UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 03-2006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.,	:	
Defendant.	:	

DEFENDANT'S RESPONSE IN OPPOSITION TO MOTION FOR CLARIFICATION OF COURT'S ORDER CONCERNING THE CLOSE OF FACT DISCOVERY

Plaintiffs' self-styled Motion for Clarification of Court's Order Concerning the Close of Fact Discovery (4/3/08) (#287) ("Motion") is a misnomer. What plaintiffs are really asking the Court to do is to (1) alter or extend the January 30, 2008 fact discovery deadline yet again, and (2) issue an advisory ruling regarding a third party's obligations to respond to a belated subpoena issued by plaintiffs out of the Middle District of Florida. Feld Entertainment, Inc. ("FEI") objects to the Motion, and the Court should deny both of plaintiffs' requests for the reasons that follow.

PROCEDURAL BACKGROUND

The Court should be aware of the following facts that are relevant to, but not set forth in, the Motion. For purposes of the Motion, two orders are operative. First, on August 23, 2007, Judge Sullivan ordered that "fact and expert discovery in this case shall close on December 31, 2007. This Court will view requests for extension of this discovery deadline with disfavor given that the parties have already been engaged in discovery for more than three and a half years." (Order at 11 (8/23/07) (#178)). He then referred the case to Magistrate Judge John Facciola for

purposes of overseeing the remainder of discovery. Id. In December, describing this case as in the "final stages of what has been a complicated and demanding discovery process," Judge Facciola ordered that "With the approval of Judge Sullivan, I have decided to extend fact discovery to January 30, 2007 [sic], and increase the number of depositions the parties may take to 15." See Order at ¶5 (12/18/07) (#239). Those orders stand, and plaintiffs have never sought to alter, amend or otherwise extend the January 30, 2008 fact discovery deadline. See generally Docket, Civil Action No. 03-2006 (D.D.C.).

On the night of January 28, 2008, counsel for FEI, Lisa Joiner, received an e-mail from plaintiffs' counsel, Katherine Meyer, stating: "Please see attached cover letter and attachments." See Exhibit 1, Meyer e-mail to Joiner with all attachments. The cover letter to FEI's counsel was dated January 28, 2008 and stated that the attached copies were of subpoenas "that were served today" on six different railroads. Id. The attached copies of all six subpoenas, however, along with their respective cover letters were dated January 25, 2008 and indicated they had already been hand-delivered. Id.[1] FEI was never provided with any proof of service for the subpoenas and none is attached to the Motion. Notably, every single cover letter to the six railroads purportedly served by plaintiffs and sent to FEI's counsel stated:

> The return date on the subpoena is January 30, 2008 because that is the date set by the Court for the end of fact discovery.

See id. at cover letters, signed by Katherine Meyer.

Thus, plaintiffs apparently served six railroads with document subpoenas that provided, at most, ***two days*** for production or, pursuant to Rule 45, objections. None of the railroads were

[1] Having apparently decided that January 25 sounds better, the Motion now reverts back to that date for service and claims without proof that CSX was "served with a subpoena on January 25." (Motion at 1). This is contrary to the January 28 date of service claimed by CSX, see Exhibit 1 to Motion, and the date that Ms. Meyer represented to FEI's counsel. Because no proof or affidavit of service is attached to the Motion, FEI proceeds herein on the January 28 service date. Conversely, if on reply plaintiffs now claim that all railroads were served on January 25, then FEI takes issue with the misrepresentation of the service date in the correspondence to its counsel as well as the delayed service on FEI's counsel until two days prior to the discovery cut-off.

local, yet all of the subpoenae purported to require the production of documents and materials at counsel's office in D.C. – well beyond the 100-mile jurisdictional limit of this Court. Cf. Exhibit 1 at subpoenas (production location at counsel's office) with Fed.R.Civ.P. 45(e) & (c)(3)(A)(ii) ("A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii)."). Plaintiffs were also fully aware that fact discovery ended on January 30, and cannot now claim ignorance of that deadline, because they recognized it explicitly in each of their cover letters accompanying the subpoenae and sent to FEI.

