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/JMF)
v.	
RINGLING BROS. AND BARNUM & BAILEY CIRCUS, et al.,	
Defendants.	

WILDLIFE ADVOCACY PROJECT'S REPLY IN SUPPORT OF ITS EMERGENCY MOTION TO QUASH DEPOSITION SUBPOENA AND/OR FOR PROTECTIVE ORDER

Contrary to FEI's view of the law, courts do not quash deposition subpoenas only when matters "like state secrets" are being sought. FEI Opp. at 2. Rather, under the plain terms of Fed. R. Civ. P. 45, a court "shall quash or modify" a subpoena when compliance with it "requires disclosure of privileged or other protected matter" and/or "subjects a person to undue burden." As set forth in WAP's motion, that standard is satisfied here and, far from demonstrating otherwise, FEI's response only serves to reinforce the validity of WAP's objections.

1. First, the thirteen "subject areas" set forth in the subpoena are hardly "narrowly focused" on issues relevant to this case. FEI Opp. at 1. Indeed, FEI conveniently overlooks many of the items enumerated in its own subpoena – such as, once again, the "formation and corporate structure" of WAP, the organization's "relationship and overlap wih Plaintiffs'

counsel," WAP's "record/document management practices and policies," and its internal process for "plann[ing], execut[ing], manag[ing], coordinat[ing], track[ing], and deliver[ing]" funding for its public education campaign concerning FEI's elephants. Exhibit A. Even if Judge Sullivan had not already stayed FEI's RICO case, such topics are – as Judge Sullivan held with regard to much of the prior discovery sought from WAP – "completely irrelevant to to the 'taking' claim in this lawsuit, the credibility of Tom Rider, or any claimed defenses." Discovery Order at 8.[1]

Judge Sullivan, however, did stay the RICO case and he did reject FEI's unclean hands defense, and, once again, he did so precisely to avoid discovery into such extraneous matters as a non-party's internal operations and its relationship with plaintiffs' counsel. First RICO Opinion at 5-6. Yet under FEI's approach, FEI may nonetheless insist on all of this discovery merely by asserting that it is peripherally related to WAP's "role" in funding Tom Rider's media campaign. FEI Opp. at 1. Plainly, however, if that counterintuitive reading of the Court's rulings were correct, then it is impossible to understand what discovery Judge Sullivan placed off-limits by

[1] FEI's opposition contains many assertions that are not only unaccompanied by any citations to the record but that "grossly distort" the actual facts. Second RICO Opinion at 7. For example, FEI asserts (with no citation) that "all" of its "prior discovery motions" have been granted "in large part." FEI Opp. at 5. In fact, FEI's motion to compel against WAP was largely denied, with Judge Sullivan holding, once again, that FEI sought a "lot of information that is completely irrelevant," that FEI's subpoena was "over burdensome," and that FEI had demanded much information that was protected by the First Amendment. Discovery Order at 8-9. Similarly, FEI asserts (with no citation) that WAP and plaintiffs have made "persistent efforts to conceal relevant information about a topic they are striving very hard to avoid." FEI Opp. at 5. In truth, long before FEI filed any motion to compel, WAP provided FEI with documents (in 2005) reflecting that WAP, along with plaintiffs, was providing funding "to keep Mr. Rider on the road so that he can serve as an effective spokesperson on behalf of elephants and other circus animals, including in areas where the circus is performing." WAP Compel Opp'n at 17; see also First RICO Opinion at 7 (FEI's allegation of an "elaborate cover-up" "ignores the evidence in this case," including the fact that "Plaintiffs' counsel admitted in open court on September 16, 2005 that the plaintiff organizations provided grants to Tom Rider to 'speak out about what really happened' when he worked at the circus.") (internal citation omitted).

refusing to add WAP as a party to FEI's RICO counterclaim, and by refusing (twice) to allow the RICO case to go forward at this time. In any event, topics such as the "formation and corporate structure of WAP," the "relationship and overlap with Plaintiffs' counsel," WAP's "record/document management policies and practices," etc., clearly fall far outside the category of the "[v]ery limited discovery" that is genuinely necessary to challenge Mr. Rider's credibility. First RICO Opinion at 4.[2]

