

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

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Case No. 03-2006 (EGS/JMF)

**MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS
SUBPOENAED FROM MEYER GLITZENSTEIN & CRYSTAL**

Pursuant to Fed. R. Civ. P. 45(c)(2)(B), defendant Feld Entertainment, Inc. ("FEI") hereby respectfully moves to compel the production of documents subpoenaed from Meyer Glitzenstein & Crystal ("MGC"). See Ex. 1, Subpoena to MGC. FEI's straightforward subpoena commanded MGC to (a) produce two narrow categories of documents concerning payments to Tom Rider that should have been, but were not, produced by plaintiffs, and to (b) make available for inspection the original and electronic versions of certain documents that will test the veracity of Rider's sworn testimony concerning REDACTED In response to the subpoena, although MGC did produce some documents that should have been produced by plaintiffs years earlier, MGC still redacted relevant information from its production. MGC also originally refused to allow FEI to inspect the originals of any document (notwithstanding Rider's sworn testimony that he REDACTED Only after FEI informed MGC that it would move to compel such an inspection, did MGC finally relent and an inspection is expected to occur next week. MGC, however, persists in its refusal to allow FEI to review the electronic versions of letters sent to Rider. As a result, FEI now asks that MGC be compelled to produce

(in unredacted form) the documents that plaintiffs should have produced years ago, but did not, and a few specific electronic documents that (dis)prove the truth of Rider's sworn testimony.

FACTUAL BACKGROUND

A. Purpose of the Subpoena

FEI's document requests, which were served almost four years ago, required plaintiffs to produce all documents relating to payments made to Rider. Prior to the issuance of FEI's requests in March 2004,

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which are responsive to the document requests issued to plaintiffs, and which are in the possession of plaintiffs' counsel by virtue of their representation in this case, should have been produced years ago. See ASPCA v. Ringling Bros., 233 F.R.D. 209, 212 (D.D.C. 2006) ("Because a client has the right, and the ready ability, to obtain copies of documents gathered or created by its attorneys pursuant to their representation of that client, such documents are clearly within the client's control.") (internal citations omitted). Certainly, such documents should have been produced in September 2007, after Judge Sullivan ordered plaintiffs to produce "all responsive documents and

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information concerning payments to Tom Rider.” Order (8/23/07) (Docket No. 178) at 6. Nonetheless, plaintiffs did not produce these highly relevant and clearly responsive documents.

Because of plaintiffs’ obfuscation, FEI did not learn that these documents have been

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produced. FEI, therefore, subpoenaed MGC. Specifically, FEI sought “all Federal Express Packing Slips reflecting shipments to or from Tom Rider” and “all receipts reflecting wire transfers of money provided to or for Tom Rider by WAP or MGC.” Ex. 1, Subpoena Request Nos. 4-5.

In addition, FEI’s subpoena commanded an inspection of the original versions of documents (i.e., letters and 1099’s) that were sent to Tom Rider and, according to Rider’s sworn testimony, **SEALED PURSUANT TO COURT ORDER** FEI previously has argued, and still believes, that Rider not only failed to produce responsive documents in this case, but that he also failed to preserve them as well. Rider’s testimony that he

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Inspecting the originals in

² That Rider did not save, but in fact destroyed, the 1099’s and payment letters from WAP (and perhaps other documents concerning his payments) is indicated by his own actions. In 2004, Rider did not produce any such documents in response to FEI’s original discovery requests and objected on “privacy” grounds, thereby creating the impression that he had such materials and would produce them under an agreed protective order (which FEI rejected as contrary to the way in which discovery had been handled and, in any event was overruled later by the Court when Rider actually moved for such relief). Notwithstanding Rider’s frivolous objection, WAP – an entity controlled by Rider’s lawyers – subsequently (in 2006) produced some of the 1099’s and payment letters out of a file drawer in

