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)**
FELD ENTERTAINMENT, INC.,	:	
Defendant.	:	

DEFENDANT'S OPPOSITION TO EMERGENCY MOTION OF NON-PARTY WILDLIFE ADVOCACY PROJECT TO QUASH DEPOSITION SUBPOENA AND/OR FOR PROTECTIVE ORDER

FEI's subpoena is focused squarely and narrowly upon issues that Judge Sullivan already has deemed relevant to this lawsuit. Specifically, Judge Sullivan already has ruled that FEI "is entitled to information concerning the payments made to Tom Rider ***and the role of the organizational plaintiffs and WAP in those payments***." Order (8/23/07) at 8 (emphasis added). Now, WAP (a "third-party" founded and operated by plaintiffs' counsel) seeks desperately to side-step the Court's prior ruling with vigorous, yet wholly unfounded, complaints that FEI already has "all" of the documentary evidence that WAP thinks FEI needs on this issue and, therefore, should be prohibited altogether from now deposing WAP. WAP's position is a *non sequitur*. It is not for WAP to determine what FEI needs for its defense. Moreover, Judge Sullivan has already ruled that the type of information FEI seeks is relevant to its defense. Id. FEI has not asked, nor does it have any intention of asking, questions other than those which concern matters that are relevant to the pending ESA litigation. Contrary to WAP's implication, there is no "emergency" here. Quashing a deposition is traditionally reserved for true

emergencies, like state secrets, not for instances that will require a witness to discuss matters they would prefer to avoid as is the case here.

This case exists on the sole basis that Tom Rider has alleged to have an injury-in-fact resulting from FEI's treatment of certain elephants. If Rider's allegations are found to be untrue, there would be no more lawsuit. Accordingly, Judge Sullivan's slew of discovery rulings on August 23, 2007 recognized the importance of Rider's credibility and compelled plaintiffs and WAP to produce the documents and information concerning payments to him. Judge Sullivan's orders were not, as WAP argues, limited to the mere "amount" of money that Rider has been paid. Indeed, such a ruling would make no sense as there is far more to the issue of paying a witness than just the dollar amount involved. Plaintiffs will inevitably argue that Rider's credibility should not be affected by their payments to him, because they claim the payments are unrelated to his participation in this case. FEI, therefore, has a right to probe this position during discovery. That WAP believes FEI has all it "needs" is like FEI telling plaintiffs that they have all the documents that they "need" concerning elephants and, therefore, do not require deposition testimony. WAP is not in charge of FEI's defense, so its views on what FEI "needs" are beside the point, particularly when WAP's current position is contradicting what Judge Sullivan has already held to be relevant. If WAP and plaintiffs have nothing to hide, one would not expect WAP to complain so loudly about a deposition that should consume just a few hours. Indeed, WAP likely has spent more time devising objections to the deposition and filing its motion than would have been necessary to just follow Judge Sullivan's Orders and testify.

In an effort to avoid testifying, WAP also seeks to distract this Court with vociferous, yet unfounded, complaints of "undue burden," all of which are premised upon hypothetical questions that have not been asked and, indeed, are not within the scope of subject matters identified in

FEI's subpoena. First, FEI's subpoena does not command testimony concerning matters allegedly protected by the First Amendment. See Mot. at 20.[1] FEI's subpoena, moreover, has nothing to do with the separate RICO litigation that also is pending before Judge Sullivan. WAP, like plaintiffs, continues to invoke a lawsuit that is currently stayed when it suits their need. The time will come to take discovery in that case, but now is not that time. If payment information that Judge Sullivan has already ruled relevant to this case happens to overlap with the subject matter of that case, then so be it. Such overlap does not mean, as WAP poses, that FEI is precluded altogether from taking the deposition testimony regarding the payment scheme that is relevant *to this case*. FEI seeks to move forward with the current ESA litigation accordingly and to discover evidence that is relevant to it – including evidence concerning payments by plaintiffs and counsel to the one plaintiff who brings them standing to sue.

