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 BROS. AND BARNUM & BAILEY CIRCUS, et al.,	:	
Defendants.	:	

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLARIFICATION OF COURT'S ORDER CONCERNING THE CLOSE OF FACT DISCOVERY

1. Having threatened a third party that was preparing to comply with a subpoena that such compliance would amount to "a violation of [this] Court's discovery cutoff," March 21, 2008 letter from Lisa Joiner to Dominic MacKenzie, Exhibit 2 to Plaintiffs' Motion for Clarification of Court's Order Concerning the Close of Fact Discovery ("Plfs. Mem."),[1] defendant now seeks to prevent plaintiffs from even seeking clarification of the meaning of that "discovery cutoff" by asserting that this Court has no jurisdiction to resolve the dispute. See Defendant's Response in Opposition to Motion for Clarification of Court's Order Concerning the Close of Fact Discovery ("Def. Opp.") at 10 (stating that "this Court cannot grant the motion" to clarify because only the Middle

[1] Defendant contends that it did not "instruct a third party" not to comply with the subpoena. Defendant's Response in Opposition to Motion for Clarification of Court's Order Concerning the Close of Fact Discovery at 7. However, defendant's letter, in which Ms. Joiner stated that "FEI objects to any fact discovery that plaintiffs seek to take at this time from CSX . . . as a violation of the Court's discovery cutoff," Pl. Ex. 2, speaks for itself.

District of Florida court can determine the obligations of the subpoenaed party). However, this Court plainly has jurisdiction to determine the meaning and consequences of its own Order, and such clarification may obviate the need for additional litigation in the Middle District of Florida.

Indeed, had plaintiffs filed a motion to compel in the Middle District of Florida, as defendant now insists is the only proper course, see id., defendant without a doubt would have told that court that compliance with the subpoena would violate this Court's order – a matter only this Court could resolve. As usual, defendant is seeking to have it both ways.

2. The bottom line is that plaintiffs served their subpoena on CSX Transportation, Inc. ("CSX") before the close of discovery in this case.[2] Defendant's efforts to distinguish its own subpoena to plaintiffs' counsel from plaintiffs' subpoena to CSX is completely unavailing. See Def. Opp. at 5 ("Plaintiffs' comparison to FEI's subpoena to Meyer Glitzenstein & Crystal . . . is inapt."). There is no qualitative difference between the subpoena defendant issued to Meyer Glitzenstein & Crystal ("MGC") five business days prior to the close of discovery and the subpoena plaintiffs served on CSX two business days before the close of discovery. Although defendant self-servingly contends that "the [MGC] subpoena was fully capable of response by the January 30, 2008 return date," Def. Opp. at 5-6, the subpoena in fact placed a considerable burden on plaintiffs' counsel, as they were simultaneously taking depositions and preparing plaintiffs' document productions and interrogatory responses

[2] Although plaintiffs subpoena to CSX was issued on January 25, 2008, the subpoena was not actually served on CSX until January 28, 2008 – two days before fact discovery closed in this case. See Defendant's Exhibit 1.

in preparation for the close of discovery. See, e.g., January 29, 2008 letter from Howard Crystal to George Gasper (Ex. 6 to Def. Opp.) at 2 (noting that "searching for and producing [the requested] materials will take considerable time and effort"). Thus, defendant could have had no more expectation that MGC could comply with its subpoena by January 30 than plaintiffs could have had with respect to CSX. In fact, because plaintiffs understand that many of the documents responsive to the subpoena to CSX are maintained on a computer, there is no reason why CSX could not have produced them by January 30, had plaintiffs insisted that they do so. However, as the parties often do, plaintiffs decided to provide CSX additional time to comply with the subpoena.[3]

3. Although defendant also attempts to distinguish its subpoena to MGC on the grounds that some of the subpoenaed documents should have been provided by plaintiff Tom Rider, see Def. Opp. at 5, plaintiffs similarly decided to subpoena records from the train companies when they learned that defendant had been withholding critical records concerning the train schedules that plaintiffs had requested in 2004, and that show how long the endangered Asian elephants are kept chained on the trains. See Plaintiffs' Motion to Compel Discovery From Defendant and Supporting Memorandum of Law (February 5, 2008) at 3-4 (filed under seal; Notice of Filing at docket entry 265).[4]

[3] The mere fact that plaintiffs agreed to a stipulation insisted upon by defendant with regard to extending the date for compliance with a subpoena for documents and deposition testimony that defendant served on third party D'Arcy Kemnitz on January 23, 2008, only a week before the close of discovery, see Def. Opp. at 4-5, does not mean that plaintiffs agreed that all outstanding subpoenas had to be fully resolved before the close of discovery. Plaintiffs agreed to this stipulation solely to accommodate Ms. Kemnitz, who otherwise would have risked being held in contempt of Court if she did not comply with the January 30 return date on that subpoena.

[4] Nor is there any validity to defendant's assertion that plaintiffs have been "secretly contacting third parties." Def. Opp. at 8. Plaintiffs fully complied with their

CONCLUSION

Because plaintiffs' subpoena was served on CSX before the close of discovery, defendant's insistence that CSX need not comply with the subpoena is incorrect, and the Court should clarify this issue so that plaintiffs may continue with their negotiations with CSX, which could obviate the need for additional litigation in the Middle District of Florida.

Respectfully submitted,

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obligations under the Federal Rules by providing adequate notice to defendant of the subpoenas to CSX and to the other railroad companies.