UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al., Plaintiffs,	)	Civ. No. 03-2006 (EGS/JMF)
v.	)	FILED UNDER SEAL (Redacted Version)
RINGLING BROS. AND BARNUM & BAILEY CIRCUS, et al., Defendant.	)	

WILDLIFE ADVOCACY PROJECT'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL DEPOSITION TESTIMONY

INTRODUCTION

The Wildlife Advocacy Project ("WAP") – a non-party to these proceedings – has already responded to three broad document subpoenas and been deposed for seven hours. During the Rule 30(b)(6) deposition, WAP's witness (the President of the organization) provided testimony on behalf of the organization in response to all questions posed by defendant Feld Entertainment, Inc. ("FEI"). Accordingly, as discussed further below, there is no substance to either of FEI's two complaints about the deposition. As to the first complaint – regarding WAP communications with the Humane Society of the United States ("HSUS") – WAP's witness in fact answered the question posed by FEI, although he could have refused to do so pursuant to Judge Sullivan's August 23, 2007 discovery Order. As to FEI's second complaint – that WAP's witness limited his testimony to answers he could provide in his "capacity" as a representative of

WAP – that is not only fully consistent with the basic purpose of a Rule 30(b)(6) deposition but, in seeking still more information regarding the specific topics at issue, FEI is plainly attempting to invade the attorney-client privilege, as well as conflicting with this Court's December 12, 2007 Order, which prohibited FEI from seeking information concerning WAP's "relationship and overlap with Plaintiffs' counsel." DE 237 at 1.[1]

BACKGROUND

Even though FEI had represented to the Court that the deposition of WAP "should consume just a few hours," DE 235 at 2, and the Court had narrowed the scope of the deposition from what was set forth in FEI's Rule 30(b)(6) subpoena, WAP was deposed on December 21, 2007 for six hours. Nonetheless, by letter dated January 11, 2008, FEI advised WAP that FEI wanted still more deposition testimony from WAP although, in doing so, FEI raised neither of the issues now before the Court. Exhibit 6 to FEI Mot.[2]

Although WAP believed that it had fully discharged its Rule 30(6)(b) responsibilities, in an effort to avoid yet another discovery dispute with FEI, WAP agreed to resume the deposition "subject to the specific time and subject matter restrictions set forth in [FEI]'s January 11 letter."

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[1] WAP's President, Eric Glitzenstein, is also counsel of record in this case.

[2] FEI's assertion that WAP somehow "stonewalled" the deposition, FEI Motion at 12, is baseless, as the Court will see should it review the deposition transcripts in their entirety (at the Court's direction, FEI has submitted the full WAP transcripts to the Court). WAP's President was extremely forthcoming in his answers to the questions, many of which went far beyond any topic that is even remotely relevant to the issues in this case.

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See 1/17/08 letter from Michael Trister to George Gasper (Exh. A). When the deposition continued on February 1, 2008, WAP answered all questions posed by FEI regarding the matters set forth in the January 11 letter, as well as questions that went well beyond those topics. Accordingly, WAP has now been deposed on two days for the full seven hours ordinarily permitted by the Fed. R. Civ. P.

ARGUMENT

I. ALTHOUGH FEI'S QUESTION REGARDING HSUS VIOLATED JUDGE SULLIVAN'S AUGUST 23, 2007 ORDER AND HENCE WAP WAS UNDER NO OBLIGATION TO ANSWER IT, WAP NEVERTHELESS DID ANSWER THE QUESTION.

FEI's motion identifies a single instance in seven hours of deposition testimony in which WAP's counsel purportedly issued an "improper instruction" to WAP not to answer a question. FEI Mot. at 12. In fact, however, although WAP could have refused to do so based on Judge Sullivan's August 23, 2007 discovery Order, WAP in fact ***answered the question*** in order to avoid the very discovery dispute in which FEI has nonetheless seen fit to embroil the Court.

