UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

EXHIBIT 13

TO

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEI'S MOTION TO COMPEL DISCOVERY FROM PLAINTIFF TOM RIDER AND FOR SANCTIONS, INCLUDING DISMISSAL

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December 22, 2006

VIA FACSIMILE AND U.S. MAIL

Katherine A. Meyer
Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W.
Suite 700
Washington, DC 20009-1056

Re: ASPCA v. Feld (No. 03-2006)(EGS): LCvR 7(m) Conference Regarding Plaintiffs' Discovery Deficiencies

Dear Ms. Meyer:

Your letter of December 15, 2006 appears to indicate that plaintiffs will only address their numerous discovery deficiencies on the condition that defendant waive its right to inquire about other deficiencies not yet uncovered and that defendant submit supplemental responses to plaintiffs' discovery requests. First, FEI will not agree to waive any of its rights in order to procure complete responses to discovery requests that should have been provided more than two years ago. Second, there is no correlation between our request that plaintiffs cure their deficiencies and your request that FEI update its discovery responses. Accordingly, we do not accept any such conditions related to plaintiffs' discovery deficiencies raised in my November 22, 2006 letter.[1]

To be clear, my letter of November 22, 2006 requested that plaintiffs cure their discovery deficiencies by providing documents and information that should have been disclosed back in 2004. The letter also asked plaintiffs to update their document productions as FEI has continued to do. We will agree that plaintiffs can have until January 15, 2007 to provide complete responses regarding the discovery deficiencies outlined in my letter of November 22, 2006. Such a response must include (where applicable) revised interrogatory responses as of June 9, 2004, and the production of documents that should have been produced on June 9, 2004. FEI will continue to seasonably update its document production and expects plaintiffs to do the same. It is, frankly, astounding that Mr. Rider has not updated his document production since June 9, 2004. As you know, FEI has provided responsive documents as recently as October 11, 2006.

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1 Your demand that FEI waive its right to subsequently raise discovery deficiencies not yet uncovered is particularly egregious considering that plaintiffs explicitly reserved their right to do so when demanding that FEI resolve certain discovery disputes. See, e.g., Ockene letter to Wolson (Dec. 22, 2004).

We will agree that plaintiffs can have until January 31, 2007 to supplement its production of all responsive documents created between June 9, 2004 and December 31, 2006. Finally, we accept your invitation that both parties provide updated interrogatory responses by January 31, 2007. This does not, however, bear upon our request that you cure plaintiffs' deficiencies by January 15, 2007.

It is odd for plaintiffs to now complain that we are trying to resolve this matter too quickly. As you know, plaintiffs have accused FEI – both in pleadings to the Court and in the press – of unnecessarily delaying the litigation. See, e.g., Pls.' Motion to Enforce (June 9, 2006) at 2; http://www.awionline.org/pubs/Quarterly/05_54_04/05_54_4p2.htm ("Feld Entertainment attempts to drag on the lawsuit by withholding documents to which we are entitled"). You will recall that FEI sought, and plaintiffs vigorously opposed, a motion to stay all discovery pending resolution of FEI's motion for summary judgment. The judge agreed with you and refused to stay discovery. Plaintiffs are now complaining that we are proceeding with discovery just as plaintiffs insisted that we do. Such doubletalk is entirely unproductive and does not advance the litigation. The judge has ordered that this case proceed, including discovery, and it would be much more fruitful for plaintiffs to comply accordingly rather than send us multiple pages of complaints about how discovery is an inconvenience for plaintiffs. The longer that plaintiffs stall and delay on these issues, the longer it will take to complete them. It is no defense to say that it is FEI's fault for waiting so long to file a motion. Not only is there no statute of limitations on incomplete interrogatory responses, this is a situation entirely of plaintiffs' own making. New counsel for FEI has simply raised the matters so that plaintiffs can correct them promptly, and so that we can all proceed to litigate this case with equality and fairness in discovery.[2]

