

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC. :

Plaintiff, :

v. :

Case No. 07-1532 (EGS/JMF)

ANIMAL WELFARE INSTITUTE, et al. :

Defendants. :

**PLAINTIFF FELD ENTERTAINMENT, INC.'S OPPOSITION TO THE
ORGANIZATIONAL DEFENDANTS' MOTION FOR A PROTECTIVE ORDER**

OPPOSITION EXHIBIT B

FILED

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EASTERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PERFORMING ANIMAL WELFARE) CIV. S-00-1259 GEB DAD
SOCIETY, PATRICIA DERBY, and)
EDWARD ALLEN STEWART,)

Plaintiffs,)

v.)

FELD ENTERTAINMENT, INC.,) ORDER*
RICHLIN CONSULTANTS, INC.,)
RINGLING BROS. - BARNUM AND)
BAILEY COMBINED SHOWS, INC.,)
and RICHARD T. FROEMMING,)

Defendants.)

Defendants Feld Entertainment, Inc. ("Feld") and Ringling Bros. - Barnum and Bailey Combined Shows, Inc. ("Ringling Bros.") move to dismiss Plaintiffs' First, Fifth, and Eighth Causes of Action and to strike and/or consolidate other portions of the Complaint. Defendants Richlin Consultants, Inc. ("Richlin") and Froemming join in Feld's and Ringling Bros.'s motions and move separately to dismiss Plaintiffs' First Cause of Action. Plaintiff opposes the motions. For the reasons that follow, Feld's and Ringling Bros.'s motions will

This matter was determined to be suitable for decision without oral argument. L.R. 78-230(h).

1 be granted in part and denied in part and Richlin's and Froemming's
2 motion will be denied as moot.

3 Plaintiff Performing Animal Welfare Society ("PAWS") is a
4 California non-profit corporation "which seeks to promote animal
5 welfare and to prevent the mistreatment of animals used in live
6 performances." Complaint at 2. Plaintiff Derby is PAWS's Executive
7 Director and President, and Plaintiff Stewart is its Secretary.
8 Plaintiffs claim that between 1989 and 1992 Defendants "entered into
9 and implemented a scheme or schemes to defraud, spy upon, and steal
10 confidential information and documents" from Plaintiffs intending "to
11 destroy the operation of PAWS, and to discredit Derby and Stewart,
12 thereby advancing the interests of defendants in their use of exotic
13 performing animals." Id., ¶ 18. Plaintiffs claim violations of the
14 Racketeer Influenced and Corrupt Organizations Act ("RICO"), invasion
15 of privacy, unfair competition, conversion, and civil conspiracy.
16 They seek compensatory damages, treble damages, injunctive relief,
17 attorney's fees, and costs.

18 Feld and Ringling Bros. contend that PAWS's civil RICO
19 claims should be dismissed because -- among other reasons -- PAWS
20 lacks standing to assert civil RICO claims, Plaintiffs' unfair
21 competition claims are time-barred, and Plaintiffs' civil conspiracy
22 claim in the Eighth Cause of Action fails to state a claim under
23 California law. Richlin and Froemming join in Feld's and Ringling
24 Bros.'s motion to dismiss.¹

25
26 ¹ Richlin and Froemming move separately to dismiss PAWS's
27 civil RICO claims on the ground that these Defendants did not conduct
28 or participate in the conduct of the alleged RICO enterprise's
affairs. Since PAWS's civil RICO claims will be dismissed because
PAWS fails to allege that it suffered an injury to its business or

(continued...)

