UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MOTION TO QUASH SUBPOENAS TO PLAINTIFFS' COUNSEL OF RECORD OR IN THE ALTERNATIVE FOR PROTECTIVE ORDER AND MEMORANDUM IN SUPPORT THEREOF

INTRODUCTION

As authorized by the Court at the evidentiary hearing held on March 6, 2008, plaintiffs are hereby moving to quash the subpoenas issued by defendant Feld Entertainment, Inc. ("FEI") for three of plaintiffs' counsel of record to testify at the hearing, which has been continued until May 30, 2008.[1]

FEI cannot satisfy the stringent standard for compelling testimony from counsel of record. The motions at issue request judicial enforcement of discovery orders directed at plaintiffs and the non-party Humane Society of the United States ("HSUS"), and the Court has now heard

[1] As the Court is aware, plaintiffs intended to file this motion prior to the initial February 26, 2008 hearing, but plaintiffs were instructed by the Court that plaintiffs' "objections" should instead be addressed at the hearing itself. See 2/20/08 Minute Order. Accordingly, at the beginning of the hearing, plaintiffs orally moved to quash the subpoenas issued to counsel and to otherwise limit the scope of the hearing. The Court indicated that it would take plaintiffs' objections under advisement and at the continuation of the hearing on March 6 the Court authorized plaintiffs to file their motion in written form.

extensive testimony from representatives of all of the organizational plaintiffs and HSUS regarding their search for documents and responses to the discovery requests at issue. As for plaintiff Tom Rider, the Court has already found that the parties can rely on his eleven-hour deposition, see Transcript of January 8, 2008 Status Hearing (previously filed as DE 252-2) at 24-25, 30, at which he was "exhaustively examined," DE 245 at 1, including with regard to his response to the discovery Order. Accordingly, there is no justification for the extraordinary step of compelling plaintiffs' counsel of record to become witnesses in this proceeding, which FEI advised the Court would be "comprehensive" without any testimony from counsel of record. Id. at 23; see also Jennings v. Family Management, Inc., 201 F.R.D. 272, 277 (D.D.C. 2001) (Facciola, J.) ("[A]s a general matter, courts regard attorney depositions unfavorably . . . [A] party seeking to depose an adversary's counsel must prove its necessity.").

In addition, Judge Sullivan has already ruled that he does not want plaintiffs' counsel of record in this seven-year-old dispute to become witnesses precisely because "[s]uch a turn in the litigation would [] be highly prejudicial to plaintiffs in pursuit of their [Endangered Species Act] claim." DE 176 at 6-7. That ruling should be regarded as the "law of the case," especially because requiring testimony from plaintiffs' counsel may also seriously impair the Court's own overriding interest in bringing this protracted dispute to a conclusion.

In any event, plaintiffs respectfully urge the Court to resolve this motion well in advance of the resumption of the evidentiary hearing on May 30 so that, if the Court finds that one or more of plaintiffs' counsel of record should testify, plaintiffs and their counsel will have sufficient time to assess how to proceed with the hearing in light of that ruling, i.e., (1) whether counsel can or should continue to represent plaintiffs at the hearing and, if not, how plaintiffs

will be represented; (2) whether counsel should arrange for their own legal representation at the hearing; and (3) whether plaintiffs will pursue reconsideration of such a ruling.

BACKGROUND

On December 20, 2007, the Court announced its intention to hold an "evidentiary hearing" concerning plaintiffs' compliance with Judge Sullivan's August 23, 2007 discovery Order, and the Court scheduled a status conference to review the "procedures for the hearing to include a discussion of the witnesses to be called." DE 241 at 1. At the January 8, 2008 status conference, the Court explained that it viewed the evidentiary hearing as an "extraordinarily preliminary" proceeding for "expedit[ing]" a determination as to how plaintiffs carried out their discovery obligations in response to the August 23, 2007 Order. DE 252-2 at 21.

