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

ATTACHMENT 1
to

Feld Entertainment, Inc.'s Motion for Leave to File a Surreply in Opposition to Plaintiffs' Motion for Attorneys' Fees and Costs

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

DEFENDANT FELD ENTERTAINMENT INC.'S
SURREPLY MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR ATTORNEY'S FEES AND COSTS

After submitting a two-page motion requesting attorney's fees with an accompanying declaration, plaintiffs now have filed an eight-page Reply to Defendant's Opposition to Plaintiffs' Motion for Attorney's Fees and Costs, attaching two new exhibits. These exhibits are wholly irrelevant to the issue before the Court. Indeed, one was ruled to be not discoverable by Judge Facciola *on the very same day that Judge Sullivan issued the scheduling order for this set of briefing.* The other document is not even a part of this case. The Court should disregard them. The Reply was filed with unclean hands, but perhaps what is most telling about the unnecessarily filed exhibits is the obvious source of them, People for the Ethical Treatment of Animals ("PETA") – an extremist group whose goal is to put the circus out of business by removing the elephants from it. Thus, the exhibits simply confirm what FEI has long suspected: PETA is rendering assistance to plaintiffs with this lawsuit, and the various animal rights groups are invoking compulsory discovery powers of the Court to take and trade information with each other. Accordingly, plaintiffs should not be awarded *any* attorney's fees or costs.

I. Defendant's 2004 Income Tax Return

Plaintiffs gratuitously attached Defendant's 2004 consolidated tax return for the first time on reply. *See* Plaintiffs' Reply Brief, Exhibit A. Remarkably, they did this knowing that Judge Facciola had just issued an order prohibiting them from taking financial discovery, because in part:

> The fact that defendants' financial information may have some value regarding defendants' witnesses' credibility is of marginal utility and is too far out of proportion to *the sensitivity of the financial information sought* and the burden that would be placed on defendants in gathering and producing such documents.

Memorandum Opinion at 9 (emphasis added) (2/23/06) (Facciola, J.). Despite the fact that the Court has prohibited this type of discovery as irrelevant and specifically recognized that it is sensitive, plaintiffs used the Court's filing system and PACER as a worldwide bulletin board for its sympathizers rather than as a mechanism for presenting any legitimate argument to the Court. It is no excuse that the document was used as a trial exhibit in the PETA case – although public by virtue of such status as an exhibit, it was not publicized or available on the web as plaintiffs have now made it – a matter about which the Court already has warned plaintiffs. See Order (9/26/05) ("Plaintiffs are admonished, however, that the purpose of discovery is to produce and seek evidence for use *in litigation* and the Court will not take lightly any abuse of the discovery process for purposes of publicity or to argue the merits of plaintiffs' claims in the media, as opposed to the Court.") The filing of the tax return was unwarranted and done in bad faith. Further, it shows that FEI was justified in protection from the Court.

Plaintiffs also argue, for the first time on reply, that defendant's corporate financial information should factor into the attorney's fees analysis. *Id.* at 7. Plaintiffs, however, fail to cite any support for the proposition that a corporate defendant should be held to a different

standard than other parties with respect to the attorney's fee analysis. First, the 2004 federal tax return for Feld Entertainment, Inc., is a consolidated tax return. *See* Plaintiffs' Reply Brief at Exhibit A. Plaintiffs, therefore, have no basis for estimating or apportioning any profit drawn from the circus itself, as opposed to the profitability of other FEI entities. Second, plaintiffs fail to cite a single case that suggests that a defendant's tax return is relevant to the attorney's fee analysis, nor do they establish how this consolidated financial information factors into this analysis. What plaintiffs appear to be arguing is that because defendant was a profitable corporate entity one year, it should be ordered to pay attorney's fees expenses, and be held to a different standard for determining whether the imposition of attorney's fees is appropriate. This argument has no basis in the law. The proper analysis is not whether a party can afford to pay for something but whether there is any legal basis whereby they should be compelled to do so.

Plaintiffs next try to argue that FEI's taxable income should be the basis for determining the amount of a deterrent sanction. There is no basis in fact or law for imposing a draconian deterrent on defendant for a discovery violation, particularly where, as here, defendant did not act in bad faith, is not a repeat offender of this Court's orders, and did not prejudice plaintiffs in any way in this litigation. *See Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996) ("choice of sanction should be guided by the 'concept of proportionality' between offense and sanction"). Discovery is still pending in this case, no trial date is currently scheduled, and plaintiffs have not been forced to depose any of defendant's witnesses without the benefit of responsive documents. Accordingly, any suggestion that a severe sanction against defendant is warranted, or should be tied to defendant's consolidated tax return, is entirely meritless.

2. Discovery Dispute In An Unrelated Case

Plaintiffs' efforts in its reply to focus the Court's attention on unrelated trial exhibits in another jurisdiction and an unrelated matter, rather than to the legal arguments raised by defendant and the law interpreting Rule 37(a)(4)(C), are quite telling.

Plaintiffs' newly introduced exhibits highlight plaintiffs' connection with PETA and their common agenda to attack the circus.[1] Interestingly, although plaintiffs found it necessary to interject transcripts from an unrelated discovery dispute into this case – that they were not party to and did not participate in – they neglected to inform the Court just how badly that case ended for PETA. After years of harassing both FEI and Mr. Feld through the litigation process with overblown, unsubstantiated claims, the jury heard all of the evidence – or lack thereof – and found that PETA failed to prove any case whatsoever and vindicated Mr. Feld. Defendant will provide a copy of the jury verdict if the Court desires.

It is unclear why plaintiffs would like to rehash the PETA case here in this Court. Such an analysis does nothing to further *this case*, has no bearing on the attorney's fee issue before the Court, and serves only to waste the Court's time. What it reveals, however, is that this case has very little to do with the Endangered Species Act and much, much more to do with FEI's unwilling role as a political target by animal rights groups who want to shut down its lawful business because they philosophically disagree with it.

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[1] Indeed, the lead counsel in this case also serve as counsel to PETA. See, e.g., Leahy, PETA v. USDA, Civil Action No. 1:05-cv-01135-PLF (D.D.C.) (6/8/05) (verified complaint signed by Katherine A. Meyer).

Dated this 28th day of April, 2006.

Respectfully submitted,

/s/

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