

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**PLAINTIFFS’ MOTION FOR CLARIFICATION OF COURT’S
ORDER CONCERNING THE CLOSE OF
FACT DISCOVERY AND SUPPORTING MEMORANDUM**

Plaintiffs request clarification of the Court’s December 18, 2007 Order setting January 30, 2008 as the fact discovery cut-off, Order (Dec. 18, 2007) at 4, to make clear that a third party that was served with a subpoena duces tecum with a return date within the discovery cut-off is not relieved of its duty to comply with the subpoena. This motion is necessitated by the fact that defendant Feld Entertainment, Inc. has instructed a third party whom plaintiffs served with a subpoena on January 25 that it need not comply with the subpoena now that discovery has closed, although FEI simultaneously is seeking the production of documents after January 30 from other parties that FEI itself has subpoenaed.

Plaintiffs have been negotiating with the subpoenaed entity for several weeks in an effort to secure compliance with the subpoena, but were recently informed that those negotiations have been halted because of FEI’s representation to the subpoenaed entity that compliance with the subpoena at this time would violate this Court’s Order. Accordingly, the subpoenaed entity has

informed plaintiffs that “absent a court order,” it will not comply with the subpoena served on it on January 25, 2008. Therefore, plaintiffs seek clarification from this Court in an effort to secure compliance with the subpoena without having to resort to additional litigation over this matter with a motion to compel.

Background

On December 18, 2007, this Court issued an Order “extend[ing] fact discovery to January 30, 2007 [*sic*].” DE 239.¹ Leading up to January 30, both plaintiffs and defendant issued third-party subpoenas duces tecum pursuant to Rule 45 of the Federal Rules of Civil Procedure, with a return date set on or before January 30. For example, on January 23, 2008, FEI served a subpoena duces tecum on plaintiffs’ counsel’s law firm Meyer Glitzenstein & Crystal (MGC), and set January 30, 2008 as the return date for the subpoena. Although MGC lodged objections to the subpoena, on February 8 it produced many of the requested materials, and FEI accepted these materials despite the fact that the January 30 discovery deadline had passed. FEI subsequently filed a motion to compel additional materials from MGC. See DE 257.

On January 25, 2008, plaintiffs issued a subpoena duces tecum to the railroad company CSX Transportation, Inc., with a return date of January 30, 2008. The requested records pertain to the amount of time the endangered Asian elephants spend chained and confined in Ringling Brothers’ rail cars, and are therefore highly relevant to plaintiffs’ claims in this case. See Complaint ¶ 75. On January 30, 2008, CSX wrote to plaintiffs objecting to the subpoena on various grounds, but indicating a willingness to work with plaintiffs to arrive at mutually agreeable accommodations that would allow CSX to comply with the subpoena. Plaintiffs’ counsel then conferred with counsel for CSX in an effort to reach various accommodations and

¹ Although the Court stated 2007, all parties understood that the Court meant 2008.

secure CSX's voluntary compliance with the subpoena. During this process CSX continued to indicate its willingness to work with plaintiffs in complying with the subpoena.

However, on March 27, 2008, plaintiffs received a letter from Dominic MacKenzie, counsel for CSX, abruptly changing course on CSX's willingness to cooperate with plaintiffs on the grounds that Lisa Joiner, counsel for defendant FEI, had contacted him and advised him in writing "that all fact discovery . . . closed on January 30, 2008," and that CSX's compliance with the subpoena "would be a violation of the court's discovery cut-off." Exhibit 1 (March 27, 2008 letter from Dominic MacKenzie to Kimberly Ockene); see also Exhibit 2 (March 21, 2008 letter from Lisa Zeiler Joiner to Dominic MacKenzie). Therefore, Mr. MacKenzie stated, CSX would not respond to plaintiffs' subpoena "absent a court order," "so as to not violate any court order or provide any party to your dispute an unfair advantage or disadvantage." Exhibit 1.

Argument

Plaintiffs seek an order from the Court clarifying that the January 30, 2008 deadline for fact discovery does not relieve an entity that was timely served with a Rule 45 subpoena duces tecum of its obligation to comply with that subpoena. Such clarification would aid plaintiffs in their attempts to secure CSX's voluntary compliance with the subpoena without having to file a motion to compel in the Middle District of Florida (from where the subpoena was issued). Moreover, if the deadline for discovery controlled, a subpoenaed party could simply refuse to comply with the subpoena for some period of time, hoping to "run out the clock" on the discovery deadline, and then assert that it is absolved of any obligations under the otherwise mandatory subpoena.

Indeed, as described above, while insisting that parties to whom plaintiffs have issued subpoenas would violate this Court's Order setting a discovery cut-off if they were to produce

records after the close of discovery, defendant itself continues to pursue compliance with a subpoena that it issued to plaintiffs' law firm, concerning documents that were provided after the close of discovery. See DE 257 (motion to compel against MGC).

Plaintiffs believe that, had FEI not interfered and instructed CSX that it would violate this Court's Order by complying with its subpoena, CSX would likely have produced responsive records without the necessity of further litigation. Accordingly, plaintiffs request an order from this Court clarifying that CSX must respond to plaintiffs' January 25, 2008 subpoena despite the fact that the fact discovery deadline has passed.

Respectfully submitted,

/s/ Kimberly D. Ockene
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Dated: April 3, 2008