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.	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO ENFORCE THE COURT'S DECEMBER 3, 2007 ORDER CONCERNING THE HUMANE SOCIETY OF THE UNITED STATES

INTRODUCTION

Plaintiffs defer to the Humane Society of the United States ("HSUS") regarding the request by defendant Feld Entertainment, Inc. ("FEI") for relief directed at that organization, including FEI's request that HSUS participate in the evidentiary hearing that has been scheduled by the Court. However, plaintiffs are responding to FEI's motion to the extent that it is predicated on false statements unsupported by any citations to the record regarding various positions taken and concessions purportedly made by plaintiffs. In addition, FEI's filing characterizes the evidentiary hearing in a manner that appears to be at variance with what the Court itself contemplates, and what plaintiffs understand to be the purpose (and legal underpinning) of that hearing. Accordingly, plaintiffs are submitting this response to ensure that the Court does not rely on FEI's erroneous descriptions of plaintiffs' position and actions, as well

as to respectfully suggest an alternative approach for addressing the Court's concerns in scheduling the evidentiary hearing that may best serve the Court's own interest in judicial economy and efficiency.

I. FEI'S MOTION IS BASED ON ERRONEOUS AND UNSUBSTANTIATED FACTUAL ASSERTIONS CONCERNING PLAINTIFFS' POSITION AND PRIOR ACTIONS.

As in many of its filings in this case, FEI's motion is replete with factual assertions that are not only unaccompanied by any citation to the record but are simply wrong. Judge Sullivan recently found that FEI engaged in this kind of "gross distort[ion]" of the facts with regard to the very discovery at issue here, and yet FEI, regrettably, persists in the very same conduct Judge Sullivan decried. See Feld Entm't, Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals, 523 F. Supp. 2d 1, 4 (D.D.C. 2007) (FEI "contends that the declarations submitted by Mr. Rider and ASPCA in response to that [August 23, 2007 order] evidence ongoing 'nefarious' document destruction from which it requires immediate relief. Again, FEI grossly distorts the facts.") (emphasis added).

For example, FEI repeatedly asserts with no citation to anything that the Fund for Animals' ("FFA's") "counsel acknowledged in open court that it [FFA] and the other plaintiffs have brazenly withheld (in the face of a separate Court Order) communications about payments to Tom Rider." FEI Mot. at 7; id. at 11 ("FFA's counsel has acknowledged in open court that it [FFA] is withholding certain documents concerning payments to Rider notwithstanding the Court's Order that all responsive documents concerning payments be produced."); id. at 9. At the January 8, 2008 status hearing, however, plaintiffs' counsel not only did not make any concession that plaintiffs had somehow failed to comply with Judge Sullivan's Order but, to the

contrary, stressed that:

> [i]t is plaintiffs' position that we have produced every single document that we were required to produce by Judge Sullivan. We have produced documents reflecting every single payment that we can possibly find involving Mr. Rider. Wildlife Advocacy Project has produced not only all of the documents it was required to produce, but even information that was not required by Judge Sullivan, such as funding of his public education campaign by other organizations. So any suggestion that Plaintiffs have not scrupulously complied with the order[] which is belied by declarations, the sworn declarations submitted in this case, is simply false.

1/8/08 Tr. at 16 (emphasis added) (Exh. A).[1]

FEI's motion "grossly distorts the facts" in other ways as well. Feld Entm't, 523 F. Supp. 2d at 4. Hence, the motion contains the blanket assertion once again, unaccompanied by any citation to the record that "[l]ike plaintiffs (including FFA), HSUS has simply refused to produce any communications concerning Tom Rider or the payments to him." FEI Mot. at 6 (emphasis added). This assertion is not only totally unsubstantiated, it is also demonstrably false. In truth, plaintiffs including FFA have previously produced to FEI extensive information reflecting "communications concerning Tom Rider or the payments to him."

