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 BROTHERS AND BARNUM & BAILEY CIRCUS, et al.,	)	
Defendant.	)	

PLAINTIFFS' MOTION TO COMPEL COMPLIANCE WITH A THIRD PARTY SUBPOENA SERVED ON PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND SUPPORTING MEMORANDUM

Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, plaintiffs hereby move to compel the production of documents that were ordered to be produced from People for the Ethical Treatment of Animals (PETA) pursuant to a third- party subpoena duces tecum that was issued in this case under Rule 45, Fed. R. Civ. P.

Background

In this case under the Endangered Species Act (ESA), plaintiffs – four animal welfare organizations and an individual – challenge certain practices of defendant Feld Entertainment Inc. (FEI), which owns the Ringling Brothers and Barnum & Bailey Circus. Plaintiffs contend that FEI "takes" endangered Asian elephants in violation of the ESA by harming, harassing and wounding the elephants though the use of the "bull hook" and other instruments on the animals and by keeping them chained for much of their lives.

On January 24, 2008, plaintiffs served PETA with a subpoena duces tecum to produce various deposition transcripts that it has in its possession as a result of a case that was litigated in 2006 by PETA against FEI in Fairfax County Virginia. In that case, People for the Ethical Treatment of Animals v. Kenneth Feld, et al., No. 204452 (Cir. Ct. Fairfax County, Va.) (March 9, 2006), PETA sought damages from Kenneth Feld, Chief Executive Officer for FEI, for damages as a result of FEI's spying on, infiltration of, and theft of confidential information from PETA – activities that FEI engaged in because of its concern that PETA was unfairly criticizing Ringling Bros.' practices, and particularly its treatment of the Asian elephants, in various public forums around the country.[1]

In the course of the trial in that case, Mr. Feld admitted that FEI paid various individuals, including a former Vice President of FEI, Richard Froemming, and a former Deputy Director of the Central Intelligence Agency ("CIA"), Clair George – to conduct an "intelligence gathering operation" to "find out what the animal activists were doing," and that this involved having individuals infiltrate some of the organizations, including PETA. See Trial Testimony of Kenneth Feld ("Feld Tr. Testimony"), [Pl. Ex. 11 at 2114-15.] According to Mr. Feld, the surveillance and infiltration was necessary because FEI felt that the animal groups "were misrepresenting to the public how we treated the animals." Id. at 2040; see also Feld Tr. Testimony at 1985, 2111, 2414, 2096-97 (Mr. Feld testified that he received "reports" concerning the activities of the animal groups "on a regular basis," that these reports contained information obtained by the "operatives" that had been placed within the animal protection groups, including

[1] Plaintiffs originally served PETA with a subpoena on January 23, 2008, but that subpoena contained various typographical and other errors. Accordingly, plaintiffs served PETA with an amended subpoena on January 24.

"complete bios" on the leaders of the groups, and social security numbers); see also "Confidential Animal Activist Activities," FEI 38273, Exhibit 1 (sample report on animal groups provided to Kenneth Feld).[2]

Because one of the core issues in the PETA v. FEI cases involved the treatment of the Ringling Bros. elephants, plaintiffs in this case subpoenaed some of the deposition transcripts that were generated in that case, including the deposition transcripts of the following FEI officials: Kenneth Feld (President and CEO), Allan Bloom (Vice President for Marketing); Charles Smith (Chief Financial Officer), Jerome Sowalsky (Vice President and General Counsel), Joel Kaplan (head of surveillance and security) and Steven Kendall (head of infiltration of animal groups). See Attachment to Subpoena.

Plaintiffs also subpoenaed from PETA all deposition transcripts in its possession of FEI officials that were taken in another case, Pottker, et al. v. Feld, et al., No. 99-008068 (D.C. Sup. Ct.). The Pottker case similarly seeks damages incurred as the result of FEI's covert actions directed at a free-lance author's effort to write a book that was critical of the circus. In an affidavit submitted in that case, the former "deputy director of operations" of the CIA stated that, after leaving the CIA, he worked as a "consultant to Feld Entertainment and its affiliates," and that "as part of my consulting work for Feld Entertainment, I was also asked to review reports from Richard Froemming and his organizations, based on their surveillance of and efforts to counter the activities of various animal rights groups," and that he "discussed these reports in

[2] Although Mr. Feld and other FEI executives admitted that they had conducted covert surveillance against PETA and other groups for the purpose of discrediting the groups and undermining their effectiveness, on March 15, 2006, a jury in Virginia found FEI not liable for common law and statutory conspiracy.

meetings in which Mr. Feld was present." See Affidavit of Clair George [Pl. Ex. 12.]. PETA successfully subpoenaed copies of those deposition transcripts as part of PETA v. Feld, and accordingly still has copies of those materials.[3]

On January 24, 2008, plaintiffs promptly notified FEI that it had served PETA with the subpoena and provided FEI with a copy of it. Because fact discovery was scheduled to close in this case on January 30, 2008, plaintiffs set the return date for the subpoena as January 30. See Subpoena. By letter dated January 25, 2008, as required by a protective order issued in PETA v. Feld, PETA's lawyer also provided notice of the subpoena to FEI and Kenneth Feld.