To the best of defense counsel's knowledge, none of the six railroads were able to comply with the two-day deadline contained in the plaintiffs' subpoena. At the time of this filing, FEI's counsel has been able to determine the following: (1) the status of the responses, if any, by Union Pacific Railroad and Florida East Coast Railway is unknown, see Exhibit 2, Joiner Declaration at ¶ 1a; (2) Norfolk Southern's in-house counsel telephoned Katherine Meyer, who extended the time period for Norfolk Southern to produce documents after January 30, 2008, which it did, id. at ¶ 1b; (3) Burlington Northern Santa Fe Railway's legal department initially objected to the January 30, 2008 return date and then produced documents to plaintiffs' counsel on February 7, 2008, id. at ¶ 1c; (4) Kansas City Southern Railway objected without producing documents and moved to quash the subpoena, which plaintiffs then withdrew, see id. at ¶ 1d; see also Exhibit 3, Stipulation and Order of Dismissal, Misc. Action 08-9002-MC-W-ODS (3/5/08); and (5) CSX Transportation Corporation objected to the subpoena, see Motion at 2.[2]

Despite the factS that discovery had closed pursuant to Court order, that plaintiffs were

[2] Apart from Kansas City Southern Railway's objections, a copy of which was served on FEI, FEI has not seen the objections raised by the third parties, including CSX's, to these subpoenas. Nor have plaintiffs made any of the productions available to FEI. Norfolk Southern was willing to provide copies to FEI, but it was uncertain whether it retained the full production set.

fully aware it had closed, and that plaintiffs had issued document subpoenas two days before the deadline that were ***incapable of timely response in compliance with the deadline***, plaintiffs never advised FEI or this Court that they had an issue with their document subpoenas and the fact discovery deadline. See generally Exhibit 4, Hearing Tr. (2/7/08) (no mention of any railroad subpoenas by plaintiffs' counsel). Instead, plaintiffs unilaterally decided to resort to self-help and sought to "negotiate" the discovery deadline with unwitting third parties and without the knowledge or consent of FEI or this Court. They did this after copying FEI's counsel on a cover letter accompanying the subpoenas that was designed to look like they were adhering to the Court's January 30, 2008 deadline. Plaintiffs were obligated, at a minimum, to disclose to this Court and to FEI what they were doing in the face of a standing court order, which they were violating. They chose not to.

Without the benefit of this background, plaintiffs now ask this Court to approve their conduct *vis a vis* these third parties and to order that the January 30, 2008 discovery deadline did "not relieve CSX of its obligation to comply with the January 25, 2008 subpoena." See plaintiffs' proposed order attached to Motion. The Court should decline to do the former and has no jurisdiction to do the latter.

PLAINTIFFS' CONDUCT IS DISTINGUISHABLE

Plaintiffs' efforts to compare their conduct to FEI's is disingenuous. The Motion omits, but the Court will recall, that when one of the witnesses that FEI subpoenaed for January 30 was unable to appear, FEI filed a stipulation for the Court's consideration. The stipulation provided that the witness could be deposed in February without otherwise altering the fact discovery deadline, and it was negotiated with not only the witness' counsel but also plaintiffs' counsel. See Stipulation (1/30/08) (#248). The stipulation expressly states "the parties further agree that

this delay does not and will not otherwise extend the January 30, 2008 fact-discovery cut-off date in this case," and plaintiffs' counsel are signatories to it. Id. The Court entered the stipulation by minute order on January 30, 2008. See Minute Order (1/30/08). That stipulation, and the express language in it regarding the otherwise full effect of the deadline, would mean nothing if the parties were free to just ignore the January 30th deadline at their whim as plaintiffs now suggest in their Motion. Contrary to the stipulation, plaintiffs then proceeded to continue taking fact discovery from the railroads without advising FEI or this Court.