You cannot seriously be suggesting that we intentionally waited until Ms. Ockene was on maternity leave before raising our concerns. Since entering our appearance we have worked diligently to move this case forward, and have until now, prioritized all of plaintiffs' requests above our own discovery needs. We also have prepared and filed a motion for summary judgment that should terminate this litigation. Plaintiffs' annoyance that FEI's current counsel is litigating this case and moving it forward is clear from your letter, but it should not come as a surprise to plaintiffs given the Court's order to proceed with discovery. Nonetheless, a response from plaintiffs should not be impossible without substantial assistance from Ms. Ockene. First, my letter focused primarily on discovery responses that were signed by you, not Ms. Ockene. Moreover, we, as new counsel for FEI, were not personally involved in the discovery matters at issue in my letter, but have been able to ascertain the parties' legal positions from, among other

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[2] Your assertion that it is difficult to coordinate with Mr. Rider while he is traveling around the country is disingenuous. Mr. Glitzenstein was able, for example, to send him weekly $500 checks as recently as September 2005. See Ex. 14 to Defs.' Motion to Compel Production by WAP (Sept. 7, 2006). It is our understanding, moreover, that Mr. Rider maintains a flexible schedule so that he can participate in this lawsuit when necessary. See http://groups.msn.com/TheElephantCommentator/earsrally.msnw?action=get_message&mview=0&ID_Message=19965&LastModified=4675580422322800627.

things, deposition transcripts. Finally, plaintiffs have seven attorneys of record that are capable of resolving these issues, including all three of the name partners of your law firm. Mr. Crystal, for example, just sent a letter to Michelle Pardo on November 7, 2006, stating that he was handling several matters for Ms. Ockene while she is out. I doubt you intended to imply that Mr. Crystal only has time to lodge complaints about FEI's discovery but not to ensure that plaintiffs provided complete and honest discovery responses.[3]

As you know, your letter of December 15, 2006 contained very little in terms of a substantive response regarding plaintiffs' discovery deficiencies.[4] Your letter indicates that you interpret Interrogatories No. 21 and No. 22 served upon the organizational plaintiffs to require only information about funds upon which plaintiffs relied in support of their standing allegations. Plaintiffs' own prior responses, however, clearly indicate that they have never considered the interrogatory to be so narrow. Please respond to the interrogatories as they are written. It is similarly irrelevant whether funds were provided prior to the complaint being filed. The interrogatories require the production of information "from 1997 to the present" not "from 1997 to the date of the complaint." The organizational plaintiffs, moreover, have provided information about funds spent well after the complaint was filed. Your interpretation is inconsistent with your clients' previous responses.

Second, your allegation that plaintiffs' delinquent production of old documents "simply demonstrates that plaintiffs are continuing to be as thorough as possible" is inconsistent with plaintiffs' views when FEI produced documents later than plaintiffs wanted. See, e.g., Pls.' Motion to Enforce (June 9, 2006) at 11 ("Moreover, defendants have never explained why the records are being produced in bits and pieces, and it is not at all clear why it should be so difficult to locate all of the responsive records, as the Court ordered more than six months ago.