On January 25, 2008, FEI's counsel informed counsel for PETA and the plaintiffs that it objected to the subpoena on various grounds, including FEI's contention that PETA's compliance with the subpoena is barred by certain protective orders that were entered in both PETA v. Feld and Pottker v. Feld, and FEI's additional assertion that "PETA is no longer lawfully in possession" of any of the deposition transcripts that are the subject of the subpoena. See Notice of Objection to Subpoena (Exhibit 2).

On January 30, 2008, plaintiffs' counsel agreed to provide PETA additional time to respond to the subpoena.

By letter dated February 5, 2008, which was also sent to counsel for plaintiffs, counsel for PETA informed FEI's counsel that he disagreed with FEI's interpretation of the relevant protective orders, but that "out of courtesy" PETA would refrain from producing the subpoenaed materials to allow FEI's counsel to "expeditiously file and set for hearing a Motion to Quash" the

[3]FEI's covert interference with Dr. Pottker's book project concerning the circus has been the subject of both a two-part series in Salon Magazine and a CBS "60 Minutes" piece. See "The Greatest Vendetta on Earth," Salon, Pl. Ex. 14.

subpoena before this Court. See Letter from Philip J. Hirschkop (February 5, 2008) (Exhibit 3).

ARGUMENT

The scope of discovery is broad under the Federal Rules, which entitle a party to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." Fed. R. Civ. P. 26(b); see also Hickman v. Taylor, 329 U.S. 495, 507 (1947) (discovery rules "are to be accorded a broad and liberal treatment"); Wyoming v. USDA, 208 F.R.D. 449, 452 (D.D.C. 2002) ("courts construe the scope of discovery liberally in order to ensure that litigation proceeds with 'the fullest possible knowledge of the issues and facts before trial'") (quoting Hickman, 495 U.S. at 501). Moreover "[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b).

The term "relevance" in Rule 26(b) in turn is defined to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Fed. R. Evid. 401 (emphasis added); see also Saltzburg, Federal Rules of Evidence (9th Ed.) 401.02 ("[t]o be relevant it is enough that the evidence has a *tendency* to make a consequential fact even the least bit more probable or less probable than it would be without the evidence") (italics in original).

Here, plaintiffs have subpoenaed material from PETA that they believe bears both on their claims concerning FEI's mistreatment of the Asian elephants, and on FEI's contention that plaintiffs are lying about these allegations. In light of the fact that PETA v. Feld involved FEI's

spying on and infiltration of PETA because of PETA's criticisms of the way FEI treats its animals, particularly the elephants, plaintiffs have reason to believe that the deposition transcripts they have subpoenaed will contain information that is relevant to the issue of whether in fact FEI mistreats its animals.

The materials subpoenaed are also relevant to FEI's contention – which has become a centerpiece of its defense in this case – that plaintiff Tom Rider is not engaged in a legitimate public education, media and legislative campaign concerning FEI's mistreatment of the animals, and that he is not involved in this case out of genuine concern for the elephants. Indeed, the materials subpoenaed will reflect both the lengths to which FEI goes to try to discredit its critics and impede their efforts, and the amount of money that FEI spends on its public relations efforts to convince the public that it does not mistreat the animals it uses in its highly profitable circus. All such information falls within the scope of permissible discovery, or is "reasonably calculated to lead to the discovery of admissible evidence" within the meaning of Rule 26(b). Indeed, at an absolute minimum, all such evidence bears on the credibility of FEI's officials who may be called to testify in this case, and hence will also be valuable to plaintiffs' efforts to impeach such witnesses.[4]

Finally, there currently is a protective order governing all discovery in this case – which this Court also issued at the request of FEI. Hence, there is no reason why this Court cannot

[4] The subpoenaed materials may also bear on certain discovery disputes before the Court. In particular, FEI is seeking to obtain access to plaintiffs' counsel's computers and to obtain the street addresses where Mr. Rider stays when he is in certain cities. Records reflecting the lengths to which FEI has gone to infiltrate and impede its critics' operations – even to the extent of hiring an ex-CIA official – bears on plaintiffs' well-placed concern that FEI is attempting to accomplish the very same sort of thing here.

compel the production of the subpoenaed materials subject to that protective order and require the parties in this case to abide by whatever protective orders are also applicable in both PETA v. Feld and Pottker v. Feld, which plaintiffs are perfectly willing to do. See, e.g., Melea Limited v. Commissioner of Internal Revenue, 118 T.C. 218 (2002) (court ordered production of subpoenaed deposition transcripts that were covered by protective order issued in a state court under condition that parties abide by terms of state court protective order).

CONCLUSION

For the foregoing reasons, plaintiffs' motion to compel should be granted.

Respectfully submitted,

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