Plaintiffs' comparison to FEI's subpoena to Meyer Glitzenstein & Crystal ("MGC") is inapt. The MGC subpoena was served a week, not two days, before the January 30, 2008 discovery cutoff. See Exhibit 5, MGC Subpoena & notice to counsel (1/23/08). It contained five requests, three of which were to inspect originals of documents that even plaintiffs had to admit were responsive to FEI's document requests to Tom Rider. See id. at nos. 1-3. The other two categories sought the Federal Express airbills and wire transfer receipts for monies paid to Mr. Rider. FEI has maintained throughout that these documents requested in the MGC subpoena were responsive to Rider's document requests and should have been produced by Rider himself – without the need for a subpoena to MGC – because they were within his counsel's possession, custody and control. See Mem. Op. at 3-4 (2/23/06) (#59) (documents gathered or created by attorneys pursuant to their representation of that client are within client's control); see also Fed.R.Civ.P. 34(a) (granting parties right to inspect, copy, test or sample). But for plaintiffs' objections to this point, FEI should have received the documents subpoenaed from MGC directly from Rider in his production and been able to inspect originals of the same pursuant to Fed.R.Civ.P. 34.

Moreover, the subpoena was fully capable of response by the January 30, 2008 return

date: Plaintiffs' counsel, Howard Crystal, wrote FEI's counsel, George Gasper, on January 29, 2008 to advise FEI of MGC's objections. Exhibit 6, Crystal letter to Gasper (1/29/08). At that time, MGC stated, *inter alia*, that *copies* of most of the materials subpoenaed have already been provided to FEI, and thus, under the circumstances, MGC could "legitimately refuse to comply" with the subpoena altogether. Id. at 1-2. MGC did not make documents available for inspection or produce anything pursuant to the subpoena, and instead again unilaterally dictated its terms: "Accordingly, by Friday, February 8, 2008, MGC will provide you with a further response to the subpoena advising you as to what materials the Firm will make available and for what materials, if any, it is claiming a specific privilege." Cf. Rule 45(c)(2)(B) (party receiving subpoena may object within 14 day of service or by the subpoena's return date, which is earlier). Notably, the letter did not represent that MGC would be producing anything, only that a further response would occur on February 8, 2008.

As a result, FEI raised the dispute with the Court at the February 7, 2008 telephone hearing based upon the information available at the time, and stated that it anticipated filing a motion to compel. See Exhibit 4, Hearing Tr. at 17:12-19. On February 8, 2008, MGC unilaterally produced documents to FEI (including unnecessary copies of documents that FEI wanted to actually inspect). MGC did so without the knowledge or consent of FEI and without any negotiation with FEI. FEI responded on February 12, 2008 advising MGC that it would move to compel on the subpoena. See Exhibit 6, Gasper letter to Crystal (2/12/08).

Thus, the MGC subpoena is not an apt comparison to what plaintiffs have done with regard to the railroad subpoenas. Unlike the railroads, MGC is hardly an arm's length third party that lacks knowledge of the procedural background in this case. Unlike the railroad subpoenas, the subpoena to MGC was timely served and capable of response by the January 30, 2008

deadline. Unlike the railroad subpoenas, both opposing counsel (who is MGC) and the Court were advised that there could be issues with the MGC subpoena. Unlike the railroad subpoenas, the documents covered by the MGC subpoena were at least arguably, if not admittedly, in Tom Rider's possession, custody and control due to MGC's status as Rider's counsel.

THE MOTION IS INACCURATE

Finally, there are several false statements in the Motion that require a response. Plaintiffs' claim that FEI "has instructed a third party [CSX] that it need not comply with the subpoena now that discovery has closed" is false. See Motion at 1. FEI has made no such instruction, and the statement itself makes no sense. First, CSX is represented by its own outside counsel, Dominic MacKenzie. FEI's counsel, therefore, does not instruct CSX to do anything. CSX has its own counsel for guidance.

