

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY TO
ANIMALS, et al.,**

Plaintiffs,

v.

**RINGLING BROS. AND BARNUM &
BAILEY CIRCUS, et al.,**

Defendants.

Case No. 03-2006 (EGS/JMF)

**MOTION FOR EXPEDITED RULING TO STRIKE NON-PARTY WAP'S RESPONSE
TO FEI'S MOTION FOR LEAVE TO AMEND
DUE TO UNTIMELINESS AND LACK OF STANDING**

Feld Entertainment, Inc. ("FEI"), through counsel, hereby moves this Court for an expedited order striking the response brief filed by the Wildlife Advocacy Project ("WAP") on Friday, March 30, 2007 to FEI's motion for leave to amend. As grounds therefore, FEI states as follows:

On February 28, 2007, FEI moved to amend its answers and to assert a RICO counterclaim against the current plaintiffs and non-party WAP. See Motion for Leave to Amend Answers to Assert Additional Defense and RICO Counterclaim (2/28/07) ("Motion"). Pursuant to LCvR 7(b), the response to this Motion was due on March 14, 2007. *Plaintiffs* sought an extension of this deadline to March 30, 2007, to which FEI consented, see Unopposed Motion for Extension of Time to Respond to Motion (3/12/07), and which this Court then granted. See Minute Order (3/12/07). WAP did not. In fact, FEI did not hear anything from WAP regarding this Motion prior to the filing of WAP's response.

Without standing, without an extension of time, and without leave of court, WAP – a self-described “present non-party to these proceedings” – has now filed a twenty-page response to the Motion. See Response by Non-Party WAP to Motion at 1 (3/30/07) (“WAP Brief”). WAP has no standing to do so. As WAP admits, it is not currently a party before this court, and thus, had no basis for behaving as a party would by filing a response brief to and seeking denial of the Motion. Both plaintiffs and their counsel know this. See Fund for Animals, Inc. v. Norton, 322 F.3d 728, 732-33 (D.C. Cir. 2003) (prospective intervenor must satisfy elements of Article III standing: injury-in-fact, causation and redressability). So long as FEI’s Motion remains pending, WAP is not yet a party to this action.

Moreover, WAP did not confer with FEI prior to filing its response. Cf. LCvR 7(m). It did not file a motion to intervene either as a party, cf. Fed.R.Civ.P. 24(c) (“A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5.”); LCvR 7(j), or for a limited purpose, see U.S. v. AT&T, 642 F.2d 1285, 1302 (D.C. Cir. 1980) (granting non-party right to intervene for limited purposes of contesting discovery request affecting its own documents). See also Marino v. Ortiz, 484 U.S. 301, 304 (1988). Nor did it seek an extension of time beyond the March 14, 2007 filing deadline. See LCvR 7(b) (“If such a memorandum is not filed within the prescribed time, the Court may treat the motion as conceded.”); Halmon v. Jones Lang Wootton, 355 F.Supp.2d 239, 245-46 (D.D.C. 2005) (pursuant to inherent authority and/or LCvR 7(b) court may elect to strike filing or deem motion as conceded).

Instead, WAP filed an untimely, twenty-page response as a “special appearance for the sole purpose of opposing the [M]otion.” It cites no legal authority to justify or permit this procedural tactic. See WAP Brief at 1. It is particularly unnecessary when plaintiffs have already represented to this Court that they needed nine extra pages in part to brief the same thing.

See Plaintiffs' Motion for Leave to Exceed the Page Limits by Nine Pages Regarding Its Opposition to Motion at ¶ 1 (3/30/07) (additional pages necessary to respond to the Motion to "add the Wildlife Advocacy Project as a defendant to [FEI's] proposed counterclaim."). The Court already granted plaintiffs' motion to exceed the page limitations this morning. See Minute Order (4/2/07).¹

The irony of WAP's latest maneuvering is, of course, that in order to properly proceed in this instance and to file a brief, it should have sought leave of court to intervene – the exact remedy that FEI wants and that WAP has urged the Court to prevent in its response. WAP cannot have it both ways: If it is a true non-party, then it cannot waltz in and start filing briefs with the Court on issues that do not presently affect it. Conversely, if it wants to be permitted to act like a party and file briefs (unannounced and nearly three weeks late no less), then the Court should grant FEI's Motion forthwith and make WAP a party to this case.

FEI's reply to WAP's brief is currently due on April 11, 2007. Because of the urgency of the impending deadline, FEI respectfully requests that the Court issue an expedited ruling on whether WAP's untimely response will be stricken. FEI otherwise will have to devote time and resources to filing a reply to WAP's frivolous response.² A proposed order is attached.

¹ Notwithstanding WAP's protest that it is not the alter ego of plaintiffs' Meyer Glitzenstein & Crystal, its response was clearly coordinated in advance with plaintiffs' opposition. See WAP Brief at 1 & 2 n.1 (previewing plaintiffs' response seven hours *before* it was filed).

² For a purported non-party, WAP's brief contains a surprising amount of detail regarding this litigation. In any event, there is no First Amendment right to bribe witnesses or conceal evidence as WAP argues. Nor is there any SLAPP suit applicability to federal claims brought in federal court, and the District itself has no such statute. FEI will brief these issues fully in its reply if necessary, but it asks the Court to rule first on the instant motion which could moot any reply.

CERTIFICATE OF CONFERENCE

Counsel for FEI hereby certify pursuant to LCvR 7(m) that Ms. Joiner, counsel for FEI, telephoned and spoke with Mr. Trister, counsel for WAP, to confer regarding this motion to strike. WAP opposes the relief requested herein.

Dated this 2nd day of April, 2007.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Lisa Zeiler Joiner", is written over a horizontal line.

John M. Simpson (D.C. Bar #256412)
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