1 PAWS's First Cause of Action advances claims under RICO, 18
2 U.S.C. § 1962(c) & (d). "A violation of section 1962(c) . . .
3 requires (1) conduct (2) of an enterprise (3) through a pattern . . .
4 (4) of racketeering activity." Sedima, S.P.R.L. v. Imrex Co., 473
5 U.S. 479, 496 (1985) ("Sedima"). Section 1962(d) makes it "unlawful
6 for any person to conspire to violate" section 1962(c). A plaintiff
7 advancing civil RICO claims must allege each of the elements required
8 under section 1962(c) or section 1962(d), and that it was "injured in
9 [its] business or property by the conduct constituting the violation."
10 Sedima, 473 U.S. at 496; see also 18 U.S.C. § 1964(c). "[I]t is
11 well-established that not all injuries are compensable under [18
12 U.S.C. § 1964(c)]." Oscar v. University Students Co-Operative Assoc.,
13 965 F.2d 783, 785 (9th Cir. 1992) (en banc). "First, a showing of
14 'injury' requires proof of concrete financial loss, and not mere
15 'injury to a valuable intangible property interest.'" Id. (quoting
16 Berg v. First State Ins. Co., 915 F.2d 460, 464 (9th Cir. 1990)); see
17 also Steele v. Hospital Corp. of America, 36 F.3d 69, 70-71 (9th Cir.
18 1994); Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303, 1310
19 (9th Cir. 1992). "Second, it is clear that personal injuries are not
20 compensable under RICO." Oscar, 965 F.2d at 785.

21 PAWS's claimed injury is the obtaining by Defendants of its
22 "confidential business information," including copies of "documents
23 pertaining to its donors, and the private and personal information of
24 Derby and Stewart." Complaint, ¶¶ 21, 22. Also allegedly stolen were
25 copies of "PAWS' membership list, . . . copies of checks written to
26

27
28 ¹(...continued)
property within the meaning of 18 U.S.C. § 1964(c), Richlin's and
Froemming's motion is moot.

1 PAWS as contributions from various donors, . . . copies of PAWS' donor
2 cards," id., ¶ 34, "[c]hecks written by Derby on her personal bank
3 account," id., ¶ 36(d), "[d]ocuments relating to PAWS' operation,"
4 id., ¶ 36(e), and "[p]hotocopies of Stewart's drivers license and
5 social security card," id., ¶ 36(f). PAWS does not allege that it was
6 injured in its business or property within the meaning of RICO by the
7 removal of these documents from its possession.² Rather, PAWS argues
8 it was injured because its confidential business information "has been
9 diminished in value because it was stolen by defendants." Pltfs' Opp.
10 at 10-11. PAWS concedes it does not allege "that defendants have
11 actually used the information they stole from PAWS to divert donations
12 which otherwise would have been made to PAWS." Id. at 11.³ Further,
13 PAWS admits it "found no [precedential court] decisions directly
14 addressing the question whether a RICO claim premised on the theft of
15 proprietary, confidential business information asserts a compensable
16 injury under section 1964(c)." Id. at 10. However, PAWS argues that
17 the theft of confidential business information is "injury" to
18 "property" within the meaning of section 1964(c) based upon Supreme
19 Court decisions which hold that confidential business information is
20 property for the purpose of Takings Clause jurisprudence, see
21 Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-04 (1984), and that

22
23 ² Plaintiffs advance a separate claim for conversion based
24 upon "the wrongful assumption of authority over [P]laintiffs'
25 documents." Complaint, ¶ 72. However, PAWS argues that the RICO
26 element of injury to its business or property is satisfied by
27 Defendants' obtaining its confidential business information. Pltfs'
28 Opp. at 10.

27 ³ PAWS states that they could not, in accordance with Fed. R.
28 Civ. P. 11, make such an allegation prior to obtaining discovery of
"information which is currently in the exclusive possession of
defendants and others." Pltfs' Opp. at 13.

1 the theft of confidential business information can support a required
2 element of criminal charges for mail or wire fraud, see Carpenter v.
3 United States, 484 U.S. 19, 28 (1987). PAWS also cites a Fifth
4 Circuit case suggesting that an owner of confidential business
5 information -- a trade secret -- may recover the diminution in value
6 of that information resulting from its public disclosure. Precision
7 Plating & Metal Finishing, Inc. v. Martin-Marietta Corp., 435 F.2d
8 1262, 1263-64 (1970) (per curiam). Plaintiff also contends that the
9 Ninth Circuit authorities cited by Defendants are factually
10 distinguishable.