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[1] As the Court knows, there is apparently a legal disagreement between the parties regarding the proper construction of Judge Sullivan's various orders bearing on this matter. In plaintiffs' view, they have not only scrupulously complied with Judge Sullivan's discovery order as plaintiffs counsel advised this Court on January 8 but they have now furnished FEI with far more than the "very limited discovery" that Judge Sullivan contemplated was remaining regarding Tom Rider. Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. Barnum & Bailey Circus, 244 F.R.D. 49, 51 (D.D.C. 2007). In sharp contrast, FEI evidently believes that it is entitled to every communication plaintiffs (and others) have ever engaged in concerning Tom Rider or his public education activities, although this appears to be precisely what Judge Sullivan did not anticipate as being necessary for the parties to resolve this case. Id. ("Any limited information about payments to or the behavior of Tom Rider that defendant is entitled to in order to challenge [the] credibility of *one* plaintiff in this case is far different from the vast amount of information they would be seeking under the guise of attempting to prove an alleged RICO scheme.") (italics in original). In any event, contrary to FEI's apparent assumption, the fact that the parties have a legal disagreement concerning Judge Sullivan's orders does not mean that plaintiffs have conceded that they are in violation of any orders.

Thus, in addition to producing "[a]ll responsive documents and information concerning payments to Tom Rider," DE 178 at 6 (emphasis added) i.e., all documents plaintiffs can locate after an extensive search reflecting every single payment ever made to Tom Rider for any reason plaintiffs have in fact produced many additional documents reflecting "communications" concerning plaintiffs' strategy for funding Tom Rider's activities, although many of these documents are in fact "related to any media or legislative strategies or communications," and hence, under Judge Sullivan's August 23, 2007 Order, could clearly have been withheld on that basis as irrelevant to any claim or defense in this lawsuit. Id. at 3.[2]

As the Court now knows, plaintiffs have also provided FEI with extensive deposition testimony concerning Mr. Rider's funding and plaintiffs' communications regarding it. See DE 245 at 1 (Order declining to extend Mr. Rider's deposition because he was "exhaustively

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[2] See, e.g., A 00046 (ASPCA e-mail reflecting agreement with plaintiff Animal Welfare Institute to split Tom Rider's travel expenses); A 00073 (internal ASPCA e-mail explaining that Mr. Rider "has been doing some impressive p.r. work for us," discussing the funding available for his public education campaign, and how best to coordinate his work with ASPCA's in-house media department); AWI 06038 (four-page grant proposal from Wildlife Advocacy Project ("WAP") to AWI for funding of Mr. Rider's "grass-roots media campaign to educate the public about what goes on behind the scenes of the Ringing Bros. circus with respect to endangered Asian elephants"); AWI 06058 (furnishing grant "to be used towards the Ringling Bros. Public Education Effort as described in your proposal dated December 11, 2003"); AWI 09931 (letter from WAP thanking AWI for another contribution to "Tom Rider's important work related to the treatment of elephants by Ringling Brother's"); F 04483 (internal FFA communication indicating that FFA provided Mr. Rider with a check "so that he could get his van fixed[] and drive it from California to Colorado for a press conference in Denver next Wednesday. Denver has a city initiative on the issue of allowing circuses with performing animals to perform within city limits, and there is going to be a press conference. Tom Rider and Michael will both be speaking."); F 04485 (internal FFA memo stating that "this second check for $ 500 to Tom Rider is because we were supposed to send $ 500 and the ASPCA is supposed to send $ 500 and turns out the A[SPCA] can't send its $ 500 until next week which is too late."); F 04489 (cover letter providing donation "to assist with media outreach and other press-related efforts in support of the pending case concerning Ringling Brothers Circus").

examined on . . . money made available to him by, for example, the Wildlife Advocacy Project, and others as he traveled across the United States to speak generally about his claims of the abuse of circus elephants"); id. at 2 ("defendant covered exhaustively the crucial issues that Rider's testimony presents"); see also, e.g., 7/29/05 Dep. of Lisa Weisberg (ASPCA representative) (Exh. B) at 51-52, 80-81 (describing communications between plaintiffs regarding "how we could fund the costs for [Tom Rider's] travels and how we would divide up costs").

FEI is free to take whatever legal position it desires in this litigation. However, as Judge Sullivan has already made explicit, FEI should not be permitted to manufacture its own facts or to otherwise mislead the Court for tactical advantage which is what FEI has done in the motion here, as well as in other filings it has made concerning plaintiffs' discovery responses regarding Mr. Rider's funding and activities. The unavoidable reality is that FEI has received a vast amount of information on this single topic, and the Court should not be left with the contrary i.e., erroneous impression in ruling on the pending motion or any other issue relating to the evidentiary hearing.

