UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF TOM RIDER'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

In yet another blatant effort to divert this Court's attention from the merits of this case under the Endangered Species Act, defendants have filed a completely frivolous motion to compel testimony that, for the most part, plaintiffs immediately agreed to provide within days of being told that defendants wished to pursue such testimony. Accordingly, not only is there no merit to defendants' motion to compel, but plaintiffs, not defendants, should be awarded their costs and attorneys' fees for having to spend time on this matter. See Rule 37(a)(1)(B). In support of this opposition, plaintiffs rely on and hereby incorporate by reference the memorandum in support of Plaintiff Tom Rider's Motion for a Protective Order which was filed earlier today (Docket No. 106).

BACKGROUND

Tom Rider, who worked for the Ringling Bros. circus for two and a half years, is one of the plaintiffs in this case concerning defendants' mistreatment of endangered Asian elephants. Although the parties have been engaged in discovery since 2004, defendants have yet to take Mr. Rider's deposition, and a trial date has not yet been set by the Court.

On October 12, 2006, in an effort to preserve Mr. Rider's eye-witness testimony for trial in this case, the other plaintiffs – the American Society of Prevention of Cruelty to Animals, The Fund for Animals, the Animal Welfare Institute, and the Animal Protection Institute – took Mr. Rider's deposition, as they are clearly entitled to do. See Rule 30(a)(1) ("[a] Party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court") (emphasis added). The day before that deposition was to take place, defendants' counsel faxed to plaintiffs' counsel – and filed with the Court – their "objections" to the deposition, in which they made absolutely clear their intention to take their own deposition of Mr. Rider at some future point in the litigation. See Defendant's Objections To Plaintiffs' Preservation Deposition Of Plaintiff Tom Rider (Oct. 11, 2006), attached as Exhibit C.

During the course of defendants' cross-examination of Mr. Rider at the October 12 deposition, defendants' counsel asked Mr. Rider several questions concerning his marital history, military background, and possible arrests and misdemeanor convictions. See Transcript of Tom Rider's Deposition (October 12, 2006) ("Rider Dep. Tr.") at 157-67. Mr. Rider's counsel objected to these questions and instructed Mr. Rider not to answer them, on the grounds that some of this information i.e. his marital history and arrests unrelated to convictions – is

completely irrelevant to this case and all of this information is highly personal in nature and hence should not have to be divulged on the public record. See id.

At no time during Mr. Rider's deposition did defendants' counsel clarify whether defendants would nevertheless insist that Mr. Rider provide all of this information. Indeed, as to whether Mr. Rider had ever been arrested, or convicted of a misdemeanor, defendants had already asked Mr. Rider those same questions in their March 2004 Interrogatories. See Tom Rider Objections and Responses to Defendants' Interrogatories (June 9, 2004) (Exhibit B), at 13. However, when Mr. Rider objected to providing the information on the grounds that it was irrelevant and would invade his personal privacy, id., defendants did not pursue the matter any further – i.e., they did not file a motion to compel, require Mr. Rider to move for a protective order, or otherwise provide any indication that Mr. Rider's refusal to answer these questions was unacceptable or somehow hindered defendants' ability to pursue their defense in this case. Thus, for two and a half years, plaintiffs had every reason to believe that defendants had accepted Mr. Rider's position on those particular matters. Moreover, when Mr. Rider again objected to answering these questions at the deposition, defendants' counsel did not suggest that the matter now had to be immediately resolved by the Court.

As to the questions concerning Mr. Rider's marital history and military background, defendants had never pursued those lines of inquiry before, and hence the October 12, 2006 deposition was Mr. Rider's first opportunity to assert a personal privacy objection to providing such testimony. Nevertheless, at no time during the deposition did defendants' counsel indicate that defendants would insist on public answers to those questions, nor did defendants' counsel suggest that the Court needed to be contacted immediately to resolve this matter.

The day after the deposition however, by letter dated October 13, 2006, defendants' counsel informed plaintiffs' counsel that, in fact, defendants wished to pursue all of these lines of inquiry, and demanded to know when Mr. Rider would be filing a motion for a protective order with regard to these matters. See Letter from John Simpson to Katherine Meyer (Oct. 13, 2006), Exhibit C. Although defendants had not shown any urgency whatsoever in taking Mr. Rider's deposition during the more than two years since discovery had commenced, and they had also made it absolutely clear that they intended to take their own deposition of Mr. Rider at some point in the future, see Def. Obj. (Exhibit A), defendants' counsel nevertheless stated that "[s]ince we would like to proceed with completing discovery regarding Mr. Rider, please inform me when you plan to file the motion for a protective order," and he further insisted that plaintiffs' counsel so inform him "by Wednesday, October 18, 2006, so that we may consider whether to pursue other avenues." Simpson Letter (Oct. 13, 2006) (Exhibit C).