FEI's counsel represented to the Court and plaintiffs that the hearing need last no longer than a single day – including plaintiffs' presentation of any witnesses they intended to call. See DE 252-2 at 6 (Court: "So one full day, okay." Mr. Simpson: "I don't think it would take any more than that, your Honor."); id. at 23 (Mr. Simpson: "I would say one day for the whole thing. I didn't want to be misunderstood.") (emphasis added). Consistent with that representation, FEI's counsel identified the "principal" witnesses from whom FEI sought testimony as five specific individuals: Mr. Rider along with enumerated representatives of the four organizational plaintiffs who had previously "provided declarations in response to Judge Sullivan's order" concerning their organizations' search for responsive materials. Id. at 4. In addition, FEI's counsel stated that there should be testimony from a "document custodian" from plaintiffs' counsel's law firm (Meyer Glitzenstein & Crystal) in order to "produce the original" of certain

documents Mr. Rider provided to the firm. Id.[2]

Finally, while acknowledging that the Humane Society of the United States ("HSUS") was "really not part of the motion" then at issue (which was directed solely at plaintiffs), FEI indicated that to be "comprehensive," the Court should allow FEI to also call a single representative of that organization – depending on the Court's consideration of a motion to enforce that FEI advised the Court it intended to file concerning that non-party. Id. (emphasis added).[3] However, while advising the Court as to what it believed a "comprehensive" evidentiary hearing would entail, FEI's counsel did not say, or even remotely imply, that FEI needed to procure the testimony of any of plaintiffs' counsel of record for any reason. Moreover, FEI specifically represented to the Court and plaintiffs that FEI did not intend to call any witnesses from the non-party Wildlife Advocacy Project ("WAP"). Id. at 26 (FEI counsel: "I didn't contemplate the Wildlife Advocacy Project being a witness" in the hearing).

Based on the representations made by FEI at the status hearing, plaintiffs – as instructed by the Court – explored the availability of the enumerated witnesses for various potential hearing dates provided by the Court. Representatives of all of the organizational plaintiffs save one (Mr. Markarian) were able to attend a hearing on February 26. Accordingly, what was supposed to be a one-day hearing was scheduled for February 26, and was extended to a second day (March 6)

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[2] FEI subsequently subpoenaed the "original copies" of the documents Mr. Rider transmitted to the law firm, and the firm made those materials available to FEI for a visual inspection. Nonetheless, FEI persisted in issuing a subpoena to the firm's "document custodian" so that she could make the very same documents available to FEI in open Court.

[3] FEI represented that the "most likely" organizational witness for HSUS would be Michael Markarian, the same individual FEI identified as the Fund for Animals witness from whom FEI sought testimony. See DE 252-2 at 5-6.

only to accommodate Mr. Markarian's testimony.

Yet when FEI submitted its witness list to plaintiffs and the Court just a few weeks later, FEI engaged in the classic bait and switch. Not only did FEI drastically expand its list of witnesses beyond what was represented to the Court and plaintiffs on January 8 – and far beyond a one-day hearing – but FEI, for the first time, identified (and subsequently issued subpoenas to) three of plaintiffs' counsel of record.[4]

The subpoenas and witness list, however, provide absolutely no indication as to the matters on which counsel are even being subpoenaed to offer testimony. Nor has FEI provided any explanation as to how an evidentiary hearing that FEI told the Court would be "comprehensive" without the testimony of counsel of record could somehow now require their involvement as witnesses.[5]

ARGUMENT

As is par for the course in this litigation, when FEI is given an inch, it invariably tries to take a mile. See, e.g., DE 176 at 5, 8 ("[t]hrough its numerous discovery-related motions, [FEI]

[4] These witnesses are Katherine Meyer (plaintiffs' lead counsel), Eric Glitzenstein, and Jonathan Lovvorn.