11 PAWS's civil RICO claims do not survive Defendants' motion
12 because PAWS does not allege concrete financial loss as required to
13 show standing under section 1964(c). Steele, 36 F.3d at 70; Oscar,
14 965 F.2d at 785. PAWS has failed to show that Defendants' obtaining
15 its confidential business information, by itself, constitutes an
16 injury to business or property within the meaning of section 1964(c).
17 Further, even though Steele and Oscar are factually distinguishable,
18 PAWS has not demonstrated that the Ninth Circuit's requirement of a
19 concrete financial loss is not applicable in this case. Therefore,
20 PAWS's civil RICO claims will be dismissed.⁴

21 Defendants next argue that Plaintiffs' unfair competition
22 claims under Cal. Bus. & Prof. Code §§ 17200-17210 are time-barred.
23 Plaintiffs argue that, under the doctrine of fraudulent concealment,
24 the statute of limitations applicable to these claims was equitably
25 ///

27 ⁴ Since PAWS's civil RICO claims are dismissed for lack of
28 injury to business or property, Defendants' additional arguments for
dismissal of these claims are not reached.

1 tolled until the time it allegedly discovered the unfairly competitive
2 conduct in May of 2000. Under California law,

3 [w]hen a plaintiff alleges the fraudulent
4 concealment of a cause of action, the
5 same pleading and proof is required as in
6 fraud cases: the plaintiff must show (1)
7 the substantive elements of fraud, and
8 (2) an excuse for late discovery of the
9 facts. . . . As for the belated
10 discovery, the complaint must allege (1)
11 when the fraud was discovered; (2) the
12 circumstances under which it was
13 discovered; and (3) that the plaintiff
14 was not at fault for failing to discover
it or had no actual or presumptive
knowledge of facts sufficient to put him
on inquiry. . . . Furthermore, as with
any cause of action for fraud, general
pleading of the legal conclusion of fraud
is insufficient; the facts constituting
the fraud must be alleged, and the policy
of liberal construction will not
ordinarily be involved to sustain such a
pleading defective in any material
respect.

15 Community Cause v. Boatwright, 124 Cal. App. 3d 888, 900-01 (1981)
16 (internal quotation marks and citations omitted).

17 The substantive elements of fraud are: "(1) misrepresentation (false
18 representation, concealment, or nondisclosure); (2) knowledge of
19 falsity (scienter); (3) intent to induce reliance; (4) justifiable
20 reliance; and (5) resulting damages." Okun v. Morton, 203 Cal. App.
21 3d 805, 828 (1988). Plaintiffs do not specifically allege that
22 Defendants engaged in any fraudulent conduct after the unfair
23 competition allegedly ceased in 1992. Complaint, ¶ 18. Plaintiffs
24 contend that "[t]he very nature" of their unfair competition claims
25 establishes fraudulent conduct by Defendants. Pltfs' Opp. at 16.
26 However, the deceptive nature of the sued-upon conduct alone is
27 insufficient to show the affirmative conduct necessary to establish
28 fraudulent concealment. Cf. Santa Maria v. Pacific Bell, 202 F.3d

1 1170, 1177 (9th Cir. 2000) ("Fraudulent concealment necessarily
2 requires active conduct by a defendant, above and beyond the
3 wrongdoing upon which the plaintiff's claim is filed, to prevent the
4 plaintiff from suing in time."). Therefore, Plaintiffs' unfair
5 competition claims are time-barred.

6 Defendants next argue that Plaintiffs' Eighth Cause of
7 Action for civil conspiracy under Nevada law must be dismissed because
8 California law governs this claim, and California law does not provide
9 an independent cause of action for civil conspiracy. The Eighth Cause
10 of Action alleges that a lawsuit filed by two non-parties ("the
11 Berosinis") against PAWS (and others) in a Nevada court "was filed and
12 pursued for the sole and wrongful purpose of harming PAWS, preventing
13 it from pursuing its activities, and driving it out of business."
14 Complaint, ¶ 80. Feld and Ringling Bros. allegedly "gave PAWS'
15 stolen, confidential information to the Berosinis to assist the
16 Berosinis in their lawsuit against PAWS, in order to discredit PAWS
17" Id., ¶ 38. Further, Feld and Ringling Bros. allegedly
18 "guaranteed that they would pay for any money damages incurred by the
19 Berosinis in connection with their Nevada lawsuit against PAWS.
20 [T]his guarantee induced the Berosinis to aggressively pursue the
21 lawsuit." Id., ¶ 39. The Berosinis' lawsuit was allegedly ultimately
22 resolved in PAWS's favor, but caused PAWS to expend \$168,000 in legal
23 fees. Id., ¶¶ 39-40.

