

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION	)	
OF CRUELTY TO ANIMALS, <u>et al.</u> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civ. No. 03-2006 (EGS/JMF)
	)	
RINGLING BROTHERS AND BARNUM & BAILEY	)	
CIRCUS, <u>et al.</u> ,	)	
	)	
Defendant.	)	
	)	

**PLAINTIFFS’ MOTION TO REQUIRE DEFENDANT TO REIMBURSE PLAINTIFFS  
FOR THE COST OF THE SECOND DAY OF GARY JACOBSON’S DEPOSITION  
AND SUPPORTING MEMORANDUM**

Pursuant to Rules 30(d)(2) and 37(a)(4)(A), Fed. R. Civ. P., plaintiffs move for an order requiring defendant Feld Entertainment Inc. (FEI) to reimburse plaintiffs for the transcription costs incurred in having to take a second day of deposition testimony from Gary Jacobson because defendant’s counsel had refused to allow Mr. Jacobson to testify concerning certain matters when he was originally deposed on October 24, 2007.

**The Pertinent Factual Background**

The facts that are pertinent to this motion are as follows:

1. By letter dated September 28, 2007, plaintiffs’ counsel notified defendant’s counsel that plaintiffs wished to take the deposition of Gary Jacobson, who is the General Manager of defendant’s breeding facility for Asian elephants. See Exhibit 1. With that letter, plaintiffs enclosed a subpoena and notice to take the deposition, both of which notified defendant

that the deposition would take place on October 9, 2007. Id. In the accompanying cover letter, plaintiffs' counsel also informed defendant's counsel that plaintiffs were flexible about the date for the deposition and were willing to "accommodate Mr. Jacobson's schedule." Id. Although plaintiffs have maintained throughout this litigation that they are not required to serve FEI officials such as Mr. Jacobson with a subpoena, because defendant has insisted that they do so, plaintiffs served Mr. Jacobson with a subpoena issued from the district court for the Middle District of Florida. See id. The Attachment to the subpoena explained that Mr. Jacobson was expected to provide testimony "regarding the Ringling Brothers and Barnum & Bailey Circus and the Center for Elephant Conservation, his employment history and duties, his work with elephants, and related topics." Id.

2. By letter dated October 17, 2007, defendant's counsel confirmed that Mr. Jacobson would be made available for the deposition on October 24, 2007, see Exhibit 2, and by letter dated October 19, 2007, plaintiffs provided counsel for defendant with an additional subpoena issued from this Court, as required by defendant's counsel, see Exhibit 3. At the time plaintiffs noticed Mr. Jacobson's deposition, the parties were operating under a schedule that required the close of all fact and expert discovery by December 31, 2007. See Order (Document No. 178).

3. At no time between September 28, 2007 and October 24, 2007 did defendant's counsel file or otherwise raise any objections to the subpoenas or notice of deposition served on Mr. Jacobson.

4. At the deposition of Mr. Jacobson on October 24, 2007, defendant's counsel for the first time asserted that Mr. Jacobson would not be permitted to testify about certain matters –

i.e., facts concerning the treatment of elephants who were born in captivity, and she instructed him not to answer those questions. See Deposition of Gary Jacobson (Oct. 24, 2007) at 47-59. Although defendant's counsel had known since September 28, 2007, that plaintiffs would be taking Mr. Jacobson's deposition, she nevertheless asserted that in instructing Mr. Jacobson not to testify to such matters she was relying on Judge Sullivan's August 23, 2007 summary judgment ruling, which did not discuss the scope of discovery in this case, and on Judge Facciola's September 19, 2007 order concerning the physical inspections of the elephants. See id.

5. At Mr. Jacobson's deposition, plaintiffs' counsel stated for the record that she wished defendant's counsel had raised this issue before the deposition "particularly given the tight discovery deadline that we are operating under" so that the parties could "perhaps have taken this matter up with Judge Facciola before this deposition," because "now we [are] in the position of having to take it up with him after the deposition is over, which means if we prevail on this issue, we are going to have to bring Mr. Jacobson back for another deposition." See Jacobson Deposition at 55-56. Defendant's counsel replied by stating that "I don't need to advise you about the orders in this case. You are a big girl. You can read them on your own." Id. at 56.