MGC's possession is the only way for FEI or the Court to answer this question. In order to test the veracity of Rider's sworn testimony and to determine the extent to which plaintiffs have attempted to mask any spoliation, FEI's subpoena commanded an inspection of "all original copies of any and all IRS Forms 1099 issued to Tom Rider by WAP or MGC," "all original copies of any and all letters from WAP to Tom Rider," and "the electronic copies (together with any and all existing metadata) of any and all letters from WAP to Tom Rider." Ex. 1, Subpoena Request Nos. 1-3.³

B. MGC's Deficient Response to FEI's Subpoena

In lieu of complying with a straightforward subpoena that was necessitated by plaintiffs' failure to produce responsive documents and Rider's sworn testimony concerning

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MGC has vociferously complained that FEI issued a subpoena to Rider's counsel. Ex. 3, Crystal letter to Gasper (1/29/08); Ex. 4, Crystal letter to Gasper (2/8/08). Such complaints get MGC nowhere as this is a situation of plaintiffs' own making. Counsel transmitted the payments to Rider and paid for such transmissions. All of the documents surrounding these transactions were within Rider's and/or the other plaintiffs' control because

the offices of plaintiffs' counsel without any objection on "privacy" grounds. If these materials really were "private," then they likewise would have been "private" in the hands of WAP, and should have been so designated since Rider's lawyers (Glitzenstein and Meyer) control WAP and one of them (Glitzenstein) actually was personally involved in WAP's document production. Moreover, Rider himself produced a WAP payment letter in January 2007 without any objection that it was "private." Finally Rider's own lawyer (Meyer) was heard to say in a discovery meet and confer that Rider was not saving the payment letters and related documents – although she has later denied making such statement. See FEI's Reply in Support of Its Mot. to Compel Discovery From Rider (5/7/07) (Docket No. 144) at 4 n.3; FEI's Opp. to Rider's Mot. for Protective Order With Respect to Certain Financial Information (5/15/07) (Docket No. 146) at 9-12. Consequently, it is more than a fair inference that Rider's original "privacy" objection was made in bad faith to conceal the fact that he had failed properly to preserve documents relevant to this case. The discovery that FEI seeks from MGC is aimed at getting to the bottom of this subterfuge.

³ FEI must be able to review the electronic versions of these letters (together with their metadata) to determine when the letters were created, edited, and printed. If, as FEI believes, Rider was not properly preserving documents, the only way these letters would still exist is if (a) WAP kept a copy of each, a set of which was given to Rider for production or (b) WAP re-printed the letters and signed them to create the illusion that Rider was preserving them. Either way, FEI is entitled to evaluate the veracity of Rider's testimony

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they were within the custody of plaintiffs' lawyers. FEI should not have been required to issue a separate subpoena to MGC, so MGC's claims of "harassment" have no credibility. Having participated in the payments to Rider, MGC cannot now hide behind their dual-status as "counsel".

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Such information would tend to prove (or disprove) the parties' arguments concerning what it is that Rider does when he visits certain towns.

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It is not, as plaintiffs previously argued, following

the circus on some large scale media campaign.

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presumably because they show even when Rider does travel to other cities, he does so to see friends and family, not to conduct any form of a media or public education campaign.

Moreover, in lieu of making any original 1099's or letters to Rider available for inspection, MGC pretended not to know why FEI wanted to see the *originals* and produced, instead, copies. That is not what FEI's subpoena commanded and that is not what the parties and the Court need to answer a simple question: Did Rider destroy relevant documents and produce, instead, his attorneys' copies (and lie about it under oath) or did he actually fulfill his obligations as a party to a lawsuit in federal court? After being informed that FEI would move to compel such an inspection, MGC relented and has indicated it will allow an inspection of the original documents to occur. See Ex. 5, Gasper letter to Crystal (2/12/08); Ex. 6, Crystal letter to

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Gasper (2/14/08). MGC, however, refuses to make electronic copies of the documents available for inspection.

Because MGC refuses to produce unredacted copies of documents that should have been produced years ago and because MGC refuses to allow an inspection of certain electronic documents, FEI asks the Court to compel MGC to comply with FEI's subpoena in its entirety and to pay the costs and fees incurred by FEI in bringing this Motion.

