

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**PLAINTIFFS’ MOTION TO COMPEL DEFENDANTS
TO COMPLY WITH PLAINTIFFS’ RULE 34 REQUEST FOR INSPECTIONS**

Pursuant to Rules 34 and 37 of the Federal Rules of Civil Procedure, plaintiffs hereby move to compel defendants to comply with plaintiffs’ request to inspect the Asian elephants at issue in this case, as well as defendants’ facilities at which such elephants are maintained. As more fully explained in the accompanying memorandum of points and authorities, on August 11, 2006, pursuant to Rule 34, plaintiffs requested the opportunity to conduct such inspections, but defendants have refused that request on the grounds that such discovery is “not reasonably calculated to lead to the discovery of admissible evidence,” and for various other reasons. See Defendant Feld Entertainment Inc.’s Response and Objections To Plaintiffs’ Rule 34 Requests For Entry Upon Land & Inspection of Elephants and Facilities.

However, because plaintiffs are clearly entitled to such discovery under Rule 34, they respectfully move the Court to compel the defendants to comply with their request.

Pursuant to Federal Rule of Civil Procedure 37(a)(2)(B) and Local Rule 7.1(m), counsel hereby certify that they have conferred with defendants' counsel in an effort to determine whether this dispute could be resolved without litigation, and have determined that such a resolution is not possible at this time.¹ Defendants have stated through counsel that they oppose this Motion.

Respectfully submitted,

/s/ Katherine A. Meyer

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Dated: October 26, 2006

¹ For example, defendants take the position that plaintiffs' request for inspections is completely impermissible, because, pursuant to the parties' original pre-trial schedule, no more "written discovery" is permitted. However, the parties' original pre-trial schedule did not even refer to "written discovery," nor, in any event, is a Rule 34 inspection request "written discovery." Moreover, discovery in this case is plainly ongoing. See Order (Sept. 26, 2006) (denying defendants' motion to stay all discovery).

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS’
MOTION TO COMPEL DEFENDANTS
TO COMPLY WITH PLAINTIFFS’ RULE 34 REQUEST FOR INSPECTIONS**

BACKGROUND

In this case under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 et seq., plaintiffs allege that defendants Ringling Brothers and Barnum & Bailey circus and Feld Entertainment (hereinafter collectively referred to as “Ringling Bros.”) are violating the “take” prohibitions of the ESA with respect to the endangered Asian elephants that they use in their circus. See 16 U.S.C. § 1538(a)(1). Plaintiffs allege that defendants are violating the take prohibition by harming, harassing, and wounding endangered Asian elephants by beating, striking, and hitting the elephants with bull hooks and other instruments; keeping the elephants chained for long periods of time; and forcibly removing baby elephants from their mothers while they are still nursing. See Pls. Compt. (Docket No. 1); Pls. Supplemental Compt. (Docket No. 55); see also 16 U.S.C. § 1532(19) (defining “take”). Defendants have denied that they engage in any such conduct. See Defs’ Answer (Docket No. 4); Defs’ Supplemental Answer (Docket No. 63).

On August 11, 2006, pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, plaintiffs served defendants with Rule 34 Requests For Entry Upon Land & Inspection of Elephants and Facilities “for the purpose of inspecting the elephants maintained by Ringling Bros. and the facilities relevant to defendants’ maintenance and care for elephants at these facilities.” See Plaintiffs’ Rule 34 Requests For Entry Upon Land & Inspection Of Elephants And Facilities (“Inspection Request”) (attached as Plaintiffs’ Inspection Exhibit (“Pl. Insp. Ex.”) 1). As plaintiffs explained, “[t]he behavior and physical condition of the elephants, and their maintenance by defendants in the ordinary course of defendants’ operations are relevant to the claims” at issue in the lawsuit. See Inspection Request at 1.

Plaintiffs requested permission to inspect the elephants while they are on the road, including the animals being used in both the “Blue” and “Red” Units operated by Ringling Bros., because the Asian elephants used in both units travel across the country to various performance venues for as much as 48-50 weeks of each year. See Inspection Request at 5-6; see also, e.g., Schedule for Red Unit (Pl. Insp. Ex. 2); Deposition Testimony of Troy Metzler at 107 (“Metzler Dep.”) (Pl. Insp. Ex. 3) (explaining that elephants are not taken off the road until “after Thanksgiving,” and then go back out on the road “around January 1st or 2nd”).