Moreover, FEI's assertion (at 3) that its subpoena does not require a deposition of plaintiffs' counsel (a result, FEI tacitly concedes, Judge Sullivan specifically wanted to avoid in refusing to add WAP as a party, see First RICO Opinion at 6), is belied by the fact that FEI purposefully selected "subject areas" – including the "formation" of WAP and WAP's "relationship" with Plaintiffs' counsel – that not only have nothing whatsoever to do with the ESA claim at issue, but that only plaintiffs' counsel could competently testify about. Hence, FEI's protestations notwithstanding, given the specific way in which the subpoena was drawn up, it is difficult to come to any conclusion other than that FEI is attempting to harass plaintiffs' counsel as discovery is "winding down" in this case. First RICO Opinion at 5. In any event, the subpoena clearly encompasses "protected matter[s]" within the meaning of Rule 45 – i.e.,

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[2] In this connection, FEI's admonition that "[i]t is not for WAP to determine what FEI needs for its defense" is seriously misplaced. FEI Opp. at 1. WAP's argument is predicated on the Court's distinction between the "limited information" that FEI is legitimately "entitled to" for its defense of this case in which WAP is not a party, First RICO Opinion at 5 – and which it has in fact already received – and the far broader information that FEI wants in order to pursue a different case (the RICO claim against WAP) and what Judge Sullivan has ruled is an impermissible defense (the unclean hands defense). Similarly off-base is FEI's contention that "WAP implies that Rider's credibility is not that important because he is merely 'one' witness." FEI Opp. at 7. In fact, it is Judge Sullivan who stressed that only "limited information" was needed to "challenge the credibility of one plaintiff in this case . . . ." First RICO Opinion at 5 (emphasis original).

matters that Judge Sullivan expressly placed out of bounds in his rulings on the RICO claim and unclean hands defense.[3]

2. FEI's repeated assertions that it must subject a non-party to a fourth subpoena in order to explore the organization's "role" in funding Mr. Rider's public education campaign is unpersuasive for another fundamental reason: FEI has already received massive amounts of information on WAP's role in funding Mr. Rider's public education campaign, FEI Opp. at – far more, in fact, than the "limited information" Judge Sullivan evidently contemplated as genuinely necessary for FEI to raise whatever challenge it desires to Mr. Rider's credibility. Thus, contrary to FEI's suggestion that it has only received information on the "mere 'amount' of money that Rider" has received from plaintiffs and WAP (and other organizations and individuals around the country concerned with FEI's mistreatment of the animals) for his media campaign, FEI Opp. at 2, FEI has received (from both WAP and plaintiffs) extensive, detailed information on exactly when funds were provided to Mr. Rider, the sources of the funding (including, once again, highly sensitive information on non-plaintiff organizational sources – such as foundations and animal protection organizations other than plaintiffs – that Judge Sullivan specifically held could be withheld by WAP on First Amendment grounds), hundreds of Mr. Rider's personal receipts (reflecting, e.g., where he repairs the van that he uses to track the circus around the country, the food he eats, and the beverages he drinks), and videotapes of

[3] FEI's assertion (unaccompanied, again, by any citation to the record) that WAP has "argued repeatedly to this Court that it is wholly independent of plaintiffs' counsel," FEI Opp. at 3, is simply false. From the beginning of its discovery dispute with FEI, WAP has advised the Court that WAP is in fact a separate non-profit (c)(3) organization that was established to support public education campaigns of the kind being pursued by Mr. Rider, and that it was established by two of plaintiffs' counsel who continue to serve as officers of the organization and on its board along with non-firm members. See WAP Compel Opp. at 7-10.

television interviews and other materials reflecting Mr. Rider's media and lobbying efforts on behalf of the elephants.

Indeed, FEI has received so much information on this one topic that it told Judge Sullivan, in moving to add its RICO counterclaim, that it became "fully aware of the extent, mechanics, and purposes" of plaintiffs' and WAP's "scheme" (in 2006) as a direct result of the discovery previously taken from WAP and plaintiffs in this case. First RICO Opinion at 4 (emphasis added). Thus, whatever underlying motivation FEI has in serving a fourth subpoena on WAP (and the stayed RICO case would seem to fully answer that question) the notion that it still does not have enough information on WAP's "role" to make whatever arguments it wishes concerning the credibility of Mr. Rider (who it will depose for the second time next week for two days) is difficult to take seriously.