[5] This confusion is compounded, rather than alleviated, by the subpoenas issued to counsel. Not only do those subpoenas give no indication whatsoever as to what counsel of record are being subpoenaed to testify about, but they are directed to counsel in dual capacities. Thus, with regard to Ms. Meyer and Mr. Glitzenstein, both the subpoenas and FEI's witness list refer to "Meyer Glitzenstein & Crystal/Wildlife Advocacy Project" – a hybrid entity that does not exist – and hence suggest that FEI is demanding their testimony both as counsel of record and as officers of a non-party that is not the subject of the motions at issue and that FEI expressly represented to the Court need have no involvement whatsoever in this evidentiary hearing. Likewise, with respect to Mr. Lovvorn (who is employed by HSUS), the subpoena and witness list refer to "Fund for Animals/Humane Society of the United States" – another hybrid entity that does not exist – and thus also suggest that his testimony is being sought both in his capacity as counsel of record and as an employee of HSUS.

has shown that its efforts to obtain information to impugn plaintiff Tom Rider and learn every detail of the media and litigation strategies of its opponents are relentless"). In any event, FEI's effort to force plaintiffs' counsel to now become witnesses at a proceeding that FEI has in effect conceded does not require such involvement must fail for several compelling reasons.

A. FEI Cannot Satisfy The Stringent Standard For Compelling Testimony From Plaintiffs' Counsel Of Record, Particularly Because FEI Represented At The January 8, 2008 Status Hearing That A "Comprehensive" Evidentiary Hearing Did Not Require Counsel's Testimony.

As this Court has explained, courts generally regard efforts to subpoena opposing counsel "unfavorably because [such efforts] may interfere with the attorney's case preparation and risk disqualification of counsel who may be called as witness[es]." Jennings, 201 F.R.D. at 276-77; see also Shelton v. Am. Motors Corp., 805 F.2d 1323, 1330 (8th Cir. 1986) ("[t]he harassing practice of deposing opposing counsel (unless that counsel's testimony is crucial and unique) appears to be an adversary trial tactic that does nothing for the administration of justice but rather prolongs and increases the costs of litigation, demeans the profession, and constitutes an abuse of the discovery process"). Accordingly, to overcome the strong "presumption" against such testimony, the party demanding it must demonstrate that "(1) no other means exist to obtain the information; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." Evans v. Atwood, No. 96-2746 (RMU), 1999 WL 1032811, *2 (D.D.C. Sept. 29, 1999) (footnotes omitted); Jennings, 201 F.R.D. at 277 (same); id. at 279 (a party demanding testimony from opposing counsel must satisfy its "burden as to the compelling need" for the testimony) (emphasis added). FEI cannot meet any of these stringent standards here, let alone all of them.

First, especially in view of the purpose of the evidentiary hearing as described by the Court itself – i.e., to facilitate the Court's understanding of "what people did as they responded" to the discovery requests and to allow the Court to make a "preliminary determination" regarding compliance with the Court's discovery orders, DE 252-2 at 21 – it is certainly not the case that testimony from counsel of record is the only available "means" to "obtain the information" necessary for the proceeding. Id. Rather, as recognized by FEI itself at the January 8 status hearing, id. at 21, the pertinent testimony is that supplied by Mr. Rider (who has already been extensively deposed on this very subject) and by the organizational representatives who oversaw the searches carried out by their respective organizations and who, in fact, have now testified concerning how and what they searched. In short, not only do "other means exist" to obtain the information the Court has deemed pertinent, but those very means have already been employed. See also N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 86 (M.D.N.C. 1987) ("[D]efendant fails to explain why the deposition of plaintiffs' president concerning the matter would not be sufficient . . . [D]efendant utterly fails to demonstrate that [plaintiffs' counsel] is the only person who would be able to . . . present evidence on the issue."); Harriston v. Chicago Tribune Co., 134 F.R.D. 232, 233 n. 2 (N.D. Ill. 1990) (quashing deposition where information sought was "readily obtainable from other sources"); cf. Jennings, 201 F.R.D. at 278 (permitting deposition of opposing counsel because she was in a "unique position to testify as to the information defendants seek").

