UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

OPPOSITION OF WILDLIFE ADVOCACY PROJECT TO MOTION FOR EXPEDITED RULING TO STRIKE NON-PARTY WAP'S RESPONSE TO FEI'S MOTION FOR LEAVE TO AMEND

Defendant Feld Entertainment Inc. ("FEI") has moved for a Court order that, among other relief, would *compel* the Wildlife Advocacy Project ("WAP") to involuntarily become a party to these proceedings. Relying on a notice issued by the Court indicating that the time for "responses" had been extended until March 30, WAP on that day filed such a response focusing *solely* on the part of the motion that pertains directly to WAP. Specifically, WAP's response explains that it should not be forced to become a party because (1) FEI is seeking to punish WAP for exercising its First Amendment rights to speech, association, and petition governmental bodies for redress of grievances in connection with FEI's ongoing mistreatment of the Asian elephants in its care; and (2), in any event, the motion to add WAP is woefully out of date, coming seven years after this litigation was filed and even several years after FEI specifically learned of the activities that purportedly justify its proposed "RICO" counterclaim against WAP.

FEI now contends, remarkably, that WAP should not even be *heard* by the Court *before the Court decides whether to grant FEI's belated motion to force WAP to become a party in the case*. In effect, FEI is compounding its effort to deter WAP from exercising its First Amendment rights by asking the Court to *also* deprive the non-profit organization of its Due Process right simply to have its views *considered* by the Court before the Court issues a ruling that may have an enormous adverse impact on WAP's financial well-being, as well as its ability to continue to pursue its public education campaign on behalf of the elephants (which, as detailed in WAP's response, appears to be exactly what FEI had in mind in asking the Court to force WAP to be a party).[1]

Not surprisingly, there is no substance to FEI's specific reasons for why the Court should resolve FEI's motion to force WAP into this longstanding litigation without first even hearing from WAP itself. First, contrary to FEI's implication that WAP simply ignored the Court's rules on the timing of any response, WAP – *although never even formally served with the motion to make it a party and hence technically under no obligation to respond within any particular time frame* – was in fact striving to comply with the Court's scheduling order concerning briefing on the "RICO" motion. Thus, WAP's counsel, who has been receiving electronic mail notifications

[1] That it is vitally important that WAP be heard on this matter is reinforced by FEI's motion to strike which itself contains false and, indeed, outrageous statements concerning WAP with no supporting citation to anything. For example, the motion asserts that "there is no First Amendment right to bribe witnesses or conceal evidence as WAP argues." FEI Mot. at 3 n. 2. WAP, of course, has never "argued" or even intimated anything of the sort, and the organization wishes to be heard precisely so that the Court is not left with the impression that such accusations have any validity. As the Court will learn when it reads WAP's response rather than FEI's caricature of it, WAP is *actually* arguing that FEI does *not* have a shred of evidence to support the scurrilous allegations in its "RICO" counterclaim that WAP has "bribed" anyone or "concealed" anything and, instead, FEI is merely seeking to punish WAP for the exercise of core First Amendment rights and, particularly, a public education campaign that is *successfully* exposing the public and legislative policymakers to the ongoing abuse of elephants in the Ringling Bros. and Barnum and Bailey Circus.

concerning the case since WAP filed a response to FEI's motion to enforce a subpoena against the organization, was aware of a March 13, 2007 Court Notice specifically stating, with respect to FEI's "RICO" motion, "Set/Reset Deadlines: *Responses* due by 3/30/2007" (emphasis added). Accordingly, WAP reasonably assumed that this time frame encompassed its response as well as that of plaintiffs. Even if WAP was mistaken in that good faith assumption, particularly given the gravity of the accusations made by FEI against WAP, the severe harm that will be inflicted on the non-profit organization should FEI's motion be granted, and the complete lack of prejudice to FEI in light of the briefing schedule set by the Court, WAP respectfully requests that its response be deemed filed and considered by the Court.

Second, asserts that WAP lacks "standing" to be heard on whether it should involuntarily be made a party to the case. FEI contends that WAP must *become* a party – *i.e.*, it must *intervene* in the case – simply to explain to the Court's its views on why it should *not* become a party. Simply to state that Alice in Wonderland view of the law is to expose its absurdity. If FEI's motion is granted and WAP is forced to become a party, then a small non-profit organization will be compelled to spend its very limited time and resources on litigation in which the organization did *not* seek to, and does *not* wish to, intervene. That surely qualifies as an "injury in fact" that is sufficiently "distinct and palpable" for WAP to be heard at this stage. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Even further, however, if WAP is correct that FEI is clearly attempting to accomplish this result for the impermissible purpose of punishing the organization for speaking out about conditions in the circus, and to also "chill" others from "exercising their First Amendment rights" – as we believe the facts will demonstrate – then WAP surely has "standing" to urge the Court *not* to issue an order that would aid and abet such

an unconstitutional result. *Ruggiero v. FCC*, 317 F.3d 239, 248 (D.C. Cir. 2003) (Randolph, concurring) (citing *New York v. Ferber*, 458 U.S. 747, 766-73 (1982).

Finally, even if the Court were to conclude that WAP somehow lacks "standing" to file a response to a motion that *expressly* targets the organization – and, at the very least, raises serious First Amendment concerns – WAP respectfully requests that the Court consider its response as the submission of an *amicus curiae* that affords the Court an alternative perspective on the actual implications and motivations of FEI's "RICO" counterclaim. In any event, we respectfully submit that basic fairness, to say nothing of the grave First Amendment concerns WAP has raised, dictates that the Court should not grant a motion to force WAP into this case without first considering what WAP has to say about the matter.

Respectfully submitted,

/s/

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