Even though the only deadlines that the parties are normally required to obey are those set by the Court, plaintiffs' counsel nevertheless did respond to defendants' letter on October 18, 2006, and explained that Mr. Rider was willing to provide testimony to defendants concerning his military background and any misdemeanor convictions, but would like to do so subject to a "voluntary protective order" since such information was highly personal in nature. See Letter from Katherine Meyer to John Simpson (Oct. 18, 2006) (Exhibit D). Thus, plaintiffs' counsel explained, "[w]hile we do not object to providing the defendants and the Court with information about these two matters, we do object to such information, which is extremely personal, being publicly disclosed." Id. (emphasis added).

Plaintiffs' counsel also advised defendants' counsel that Mr. Rider was prepared to "answer questions as to why his Interrogatory Response concerning 'prior civil litigation' did not mention some marital disputes to which he has been a party." Id. However, as to the substance of those marital disputes, as well as whether Mr. Rider had ever been arrested but not convicted of any crimes, plaintiffs' counsel explained that, unless defendants could demonstrate how such information is relevant to this proceeding, Mr. Rider would object to providing such information on the grounds that it is highly personal. Id.

Observing that plaintiffs have "always acknowledged that you are entitled to take your own deposition of Mr. Rider," plaintiffs' counsel suggested that "when you are ready to take Mr. Rider's deposition [the parties] work out the terms under which Mr. Rider will testify about his military record, misdemeanor convictions, and the reason he did not identify certain marital disputes in answer to defendants' Interrogatory concerning 'prior civil litigation,'" and that "[i]f for some reason, it is necessary for us to agree to such terms before you are prepared to take Mr. Rider's deposition, we could certainly consider doing so." Id. (emphasis added). Plaintiffs' counsel further explained that she was going to be out of town on business the following week, but that, "[i]n the event that, in response to this letter, defendants decline our offer to accept Mr. Rider's testimony on certain matters subject to a voluntary protective order, and/or defendants insist that they are entitled to information concerning felony arrests and the substance of Mr. Rider's marital disputes, we will be prepared to file a motion for a protective order within the next few weeks." Id. (emphasis added). Plaintiffs' counsel further stated that "[i]n view of our willingness to work out the terms of a protective order concerning several of the matters addressed in your letter, and the fact that defendants are not yet ready to take Mr. Rider's

deposition, there should be no reason for defendants to file a motion to compel over these matters." Id. (emphasis added).

In response, by letter dated October 20, 2006, defendants' counsel did not provide any indication as to why information concerning Mr. Rider's martial history or possible arrest record is relevant to the proceeding. See Letter from John Simpson to Katherine Meyer (October 20, 2006) (Exhibit E). Defendants' counsel further declined to "consent to a protective order for Mr. Rider" regarding the matters that Mr. Rider is willing to provide to defendants, on the grounds that, since plaintiffs had earlier objected to defendants' desire to have a protective order that would govern "all discovery in this case" – a position with which "the Court agreed" – "[h]aving denied that to our client, we see no reason to now reverse that course and provide special protections for your client." Id.

Stating that since, "[u]nfortunately, your letter does not provide a date certain, as we requested [sic],[1] by which you will file a motion for a protective order," defendants were not willing to "abandon[] this matter for a 'few weeks' as your letter proposes." Id. Therefore, defendants' counsel indicated that he would "prepare and file with the Court a motion to compel . . . and will seek our costs and fees pursuant to Rule 30(d)(4)." Id. Ten days later, on October 30, 2006, defendants filed their motion to compel.

Meanwhile, as plaintiffs' counsel promised she would do within a "few weeks" of October 18, 2006, see Meyer Letter (Oct. 18, 2006), Mr. Rider has moved for a protective order pursuant to Rule 26(c) to excuse him from testifying about past marital disputes and whether he

[1]Defendants' letter did not request a "date certain" by which plaintiff's counsel would file a motion for a protective order. See Simpson Letter (Oct. 13, 2006) (Exhibit C).

has ever been arrested of crimes for which he was not convicted, and he has also moved for a protective order that would allow him to provide testimony to defendants and the Court, but not the public, about his military background and whether he has ever been convicted of a misdemeanor. See Tom Rider's Motion for a Protective Order (November 13, 2006) (Docket No. 106). With that motion Mr. Rider also submitted a declaration explaining that he did not identify prior marital disputes with his ex-wife in answer to defendants' March 2004 Interrogatory requiring him to list all "prior civil litigation" to which he has been a party, because "it did not even occur to me that those kinds of matters are "civil litigation." See Declaration of Tom Rider, attached to Tom Rider's Motion for a Protective Order, at ¶3. See also id. ¶ 4 ("I am not a lawyer and did not realize that filings in court concerning marital disputes are 'civil litigation'").