Second, FEI did not "instruct CSX that it would violate this Court's Order by complying with its subpoena." (Motion at 4). To the contrary, FEI's position is that while CSX, a non-resident third party, is not subject to this Court's jurisdiction, plaintiffs clearly are. The issue here is not whether CSX is violating the January 30 deadline, but whether plaintiffs are by unilaterally purporting to "grant" unknowing third parties "extensions" without the knowledge or consent of FEI or this Court. This was explained to CSX's counsel: On March 19, 2008, Ms. Joiner was out of the office and received a call from Mr. MacKenzie. See Exhibit 2, Joiner Declaration ¶ 2. On March 20, 2008, Ms. Joiner returned Mr. MacKenzie's phone call and spoke with him. During that conversation, Mr. MacKenzie advised that plaintiffs' counsel had purportedly granted CSX an extension of time to produce documents, and he inquired as to FEI's position. Ms. Joiner explained that while she did not know whether the Middle District of Florida would enforce the subpoena against CSX with a two-day response time, FEI did object to

plaintiffs' counsel own violation of this Court's discovery cutoff date by purporting to grant time extensions for responding to the subpoena. Ms. Joiner further explained that plaintiffs had not raised any extension of the January 30, 2008 deadline with FEI or the Court. Id. FEI then sent its written objections in a letter to Mr. MacKenzie along with the Court's orders regarding the fact discovery cutoff. Id. at ¶ 3. (The letter without the accompanying orders is attached as Exhibit 2 to the Motion.)

Third, plaintiffs imply that FEI is acting similarly to them by "simultaneously seeking the production of documents after January 30 from other parties that FEI itself has subpoenaed." (Motion at 1). This is incorrect. Unlike plaintiffs, FEI is not secretly contacting third parties unrelated to this case and telling them to just go ahead and produce documents weeks or months after the January 30 discovery deadline. FEI currently has motions pending to enforce third party document subpoenae that it served before the January 30 deadline and that were capable of response by the January 30 deadline. FEI's motions to compel were filed either before the discovery deadline (as against PETA) or once this Court had lifted its prohibition on the filing of motions (as against MGC), and both of which were disclosed in advance of filing to plaintiffs and the Court.

ARGUMENT

The relief plaintiffs seek is not attainable from this Court: The Motion claims to "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." (Motion at 3). The request presupposes that (1) CSX was timely served; and (2) CSX actually has an obligation to comply with that subpoena. The subpoena at issue, however, did not arise from this Court. This Court has no jurisdiction to rule on either of

those issues.[3] Only the Middle District of Florida would have jurisdiction to adjudicate whether a subpoena arising there and served two days before a discovery cutoff was timely and, ultimately, whether CSX has any obligation to comply with the subpoena at all. Plaintiffs' counsel themselves have stated there would be no such obligation. Cf. Exhibit 6, Crystal letter to Gasper at 1 (2/8/08) ("MGC could reasonably refuse to comply with the subpoena – which, once again, was served only five business days before the discovery cutoff date[.]"). Under these circumstances, it is no surprise that plaintiffs want to "secure CSX's voluntary compliance with the subpoena" without having to file a motion to compel. (Motion at 3). The only railroad subpoena previously brought to a court's attention resulted in plaintiffs' withdrawal of the subpoena. See Exhibit 3.

Plaintiffs argue that "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." (Motion at 3). There is no point to having a discovery deadline if it does not control. Notwithstanding the arguments now made in their Motion, plaintiffs know this as demonstrated by their prior actions – they participated in a stipulation specifically negotiated to seek Court approval to take a fact deposition after the deadline, and they included the deadline in all of the cover letters sent by plaintiffs' counsel accompanying the railroad subpoenas and copied to FEI. Apparently, once the railroads received these subpoenas, plaintiffs told them to just ignore the deadline explicitly set forth in their cover letters as well as the return date on the subpoenae. FEI has been prejudiced by receiving correspondence that purports to

[3] Rule 45 clearly grants the issuing court the power to enforce a subpoena. Fed.R.Civ.P. 45(e) (failure to obey a subpoena "may be deemed a contempt of the *court from which the subpoena issued*") (emphasis added). The issue of subpoena jurisdiction was also briefed at length in the miscellaneous action filed by PETA with this Court. See FEI's Opp. to PETA's Motion for Protective Order at 8-9 (Case No. 08-mc-0069) (2/29/08) (#9).