Second, although FEI has yet to articulate how testimony from plaintiffs' counsel of record is even relevant – and FEI evidently perceived no such relevance at the status hearing whose specific purpose was to address the "witnesses to be called" at the evidentiary hearing,

DE 241 at 1 – or even what it wants counsel to testify about, it is apparent that almost any testimony FEI seeks to elicit will unavoidably raise serious attorney-client and other privilege concerns, and hence that the subpoenas should be quashed for that reason as well. See Evans, 1999 WL 1032811 at *2. Indeed, at the January 8 status hearing, the Court recognized, even with regard to the anticipated testimony of the plaintiffs themselves, that the need to avoid divulging attorney-client communications would be a "significant consideration" and that the Court would be "very sensitive" to that concern at the hearing. DE 252-2 at 27. Plainly, that concern also argues strongly against compelling plaintiffs counsel of record to take the stand in the evidentiary hearing, the central focus of which is whether plaintiffs have complied with the Court's discovery orders. See In Re Sause Bros. Ocean Towing, 144 F.R.D. 111, 117 (D. Or. 1991) (refusing to allow compelled testimony of attorney where the requesting party "has not shown that deposing [opponent's] counsel is the only means to discover the information it seeks, nor that the proposed deposition would not, as appears certain, invade areas protected by privilege"); see also N.F.A. Corp., 117 F.R.D. at 85 ("[O]ften deposition of the attorney merely embroils the parties and the court in controversies over the attorney-client privilege and more importantly, involves forays into the area most protected by the work product doctrine – that involving an attorney's mental impressions or opinions.").

Third, and perhaps most important, FEI has as much as conceded that there is no "compelling need" for the testimony of plaintiffs' counsel of record, Jennings, 201 F.R.D. at 279, and that the testimony is not "crucial" to this proceeding – which is alone sufficient to quash the subpoenas. Evans, 1999 WL 1032811 at *2 (emphasis added). Once again, at the January 8 status hearing, FEI advised the Court as to what it believed would constitute a "comprehensive"

evidentiary hearing, yet made no mention of any – let alone a "compelling" or "crucial" – need to hear testimony from any of plaintiffs' counsel of record. DE 252-2 at 5. To the contrary, FEI represented that "we would need to hear from Tom Rider, from Tracy Silverman, from Nicole [Paquette], from Michael Markar[i]an, [] from Lisa Weisberg," and from a "document custodian from Meyer[] Glitzenstein & Crystal." Id. at 4-5 (emphasis added). But the Court has now heard live testimony from all of these witnesses except Mr. Rider, whose "exhaustive[]" deposition testimony the Court has reviewed. DE 245 at 1. In addition, the Court has heard from two additional witnesses who were not even alluded to on January 8.[6]

In other words, the Court has conducted a hearing that has already gone well beyond what FEI itself represented would be a "comprehensive" proceeding from defendant's own vantage point. Accordingly, whatever purpose FEI actually has in now demanding that plaintiffs' counsel of record become witnesses, it has nothing to do with their testimony being genuinely "crucial" to a resolution of the specific discovery motions before the Court. Jennings, 201 F.R.D. at 277.[7]

[6] In particular, FEI subpoenaed a document custodian for WAP and the former Executive Director of that organization (who had just been deposed several days earlier) although, once again, FEI specifically advised the Court at the January 8 status conference that it "didn't contemplate the Wildlife Advocacy Project being a witness" at all in the evidentiary hearing. DE 252-2 at 26. WAP has also been deposed for seven hours over two days and responded to three document subpoenas served on that non-party organization.