WAP also complains that the deposition would be burdensome because it would require plaintiffs' counsel to testify. This, however, is not true. The subpoena commands WAP to produce a witness competent to testify concerning certain narrow areas of inquiry. WAP, having argued repeatedly to this Court that it is wholly independent of plaintiffs' counsel, now argues that the only two people capable of testifying on its behalf are plaintiffs' counsel. WAP can designate anybody it wants to be its 30(b)(6) witness, so long as that person is properly prepared to testify on the subjects that FEI has noticed. Plaintiffs' counsel are surely not the only candidates for filling that capacity. Moreover, having solicited money from some clients to pay another, counsel's purported "third-party" WAP now claims that no one other than plaintiffs' counsel is sufficiently knowledgeable about the payments. If truly so, then this is a situation

[1] If WAP somehow feels a First Amendment privilege applies to a response, then it can invoke the "privilege" and instruct the witness not to answer, which is the normal procedure. There is no reason, however, to quash prematurely the entire subpoena just because WAP thinks some such questions might be asked. This is not what Rule 30 contemplates. See Fed. R. Civ. P. 30(d)(1) (permitting objections and privilege instructions at the time of the deposition – not wholesale quashing of depositions in advance).

entirely of WAP's and counsel's own making. It does not follow that FEI's right to discovery is then foreclosed because of what WAP and plaintiffs' counsel have done. Nor does FEI seek to depose counsel. It seeks to depose the organization that has paid the lead plaintiff well over $100,000 since this lawsuit was filed. FEI should not be denied relevant information simply because the payor organization is run by plaintiffs' counsel.

Finally, WAP complains that the date noticed by FEI would conflict with an existing appointment of the unidentified person it would like to testify. WAP makes much about the fact that FEI noticed the deposition without conferring about dates, but does not mention that plaintiffs have routinely done precisely the same thing. WAP also does not mention that it gave FEI no reason for its requested delay until it filed its "emergency motion." WAP (and, thus, plaintiffs' counsel) simply said "we aren't doing this" in the face of a discovery cut-off three weeks hence. Now that a motion is filed, they raise for the first time a medical issue. If there really is some kind of "conflict," we can work with them on that, but they were not forthcoming at all about this and the parties have a deadline of December 31, 2007. For example, WAP can appear for its deposition on Thursday, December 13.

The truth is that WAP had no intention of appearing for a deposition from the time it was served with the subpoena on November 27. Rather than immediately contacting FEI's counsel regarding any "scheduling conflict," WAP waited for nearly two weeks before doing so, and then advised the Court of its "emergency." Had WAP contacted FEI earlier, the parties could have scheduled the deposition prior to the currently-scheduled December 14, 2007. ***Indeed, WAP also omits the fact that plaintiffs' counsel have unilaterally decided that they are "unavailable" for the depositions that FEI noticed for this week even though they represented in open court that they see no reason why fact discovery cannot be completed by the end of this***

month. Apparently, what plaintiffs' counsel really meant was that all discovery could be completed by December 31 so long as the Court prohibited FEI from *taking* any discovery. As the Court may suspect, that outcome does not work for FEI.

It is quite clear that WAP does not want to testify under oath about matters already deemed relevant by Judge Sullivan. WAP's motion, however, sets forth absolutely no factual or legal basis for quashing FEI's subpoena. In lieu of testimony concerning relevant information, WAP has resorted to complaining about hypothetical questions FEI has not asked and does not intend to ask. FEI's subpoena (like its prior discovery motions – all of which have been granted in large part) is not the result of "harassment" by FEI; rather, it is the result of WAP's, plaintiffs', and counsel's persistent efforts to conceal relevant information about a topic they are striving very hard to avoid. Yet there is no avoiding it in this lawsuit – regardless of whether plaintiffs like it or not, the very payment plan that they devised and executed for Tom Rider is part and parcel of this lawsuit.

ARGUMENT

WAP "bears a heavy burden of proof" in seeking to quash FEI's deposition subpoena. Irons v. Karceski, 74 F.3d 1262, 1264 (D.C. Cir. 1995) (citing Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 403 (D.C. Cir. 1984)). "The quashing of a subpoena is an extraordinary measure, and is usually inappropriate absent extraordinary circumstance." Flanagan v. Wyndham Int'l, Inc., 231 F.R.D. 98, 102 (D.D.C. 2005). "A court should be loathe to quash a subpoena if other protection of less absolute character is possible. . . . Consequently, the movant's burden is greater for a motion to quash than if she were seeking more limited protection . . . ." Flanagan, 231 F.R.D. at 102 (internal citations omitted). "Rule 45(c), which delineates the circumstances that justify quashing a subpoena, was 'not intended to diminish

rights conferred by Rules 26-37.'" Briggs v. Washington Metro. Area Transit Auth., No. 01-1876, 2005 U.S. Dist. LEXIS 2020 (D.D.C. Feb. 15, 2005) (Facciola, J.) (quoting Fed. R. Civ. P. 45 (1991 amendment) advisory committee note).