Plaintiffs also requested the opportunity to inspect the animals maintained at defendants’ “Center for Elephant Conservation” in Polk City, Florida, which is where Ringling Bros. breeds elephants for use in the circus, where it “separates” baby elephants from their mothers, and where it trains the elephants to perform tricks in the circus. See Inspection Request at 2-3; see also, e.g., USDA Records (Pl. Insp. Ex. 4); Metzler Dep. at 93-103. Plaintiffs further requested the opportunity to inspect the elephants maintained at defendants’ “Retirement” facility in Williston,

Florida, which is where defendants maintain elephants who are neither performing nor involved in breeding or training activities. See Inspection Request at 2; see also Defendants' Response To Plaintiffs' Interrogatory No. 13 (Pl. Insp. Ex. 5); Metzler Dep. at 402-05.

Pursuant to Rule 34, plaintiffs provided the details of the requested inspections in their Inspection Request. Plaintiffs explained that, with respect to the two "Stationary Facilities" – i.e., the CEC and Williston – they wish to bring a team of four to five experts to enter the facilities at each of the above locations to conduct the inspections, to be accompanied by plaintiffs' attorneys, along with photographers and videographers who could record the inspections for possible use at trial. See Inspection Request at 3-4. Plaintiffs further requested that defendants make available at each of the inspections an official representative of Ringling Bros. to identify the elephants, as well as "those personnel who are necessary to ensure that plaintiffs' representatives are provided complete access to all of the elephants and facilities, as needed to perform the requested inspections." Id. Plaintiffs requested the opportunity to inspect, observe, and take photographs and video footage of the elephants for up to six hours at each facility, and to inspect, observe, photograph, and take video footage of the "areas of the facilities where the elephants are kept or maintained," and the areas of the facilities associated with the maintenance of elephants. Id. at 4.

As to the inspections of the elephants on the road in the Blue and Red Units, plaintiffs requested the opportunity to have four to five experts inspect the elephants and facilities involved in the maintenance and care of the elephants, accompanied by plaintiffs' attorneys, as well as photographers and videographers who could record the evidence for possible use at trial.

Inspection Request at 6-7. Plaintiffs also requested the opportunity to inspect the animals as they are being unloaded from the train, to inspect the train cars in which the elephants are transported,

and to inspect the animals as they are taken to the arena, coliseum, or other facility where they will perform. Id. at 6.¹

In the interest of minimizing disruption of defendants' operations as much as possible, plaintiffs gave defendants several alternative dates for each of the inspections. See Inspection Request at 4, 7-8. However, because the date and location of each inspection would affect the availability of the experts plaintiffs would use for each inspection, plaintiffs also stated that "[o]nce the date of the inspection is agreed upon, a more detailed description of the inspection team, including the identities and credentials of the experts who will be participating in the inspection, will be provided to counsel for defendants." Id. at 3, 6. Plaintiffs further stated that, aside from the requirement that "[n]one of the four inspections [requested] can be scheduled to occur at the same time . . . plaintiffs are willing to work with defendants to find mutually agreeable dates for the inspections." Id. at 8.²

Instead of responding to plaintiffs about dates or any alternative suggestions about the terms or conditions of possible inspections that would accommodate plaintiffs' discovery requests, defendants waited until the thirtieth day and then filed Objections to any such inspections on numerous grounds. See Defendant Feld Entertainment Inc.'s Response and

¹ Plaintiffs provided many more details about what would be entailed in each of the requested inspections, including, e.g., the names of each elephant they wish to examine at each facility, the areas of each facility they wish to inspect, and the specific expertise that each expert would have. See Inspection Request at 2-8.

² By the time plaintiffs' motion to compel is resolved, none of the dates suggested by plaintiffs for the inspections will remain viable. However, should the Court grant plaintiffs' motion to compel, plaintiffs are still willing to work with the defendants to determine appropriate dates for inspections.

Objections To Plaintiffs' Rule 34 Requests For Entry Upon Land & Inspection of Elephants and Facilities (Pl. Insp. Ex. 6). For example, defendants objected to plaintiffs' request for inspections on the grounds that the request was "overbroad, unduly burdensome, vague and ambitious, and not reasonably calculated to lead to the discovery of admissible evidence." Id. at 1. Defendants further objected on the grounds that plaintiffs' discovery request was an "improper use of Rule 34 as a vehicle to gather general information for their political cause rather than as a legitimate means for discovering evidence related to this case." Id. Thus, having received no constructive response from defendants regarding their inspection request, plaintiffs have been forced to turn to the Court for assistance in inspecting the elephants who are at the heart of this case.