ARGUMENT

DEFENDANTS' MOTION TO COMPEL SHOULD BE DENIED

A. Defendants Did Not Make A Good Faith Effort To Resolve These Matters Before Moving To Compel.

Pursuant to Rule 37(a)(2), Fed. R. Civ. P., a motion to compel testimony from a deponent "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." Rule 37(a)(2) (emphasis added); see also Local Rule 7(m) (before filing any nondispositive motion, "counsel shall discuss the anticipated motion with opposing counsel . . . in a good-faith effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement").

Here, defendants' counsel did not provide any such "certification" with their motion to compel – nor could they in light of what occurred here. In fact, rather than engage in any "good faith" effort to resolve these matters "without court action," Rule 37(a)(1)(B), the correspondence between counsel for the parties demonstrates that defendant's counsel was bound and determined to file a motion to compel against Mr. Rider, regardless of whether Mr. Rider was willing to provide the requested testimony, without making any showing of relevance as to some of that testimony, and without waiting a mere "few weeks" for Mr. Rider's counsel to file a motion for a protective order.

Indeed, as the correspondence also shows, the only reason given by defendants for refusing to entertain a voluntary protective order for Mr. Rider's testimony regarding his military service and any misdemeanor convictions was their desire to punish plaintiffs for refusing to agree to a "global protective order" for all discovery that defendants had proposed, but the Court had denied. See Simpson Letter (October 20, 2006); see also Compel Mem. at 4, n.5 (referring to protective order requested by defendants as a "global protective order"). However, this basis for refusing to negotiate the terms of an appropriate protective order certainly does not evidence a "good faith" effort to narrow the issues that will be brought before the Court. Rule 37(a)(1)(B); Local Rule 7(m).

Nor, despite plaintiffs' counsel's invitation, did defendants provide any explanation as to how the substance of Mr. Rider's 15-year old marital disputes and any prior arrests without convictions are relevant to this Endangered Species Act case. See Meyer Letter (Oct. 18, 2006); Simpson Letter (Oct. 20, 2006). Rather, again, defendants took the intransigent approach that because plaintiffs had refused to agree to a "global protective order" for all discovery, defendants

had no need to make any accommodation for Mr. Rider's personal privacy interests. See Simpson Letter (Exhibit E) ("[h]aving denied [the global protective order] to our client, we see no need to now reverse that course and provide special protections for your client, Mr. Rider").

However, not only does defendants' correspondence demonstrate a total lack of "good faith effort to . . . narrow the areas of disagreement," Local Rule 7(m), but, by seeking a protective order that would provide defendants with all relevant information to which they are entitled, but at the same time protect Mr. Rider's personal privacy, plaintiffs certainly were not asking for any "special protections" for Mr. Rider. Indeed, as the record of this case demonstrates, plaintiffs have agreed to several protective orders for categories of evidence they have requested from defendants, including videotape recordings and certain medical records of the elephants at issue. See Joint Stipulated Protective Order Concerning Recordings of Ringling Bros. And Barnum & Bailey Circus Performances (Aug. 15, 2006) (Docket No. 77); Joint Stipulated Protective Order Regarding Video Recordings (Aug. 4, 2006) (Docket No. 76); Plaintiffs' Proposed Protective Order (Docket No. 49, Attachments 1 and 2) (regarding medical records containing information that "forms the basis of a specific research paper that defendants intend to publish in the near future"); Court's Order (September 26, 2005) (Docket No. 50) (approving plaintiffs' protective order for the medical records). .

Thus, in keeping both with Federal Rule 26(c), which allows for protective orders upon a showing of "good cause," and with this Court's November 25, 2003 directive that the parties seek such orders only for "particular specified information . . . upon a showing of 'good cause,'" see id. (Docket No. 15), plaintiffs have agreed to such orders when necessary to protect the purported commercial interests of the corporate defendants in this case. However, apparently

blinded by their desire to punish plaintiffs for refusing to agree to a blanket protective order for every record defendants produce in this litigation, defendants are unwilling to reciprocate by agreeing to a protective order that would provide defendants all of the relevant information that they have requested, but ensure that Mr. Rider's personal information is not publicly disclosed. Such a one-sided approach to litigation simply does not satisfy the "good faith" effort that is required here under both Rule 37(a)(1)(B) and Local Rule 7(m).