Moreover, WAP's burden is particularly heightened because the subpoena commands deposition testimony. The D.C. Circuit has emphasized that "[d]epositions . . . rank high in the hierarchy of pretrial, truth-finding mechanisms." Founding Church of Scientology v. Webster, 802 F.2d 1448, 1451 (D.C. Cir. 1986). Courts in this district have "expressed [a] preference that a deposition proceed and the deponent assert her objections during the deposition, thus allowing the deposing party to develop circumstantial facts in order to explore the propriety of the [] objection." Flanagan, 231 F.R.D. at 103 (internal quotations and citations omitted).

That WAP has offered to provide a declaration in lieu of deposition testimony is of no moment: "A declaration 'is simply not an adequate substitute for live testimony,' such as a deposition." Cavanaugh v. Wainstein, No. 05-123, 2007 U.S. Dist. LEXIS 40242, at *34 (D.D.C. June 4, 2007) (quoting Alexander v. F.B.I., 186 F.R.D. 113, 121 (D.D.C. 1998)). "'[S]uch an approach eschews the opportunity for opposing counsel to probe the veracity and contours of the statements and denies the opportunity to ask probative follow-up questions.'" Flanagan, 231 F.R.D. at 104 (quoting Alexander v. F.B.I., 186 F.R.D. at 121).

FEI's subpoena commands testimony that is relevant to this case, that is not privileged, and that is not unduly burdensome for WAP to provide. As explained below, the four categories of information (and their corresponding descriptions in the subpoena) are discoverable.

I. Payments to or for Tom Rider and the Role of Plaintiffs and Counsel Therein

Judge Sullivan already has ruled that payments to or by WAP for Tom Rider are relevant to this lawsuit, as are the roles of plaintiffs, their counsel, and WAP in making such payments.

See Order (8/23/07) (Docket No. 178) ("Discovery Order") at 8 (FEI "is entitled to information concerning the payments made to Tom Rider and the role of the organizational plaintiffs and WAP in those payments.").[2] Indeed, six of the "Subject Matters for Inquiry" ("SMI") contained in the deposition subpoena relate precisely to that portion of the Court's ruling: No. 1 (payments to or for Rider), No. 2 (payments to WAP for Rider), No. 3 (the role of WAP), No. 4 (the role of plaintiffs), No. 9 (the relationship between WAP and plaintiffs' counsel), and No. 10 (WAP's accounting of payments to Rider).[3]

Despite Judge Sullivan's clear ruling that these topics are relevant, WAP argues that FEI is not entitled to deposition testimony on them. Even if, as WAP alleges, it has produced documents showing the amount of payments to Rider, it has not produced documents that establish its role or the role of plaintiffs in the payments. Nowhere in his prior Order did Judge Sullivan rule that only the amount of the funding to Rider is relevant.[4] Indeed, just as payments to a witness are relevant, the purpose of those payments are equally as relevant. If, for example,

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[2] See also id. at 4 ("The Court finds that Rider's funding for his public education and litigation efforts related to defendants is relevant. However, the Court finds that the source of any such funding is irrelevant unless it is a party, any attorney for any of the parties, or any officer or employee of the plaintiff organizations or WAP."); id. at 8 ("WAP shall provide any non-privileged documents or information that it has not already provided, with the exceptions discussed below, related to payments or donations for or to and expenses of Tom Rider in connection with this litigation or his public education efforts related to the Circus's treatment of elephants in compliance with Request No. 2 of the subpoena.").

[3] WAP conspicuously omits from its Motion any objection that SMI Nos. 3-4, 9-10, and 12 improperly seek information concerning the "role of WAP in making payments." See Trister letter to Gasper at 1 (attached as Ex. D to WAP's Motion). As FEI explained in writing to WAP, Judge Sullivan already has ruled that WAP's role in the payments to Rider is relevant. That WAP now avoids that terminology does not alter the fundamental principle at issue: the role of plaintiffs, their counsel, and WAP in payments made to the individual without whom this lawsuit would not exist are relevant to this lawsuit and information concerning that is discoverable. SMI Nos. 3 (role of WAP), 4 (role of plaintiffs), 9 (relationship between WAP and plaintiffs' counsel), and 10 (accounting of payments to Rider) are valid lines of inquiry. As discussed below, SMI No. 12 also is valid. Contrary to WAP's self-serving hypothesis, this request has nothing to do with payments to Rider; rather, it tests the sufficiency of WAP's search for responsive documents.

[4] WAP implies that Rider's credibility is not that important because he is merely "one" witness. Mot. at 20. WAP's argument, however, overlooks that fact that Judge Sullivan already has ruled that Rider's credibility is relevant to this case and that, without Rider's uncorroborated allegations of injury there would be no lawsuit in the first place. Rider is not just any "fact witness," he is the person whose allegations are the ***sole basis*** this case was reinstated by the D.C. Circuit. See FEI's Reply in Support of Its Motion to Enforce (12/3/07) (Docket No. 233) at 5-6.