24 Since jurisdiction over the Eighth Cause of Action is based
25 upon diversity of citizenship of the parties, California's choice-of-
26 law rules govern the determination whether this claim is governed by
27 Nevada law. Ferens v. John Deere Co., 494 U.S. 516, 519 (1990).
28 "California applies a three-step 'governmental interest' analysis to

1 choice-of-law questions." Abogados v. AT&T, Inc., 223 F.3d 932, 934
2 (9th Cir. 2000).

3 First, the court examines the substantive
4 law of each jurisdiction to determine
5 whether the laws differ as applied to the
6 relevant transaction. . . . Second, if
7 the laws do differ, the court must
8 determine whether a true conflict exists
9 in that each of the relevant
10 jurisdictions has an interest in having
11 its law applied. . . . If only one
12 jurisdiction has a legitimate interest in
13 the application of its rule of decision,
14 there is a false conflict and the law of
15 the interested jurisdiction is applied.
16 . . . On the other hand, if more than one
17 jurisdiction has a legitimate interest,
18 the court must move to the third stage of
19 the analysis, which focuses on the
20 comparative impairment of the interested
21 jurisdictions. At this stage, the court
22 seeks to identify and apply the law of
23 the state whose interest would be the
24 more impaired if its law were not
25 applied.

26 Id. (internal quotations marks and citations omitted).

27 First, the parties agree that, under California law, the
28 Eighth Cause of Action would be subject to dismissal because it does
not state a separate independent cause of action, while the claim
would be independently viable under Nevada law. Turning to whether
each jurisdiction has a legitimate interest in the application of its
rule of decision to this claim, "[a]lthough the situs of the injury is
no longer the sole consideration in California choice-of-law analysis,
California courts have held that, 'with respect to regulating or
affecting conduct within its borders, the place of the wrong has the
predominant interest.'" Id. at 935 (quoting Hernandez v. Burger, 102
Cal. App. 3d 795, 802 (1980)). However, "California, as the forum
state, has an interest in having its law applied to this case."
Rosenthal v. Fonda, 862 F.2d 1398, 1402 (9th Cir. 1988). Therefore,

1 the issue is which jurisdiction's interest would be more impaired if
2 its law were not applied. Defendants point out that none of the
3 parties are citizens of Nevada and that Plaintiffs are all citizens of
4 California. Plaintiffs rejoin that Defendants and the Berosinis "used
5 the Nevada court system" to commit the alleged wrongs and "Nevada has
6 an interest in preventing its courts from being exploited in this
7 manner." Pltfs' Opp. at 17, 18. Plaintiffs also cite Engel v. CBS,
8 Inc., 981 F.2d 1076 (9th Cir. 1992), which held that, under
9 California's choice-of-law rules, New York law governed a malicious
10 prosecution claim arising out of a lawsuit which CBS had filed in New
11 York because, among other reasons, "where another state's litigation
12 process has allegedly been perverted, California's interest is far
13 less than if the litigation process in California were subject to
14 misuse." Id. at 1081. Although "[t]he balancing of [comparative]
15 impairment is slightly weighted by California's general preference for
16 applying its own law," id., Plaintiffs have shown that Nevada's
17 interests would be comparatively more impaired if Nevada law were not
18 applied to Plaintiffs' Eighth Cause of Action. Accordingly,
19 Defendants' motion to dismiss this claim is denied.

20 Feld and Ringling Bros. also move under Federal Rule of
21 Civil Procedure 12(f)⁵ to strike Paragraphs 42, 43 and 44 of the
22 Complaint and to consolidate Counts II, III, and IV of the Complaint
23 and/or strike the latter two claims as redundant. These allegations
24 concern (i) an allegedly false report which Feld and Ringling Bros.,
25 through Richlin and Froemming, made to the California Fish and Game
26 Department that PAWS was improperly caring for animals; (ii) an

27 _____
28 ⁵ Unless otherwise indicated, all references herein to Rules
are to the Federal Rules of Civil Procedure.

