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.	:	

REPLY IN SUPPORT OF FEI'S 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 replies to the Opposition of Wildlife Advocacy Project ("WAP") to FEI's Motion for Expedited Ruling to Strike (4/4/07) (Docket No. 133) ("Response"):

When confronted by FEI's Motion to Strike ("Motion") with the binding law in this Circuit and asked to explain why WAP ignored that law by filing a brief without leave to do so, WAP addressed neither the caselaw nor procedural rules presented in FEI's Motion prohibiting their conduct. See generally Response (containing no reference or refutation of any authorities presented in Motion). Instead, WAP scoffed at such principles as "Alice in Wonderland view[s] of the law" that are "absurd." Response at 3. To the contrary, Article III standing requirements, the Federal Rules of Civil Procedure, and for that matter federal statutes, are not optional guidelines for WAP, the plaintiffs or their counsel to ignore at whim. That they routinely ignore such authority speaks volumes as to why all three of these groups now face the serious allegations leveled by FEI based on conduct uncovered by FEI.

WAP engages in revisionist history that makes no sense in an effort to convince the Court to condone its conduct. WAP claims that "although never formally served with the motion to make it a party and hence technically under no obligation to respond within any particular time frame" it nonetheless "reasonably assumed that this time frame [the extension granted to the plaintiffs, see Minute Order (3/12/07)] encompassed its response as well as that of plaintiffs." Response at 3. There is absolutely nothing reasonable about a non-party, who admits it was never served with the motion and under no obligation to respond, assuming that an extension of time granted to plaintiffs – whom both WAP and plaintiffs have consistently maintained are separate entities and should be treated as such – automatically applied to WAP as well.

Equally, if not more, plausible is that WAP's filing was actually a last-minute effort to further reduce the number of pages in the voluminous brief actually filed by plaintiffs. Given the bizarre formatting and nature of the arguments presented in WAP's Response to FEI's Motion for Leave to Amend, (Docket No. 130) ("Amendment Brief"), it appears that WAP filed its 20-page Amendment Brief so that plaintiffs needed to only seek leave to file an extra 9 pages rather than the extra 30 pages actually filed in response to FEI's motion.[1] For example, WAP's Amendment Brief does not contain the after-thought arguments now presented in its current Response such as: the purported but unidentified "severe harm that will be inflicted on it should FEI's motion be granted," the alleged lack of prejudice to FEI,[2] and the supposed limited effort and resources of WAP. Compare Response at 3 with Amendment Brief. WAP should have considered such issues before paying Tom Rider.

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[1] FEI pointed out in its Motion that WAP's brief and the plaintiffs' brief were coordinated. See Motion at 3 n.1. WAP does not dispute this in its Response.

[2] This is incorrect. FEI has been prejudiced by having to now file the instant motion in response to the unauthorized, unannounced Amendment Brief. In addition, FEI also now has to expend time and resources to reply to that brief as the filing deadline – which unlike WAP, FEI observes – is rapidly approaching.

Moreover, the caselaw that WAP cites undermines rather than supports its argument. WAP cites Whitmore v. Arkansas, 495 U.S. 149, 155 (1999), to baldly proclaim that its position "surely qualifies as an 'injury in fact' that is sufficiently 'distinct and palpable' for WAP to be heard at this stage." Response at 3. Whitmore, however, actually held that the third party who attempted to intervene could not due to lack of standing, and dismissed his cert petition accordingly. 495 U.S. at 151. WAP stopped reading the opinion too soon. The Court was clear that Article III case or controversy standing requires injury in fact that must be both "qualitative and temporal" and not "merely 'abstract.'" Id. at 155 (quoting O'Shea v. Littleton, 414 U.S. 488, 494 (1974)). Thus, a "federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." Id. at 155-56. It then cited numerous cases in which future contingent injury, which is what WAP faces here, is insufficient to confer standing. Id. at 158. WAP has no possible harm, no possible injury in fact, until such time as the Court rules on FEI's Motion for Leave to Amend. What WAP is really arguing is a 12(b)(6) motion and its own interpretation of the evidence—evidence that, in large measure, comes from WAP's own files.[3] WAP can save its argument on the facts for another day. Such issues neither impact nor affect the matter at hand here, which is: why does a non-party who admittedly "did *not* seek to, and does *not* wish to, intervene" get to arbitrarily proceed and behave as if it has? Response at 3 (emphasis in original).

Furthermore, granting FEI's Motion for Leave to Amend would not be unconstitutional and WAP's authority will not support such an outlandish claim. See Response at 3-4. Ruggiero v. FCC, 317 F.3d 239, 241 (D.C. Cir. 2003), involved a private party who had sued the

[3] WAP again claims incorrectly that "FEI does *not* have a shred of evidence to support the scurrilous allegations in its 'RICO' counterclaim." Response at 2 n.1 (emphasis in original). ***The Court should note that FEI has documented the allegations contained in its proposed counterclaim, and will be more than happy to present such evidence to the Court at the appropriate juncture should it become necessary.***

government directly to challenge a statute and implementing regulations – an approach that plaintiffs in this case deliberately avoided. The petitioner claimed that the statute was overbroad, underinclusive, and a violation of the First Amendment. Id. at 244-47. The D.C. Circuit rejected all three challenges. Id. at 247-48. The statute regulated unlawful conduct not content (speech), and did not infringe upon the First Amendment. Thus, there is no constitutional protection for illegal conduct properly regulated by statute. Id.; accord New York v. Ferber, 458 U.S. 747, 766, 773 (1982) (rejecting both First Amendment and overbreadth challenges to statute) (cited by WAP). Again, if WAP's desire is to challenge the constitutionality of the RICO statutes, such arguments are appropriate, if anywhere, in a 12(b)(6) motion but not here.

Finally, WAP claims, again without authority, that it should be permitted retroactively to file its Amendment Brief as an amicus brief. Response at 4. First, participation as *amicus curiae*, however, also requires first filing a motion for leave to so participate – to which FEI would be permitted to respond. See State of New York v. Microsoft Corp., No. 98-1233, 2002 WL 31628215, at *1 (D.D.C. Nov. 14, 2002) (denying all four motions seeking to participate in proceedings as *amicus curiae*). Second, *amicus curiae* do ***not*** represent the parties: they participate only for the benefit of the Court. Id. Third, plaintiffs already sought, and were granted, additional pages to argue why WAP should not be joined as a party. See Motion for Leave to Exceed the Page Limits (3/30/07), and Minute Order (granting same) (4/2/07). WAP is simply double-dipping into briefing that plaintiffs already have undertaken for them. This defies the purpose of participation as an *amicus curiae*. WAP does not qualify as an amicus. See Cobell v. Norton, 246 F. Supp. 2d 59, 62 (D.D.C. 2003) (amicus briefs allowed when party is not competently represented, the amicus has an interest in some other case that could be affected by the instant case, or when the amicus has unique information).

Since entering this case last spring, it has become abundantly apparent to present counsel for FEI that plaintiffs, their counsel, and now even WAP behave and litigate in any manner that they desire regardless of what the law requires. FEI is aware of no exemption from the law for those who are classified merely as plaintiffs or have embarked upon a political cause. ***The plaintiffs, their counsel, and WAP are not above the law.*** It is for this Court to deal with their conduct as it sees fit. In the meantime, however, FEI will not willingly oblige them in their efforts to ignore the law.

WAP has not refuted or even bothered to address the authority presented in FEI's Motion. It cites inapposite caselaw to support its position. The Motion should accordingly be granted, and the Amendment Brief should be stricken immediately without need for a response by FEI.

Dated this 5th day of April, 2007.

Respectfully submitted,

/s/

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