As reflected in the portions of the deposition transcript attached to FEI's brief (but incompletely excerpted in the brief itself), FEI specifically asked WAP to testify about

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Although WAP's counsel interposed an objection and instruction not to answer – on the grounds that HSUS is not a party to this case and Judge Sullivan has specifically ruled that WAP, on First Amendment and relevance grounds,

need not provide "any further information" concerning the funding by non-parties, DE 178 at 9 – WAP in fact answered the question. Thus, precisely

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In short, this is simply a non-issue. But even if it were an issue the Court needed to resolve, the August 23, 2007 Order relieved WAP of any obligation to answer questions concerning HSUS. Thus, after requiring WAP to provide an affidavit (as it now has) "indicating that any donors are not plaintiffs' counsel, employees, or officers of the organizational plaintiffs or employees or officers of WAP, to the extent that is true," Judge Sullivan specifically held that compelling the disclosure of "any further information about individual or organizational donors" – i.e., donors to Mr. Rider's public education campaign who do not fall in these specific categories – "would be irrelevant and would tread on core First Amendment rights." DE 178 at 8, 9 (emphasis added) (citing Wyoming v. U.S. Dep't of Agriculture, 208 F.R.D. 449, 454 (D.D.C. 2002)). Because HSUS is not (and never has been) a plaintiff in this case, and FEI was seeking "further information about" WAP's interactions with that organization, WAP would have been fully justified in refusing to answer FEI's question, especially because Judge Sullvan's ruling was expressly predicated on the vital interest in protecting WAP's "First Amendment rights." DE 178 at 9 (emphasis added).[3]

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[3] FEI's efforts to sidestep this straightforward reading of the August 23, 2007 ruling are unconvincing. First, FEI contends that "withholding heretofore undisclosed donor identity is all the [August 23, 2007] Order permits," and that no First Amendment concern "can arise with respect to a payor whose identity is already well known to FEI." FEI Mot. at 14 (emphasis added). Judge Sullivan, however, did not say that WAP could withhold only "heretofore

II. WAP'S DEPONENT FULLY ANSWERED ALL QUESTIONS IN HIS CAPACITY AS WAP'S ORGANIZATIONAL REPRESENTATIVE, WHICH IS ALL HE WAS REQUIRED TO DO UNDER FED. R. CIV. P. 30(b)(6); ANY ADDITIONAL INFORMATION FEI NOW SEEKS IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND THE COURT'S DECEMBER 12, 2007 ORDER.

FEI's second complaint regarding WAP's deposition answers is equally devoid of merit. In essence, having demanded that WAP produce a Rule 30(b)(6) witness who could speak on behalf of the organization, and having accomplished that result by having WAP's President testify for seven hours on all matters allowed by the Court, FEI now complains that WAP's representative – in addition to furnishing such testimony – should have also provided testimony regarding legal advice he may have rendered and information he may have obtained in his role as

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undisclosed donor identit[ies," but, rather, that "any further information about individual or organizational donors" who do not fall within discrete categories "would tread on core First Amendment rights." DE 178 at 9 (emphasis added). This ruling is consistent with the First Amendment precedent cited by Judge Sullivan, which specifically extends First Amendment protection to "communications among various groups" seeking to advance a political or social agenda and the disclosure of which would have the "potential 'for chilling the free exercise of political speech and association guarded by the First Amendment.'" Wyoming, 208 F.R.D. at 454-55 (emphasis added) (quoting Federal Election Comm'n v. Machinists Non-Partisan Political League, 655 F.2d 380, 388 (D.C. Cir. 1981)).

Second, FEI asserts that WAP must "testify about HSUS's payments and the related communications ***because HSUS is one and the same with one of the plaintiffs in this case, FFA***." FEI Mot. at 15 (bold and italics in original). But the Court has never held that HSUS is "one and the same with" FFA, and WAP was surely under no obligation in its deposition to accept FEI's position on that matter (which has been contested by HSUS itself).