1 attempt by Defendants to persuade the Milwaukee Zoo not to give two of
2 its elephants to PAWS; and (iii) the existence of a risk of
3 transmission of tuberculosis from Feld's and Ringling Bros.'s
4 elephants to humans. Richlin and Froerming join in this motion.

5 Rule 12(f) authorizes the district court to strike from a
6 pleading "any redundant, immaterial, impertinent, or scandalous
7 matter." "'Immaterial' matter is that which has no essential or
8 important relationship to the claim for relief or the defenses being
9 pleaded. . . . 'Impertinent' matter consists of statements that do not
10 pertain, and are not necessary, to the issues in question." Fantasy,
11 Inc. v. Focarty, 984 F.2d 1524, 1527 (9th Cir. 1993) (internal
12 quotation marks and citation omitted), rev'd on other grounds, 510
13 U.S. 517 (1994).

14 Plaintiffs contend that the allegations in Paragraphs 42
15 through 44 relate to Defendants' motive and show malice necessary to
16 support a prayer for punitive damages. But, as Plaintiffs concede,
17 the Complaint does not contain a prayer for punitive damages.⁶
18 Further, although these allegations evince the adversarial history
19 between Plaintiffs and Defendants, Plaintiffs have not shown that
20 these allegations are essential to any of their claims. "Superfluous
21 historical allegations are a proper subject of a motion to strike."
22 Id. Since Plaintiffs have not shown that Paragraphs 42, 43, and 44
23 relate to their claims, these allegations will be stricken from the
24 Complaint.

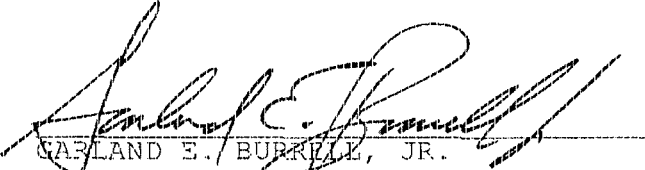
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26 -----
27 ⁶ Plaintiffs state that, "Plaintiffs' [sic] will amend their
28 Complaint, if necessary, to request such damages." Pltfs' Opp. at 6
n.3. However, Plaintiffs may not amend the Complaint "except with
leave of Court, good cause having been shown." Status (Pretrial
Scheduling) Order filed September 25, 2000, at 2.

1 Plaintiffs oppose consolidation or striking of Counts II,
2 III, and/or IV, which advance claims for intrusion, public disclosure
3 of private facts, and violation of Article I, section 1 of the
4 California Constitution, respectively. Although Defendants contend
5 that these claims are simply different theories of liability under the
6 rubric of invasion of privacy, they fail to distinguish Plaintiffs'
7 precedential authority holding that these are separate, independent
8 tort claims. See Virgil v. Time, Inc., 527 F.2d 1122, 1125 (9th Cir.
9 1975); People v. T.A.J., 62 Cal. App. 4th 1350, 1355-56 (1998).
10 Therefore, this aspect of Defendants' motion to strike will be denied.

11 For the reasons stated, Feld's and Ringling Bros.'s motion
12 to dismiss is GRANTED IN PART AND DENIED IN PART, Feld's and Ringling
13 Bros.'s motion to strike is GRANTED IN PART AND DENIED IN PART,
14 Richlin's and Froemming's motion to dismiss is DENIED AS MOOT,
15 Plaintiffs' First and Fifth Causes of Action are DISMISSED, and
16 Paragraphs 42, 43, and 44 of the Complaint are STRICKEN.

17 IT IS SO ORDERED.

18
19 DATED: November 20, 2000

20 
21 GARLAND E. BURRELL, JR.
22 UNITED STATES DISTRICT JUDGE
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kdc

United States District Court
for the
Eastern District of California
November 21, 2000

* * CERTIFICATE OF SERVICE * *

2:00-cv-01259

Performing Animal

v.

Feld Entertainment

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on November 21, 2000, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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