be responsive* to plaintiffs' discovery request.") (emphasis added).

[3] Plaintiffs make no effort to explain their peculiar need to depose Tom Rider to "preserve his testimony." See Response at 6. Mr. Rider, as a plaintiff, is clearly under plaintiffs' control as demonstrated by the *ex parte* "deposition" he provided on March 25, 2000. See PL-07068. One wonders why the need for preservation has arisen at all and at this time. Is Mr. Rider ill or dying? Is he planning on leaving the case? Will he no longer be paid by plaintiffs? See Motion to Compel Documents from WAP (9/7/06).

normal discovery parameters are no longer the operative standard. As indicated in the Motion, which plaintiffs do not dispute or even address, the burden now is on plaintiffs to come forward and explain why *any* discovery sought is relevant and necessary to their response to summary judgment. See Motion at 4-5. This they have not done.

The same holds true for the evidence cited by plaintiffs. See Response at 7 and exhibits thereto. Nobody disputes that the guide comes into contact with the elephants. See DX 4 to Motion for Summary Judgment, Elephant Husbandry Resource Guide, at 66 ("On a rare occasion, superficial skin marks may result but generally do not require medical attention.") ("Contact between the elephant and the shaft of the guide should be immediate, in response to the incorrect behavior, and should stop immediately upon the elephant demonstrating appropriate behavior.").[4] But again, this is not material to the motion for summary judgment: it has no bearing on whether the animals at issue are exempt, via permit or lineage, from the ESA. Accordingly, a stay is warranted.

Interestingly, Plaintiffs claim prejudice because the "animals [remain] subject to this unlawful treatment." (Response at 8). That is nonsense. FEI treasures its elephants, and they are treated with the utmost care and respect. What plaintiffs' proclamation illustrates, however, is their complete disregard of the extensive federal statutory scheme established under the Animal Welfare Act to regulate the care and treatment of animals. The animals are inspected frequently without any findings of mistreatment by those tasked by Congress with that responsibility, namely the USDA. The real purpose of this lawsuit is to invalidate through the backdoor the entire regulatory structure established by Congress and instead task this Court with

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[4] Apart from being irrelevant to the summary judgment motion, plaintiffs' own reliance on the depositions and documents attached as exhibits also shows why no further discovery is necessary: *Plaintiffs have already taken such discovery, are in possession of it, and can endeavor to use it as necessary.* Further discovery would simply be duplicative, cumulative, and thus, pointless.

the duties of some heretofore unknown penultimate animal inspector – all without ever having sued an agency. This approach, while novel under the ESA, is blatantly impermissible. See, e.g., Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426 (D.C. Cir. 1998); Fund for Animals v. Williams, 391 F.Supp.2d 191 (D.D.C. 2005).

Plaintiffs protest that their evidence "is stale and hence irrelevant," and argue that they should apparently be permitted to take infinite discovery "to update their evidence until the case is finally tried." See Response 8-9. If this were true, one might well ask why plaintiffs have amended their complaint over the years and have never sought a TRO or preliminary injunction. There is, however, another equally legitimate viewpoint through which to consider discovery: After years and years of taking discovery, plaintiffs still do not have a case, still do not have evidence of any "taking" and yet still ask to be able to continue their fishing expedition. At some point though, even Admiral Byrd's expedition had to return home. The Court should stay discovery.

III. THE MOTION FOR SUMMARY JUDGMENT WILL SUPPORT A STAY

The remainder of the Response is devoted to plaintiffs' bald conclusion that the motion for summary judgment is "completely without merit." See Response at 9-13. FEI obviously disagrees and could respond in kind by stating that its motion is not only meritorious but also case-terminating. Such quibbling, however, does nothing to further the analysis of a stay. It can certainly be said accurately, however, that the motion for summary judgment has the realistic potential to terminate this litigation, which is the standard set by law to obtain a stay. See White v. Fraternal Order of Police, 909 F.2d 512, 516-17 (D.C. Cir. 1990). Were this not so, plaintiffs would not be in their current frenzied state. FEI is content to let the summary judgment briefing run its course so that the Court can consider all the papers and then rule on the motion

accordingly. In the meanwhile, for the reasons herein and in its Motion, a stay of discovery is warranted, and FEI respectfully requests that the Court enter one immediately.

Dated this 22d day of September, 2006.

Respectfully submitted,

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.