advise third parties of a discovery deadline, and then been provided no notice that plaintiffs subsequently told those very same third parties to ignore the deadline in the letter as well as the return date on the subpoena and proceed as if it did not exist. FEI should not have to expend resources following up on the veracity of representations made by plaintiffs' counsel in its written correspondence sent to FEI – it should be able to rely upon those representations. In the case of the railroad subpeonas, FEI received cover letters stating one thing (that there was a discovery deadline on January 30) while third parties were told another thing (disregard the January 30 deadline and produce afterwards). FEI objects to this kind of maneuvering and ask that the Court not condone it.

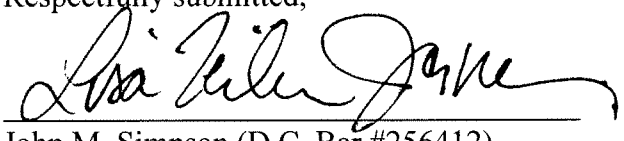
Although FEI further disagrees that failing to respond to the CSX subpoena with a two-day return is "running out the clock," that is an issue that only the Middle District of Florida could ultimately determine. Thus, this Court cannot grant the Motion to "clarify that CSX must respond to plaintiffs' January 25, 2008 subpoena despite the fact that the fact discovery deadline has passed." It is particularly telling that CSX's (or any other railroad's) objections are not attached to the Motion. As indicated in Exhibit 1 to the Motion, they clearly exist: "CSX will maintain its objections to the subpoena served upon it January 28, 2008." Id. at 1. Specifically, CSX does not want to incur the "substantial" expense of complying with the subpoena voluntarily. Id. at 1-2. FEI would like to know whether these railroads would have capitulated in producing documents pursuant to these subpoenas had they been told that the January 30 deadline was real rather than being "granted" unilateral extensions by plaintiffs' counsel. See, infra, note 2.

CONCLUSION

The issue here is not whether unknowing third parties can be coaxed voluntarily or forced legally into producing documents after the January 30, 2008 deadline, particularly where those parties initially objected to the two-day return date. The issue here is whether plaintiffs' counsel can unilaterally tell those third parties to ignore the return date on the subpoena (and hence the discovery deadline that binds plaintiffs) without the knowledge, much less consent, of FEI or this Court. FEI has a legitimate expectation that the Court's January 30 discovery deadline be enforced equally. The cover letters on those subpoenas and the return dates in the subpoenas that plaintiffs' counsel sent to FEI's counsel were misleading – they created the written impression that plaintiffs were accurately stating the discovery deadline to third parties. Instead, unbeknownst to FEI and to this Court, plaintiffs' counsel were subsequently "granting" these third parties extensions of time to produce documents. The January 30 discovery deadline binds plaintiffs – they do not have the unilateral right to ignore that deadline and grant time extensions to third parties who are unfamiliar with this case. Plaintiffs never sought to alter or extend that deadline, and their Motion should be denied accordingly. Plaintiffs should further be required to explain exactly what has been produced to them thus far, by whom, and when production occurred so that the Court and FEI can understand and fully assess what happened with the subpoenas after the January 30 deadline. Plaintiffs should also be required to produce any and all responses and objections that were raised by any of the six railroads. A proposed form of order is attached.

Dated this 15th day of April, 2008.

Respectfully submitted,



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ORDER

Upon consideration of Plaintiffs' Motion for Clarification of Court's Order Concerning the Close of Fact Discovery and Supporting Memorandum (4/3/08) ("Motion"), Feld Entertainment, Inc.'s Response in Opposition thereto, and for good cause shown, it is this _____ day of April, 2008,

ORDERED that the Motion is DENIED; and it is further

ORDERED that within 10 days of the date of this Order, plaintiffs shall produce all correspondence, objections and materials that they have received in response to the railroad subpoenas without any redactions.

_____
MAGISTRATE JUDGE FACCIOLA