Rider received approximately $35,000 each year because he actually incurred $35,000 worth of expenses, a factfinder may evaluate his credibility differently than if he received $35,000 from plaintiffs, their counsel, and WAP despite incurring expenses of only $5,000. Consistent with Judge Sullivan's ruling that FEI is entitled to information concerning the role of plaintiffs, moreover, FEI is entitled to depose WAP concerning the reasons plaintiffs have paid Rider through WAP. FEI has no intention for this deposition to "essentially replicate[]" the documents WAP has produced. Mot. at 20. It is intended, instead, to close the loop between what Judge Sullivan has ruled FEI is entitled to regarding *documents* and what precisely the documents do or do not reflect or contain. FEI, moreover, has no intention of using this deposition to obtain WAP's media strategies or the identities of other individuals who have made payments to Rider. Mot. at 20. Such self-serving hypotheticals are irrelevant here. FEI will ask questions concerning information that has been deemed relevant by Judge Sullivan. FEI will not ask specifics related to media strategy. As previously explained to the Court, if information related to the payment scheme overlaps with some kind of media strategy, then so be it. But plaintiffs and WAP cannot hide information regarding the payments to Rider by labeling or categorizing it under the rubric of "media strategy" (which FEI believes plaintiffs have done and that WAP is now trying to similarly do with this motion). See FEI's Reply in Support of Its Motion to Enforce (12/3/07) (Docket No. 233) at 9-10.

Tellingly, WAP offers no authority for its novel argument that a person who complies with a document subpoena need not comply with a deposition subpoena. Indeed, the Federal Rules of Civil Procedure clearly contemplate that a person will be expected to both produce documents ***and*** testify concerning matters relevant to pending litigation. See Fed. R. Civ. P. 45(c)(2)(A) ("A person commanded to produce documents, electronically stored information, or

tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial."). The policy behind this concept seems self-evident. WAP's production of documents reflecting the dates and amounts of such payments does not in any way limit FEI's right to inquire about other aspects of the payments that are not reflected in the documents.

II. Payments to or for Other Witnesses in This Case

Judge Sullivan already has ruled that payments by plaintiffs, WAP, and/or other animal advocacy organizations to Rider are discoverable because he is a witness in this case. See Discovery Order at 8. FEI, accordingly, also intends to depose WAP concerning payments, if any, to former employees of FEI who have already been deposed or identified as parties and/or witnesses in this case. See SMI 5-8. These are not seven random individuals as WAP portrays them, Mot. at 20-21; rather, they are individuals who have been deposed by plaintiffs in this case or might be called as witnesses at trial.

A declaration is not an adequate substitute for a deposition. If that were so, then the parties would just exchange declarations and proceed to briefing and/or trial. Relevant lines of inquiry are cut short or cutoff altogether by a declaration whereas a deposition affords for follow-up based on what the witness testifies. FEI is entitled to depose WAP irrespective of its willingness to proffer a declaration concerning these individuals. Cavanaugh, 2007 U.S. Dist. LEXIS 40242, at *34; Flanagan, 231 F.R.D. at 104. Moreover, the pertinent question here is whether any payments have been made and what role plaintiffs and WAP have played in making such payments. Therefore, WAP's representation that it "has no documents concerning these individuals", Mot. at 20, is worthless. Even if WAP does not have "documents" concerning payments to these individuals, any information it has concerning such payments is relevant to the

litigation.

As explained above, FEI is entitled to depose WAP concerning payments to or for Tom Rider. If, as WAP implies, it has no or limited knowledge about payments to or for other witnesses, it should be able to quickly answer a few questions on that subject under oath. See Amherst Leasing Corp v. Emhart Corp., 65 F.R.D. 121, 122 (D. Conn. 1974) ("The general rule is that a claimed lack of knowledge does not provide sufficient grounds for a protective order; the other side is allowed to test this claim by deposing the witness.") (cited in Flanagan); Parkhurst v. Kling, 266 F. Supp. 780, 781 (E.D. Pa. 1967) ("If the 'good cause' requirement could be thus simply met by an ex parte affidavit that the affiant had no relevant knowledge of the subject matter of the action the salutary purpose of Rule 26, providing for unlimited discovery would be easily and unjustifiably frustrated.") (cited in Flanagan). However, such answers must be subject to examination and, thus, any declaration by WAP – regardless of its wording – will be insufficient. Cavanaugh, 2007 U.S. Dist. LEXIS 40242, at *34; Flanagan, 231 F.R.D. at 104.