B. Plaintiffs Were Under No Obligation To "Immediately" Move For A Protective Order.

Defendants take the untenable position that they are entitled to an order compelling Mr. Rider to provide testimony – most of which Mr. Rider has already agreed to provide defendants (pursuant to a protective order that would limit further dissemination) – because plaintiffs' counsel did not "immediately" call the Court during the course of the October 12, 2006 deposition and move for a protective order. See Def. Compel Mem. at 6. However, as explained supra at 2-3, until plaintiffs received defendants' October 13, 2006 letter, they had no basis for knowing that defendants would not accept the objections lodged at the deposition.

In fact, as also explained, supra at 3, although defendants had asked Mr. Rider questions in their 2004 Interrogatories about his arrest record and misdemeanor convictions – to which Mr. Rider also objected – defendants had never moved to compel that testimony or otherwise raised any concern about those objections. Moreover, parties often make objections and instruct their witnesses not to answer questions at depositions with no follow-up by opposing counsel, either because the opposing party agrees that such information warrants confidentiality or is irrelevant and not worth pursuing, or for some other reason. In fact, defendants' counsel in this case has, in

the past, demonstrated that they do not necessarily pursue testimony that a deponent refuses to provide in the course of a deposition. See, e.g., Deposition of Frank Hagen (November 9, 2004), Transcript at 124, 129-30, 140-41, 147-48 (Exhibit F) (refusing to answer a host of questions concerning the circumstances under which he left his employment with Ringling Bros.).[2]

Accordingly, there was no reason for plaintiffs' counsel to "immediately" call the Court and demand that the Court entertain a spontaneous motion for a protective order on October 12, 2006, as suggested by defendants. See Def. Compel Mem. at 6. This is particularly true in light of the requirement of Rule 26(c) that parties confer in good faith "in an effort to resolve the dispute without court action" before filing a motion for a protective order, and plaintiffs knew that defendants were planning to take their own deposition of Mr. Rider at some point in the future, and hence that defendants would have additional opportunities to pursue this testimony (subject to an appropriate protective order). See, e.g., Def. Obj. (Exhibit A); see also Meyer Letter (Exhibit D) ("we have always acknowledged that you are entitled to take your own deposition of Mr. Rider"). In light of all of these circumstances, it was perfectly acceptable for plaintiffs to attempt to negotiate the terms of such a protective order before filing a motion with the Court – precisely what plaintiffs did here.

C. A Motion To Compel Was Completely Unnecessary To Obtain Relevant Testimony From Mr. Rider.

Furthermore, as demonstrated by the Motion For A Protective Order that has been filed by Mr. Rider, Mr. Rider is perfectly willing – as he immediately made clear to defendants – to

[2]Although Mr. Hagen's deposition was taken in November 2004, and he recently died in May 2006, defendants never moved to compel Mr. Hagen's testimony, nor insisted that he file a motion for a protective order with respect to such testimony.

provide testimony to the defendants concerning his military background and whether he has ever been convicted of a misdemeanor. See Memorandum In Support Of Mr. Rider's Motion For A Protective Order (Docket No.106) at 14-15. However, because such information is highly personal, Mr. Rider requests that he be allowed to provide that testimony subject to a limited protective order that would ensure that such information is not publicly disseminated. See Rule 26(c) ("for good cause shown," the court may fashion a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"); see also Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984) (recognizing that "[a]lthough the Rule [26(c)] contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule") (emphasis added); In re Sealed Case, 381 F.3d 1205, 1216 (D.C. Cir. 2004) ("[i]n exercising their discretion under the rule, courts have long recognized that interests in privacy may call for an extra measure of protection, even where information sought is not privileged") (emphasis added).[3]

However, defendants should not be permitted to compel Mr. Rider to discuss his marital history or whether he has ever been arrested for a crime for which he was not convicted. See Def. Compel Mem. at 6-8. As demonstrated in the memorandum in support of Mr. Rider's motion for a protective order, such information is both highly personal and completely irrelevant to this proceeding. See Rider PO Mem. at 10-14; see also U.S. v. Miles, No. CR90-092-01-J, 1992 WL 138612 (10th Cir. June 19, 1992) (divorce decree irrelevant to issues surrounding