The Court should also take note of the fact that FEI's position, as embodied in the pending motion and other filings it has made concerning this matter, is not only factually baseless, but also internally contradictory. Thus, when FFA and the other plaintiffs responded to Judge Sullivan's August 23, 2007 discovery order concerning Tom Rider by producing "nearly 700 pages of documents" on Tom Rider's funding, FEI relied on that substantial production to argue that plaintiffs remained in violation of their discovery obligations because it showed that plaintiffs must be hiding even more materials. See DE 223 at 4. But now that HSUS has produced a "mere ***sixteen pages*** relating to Rider or payments to him," FEI Mot. at 4 (emphasis

in original), FEI relies on that smaller production to argue that HSUS must be in violation of its discovery obligations because HSUS has not produced enough materials.

Evidently, therefore, whatever plaintiffs or any others do in responding to FEI's discovery requests and the Court's rulings concerning Tom Rider proves that the responses are inadequate and that those responding should be held in contempt i.e., if extensive materials are located and produced, it is evidence of an inadequate response, but if limited materials are located and produced that is also proof of an inadequate response. Perhaps this is the sort of gamesmanship that constitutes the "false and empty posturing of high-priced lawyers" that FEI, ironically, purports to bemoan. FEI Mot. at 7.

II. FEI'S MOTION MISSTATES THE COURT'S OWN DESCRIPTION OF THE NATURE AND FUNCTION OF THE EVIDENTIARY HEARING.

FEI's motion as well as other recent statements it has made concerning discovery also describes the scheduled evidentiary hearing in a manner that appears to be at variance with the Court's own characterization of the function of the hearing. Hence, FEI's motion asserts that HSUS should be "ordered to appear at the Court's hearing concerning FFA's and the other plaintiffs' failure to comply with the existing discovery Orders," FEI Mot. at 5 (emphasis added) as if the Court had already established that plaintiffs were in default of their discovery obligations. Elsewhere, FEI's motion a publicly filed document flatly refers to the "contempt hearing scheduled for February 26, 2008 and March 6, 2008." Id. at 2 (emphasis added). Likewise, in other recent communications concerning discovery sought by plaintiffs, FEI has not only characterized the upcoming hearing as a "contempt hearing," but has even gone so far as to employ that characterization as a rationale for depriving plaintiffs of discovery they are pursuing. See 1/18/08 letter from Michelle Pardo to Katherine Meyer (Exh. C) (asserting that plaintiffs are

seeking additional documents concerning their claims of elephant mistreatment because of "retaliatory motives for the contempt hearing rather than good faith concerns about the documents themselves"); 1/23/08 letter from Michelle Pardo to Kimberly Ockene (Exh. D) (asserting that plaintiffs' complaint about inadequate interrogatory answers was "obviously brought as retaliation for the upcoming contempt proceedings against plaintiffs").

The Court itself, however, has not characterized the hearing in this manner nor, in plaintiffs' view, could it do so. Rather, the Court has simply scheduled an "evidentiary hearing" and, at the January 8, 2008 status hearing, further described the hearing as an effort to make an "extraordinarily preliminary determination" regarding how plaintiffs conducted their search for responsive documents. 1/8/08 Tr. at 21.[3]

Indeed, in light of the Court's own explanation of the narrow function of the hearing, and FEI's apparent desire (as embodied in the pending motion against HSUS) to vastly expand its scope and purpose, plaintiffs respectfully suggest that the Court consider an alternative method for satisfying the concerns expressed by the Court at the January 8 status hearing, i.e., that the Court did "not really understand[] and know[] what people did as they responded" to the August 23, 2007 discovery Order because the "papers didn't tell me that." 1/8/07 Tr. at 21. In