[7] Plainly, FEI's mere preference for now obtaining opposing counsel's testimony cannot satisfy the "compelling need" standard set forth by the Court. Jennings, 201 F.R.D. at 279. If it did, testimony by counsel of record would be a routine, rather than an extraordinary, occurrence.

B. Judge Sullivan's Prior Ruling That Plaintiffs' Counsel Of Record Should Not Be Compelled To Become Witnesses Should Be Followed As The Law Of The Case.

In addition to the fact that FEI has as much as conceded that it is not essential that counsel of record testify, the subpoenas should also be quashed because Judge Sullivan has already held in clear and unmistakable terms that he desires to avoid having plaintiffs' counsel become witnesses in this case because of the severe "prejudice" it could inflict on plaintiffs. In particular, Judge Sullivan was extremely concerned that forcing plaintiffs' counsel to become witnesses risked creating a conflict that might necessitate a change in counsel after seven years of litigation, as well as diverting counsel from their representation of plaintiffs' interests in this litigation – i.e., the very reasons that courts ordinarily disfavor attorney testimony. See DE 176 at 6 (refusing to allow counterclaim to proceed because it would compel plaintiffs' counsel to become witnesses and potentially "create a need for new counsel to pursue the 'taking' claim where no need currently exists. Such a turn in the litigation would be highly prejudicial to plaintiffs in pursuit of their ESA claim") (emphasis added). Especially because FEI cannot demonstrate that there is any compelling reason to deviate from Judge Sullivan's prior ruling, it should be regarded as the "law of the case" on the question of whether counsel of record should be compelled to participate as witnesses. Spirit of the Sage Council v. Kempthorne, 511 F. Supp. 2d 31, 38 (D.D.C. 2007) (Sullivan, J.) ("the 'law of the case' doctrine instructs . . . that 'where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again'") (quoting Singh v. George Washington Univ., 383 F. Supp. 2d 99, 101 (D.D.C. 2005)); see also Kimberlin v. Quinlan, 199 F.3d 496, 500 (D.C. Cir. 1999) ("The law-of-the-case doctrine rests on a simple premise: the *same* issue presented a

second time in the *same* case should lead to the *same* result") (italics in original; internal citations omitted).[8]

Indeed, plaintiffs respectfully submit that the Court should be especially reluctant to deviate from Judge Sullivan's prior determination that the Court should avoid testimony from plaintiffs' counsel of record because compelling counsel to now become witnesses may have dire consequences not only for plaintiffs' ability to pursue their ESA claim – as articulated by Judge Sullivan – but may seriously impair the Court's own ability to finally bring this case to a conclusion. Thus, as Judge Sullivan's ruling on the proposed RICO counterclaim recognized, FEI's objectives in compelling counsel of record to furnish testimony plainly include forcing a change in plaintiffs' counsel at this advanced stage of the litigation or, at minimum, disrupting and impeding counsel's ability to complete the various tasks that are necessary to bring the case to trial. See DE 176 at 6-7; see also Evans, 1999 WL 1032811 at **2-3 (compelling testimony from counsel "may lead to the disqualification of counsel who may be called as witnesses" and is at least "likely to have a disruptive effect on the attorney-client relationship and on the litigation of the case") (internal quotation omitted).

FEI has as much as acknowledged that forcing a change in plaintiffs' counsel is precisely what FEI contemplates, notwithstanding Judge Sullivan's ruling that he does not want that result. Thus, in arguing (unsuccessfully) against a stay in the related RICO action on the grounds that it

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[8] Notably, FEI has itself relied heavily on the law of the case doctrine in arguing that the Court should refrain from deviating from prior pronouncements it has made in this case. See, e.g., DE 190 at 3 (contention that the Court's prior ruling concerning standing "is controlling as the law of the case") (emphasis added) (citing Spirit of the Sage Council). Accordingly, FEI can hardly contend with any pretense of consistency that the Court should give short shrift to the same doctrine with regard to the issue at hand.