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[3] We do not doubt that you and your clients have "extremely busy schedules" just as we and our client do. The discovery deficiencies that we would like rectified, however, address matters that should have been disclosed more than two years ago. The obligation to submit to discovery is part of litigation. There is no exception under the rules for people with "extremely busy schedules." Given that your clients have been willing to take time out of their "extremely busy schedules" to file a lawsuit against FEI, advertise that lawsuit to the public on many occasions, solicit donations for your legal fees, and participate personally by submitting declarations, they also should be making time to fulfill their long overdue discovery obligations. See, e.g., http://www.awionline.org/pubs/Quarterly/05_54_04/05_FallQ.pdf (advertising the 2005 fund-raiser that ASPCA's Lisa Weisberg described in her deposition as being for Tom Rider, but stating that more funds are still needed to pay for this litigation); http://www.awionline.org/pubs/Quarterly/05_54_04/05_54_4p2.htm (noting that legal bills continue to rise); Exhibit B to Pls.' Opposition to Defs.' Motion for Summary Judgment (Oct. 6, 2006) (seven-page declaration of Cathy Liss regarding the issues in FEI's motion for summary judgment, the factual matters underlying such issues, and the legal arguments associated therewith). You also will recall that we have had to take our client's time to respond to plaintiffs' allegations regarding document productions. We did so without requesting any waiver or forfeiture of rights from plaintiffs. Indeed, we doubt very much that you would have been amused had we told you that we could not search for allegedly missing medical records unless you promised never to challenge the sufficiency of our other discovery responses, particularly as such an approach would violate Fed. R. Civ. P. 26(d).

[4] Your statement that defendant "intentionally hid the existence of any documents" requested by plaintiffs is false and unsupportable. It also is entirely irrelevant to the matter now at hand: plaintiffs' own failures to fulfill their discovery obligations.

Plaintiffs are therefore asking for the Court's immediate intervention in this matter."). We believe that plaintiffs should be held accountable in the same manner as FEI with regard to document productions, and intend to see to it that the Court enforces a standard of equality for all parties.

Third, Mr. Rider does indeed have "possession, custody, or control" of documents maintained by WAP and the other plaintiffs. "[F]ederal courts broadly construe the term control for Rule 34 purposes." McKesson Corp. v. Islamic Republic of Iran, 185 F.R.D. 70, 78 (D.D.C. 1999). As plaintiffs themselves have argued to the Court, "[a] party must provide otherwise discoverable documents that are in his attorney's possession, custody, or control." Pls.' Motion to Compel (Jan. 25, 2005) at 19 (quoting Axler v. Scientific Ecology Group, Inc., 196 F.R.D. 210, 213 (D. Mass. 2000)). As you know, WAP shares an office with your law firm, is run by you and Mr. Glitzenstein and is, in fact, the alter ego of your law firm. It is disingenuous for you to claim that Mr. Rider does not have the right to documents held by his attorneys that are physically maintained in his attorneys' office. Mr. Rider has, moreover, asserted control over documents in the files of other plaintiffs. By doing so, he has waived any claim that they are not in his possession, custody, or control. See, e.g., Henderson v. Zurn Indus., Inc., 131 F.R.D. 560, 568 (S.D. Ind. 1990). Mr. Rider, in responding to FEI's document requests, incorporated by reference documents produced by the other plaintiffs. He cannot rely upon them to produce some documents without ensuring that they produced all responsive documents.

Finally, you erroneously stated that I omitted from the discussion of Mr. Rider's failure to identify his income/payments from other plaintiffs any reference to his alleged need for a protective order. As I stated previously (on page eleven of my letter), no such protective order is appropriate here. Also, for clarity, Mr. Rider's responses to Document Requests No. 20 and No. 21 state that he would provide "information" subject to a confidentiality agreement. As you surely know, he must produce the documents requested, not his summary of the "information." Again, however, no confidentiality agreement is warranted here.

To summarize, we will agree that plaintiffs have until January 15, 2007 to cure the discovery deficiencies identified in my letter of November 22, 2006. Plaintiffs also must update their document productions as FEI has continued (and will continue) to do. Plaintiffs, accordingly, should supplement their production by January 31, 2007 with all responsive documents created between June 9, 2004 and December 31, 2006. Finally, we accept your invitation that both parties provide supplemental interrogatory responses (to the extent such responses are required by the Federal Rules of Civil Procedure) by January 31, 2007. We will not agree under any circumstances, however, to waive any rights to raise additional discovery deficiencies should they come to our attention. We think it would be more productive to discuss

this matter once plaintiffs have had the chance to submit their responses and documents in January and we have had the opportunity to review them.

Very truly yours,

George A. Gasper