Third, FEI falsely implies that WAP is somehow "conceal[ing]" funds that have been used to support Mr. Rider's media campaign. FEI Mot. at 15. In truth, the "transaction detail reports" and other financial documents addressed in Judge Sullivan's August 23, 2007 Order disclose all funds that have been provided to WAP and used for Tom Rider's public education campaign. See DE 178 at 8-9; see also American Soc'y for the Prevention of Cruelty to Animals v. Ringling Brothers and Barnum & Bailey Circus, 2007 WL 4261699 * 3 (D.D.C. 2007) (describing 9/24/07 Decl. submitted by WAP President).

counsel of record in the case. In doing so, FEI is not only demanding that WAP's witness disclose protected attorney-client communications, but it is also disregarding the Court's December 12, 2007 Order prohibiting FEI from using the deposition to inquire about the "relationship" between WAP and plaintiffs' counsel.[4]

For example, FEI complains, remarkably, that WAP's witness did not disclose attorney-client "communications concerning plaintiffs' standing in this case . . . ." See FEI Mot. at 19. At the deposition, FEI asked WAP's witness whether the

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It could hardly be plainer, therefore, that in now seeking to compel additional "communications concerning plaintiffs' standing in this case," FEI Br. at 19, FEI is asking the Court to order the disclosure of attorney-client

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[4] Although WAP's President made clear during his first deposition that, in accordance with the Rule 30(b)(6) subpoena the Court's Order, he was testifying solely as a representative of the organization and not as counsel of record in the case, FEI in no way suggested any objection to this purported "limitation on discovery," FEI Mot. at 2, either during the deposition itself or in the January 11, 2008 letter that led to WAP's agreement to resume the deposition for a second day.

communications relating to plaintiffs' standing.[5]

Likewise, FEI asked whether

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FEI is likewise seeking information that can only have been derived from the

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[5] FEI asserts that WAP's witness "implied that knowledge obtained in his role as 'counsel' is protected by the attorney-client privilege." FEI Mot. at 17-18 (emphasis added). In fact, to ensure there was no confusion, the witness stated expressly that he was

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attorney-client relationship.[6]

In short, FEI is seeking impermissibly to use a Rule 30(b)(6) deposition (and this motion) to ask plaintiffs' counsel of record about non-WAP communications with plaintiffs that are squarely covered by the attorney-client privilege. See, e.g., Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997) ("The attorney-client privilege protects confidential communications from

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[6] FEI is wrong in suggesting that WAP's witness refused to answer any questions "within his personal knowledge" simply because they involved matters "outside the 30(b)(6) notice" served on WAP. FEI Mot. at 16. In fact, although the basic purpose of Rule 30(b)(6) is to compel an organizational representative to testify as to what is "reasonably known to the company," Banks v. Office of the Senate Sargeant-At-Arms, 241 F.R.D. 370, 375 (2007) (Facciola, J.) (emphasis added); Fed. R. Civ. P. 30(b)(6) (the organizational representative must testify concerning "information known or reasonably available to the organization"), WAP's witness did not simply refuse to answer all questions that went beyond WAP's institutional knowledge or involvement. For example,

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Accordingly, the only "limitation"on WAP's testimony regarding this and the other questions addressed in FEI's motion involved the need to protect confidential information obtained in the course of the attorney-client relationship.

In this connection, it is also worth stressing that any proceeds from any fundraising activity that were ultimately provided by the plaintiff organizations to WAP and used for Mr. Rider's media campaign have been fully divulged in the transaction detail reports and other financial documents disclosed by WAP. Accordingly, in seeking from WAP additional details about this and other fundraising activities organized by non-profit organizations to further their joint interests in halting the abuse and mistreatment of elephants, FEI is not only seeking to invade the attorney-client privilege but is also demanding information that goes to the core of First Amendment associational rights to "organize, raise money, and associate with other like-minded persons so as to effectively convey the message of the protest." Wyoming, 208 F.R.D. at 454 (internal citation omitted). FEI is also violating Judge Sullivan's Order staying all discovery in the RICO action, which prominently features the fundraiser that WAP was asked about at the deposition. See Feld Entertaiment, Inc. V. Am. Soc'y for the Prev. of Cruelty to Animals, No. 1:07-cv-01532 (D.D.C. Complaint filed, 8/28/07), at ¶¶ 122-26.

clients to their attorneys made for the purpose of securing legal advice or services. The privilege also protects communications from attorneys to their clients if the communications 'rest on confidential information obtained from the client.'") (internal citation omitted); In Re Lindsey, 158 F.3d 1263, 1270 (D.C. Cir. 1998) (the attorney-client privilege applies "if the person to whom the communication was made is a 'member of the bar of a court' who 'in connection with th[e] communication is acting as a lawyer' and the communication was made 'for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding.") (internal citation omitted). Because FEI would surely be unable to directly subpoena plaintiffs' counsel to inquire into such attorney-client communications, it cannot possibly be the case that FEI can accomplish the same impermissible result through a Rule 30(b)(6) deposition of WAP.[7]