[3]In addition, once Mr. Rider provides testimony to defendants concerning his military service (subject to an appropriate protective order), he should also be able to clear up defendants' confusion about when, in relation to such service, he graduated from high school. See Def. Compel Mem. at 8.

illegal distribution of drugs); U.S. v. Johnson, 64 Fed. Appx. 596 (8th Cir. 2003) (evidence of police officer's domestic conflicts not permitted because it "would have been more unfairly prejudicial than probative as required by Federal Rule of Evidence 403"); Wigmore on Evidence, Vol. IIIA, § 980a, p. 835 ("the fact of arrest or indictment is quite consistent with innocence, and . . . the reception of such evidence is merely the reception of somebody's hearsay assertion as to the witness' guilt).[4]

Indeed, although requested to do so by plaintiffs, defendants have not made any showing whatsoever as to why a possible arrest record, unrelated to a conviction, would be relevant to this case. Furthermore, as to Mr. Rider's marital history, the only argument that defendants have proffered is that this line of inquiry bears on Mr. Rider's credibility because it shows that he submitted "false" information when he failed to list past marital disputes in response to defendants' 2004 Interrogatory asking him to identify all "prior civil litigation" to which he has been a party. See Def. Compel Mem. at 8. However, as the correspondence between the parties makes clear, Mr. Rider offered to provide that information as soon as defendants' counsel clarified that defendants intended to pursue the matter. See Meyer Letter (Exhibit D) ("[w]e are willing to have Mr. Rider answer questions as to why his Interrogatory Response concerning 'prior civil litigation' did not mention some marital disputes to which he has been a party").

Moreover, although defendants declined to accept that offer, Mr. Rider has in fact now submitted a declaration that explains that he did not list these prior marital controversies in

[4]Contrary to the assertions made by defendants, Def. Compel Mem. at 10, plaintiffs certainly did not ask defendants' employees, Mr. Metzler and Mr. Ridley, any questions about their marital history, their arrest records, or their military service, or, for that matter, any other questions that would have constituted an unwarranted invasion of their personal privacy.

answer to defendants' Interrogatory "because, when I was providing that answer, it did not even occur to me that those kinds of matters are 'civil litigation.'" See Declaration of Tom Rider, submitted in support of Mr. Rider's Motion for a Protective Order at ¶3; see also id. ¶ 4 ("I am not a lawyer and did not realize that filings in court concerning marital disputes are "civil litigation").

However, because defendants have not made any demonstration of relevance with respect to the substance of those marital disputes, and because such matters are extremely personal, Mr. Rider should not be compelled to produce any such testimony. See, supra at 6; see also Seattle Times v. Rhinehart, 467 U.S. at 36, n.22 (noting that, without the ability to protect their personal privacy through the use of a protective order, "individuals may well forgo the pursuit of their just claims," and that "[t]he judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it, resulting in frustration or a right as valuable as that of speech itself") (emphasis added).

D. Because Defendants Have Acted In Bad Faith In Pursuing Their Motion To Compel Against Tom Rider They, Not Plaintiffs, Should Be Sanctioned.

Because defendants' motion to compel should be denied, defendants are clearly not entitled to their attorneys' fees and costs in connection with filing the motion. See Def. Compel Mem. at 11. Thus, as the facts clearly demonstrate, plaintiffs' conduct here certainly did not "necessitate[]" the motion to compel, as required to obtain sanctions under Rule 37(a)(4)(A). Rather, that motion was completely unnecessary, since Mr. Rider was willing to provide defendants with all of the relevant information they had requested, and his counsel had also made clear her intention to file a motion for a protective order with respect to the remaining

information "within a few weeks" of being requested to do so by defendants. See Meyer Letter (Exhibit D). Thus, defendants had absolutely no legitimate basis for rushing into Court with their motion to compel.

Indeed, because as demonstrated above, defendants did not act in "good faith" in trying to resolve this matter with plaintiffs as required by both the Federal and Local Rules, but instead decided to punish plaintiffs for refusing to enter into a "global protective order" that would have allowed defendants to litigate this entire case in secret, it is defendants, not plaintiffs, who should be required to bear the costs of litigating defendants' frivolous motion to compel, including plaintiffs' attorneys' fees and costs. See Rule 37(a)(4)(A) (party that files motion to compel is not entitled to fees and costs when it has not made a "good faith effort to obtain the disclosure or discovery, without court action"); Rule 37(a)(4)(B) (if the motion to compel is denied, the court may "require the moving party . . . to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorneys' fees").

CONCLUSION

For all of the foregoing reasons, defendants' motion to compel and for fees and costs should be denied.

Respectfully submitted,

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