[3] Indeed, as the Court has explained in a previous case, while, under 28 U.S.C. § 636(e), a magistrate judge may have the "authority to begin the contempt proceedings" by referring the matter to a district judge for resolution, a magistrate judge "does not have jurisdiction to adjudicate contempt." Athridge v. Aetna Cas. and Surety Co., 184 F.R.D. 181, 198 (D.D.C. 1998). This ruling is consistent with the Court's characterization of the evidentiary hearing here as a "preliminary" effort to explore whether there is a basis for referring the matter to Judge Sullivan; it is impossible, however, to reconcile with FEI's repeated and inflammatory description of the proceeding as a "contempt hearing." See also Athridge, 184 F.R.D. at 198 ("It is entirely consistent with § 636(e) that the magistrate judge exercise discretion in deciding whether conduct has risen to the level at which he or she must certify the facts of the conduct to a district judge for adjudication.").

particular, to rebut FEI's repeated but baseless assertions (reiterated again in the pending motion) that plaintiffs did not perform an adequate search for documents concerning "payments to" Tom Rider, plaintiffs could, in lieu of an evidentiary hearing, submit more detailed declarations describing how they conducted their search for responsive documents. The Court could then consider whether, in light of these supplemental materials furnishing a fuller explanation and any response by FEI concerning precisely what it believes should have been searched but was not, an evidentiary hearing is still necessary to resolve this matter.[4]

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[4] Contrary to FEI's pending motion and its similar argument at the status hearing, plaintiffs have indeed stated "under oath," 1/8/08 Tr. at 21, that they searched for and provided all documents responsive to Judge Sullivan's Order. See DE 227-4 at Exh. 3 ¶ 1 (Decl. of Lisa Weisberg) ("To the best of my knowledge, the ASPCA has produced all records in its possession, custody, or control that are responsive to defendant's Document Production Requests and that are required by the Court's Order.") (emphasis added); id. at Exh. 4 ¶ 2 (Decl. of Tom Rider) (similar statement); id. at Exh. 5 ¶ 1 (Decl. of Tracy Silverman) ("AWI has done a thorough search of all places where such records might be located and has produced all such records."); id. at Exh. 6 ¶ 1 (Decl. of Nicole Paquette) ("API has done a thorough search of all places where such records might be located and has produced all such records."); id. at Exh. 7 ¶ 1 (Decl. of Michael Markarian) ("The Fund has done a thorough search of all places where such records might be located and has produced all such records.").

Although plaintiffs' Declarations did indeed make these representations, they did not provide extensive details regarding the precise manner in which the search was carried out because that was not required by Judge Sullivan's August 23, 2007 Order. That Order simply compelled plaintiffs to produce a "sworn declaration or affidavit identifying, to the extent plaintiffs can recall, any responsive documents that were once in plaintiffs' possession but have been discarded, destroyed, or given to other persons or otherwise not produced, together with a description of each such document and an explanation of why it was discarded, destroyed, spoilated, or otherwise disposed of." DE 178 at 7. As Judge Sullivan has subsequently held in the course of staying FEI's RICO claim, plaintiffs' existing declarations "comply precisely" with what Judge Sullivan ordered plaintiffs to address in their declarations. Feld Entm't, 523 F. Supp. 2d at 4 ("In fact, the declarations comply precisely with this Court's order requiring defendants [plaintiffs here] to provide a sworn statement accounting for all responsive documents that may have been destroyed."). However, plaintiffs are fully prepared to submit supplemental declarations also detailing for the Court exactly how plaintiffs conducted their search for responsive materials so that the Court can consider whether, in view of such materials and any concrete response by FEI pinpointing what it believes should have been searched but was not, an

If the Court nevertheless continues to believe that an evidentiary hearing is needed to address this matter, plaintiffs respectfully suggest that, at the hearing, plaintiffs first proffer to the Court their affirmative evidence regarding how the search was conducted, and that FEI then cross-examine plaintiffs' witnesses and/or put on other evidence FEI wishes to place before the Court. This would seem to be the most efficient process for actually putting the Court in a position to make a "preliminary determination" of what materials were in fact searched by plaintiffs, how the search was conducted, and how plaintiffs endeavored to comply with Judge Sullivan's August 23, 2007 Order. 1/8/08 Tr. at 21.

Respectfully submitted,

/s/

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evidentiary hearing which will entail a substantial commitment of time and resources by non-profit organizations remains necessary.