6. Consistent with her position, defendant's counsel instructed Mr. Jacobson not to answer lines of inquiry about elephants who were born in captivity. See e.g., id. at 47-58, 287.

7. At a status hearing the next day, October 25, 2007, plaintiffs' counsel raised this issue with the Court and requested a ruling that would require Mr. Jacobson to respond to these questions. To decide the matter, the Court requested an opportunity to read Mr. Jacobson's deposition transcript. See Transcript of Hearing (October 25, 2007) at 23.

8. On November 5, 2007, this Court issued an Order requiring defendant to produce Mr. Jacobson for an additional two hours of testimony. See Order (Document No. 220). In that Order, the Court observed that “[r]ather than make their objections on the record but then allow the witness to answer the questions, subject to a later ruling by me, defendants’ counsel instructed the witness not to answer the questions,” and that defendant’s argument as to why Mr. Jacobson could refuse to answer the questions at issue “has no merit.” Id. at 1-2.

9. By letter dated December 27, 2007, plaintiffs’ counsel sent defendant’s counsel a copy of the invoice from the reporting company for the cost of recording Mr. Jacobson’s November 20 deposition, and requested defendants to pay that expense. See Exhibit 4. By letter dated January 3, 2008, defendant’s counsel refused to do so, stating that “[d]efendant has no obligation to and will not pay for plaintiffs’ share of court reporting expenses.” See Exhibit 5.

#### ARGUMENT

Federal Rule of Civil Procedure 30(d)(2) provides that “[t]he court may impose an appropriate sanction . . . incurred by any party – on a person who impedes, delays, or frustrates the fair examination of the deponent.” See also Banks v. Office of Senate Sergeant-at-Arms & Doorkeeper, 222 F.R.D. 1, 6 (D.D.C. 2004) (“directing a witness not to answer a question on the grounds of relevance is a clear violation of the Federal Rules of Civil Procedure and sanctionable”) (citing Fed. R. Civ. P. 30(d)).

The assessment of expenses incurred in relation to a motion under Rule 30(d)(2) in turn “is made subject to the provisions of Rule 37(a),” Note to 1970 amendment to Rule 30(d), which provides that when a motion to compel is granted:

the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

As explained in Cobell v. Norton, 213 F.R.D. 16, 28 (D.D.C. 2003), "[t]he mandatory language of th[is] Rule dictates that the Court must require the party or deponent, or both, to reimburse the moving party for reasonable expenses incurred in making the motion to compel, unless the Court finds that one of the specified conditions for not making an award exist." (Emphasis added) (footnote omitted).

Here, in light of this Court's ruling that defendant's argument for instructing Mr. Jacobson not to answer the questions at his October 24, 2007 deposition "has no merit," and that "Judge Sullivan never indicated that discovery as to [the captive born] elephants was precluded or that such discovery was not relevant," (Document No. 22), defendant's position on this matter certainly was not "substantially justified." Fed. R. Civ. P. 37(a). Defendant's position was also entirely unjustified in light of the fact that defendant could have raised this objection before Mr. Jacobson was deposed on October 24, 2007, so that the matter could have been resolved before then and there would have been no need for Mr. Jacobson to return for a second day of testimony. Accordingly, pursuant to both Rule 30(d) and Rule 37(a), defendant should be required to at least reimburse plaintiffs for the reporting costs incurred in having to conduct a second deposition of Mr. Jacobson.

**CONCLUSION**

For the foregoing reasons, plaintiffs' motion should be granted, and defendant should be ordered to reimburse plaintiffs in the amount of \$1,056.45 for the reporting costs associated with Mr. Jacobson's November 20, 2007 deposition.

Respectfully submitted,

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