

**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)

**FELD ENTERTAINMENT, INC.’S MEMORANDUM IN SUPPORT OF ITS PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to the Court’s instruction at the May 30, 2008 hearing, Feld Entertainment, Inc. (“FEI”) hereby submits its memorandum of law in support of its proposed findings of fact and conclusions of law (filed concurrently).

I. INTRODUCTION & PROCEDURAL HISTORY

After an extensive period of conferring, FEI moved to compel discovery from Rider and from the Organizational Plaintiffs (collectively, ASPCA, AWI, FFA and API).¹ The Court ruled on these and other discovery motions in one order issued on August 23, 2007 that is now the subject of the current contempt proceedings. See Order (8/23/07) (Docket # 178) (“Discovery Order”).

The Discovery Order compelled Rider to produce to FEI by September 24, 2007 all responsive documents, including those in his attorney’s files; a privilege log; complete and

¹ The briefing leading to the August 23, 2007 discovery order at issue is as follows: FEI moved to compel discovery from Rider on March 20, 2007 (Docket # 126). Plaintiffs responded on April 19, 2007 (Docket # 138), and FEI replied on May 7, 2007 (Docket # 144). FEI’s motion to compel discovery from the organizational plaintiffs was filed on May 29, 2007 (Docket # 149). Plaintiffs responded on June 26, 2007 (Docket # 156), and FEI filed its reply on July 13, 2007 (Docket # 159).

truthful answers to certain interrogatories; and the identification of documents incorporated into his interrogatory answers. See Discovery Order at 3-4. As to the documents and information compelled, the Discovery Order directed Rider to produce:

All responsive documents and information concerning his income and payments from other animal advocates and animal advocacy organizations, except that Rider may redact the names of individual donors or organizations unless they are parties to this litigation, attorneys for any of the parties, or employees or officers of any of the plaintiff organizations or WAP. . . .

All responsive documents and information concerning relevant, non-privileged communications regarding the subject matter of this lawsuit between Rider, WAP, other plaintiffs' and plaintiffs' counsel, except that Rider need not produce documents or further information related to any media or legislative strategies or communications or any documents or information about litigation strategy or communications that are properly protected by the attorney-client or work product privileges, including the "common interest doctrine" as defined by this Circuit;

A sworn declaration or affidavit identifying, to the extent Rider can recall, any responsive documents that were once in Rider's possession (since July 11, 2000) but have been discarded, destroyed, or given to other persons or otherwise not produced together with a description of each such document and an explanation of why it was discarded, destroyed, spoliated or otherwise disposed of.

Id. at 3. The Court emphasized that while Rider need not produce documents or information already produced by him or other plaintiffs, he must still identify by Bates number which documents have already been produced that pertain to him. Id. at 4.

While the Court found that any documents or communications Rider had with others about media or legislative strategies is irrelevant and overly burdensome to produce, the Court also found that

Rider's funding for his public education and litigation efforts related to defendants is relevant. However, the Court finds that the source of any such funding is irrelevant unless it is a party, any attorney for any of the parties, or any officer or employee of the plaintiffs organizations or WAP.

Id.

The Court also denied Rider's motion for a protective order regarding his financial information:

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, Rider's relevant financial information shall be produced without a protective order but with appropriate redactions approved by this Order.

Id. at 5; see also id. at 8 ("Defendant, however, is entitled to information concerning the payments made to Tom Rider and the role of the organizational plaintiffs and WAP in those payments.").

Similarly, the Court ordered the Organizational Plaintiffs to produce to FEI by September 24, 2007 a privilege log, which was to have included any "confidential or proprietary" documents or information responsive to defendant's discovery requests, id. at 6-7; and any inspections conducted by the ASPCA, and if such information existed without documentation, then an explanation of the information along with a sworn declaration explaining why no such evidence exists, id. at 6.