ARGUMENT

Having given notice to MGC, FEI may "move at any time to compel the production" of documents responsive to its subpoena. Fed. R. Civ. P. 45(c)(2)(B). For purposes of enforcing FEI's subpoena, "the Court needs to balance, (1) the relevance of the information sought in the underlying case, (2) the requestor's need for the information from the subpoenaed source, (3) the burden on the source to produce the information, and (4) the harm, if any, that disclosure of the requested information would have on the source." Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada, 2005 U.S. Dist. LEXIS 19127 at *3-4 (D.D.C. Mar. 9, 2005) (internal citations omitted), modified on recons., 384 F. Supp. 2d 45 (D.D.C. 2005).

In this context, the relevancy standard is "exceedingly broad." See id. ("Relevancy determinations made for information sought at the discovery phase of litigation is different from the standard used to assess reliability in the context of admissibility as evidence in the resulting trial. In determining relevance at this stage, the Court applies, 'an exceedingly broad' standard which will assess merely whether the information sought is reasonably calculated to lead to the discovery of admissible evidence, not whether the information sought itself would be admissible.") (internal citations omitted), modified on recons., 384 F. Supp. 2d 45 (D.D.C. 2005). Moreover, "[t]he burden of proving that a search for information would be unduly

burdensome is on the party requesting relief from the subpoena.” Linder v. Calero-Portcarrero, 183 F.R.D. 314, 319 (D.D.C. 1998). “Whether compliance with a requested search would be unduly burdensome depends on the volume of material requested, the ease of searching for the requested documents in the form presented, and whether compliance threatens the normal operations of the responding [party].” Id. at 320 (internal citations omitted). See also Coregis Ins. Co. v. Baratta & Fenerty, Ltd., 187 F.R.D. 528, 530 (E.D. Pa. 1999) (“The party asserting the objections must show *specifically* how each [request] is privileged or vague or overly broad.”) (emphasis added).

A. **Documents Concerning Payments to Rider That Should Have, But Have Not, Been Produced by Plaintiffs**

The ‘ **REDACTED** concern payments to Rider, have not been produced by plaintiffs, and already have been deemed relevant by Judge Sullivan and Judge Facciola. See Order (8/23/07) (Docket No. 178) at 5 (“As Rider is a plaintiff in this case and the financing of his public campaign regarding the treatment of elephants is relevant to his credibility in this case”); Order (12/3/07) (Docket No. 232) at 5 (“Like Judge Sullivan, I find that Rider is a central player in this litigation and I will compel what FEI seeks.”). FEI, moreover, had no choice but to seek the requested documents from MGC. As described above, none of the plaintiffs produced these documents despite the fact that (a) they are responsive to FEI’s document requests and (b) they are in the possession of plaintiffs’ counsel pursuant to its representation of plaintiffs. Because plaintiffs failed to produce the documents, FEI had to subpoena them from MGC.

Precisely because these documents are relevant, MGC has produced

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At issue, however, is MGC's redaction of

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to which the payments have been sent. There is also no basis for redacting such information. There is a protective order in this case that applies to these documents. MGC's assertions that FEI wants this information to "spy" on Rider and "disrupt" his media campaign, see Ex. 4, Crystal letter to Gasper (2/8/08), are unfounded and ridiculous. As far as FEI can tell, there is no media campaign to "disrupt" even if MGC's spurious allegations were true, which they are not. In any event, the protective order renders all of this moot. The addresses that MGC is trying to hide clearly are relevant information. For example, is Rider actually traveling to these cities to conduct "media" work or is he getting paid by MGC and others to visit friends and family? Does Rider actually live in his van, as has frequently been portrayed, or does he sleep most nights in the same houses in a few different cities? It is a fair inference that the redacted information is damaging to plaintiffs on this subject because this very point was made by counsel for FEI at the January 8, 2008 status hearing in responding to plaintiffs' counsel's characterization of these documents as "minutiae." Ex. 7, Hearing Tr. (1/8/08) at 13-15. Indeed if this is all "minutiae," why does it need to be redacted?. In light of the protective order in this case and MGC's failure to justify its baseless allegations of "burden," the Court should compel MGC to produce the Airbills in unredacted form.