ARGUMENT

Rule 34 of the Federal Rules of Civil Procedure permits a party to serve on another party a request "to inspect . . . any tangible things which constitute . . . matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served." Fed. R. Civ. P. 34(a). The Rule also permits a party to request the opportunity to inspect "the property or any designated object or operation thereon, within the scope of Rule 26(b)." Id. Rule 26(b) in turn allows parties to obtain discovery regarding any matter that is not privileged and that is "relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b).

Here, plaintiffs allege that defendants are in violation of the "take" prohibition of Section 9 of the ESA because they "take" the Asian elephants in their possession in various ways that "harm, harass, and wound" the animals. See Pls. Compl. (Docket No. 1). Defendants not only deny that they engage in any such conduct, but they also contend that whatever actions they undertake with respect to the endangered elephants are permitted by the Fish and Wildlife

Service's "captive-bred wildlife regulations" ("CBW regulations"), which allow those engaged in captive-breeding of endangered species to engage in certain practices that are necessary to "enhance the propagation or survival of the affected species." 50 C.F.R. § 17.21(g); see Defs' Memorandum In Support Of Their Motion For Summary Judgment at 23-29 (Sept. 5, 2006) ("Def. SJ Mem.") (Docket No. 82).

However, to invoke the protections of the CBW regulations, defendants must prove that the activities about which plaintiffs complain are undertaken for the purpose of "enhanc[ing] the propagation or survival" of the Asian elephant. 50 C.F.R. § 17.21(g); see also 16 U.S.C. § 1539(g) ("[i]n connection with any action alleging a violation of section 9 . . . any person claiming the benefit of any exemption or permit under this chapter shall have the burden of proving that the exemption or permit is applicable") (emphasis added). In addition, to claim the benefit of the CBW regulations, defendants must also show that their treatment of the elephants is "not . . . detrimental to the survival of wild or captive populations of the affected species," 50 C.F.R. § 17.3, and that the practices about which plaintiffs complain constitute "normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible." Id. § 17.3(a). Indeed, defendants have already moved for summary judgment on the grounds that plaintiffs cannot prevail here because defendants' treatment of the elephants constitutes "normal husbandry practices" that are permitted by the CBW regulations. See Defs. SJ Mem. at 27-29.

To claim the benefit of the CBW regulations, however, defendants must also show that the Asian elephants are being maintained under "humane and healthful conditions," 50 C.F.R. § 13.41, and that defendants are also in compliance with "all applicable laws and regulations

governing the permitted activity,” 50 C.F.R. § 13.48, including standards that have been issued under the Animal Welfare Act (“AWA”), 7 U.S.C. § 2131 et seq., for all animals used in entertainment. See Plaintiffs’ Memorandum In Opposition to Defs’ Motion for Summary Judgment at 37-39 (October 6, 2006) (Docket No. 96).³

Therefore, clearly plaintiffs’ request to inspect all of the elephants and the conditions under which they are maintained are “relevant” both to plaintiffs’ claims and to defendants’ defenses in this action, within the scope of Rule 26(b).⁴ Moreover, because defendants maintain the elephants at five different facilities, plaintiffs’ request to inspect four of those facilities – including the two main traveling units, defendants’ breeding facility, and the place where the elephants are housed when they “retire” – is entirely reasonable.⁵

Accordingly, the inspections that plaintiffs have requested fall squarely within the kinds of inspections that are permitted under Rule 34. See, e.g., Martin v. Reynolds Metals Corp., 297 F.2d 49 (9th Cir. 1961) (in case alleging environmental poisoning of cattle, approving inspection of plaintiff’s cattle, as well as taking samples of forage, feed, air, and water); Norton v. Lindsay,

³ For example, the AWA regulations provide that “[p]hysical abuse shall not be used to train, work, or otherwise handle animals,” that [h]andling of all animals shall be done . . . in a manner that does not cause trauma . . . behavioral stress, physical harm, or unnecessary discomfort,” and that “[y]oung or immature animals shall not be exposed to rough or excessive public handling . . .” 9 C.F.R. § 2.131(b) - (c).

⁴ Defendants object to the requested inspections on the grounds that “plaintiffs have no standing to make a claim” with respect to all of the elephants. See Defs’ Objections at 3. However, the way in which defendants treat any Asian elephant in their possession is certainly “relevant” to plaintiffs’ claims in this lawsuit, as well as defendants’ defenses, since it would shed light on whether, as plaintiffs allege, defendants engage in the practices that are at issue here.

