UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS et al.,

Plaintiffs,

v. **Civil Action No. 03-2006 (EGS/JMF)**

RINGLING BROTHERS AND BARNUM & BAILEY CIRCUS et al.,

Defendants.

MEMORANDUM ORDER

In his order of August 23, 2007 [Docket #178] ("Order"), Judge Sullivan indicated that, while plaintiffs were obliged to turn over information pertaining to payments made to Tom Rider, they were not obliged to turn over information pertaining to their strategic efforts to influence the media in favor of their claim that Feld Entertainment, Inc., ("FEI") abused and harmed the elephants in the circus. Order at 3.

The testimony before me establishes that, after Judge Sullivan ruled, counsel for the plaintiffs analyzed the opinion, and on the basis of that analysis, gave his clients legal advice as to how to comply with the Order while still protecting the media strategy materials from disclosure. FEI, dissatisfied with the documents it has received, demands the right to call plaintiffs' counsel and ascertain how he interpreted the Order and what advice he then gave his clients about how to comply with it.

We are therefore confronted with a situation where a lawyer interpreted a legal standard,

reached conclusions about it, and then advised his clients as to how to proceed. It would be hard to imagine a more perfect example of the "mental impressions, conclusions, opinions, or legal theories of a party's attorney" that are absolutely protected from disclosure by Rule 26(b)(3)(B) of the Federal Rules of Civil Procedure. Understandably, FEI does not contest that the testimony it seeks to elicit is work product but claims it was waived because the witnesses have testified that in deciding not to turn over a particular document, they were guided by the advice of their lawyers.

Courts do not permit privileges of any kind to be used as both a shield and a sword. A party cannot assert a claim or a defense that is premised on the attorney-client or work-product privilege and then shield from exposure the advice given or the work product. For example, a defendant in a criminal case may try to defeat a claim that his crime was willful by explaining that, in performing the act claimed to be criminal, he relied on his counsel's advice. Similarly, a party against whom a claim of willful patent infringement has been made may rely upon patent counsel's opinion that the patent was invalid. In such situations, any claim of privilege is forfeited upon the assertion of the defense. See In re Seagate Tech., LLC, 497 F.3d 1360, 1369-70 (Fed. Cir. 2007); United States v. Mathes, 151 F.3d 251, 255 (5th Cir. 1998).

In this case, however, plaintiffs are neither asserting a claim or a defense based on counsel's advice. Rather, upon being accused of failing to comply with a court order, they have testified that they complied with that order by producing what it required and not producing what it excluded. They have also explained that, in making the determination of what should be produced, they relied on the interpretation of the order by their lawyer. These plaintiffs cannot be fairly accused of asserting a claim or defense based on their lawyer's advice and then attempting to shield that advice. Instead, like any other party in a lawsuit who has responded to

a discovery request or to a judicial order pertaining to discovery, they have relied on their lawyer's guidance to ascertain how to comply with the request or order. If that, in itself, constituted a forfeiture of the work-product privilege then the work-product privilege would cease to exist. See Aull v. Cavalcade Pension Plan, 185 F.R.D. 618, 630 (D. Colo. 1998).

Moreover, it would bring in its wake the right of one party to audit the propriety of the advice given by opposing counsel as to the meaning of discovery orders or requests in every case. It would make discovery even more time consuming and expensive than it already is, without any indication in the Federal Rules of Civil Procedure or case law that such an audit was permissible.

There remain issues as to Katherine Meyer, who is plaintiffs' counsel, and Jonathan Lovvorn, who is counsel to the Humane Society of the United States. As to Ms. Meyer, FEI wants to ask her whether any additional payment emails exist in her Meyer, Gletzenstein & Crystal files. Complaining that she only produced one email, FEI insists that it must be permitted to ask her whether there are any others.

I have consistently concluded that a party's complaint that there must be more than they received is insufficient in itself to require any further inquiry. See Hubbard v. Potter, 247 F.R.D. 27, 29 (D.D.C. 2008) ("Speculation that there is more will not suffice; if the theoretical possibility that more documents exist sufficed to justify additional discovery, discovery would never end. Instead of chasing the theoretical possibility that additional documents exist, courts have insisted that the documents that have been produced permit a reasonable deduction that other documents may exist or did exist and have been destroyed."). See also Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 313 (S.D.N.Y. 2003) (holding that additional discovery was mandated where plaintiff knew that defendant's production was insufficient because plaintiff

herself produced numerous responsive documents); Peskoff v. Faber, 224 F.R.D. 54 (D.D.C. 2007) (holding that additional discovery of electronically stored communications was warranted where 1) plaintiff testified of his frequent use of e-mail as a means of communication, 2) there was in existence one such e-mail, and 3) the previous search produced curious results); Ameriwood Indus., v. Liberman, No. 06-CV-524, 2006 WL 3825291, at *3 (E.D. Mo. Dec. 27, 2006) (holding that plaintiff's production of a responsive e-mail justified the inference that other responsive e-mails existed).

In any event, Ms. Meyer is an officer of the court and, at the conclusion of tomorrow's hearing, I will direct her attention to that portion of FEI's brief wherein FEI explains why they must be allowed to call her as a witness and ask her appropriate questions. Her responses to me will suffice. On a daily basis in this Court, lawyers make representations to me and to each other about what they have or have not done in responding to discovery. Those responses are sufficient. That the lawyers in this case do not trust each other enough to accept each other's representations is not going to make me turn every discovery dispute into a modern day version of the Inquisition, where every lawyer who makes a representation to me or opposing counsel will then be called to testify under oath as to its truth.

I will make similar inquires of Mr. Lovvorn.

Finally, there is a reference to a computer that was used by Ms. Kemnitz, a Wildlife Advocacy Project employee, and FEI's need to know what happened to it. Discovery in this case is over and we are in a contempt proceeding dealing with the commands of a specific order. To establish contempt, FEI must show the violation of an unequivocal order. There is not a word in Judge Sullivan's order that speaks to the preservation of hard drives on computers. Testimony pertaining to that issue is therefore irrelevant.

It is therefore, hereby,

ORDERED that Plaintiffs' Motion to Quash Subpoenas to Plaintiffs' Counsel of Record or in the Alternative for Protective Order and Memorandum in Support Thereof [#282] is **GRANTED.**

SO ORDERED.

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JOHN M. FACCIOLA
Dated: May 29, 2008 UNITED STATES MAGISTRATE JUDGE