Equally important is the real impact that hiding addresses has on FEI's ability to subpoena Rider. Plaintiffs' counsel has routinely asked deponents for their addresses during depositions. Yet when FEI sends a subpoena seeking documents

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not a sufficient response to FEI's subpoena. MGC must describe, among other things, each receipt that is no longer available for production, why the receipt is no longer in MGC's possession and the circumstances surrounding the disposition to the receipt, as required by the subpoena. See Ex. 1, Subpoena Instruction No. 10.

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There is no right to hide a witness' location. If Tom Rider is truly an itinerant person living in a van, as plaintiffs claim, then the need for street addresses as to his annual whereabouts become all the more important for FEI. It is reasonable for this Court to consider whether the upcoming February 26 hearing has been a motive for redacting particularly when the same counsel who did the redactions also instructed Mr. Rider at his deposition not to answer questions about

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the very subject matter of the February 26 hearing.

B. Electronic Versions of Certain Documents About Which Rider Has Testified

Similarly, the electronic versions of letters to Rider are highly relevant to this case, can only be obtained from MGC, and the production of such versions presents no undue burden upon MGC or anyone else. FEI wishes to inspect the electronic versions (together with their metadata) to ensure that any "originals" ultimately produced by MGC were prepared, printed, and signed when plaintiffs allege that they were. WAP has already testified that

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In other words, the letters themselves are an after-the-fact attempt to make the payments to Rider appear legitimate. Again, Rider testified that

If true, the electronic versions of such documents would contain information that proves (or disproves as the case may be) whether

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were recently accessed, printed, and signed to create the illusion that Rider's testimony was accurate.

There is nothing burdensome or intrusive about FEI's request that MGC produce electronic versions of the letters together with their metadata. Cf. Fed. R. Civ. P. 45(a)(1)(C) (subpoena may command inspection of "documents [or] electronically stored information"); Fed.

R. Civ. P. 34(a) (defining “documents or electronically stored information” to include “other data or data compilations stored in any medium from which information can be obtained”).⁶ The documents FEI seeks to review in electronic format are a discrete collection of documents that

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protests, FEI is not seeking a search-warrant-type invasion of the firm’s computers. If, in fact, the metadata is innocuous, MGC should be glad to produce it, but in no event does it have grounds for refusing the production.

CONCLUSION

For the reasons set forth above, FEI asks that its motion to compel be granted, that MGC be ordered to make all documents commanded by FEI’s subpoena available for inspection and copying within ten days, and that FEI be awarded its costs and fees incurred for having to file this motion. A proposed form of order is also attached.

⁶ FEI’s subpoena commands MGC to make all electronic versions of the letters to Rider available for inspection on the computer(s) on which such letters are currently stored so that all applicable metadata can be isolated and retrieved. See Fed. R. Civ. P. 34(b)(ii) (contemplating that the requesting party may specify the “form or forms for producing electronically stored information”). The production of an electronic document, standing alone, does not provide the metadata associated with each revision made to a document. Only if the document is produced on its existing computer can such metadata be obtained. In this instance, all dates upon which a letter was accessed, edited, or printed are crucial.

Dated this 15th day of February, 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Lisa Zeiler Joiner, do hereby certify that on February 15, 2008 the foregoing **Motion to Compel the Production of Documents Subpoenaed from Meyer Glitzenstein & Crystal** was served on the following in the manners stated below:

FILED PUBLICLY IN REDACTED/UNSEALED FORM VIA ECF to:

All ECF-registered persons for this case, including plaintiffs' counsel

FILED WITH THE CLERK OF COURT UNDER SEAL IN UNREDACTED FORM to:

Clerk's Office
U.S.D.C. for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

SERVED VIA HAND DELIVERY UNDER SEAL IN UNREDACTED FORM to:

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COURTESY COPY TO CHAMBERS OF HON. JOHN M. FACCIOLA UNDER SEAL IN UNREDACTED FORM

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