should be addressed differently from FEI's "dilatory" counterclaim in this case, DE 176 at 4, FEI acknowledged that compelling plaintiffs' counsel to furnish testimony could indeed "create[] a potential conflict of interest" and that this was one of the principal reasons why Judge Sullivan had refused to allow the RICO counterclaim to go forward. DE 6 in No. 1:07-cv-01532-EGS, at 20 ("The Court recognized [in this case] that adding the RICO counterclaim to the ESA Action could have created the need for the change of counsel in that case and consequently could have delayed the litigation.") (emphasis added); see also id. at n. 8 ("In fact, the representation [under such circumstances] may violate District of Columbia Rule of Professional Conduct 3.7(a)).").

Accordingly, it is evident that FEI is now seeking to use the evidentiary hearing to accomplish that which FEI has conceded Judge Sullivan did not want to occur because it might "indefinitely prolong this litigation on a very narrow issue – whether or not defendants' treatment of its elephants constitutes a taking under the ESA." DE 176 at 8.[9]

[9] FEI argued that the related RICO case should be treated differently than the RICO counterclaim because the RICO action is "wholly separate and distinct" from the ESA case, and because plaintiffs "voluntarily retained the same law firm with full knowledge" that plaintiffs' counsel might become witnesses. DE 6 in No. 1:07-cv-01532-EGS, at 2, 20. Judge Sullivan, however, held that FEI had both "seriously misconstrued" his rulings in this case and "grossly distort[ed] the facts." DE 23 in No. 1:07-cv-01532-EGS, at 4, 7. He reiterated that he had "rejected FEI's RICO counterclaim because [he] found the claim was made with a dilatory motive, would cause undue delay, and would prejudice the plaintiffs in the ESA action," id.at 5, and he held that the same reasons supported staying the RICO suit, especially because of the "painfully drawn out" and "protracted" nature of this case. Id. at 9. Particularly in this context, it is difficult to imagine that Judge Sullivan would favor any development that might result in disqualification of plaintiffs' counsel of record and/or otherwise seriously impede plaintiffs' ability to pursue this case – i.e., the very concerns that led the Court to reject the counterclaim and stay the RICO case.

C. At Minimum, If The Court Concludes That FEI Has A Compelling Need For The Testimony Of Plaintiffs' Counsel Of Record In This Proceeding, The Court Should Consider Whether There Are Means Of Meeting That Need Short Of Having Plaintiffs' Counsel Provide Live Testimony.

As discussed, the Court should quash the subpoenas issued to plaintiffs' counsel of record in view of Judge Sullivan's prior rulings and because FEI cannot, in any case, satisfy the rigorous standards for compelling such testimony. However, should the Court find that, notwithstanding FEI's previous representation to the contrary, FEI in fact has a compelling and specific need for such testimony, the Court should then consider whether there are "other means" of satisfying that need without compelling counsel to testify at the same hearing at which they are attempting to represent plaintiffs. Evans, 1999 WL 1032811 at * 2. For example, the Court could consider requiring the submission of sworn declarations in advance of the hearing addressing any specific questions the Court believes are crucial to a resolution of the outstanding discovery issues but have not been (and cannot be) adequately addressed by any of the other witnesses and/or other materials available to the Court. Such an approach would also assist the Court in avoiding the grave privilege problems that would be entailed by forcing counsel of record to take the stand. See N.F.A. Corp., 117 F.R.D. at 86 (suggesting alternatives to testimony from counsel, including to minimize attorney-client and work-product controversies).

CONCLUSION

For the foregoing reasons, the Court should quash the subpoenas issued to plaintiffs' counsel of record. Plaintiffs also urge the Court to rule on this motion sufficiently in advance of the resumption of the hearing on May 30 so that plaintiffs and their counsel may fully evaluate their options (including whether to seek reconsideration of any ruling that counsel must testify) in

light of the Court's ruling and counsel's ethical obligations towards their clients.

Respectfully submitted,

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