In this connection, WAP certainly does not, contrary to FEI's contention, advance the "novel argument that a person who complies with a document subpoena need not comply with a deposition subpoena." FEI Opp. at 8. WAP's position is, instead, the far more modest one: that, under the particular circumstances of this case – where, e.g., (1) an entity that FEI concedes "is not a party to this litigation," FEI Opp. at 11, has already produced extensive information in response to three expansive subpoenas; (2) the non-party has also produced the specific Declaration regarding its production and search for responsive materials that was required by the Court; (3) FEI has also received extensive information from plaintiffs on Mr. Rider's activities and Mr. Rider himself will be redeposed on the same topic; and (4) the Court has already made clear that it did not want FEI to stray into subject areas identified in its fourth subpoena, particularly many subjects that would necessitate a deposition of plaintiffs' counsel – the

subpoena violates Rules 26 and 45 and should be quashed on that very case-specific basis. It is hardly a "novel" proposition, FEI Opp. at 8, that the Court has wide latitude to monitor and oversee discovery under such circumstances, and to determine that FEI is imposing an "undue burden" on a non-party and, indeed, is doing so for the impermissible purpose of advancing its interests in another stayed lawsuit. See, e.g., Shepherd v. Wellman, 313 F.3d 963, 969-70 (6th Cir. 2002) (disallowing discovery and affirming an award of sanctions against an attorney who attempted to use the discovery process to investigate post-trial allegations of jury tampering in another case).

3. FEI's response also underscores WAP's contention that the subpoena should be quashed because it will invariably delve into matters that Judge Sullivan has deemed not only irrelevant, but protected by WAP's core First Amendment rights. Thus, although FEI disclaims any intention to "ask specifics related to media strategy," FEI Opp. at 8 (emphasis added), it says in the very next sentence that "if information related to the payment scheme overlaps with some kind of media strategy, then so be it." Id. (emphasis added). This ominous statement not only suggests that FEI does fully intend to use this deposition to pursue its RICO theory that there is an "elaborate corruption scheme" that is a smokescreen for Tom Rider's media campaign, First RICO Opinion at 5, but that, to do so, it will indeed pry into the "kind of media strategy" that was devised by plaintiffs, WAP, and other organizations and individuals who disagree with FEI's treatment of its elephants.

"[S]o be it," however, was not the solution devised by Judge Sullivan; rather, by requiring WAP to produce specified information (as it has) while making specific attestations in a sworn Declaration regarding the sources of the funding and the duplicative nature of its other

financial information, the Court was clearly striking a deliberate balance between FEI's discovery rights on the one hand and WAP's legitimate rights on the other to safeguard information that is crucial to its exercise of First Amendment rights to associate with whom it pleases and to campaign vigorously for a change in public policy on a matter the Court has described as being of "tremendous public import." Second RICO Opinion at 8. Yet FEI's brief makes clear that its deposition subpoena is designed to upset that judicially crafted balance by seeking "substantial additional evidence . . . beyond the evidence already produced on payments to Tom Rider," First RICO Opinion at 6, including information on WAP's "media strategy." FEI Opp. at 8.[4]

4. With regard to other potential witnesses, FEI asserts that "[e]ven if WAP does not have 'documents' concerning payments to these individuals, any information it has concerning such payments is relevant to the litigation." FEI Opp. at 10. But FEI ignores what WAP has just told the Court – that "WAP has no documents concerning them because the organization has had no dealings with them whatsoever" and that WAP is willing, if necessary, to reaffirm that fact in another Declaration. WAP Mot. at 20-21 (emphasis added). That this is still insufficient for FEI on this area of inquiry only serves to reaffirm that its actual purpose here is harassment, not legitimate factfinding.