In addition to asking for core attorney-client communications, FEI's position also runs

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[7] FEI asserts that WAP is somehow attempting to "cloak . . . WAP business and/or public relations dealings in the attorney-client privilege." FEI Mot. at 18 (emphasis added). But that is hardly the case because WAP has testified fully regarding all "WAP business and/or public relations dealings" bearing in any fashion on Mr. Rider's activities. Accordingly, the cases cited by FEI regarding the invocation of the attorney-client privilege with respect to "public relations" or "routine business" practices, FEI Mot. at 18, have nothing to do with the situation here, in which WAP fully answered all such questions, and yet FEI is also pressing to use the deposition to obtain core attorney-client communications (including on such quintessentially legal matters as plaintiffs' standing and tax filings). For similar reasons, FEI's contention that the attorney-client privilege pertaining to such issues has been "waived" because Tom Rider discussed in his deposition the funding of his public relations campaign – in accordance with Judge Sullivan's August 23, 2007 Order – is misplaced, particularly because Mr. Rider's counsel specifically invoked the attorney-client privilege in the deposition for

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see also In re Sealed Case, 877 F.2d 976, 981-82 (D.C. Cir. 1989) (a waiver of the attorney-privilege applies only to "all other communications relating to the same subject matter . . . such determinations depend heavily on the factual context in which the privilege is asserted") (internal citation omitted).

afoul of the Court's December 12, 2007 Order. Indeed, that this is so is essentially acknowledged by FEI's motion, which argues that it should be permitted to further explore the topics at issue because (according to FEI) WAP is the "alter ego" of plaintiffs' counsel, and hence "***[t]here is no meaningful distinction between their knowledge as WAP officials and their knowledge as counsel.***" FEI Mot. at 16 (italics and bold in original).[8]

But that is precisely the subject area that the Court placed off-limits to FEI by prohibiting any questions concerning the "relationship and overlap [of WAP] with Plaintiffs' counsel," DE 237 at 1 (emphasis added). Moreover, in refusing to allow FEI to pursue its RICO counterclaim against WAP (and in staying the identical RICO Complaint filed shortly thereafter), Judge Sullivan also made clear that he intended to foreclose discovery directed at plaintiffs' counsel based on FEI's contention that they are the "alter ego" of WAP. See DE 176 at 6 (refusing to allow counterclaim based on FEI's "alleg[ation] that WAP is the alter ego of plaintiffs' counsel" because this would be "highly prejudicial to plaintiffs in pursuit of their ESA claim"). Yet in derogation of those rulings, FEI's discovery motion now seeks to accomplish what the Court has prohibited by asking the Court to compel WAP's Rule 30(b)(6) witness to answer questions having nothing to do with WAP itself but, rather, with the role played by plaintiffs' attorneys as counsel to plaintiffs in the litigation.

CONCLUSION

In sum, for seven hours over two days, WAP's representative "conscientiously and completely," Banks v. Office of the Senate Sargeant-At-Arms, 222 F.R.D. 7, 19 (D.D.C. 2004)

[8] As has been previously explained to the Court, WAP is in fact a 501(c)(3) non-profit organization that engages in public education projects on behalf of elephants, manatees, and other wildlife. See www.wildlifeadvocacy.org.

(Facciola, J.), answered all questions pertaining to "matters known or reasonably available to the organization." Overseas Private Investment Corp. v. Mandelbaum, 185 F.R.D. 67, 68 (D.D.C. 1999). Accordingly, the only limitation reflected in any of the deposition testimony concerned the need to protect attorney-client communications and to abide by the Court's Order expressly prohibiting inquiry into the "relationship" between WAP and plaintiffs' counsel. There is no sound legal basis here to compel anything further from the non-party WAP, let alone to require that the deposition be resumed a third time. Cf. DE 245 at 1 (refusal by the Court to extend the deposition of plaintiff Tom Rider to a third day because he already had been "exhaustively examined" on the "most crucial issues presented by his testimony").

Respectfully submitted,

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