III. Sufficiency of WAP's Response to Subpoena and Court Order

FEI also is entitled to depose WAP regarding the sufficiency of its response to FEI's prior document subpoenas. (SMI Nos. 11-12). This subject matter is no different than what plaintiffs have asked employees of FEI when they have appeared at their depositions. FEI has the right to make the same inquiry of WAP that plaintiffs have made with FEI employees. Again, FEI need not accept WAP's declaration on its face without any ability to ask follow-up questions. Flanagan, 231 F.R.D. at 104 ("Deposition testimony permits examination and cross-examination of a live witness by counsel, where there is no opportunity to reflect and carefully shape the information given.") (internal quotations and citation omitted). Tellingly, WAP does

not cite any cases to the contrary. Indeed, WAP's declaration that it "has located no additional non-privileged non-duplicative documents or information", Decl. ¶ 7, does nothing to answer the pertinent question, which is whether or not it has produced all of the non-privileged, non-duplicative documents within its possession, custody, or control.[5] If, as WAP implies, its search was adequate, then WAP can so state under oath at the deposition and answer any related follow-up questions. There is no harm, and WAP identifies none, that would occur from WAP answering a few questions under oath about this subject.

IV. Authenticity of Documents Produced by WAP

Finally, FEI seeks to depose WAP concerning the authenticity of the documents it has produced to FEI. See SMI No. 13. As FEI already has explained to WAP, it is willing to forego deposing WAP on this topic provided that WAP and plaintiffs provide the necessary declarations and stipulations in advance. FEI cannot, however, forego its right based solely upon a declaration from WAP that the documents it has produced are authentic. WAP is not a party to this litigation and, therefore, neither plaintiffs nor the Court would be bound by such a declaration. WAP's Motion clearly establishes the fact that WAP and plaintiffs' counsel are one and the same (i.e., no one else but counsel is competent to testify on WAP's behalf) when seeking to avoid the deposition, and then simultaneously claims that it cannot secure a stipulation from plaintiffs' counsel regarding admissibility because the two are distinct. What matters here is not just a declaration from WAP, but a stipulation by plaintiffs that the documents produced by WAP are authentic and that the documents created by WAP are business records and, thus, not subject to the hearsay rule (FRE 802). FEI is not going to forego its right to lay the

[5] In fact, Judge Sullivan ordered WAP to declare that no additional responsive documents exist, not just that WAP could not "locate" any. See Order (8/23/07) at 8 ("To the extent there are no such documents that have not already been produced, WAP shall provide a sworn declaration or affidavit to that effect.").

necessary foundation for these documents at deposition only to be told that plaintiffs object to such documents at trial on the very same grounds. WAP and plaintiffs don't get to have it both ways, and they need to decide what their position is on this.

CONCLUSION

FEI's subpoena focuses upon issues that are relevant to this case. That WAP would prefer not to discuss them is beside the point. There is no authority to quash FEI's subpoena based upon WAP's unfounded concern that FEI might ask objectionable questions. WAP's motion presents no "emergency" other than their desire to conceal discoverable evidence. Moreover, WAP has failed to demonstrate that it will suffer any type of harm by submitting to FEI's deposition. Cf. Flanagan, 231 F.R.D. at 105 ("[A] showing of 'good cause' required to limit discovery must describe with specificity the potential harm the party is trying to avoid."). WAP's broad and conclusory allegations are insufficient to warrant the extraordinary measure of quashing FEI's subpoena. See id. ("general claim" of harm and "conclusory statements" "not sufficient for a total prohibition of the deposition"). WAP's motion, therefore, should be denied. FEI requests an immediate ruling compelling WAP to appear for deposition as noticed on Friday, December 14, or alternatively, on Thursday, December 13. A proposed form of order is attached.

Dated this 11th day of December, 2007.

Respectfully submitted,

/s/

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UNITED STATES DISTRICT COURT
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AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 03-2006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.	:	
Defendant.	:	

ORDER

This matter came before the Court on the Emergency Motion of Non-Party Wildlife Advocacy Project to Quash Deposition Subpoena and/or For Protective Order ("Motion"). Upon consideration of the Motion, the submissions of defendant Feld Entertainment, Inc. and the entire record herein it is, by the Court, this ____ day of _____, 2007, hereby

ORDERED that the Motion be, and hereby is, **denied;** and it is further

☐ **ORDERED** that WAP appear for deposition as noticed on Friday, December 14 at 9:30 a.m. OR

☐ **ORDERED** that WAP appear for deposition on Thursday, December 13 at 9:30 a.m. at the location previously noticed.

_____
UNITED STATES MAGISTRATE JUDGE