⁵ Plaintiffs have not requested an inspection of defendants’ “Gold Unit” on the road, which only uses a few elephants. See Metzler Dep. at 16 (Pl. Insp. Ex. 3).

350 F.2d 46, 48 (10th Cir. 1965) (in case involving rescission of contract for the sale of a race horse, allowing defendant to examine the horse); New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 961-62 (2d Cir. 1983) (allowing inspection of institution accused of providing substandard care for mentally handicapped patients); Morales v. Turman, 59 F.R.D. 157, 158-59 (E.D. Tex. 1972) (in case challenging care of juveniles, allowing plaintiffs' experts to live at institutions for up to 30 days for the purpose of conducting inspections into the care provided); Welzel v. Bernstein, 233 F.R.D. 185, 186-87 (D.D.C. 2005) (in gender discrimination case allowing inspection of facility with permission to take photos and/or video footage).

There can be no question that defendants have "possession, custody or control" of each of the elephants whom plaintiffs wish to inspect. See Rule 34(a); see also Inspection Request at 2-3; 5-6 (listing the elephants plaintiffs are asking to inspect). Indeed, defendants concede that they own all of these animals. See Def. SJ Mem. at 2.

There also can be no question that defendants have "control" over each of the facilities where plaintiffs asked to inspect the elephants and the conditions under which they are maintained. See McKesson Corp. v. Islamic Republic of Iran, 185 F.R.D. 70, 78 (D.D.C. 1999) ("Under Rule 34, the term control generally addresses the legal right, authority, or ability of the party to whom/which the Rule 34 request is directed to exercise lawful possession over the premises"). The train cars in which the elephants are transported are owned by defendants. In addition, the arenas where the circus performs are contracted by defendants, who have sufficient "control" over these facilities to allow their entire circus operation to occupy the arena. See Pl. Insp. Ex. 7 (news articles and press release discussing defendants' contractual arrangements with arenas); see also McKesson Corp., 185 F.R.D. at 78.

Defendants also clearly have control over their stationary facilities – the Williston facility and the breeding facility in Polk City, Florida (the “CEC”). Defendants clearly have sufficient access and control over the Williston facility to regularly maintain their own elephants there. Therefore, it has the requisite level of control to authorize individuals to enter the facility and inspect the elephants. See McKesson Corp., 185 F.R.D. at 78; see also Tavoulaareas v. Piro, 93 F.R.D. 11, 20 (D.D.C. 1981) (the party need only have the legal right to control or obtain the subject of the request to have control over the subject). Defendants also clearly have control over their breeding facility in Polk City, which defendants own. Indeed, defendants routinely publicize that the CEC “hosts researchers, academicians and conservationists.” See <<http://www.elephantcenter.com/about.aspx>>.

Further, as noted, once dates for the inspections are finalized, plaintiffs will provide a more detailed description of the inspection team, including the identities and credentials of the experts who will be participating in the inspections. See Inspection Request at 3, 6.

Accordingly, plaintiffs have met all of the requirements of Rule 34, and defendants may not refuse to deny plaintiffs the opportunity to conduct the requested inspections.⁶

⁶ Plaintiffs have already expressed a willingness to work with defendants to determine the appropriate time for such inspections. They are also willing to work with defendants to determine the appropriate conditions of each such inspection.

CONCLUSION

For the foregoing reasons, plaintiffs' motion to compel defendants to comply with plaintiffs' request to conduct inspections pursuant to Rule 34 should be granted.

Respectfully submitted,

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Dated: October 26, 2006

Plaintiffs' Exhibit List

Plaintiffs' Motion to Compel Defendants to Comply with
Plaintiffs' Rule 34 Request for Inspections

ASPCA v. Ringling Bros., Civ. No. 03-2006 (EGS/JMF)

<u>Exhibit</u>	<u>Description</u>
1.	Plaintiffs' Rule 34 Request for Entry upon Land & Inspection of Elephants and Facilities
2.	Schedule for Red Unit
3.	Excerpts from Deposition Testimony of Troy Metzler
4.	USDA Records
5.	Defendants' Response To Plaintiffs' Interrogatory No. 13
6.	Defendant Feld Entertainment Inc.'s Response and Objections to Plaintiffs' Rule 34 Requests for Entry upon Land & Inspection of Elephants and Facilities.
7.	Selection of articles regarding Feld Entertainment's contractual arrangements with various arenas