Further, FEI's peculiar notion that a sworn Declaration can never serve a useful function

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[4] In this connection, FEI's assertion that WAP should "just follow Judge Sullivan's Orders and testify," FEI Mot. at 2, is perplexing. Judge Sullivan has never ordered WAP to "testify" in a deposition or otherwise. To the contrary, he was very clear in ordering WAP to furnish a sworn Declaration addressing the information sought by FEI – which WAP has long since done. Hence, if compliance with Judge Sullivan's Orders is the relevant test here (which WAP agrees it should be), it is even more clear that the fourth subpoena to WAP should be quashed.

in streamlining or avoiding unnecessary discovery, FEI Opp. at 10-11, is belied by Judge Sullivan's rulings in this case. Once again, requiring WAP (and plaintiffs) to produce Declarations on certain enumerated topics was the precise mechanism selected by the Court for addressing any of FEI's legitimate discovery needs while, at the same time, avoiding "irrelevant," "over burdensome," and "duplicative" discovery. Discovery Order at 8-9. It makes perfect sense in this context as well, should the Court believe that still more is necessary regarding the individuals enumerated in FEI's subpoena as to whom WAP, in fact, has had no involvement whatsoever.

5. As for attesting to the authenticity of WAP documents, FEI's position, once again, is a non sequitur. The fact that "neither plaintiffs nor the Court would be bound" by a declaration from WAP authenticating the documents it produced, FEI Opp. at 11, obviously does not translate into a justification to take WAP's deposition because a deposition would suffer from exactly the same deficiency, i.e., WAP is in no position to speak for plaintiffs on authenticity or admissibility, whether through a Declaration or a subpoena. What WAP can do is authenticate its own documents, and it surely makes no legal difference whether it does that through a Declaration or a deposition. Once again, therefore, FEI's insistence that WAP be deposed for a reason that makes no legal or practical sense only reinforces that, whatever its underlying intent in scheduling this deposition, it has little (if anything) to do with actually preparing for trial.[5]

[5] While WAP believes that it has set forth compelling reasons – well-grounded in the plain terms of Rule 45 and the particular facts of this case – for quashing the subpoena in its entirety, in the alternative the Court should at very least "modify" it, Fed. R. Civ. P. 45(c)(3)(A) in accordance with several representations that are reflected in FEI's brief but not in the subpoena itself. Thus, FEI has said that the deposition "should consume just a few hours." FEI Opp. at 2; but see First RICO Opinion at 6, 8 (describing FEI's "relentless efforts to obtain information to impugn plaintiff Tom Rider and to learn every detail of the media and litigation strategies of its opponents," and finding "no reason" to believe FEI's contention that its

6. Finally, as to timing of the deposition, WAP continues to believe that the Court should take whatever time it believes that it needs to resolve the issues raised in this motion. Accordingly, WAP respectfully suggests that the Court at least issue an order postponing the deposition until it resolves WAP's motion. If the Court then resolves the motion by finding that the deposition should proceed in whole or in part, the Court should order FEI and WAP to agree on a mutually acceptable date for the deposition to take place.

In any event, FEI's solution that WAP should be deposed tomorrow – thus leaving it virtually no time even to prepare for the deposition[6] – hardly alleviates the "undue burden" that WAP seeks to avoid. Indeed, if the only choices were between tomorrow and Friday (which would in fact require the WAP deponent to reschedule a doctor's appointment), WAP would choose Friday. However, especially because WAP produced extensive information and a Declaration in accordance with Judge Sullivan's instructions more than two months before FEI even served it with the latest subpoena, WAP should not be required to make this Hobson's choice, and the Court certainly need not be burdened with deciding this matter before tomorrow.

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discovery concerning plaintiffs' and WAP's alleged "scheme" would be "pointed and efficient"). It has also represented that it "has no intention of using the deposition to obtain WAP's media strategies," FEI Opp. at 8, although, once again, its next sentence appears to undercut that very representation. FEI has further stated that it intends to ask only a "few questions" about various matters set forth in the subpoena, including WAP's search for responsive documents (which is already addressed in the September 24, 2007 Declaration). FEI Opp. at 11. At minimum, the Court should embody such representations in a protective order.

[6] WAP's counsel is also unavailable tomorrow because of prior professional commitments. WAP and its counsel are generally available next week, although not the following week.

Respectfully submitted,

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