Like Rider, the Organizational Plaintiffs were not ordered to produce information concerning their media and legislative strategies. Id. at 5 (documents, communications, or information concerning the media and legislative strategies of the plaintiffs are irrelevant and overburdensome to produce). But they were ordered to produce:

All responsive documents and information concerning payments to Tom Rider, regardless of whether such payments were made directly to him or indirectly through other means such as WAP, except that plaintiffs may redact the names of individual donors or organizations unless they are parties to this litigation, attorneys for any of the parties, or employees or officers of any of the plaintiff organizations or WAP;

All responsive documents and information concerning relevant, non-privileged communications regarding the subject matter of this lawsuit between plaintiffs,

Rider, WAP, and the plaintiffs' counsel, except that plaintiffs need not produce documents or further information related to any media or legislative strategies or communications or any documents or information about litigation strategy or communications that are properly protected by the attorney-client or work product privileges, including under the "common interest doctrine" as defined by this Circuit;

A sworn declaration or affidavit identifying, to the extent plaintiffs can recall, any responsive documents that were once in plaintiffs' possession but have been discarded, destroyed, or given to other persons or otherwise not produced, together with a description of each such document and an explanation of why it was discarded, destroyed, spoliated or otherwise disposed of.

Id. at 6-7. See also FEI's Proposed Findings of Fact and Conclusions of Law ¶¶ 1-8 (hereafter cited as "Facts ¶ ____").

In response to the Discovery Order, plaintiffs produced supplemental interrogatory responses, revised privilege logs, declarations, and documents numbered AWI 9928-10057, API 7203-7259, F 4483-4516, TR 221-614, A1202-1248, A1249-1250 and PL 11429-11529. See Exhibit 1 (cover letters for September 24, September 26, and October 26 2007 productions); FEI Exs. 10, 14, 19, 23, 27, 30, 40-44.

After reviewing this production, it appeared to FEI that plaintiffs had not complied with the Discovery Order. The Court granted FEI leave to file a motion at the October 25, 2007 status conference. FEI moved to enforce the Court's Discovery Order on November 6, 2007 (Docket # 223). Plaintiffs opposed the motion on November 20, 2007 (Docket # 227), and FEI replied on December 3, 2007 (Docket # 233).

In the meanwhile, FEI had subpoenaed the Humane Society of the United States ("HSUS") on June 15, 2007 for documents, including Rider payments. FEI filed a motion to compel against HSUS on September 21, 2007 (Docket # 192). HSUS opposed the motion on October 5, 2007 (Docket # 202), and FEI replied on October 18, 2007 (Docket # 206). The Court granted FEI's motion in part and denied it in part. HSUS was ordered as follows:

(2) The HSUS will produce all documents in its possession, control or custody that were created by any other party to this litigation in which that party discusses this litigation or any aspect of it. The HSUS is not obliged to produced communications protected by the attorney-client or work-product privileges. If it claims that any documents are so privileged, it must file a privilege log in compliance with Rule 26(b)(5) of the Federal Rules of Civil Procedure.

(3) The HSUS will produce documents that pertain to Tom Rider's "funding for his public education and litigation efforts" provided the funding came from "a party, any attorney for any of the parties, or any officer or employee of the plaintiff organizations or WAP" or that pertain to payments made to Rider by any such person, with the understanding that the names of donors will be redacted if the donor is not "a party, any attorney for any of the parties, or any officer or employee of the plaintiff organizations or WAP."

(4) The HSUS will produce all documents that "refer, reflect or relate" to Tom Rider, including all communications with or to him, and documents that pertain to payments made to him.

(5) The HSUS will produce any documents that fall within Judge Sullivan's August 23, 2007, order that pertain to WAP [EGS Order at 8] that are in HSUS's possession, custody or control.

HSUS Order at 1-2 (12/3/07) (Docket # 231); Facts ¶¶ 10-12. HSUS produced sixteen pages in response to this order. See FEI's Motion to Enforce the Court's December 3, 2007 Order at 5 (1/25/08) (Docket # 247).

On December 20, 2007, the Court, having determined an evidentiary hearing was necessary to resolve FEI's Motion to Enforce the Court's August 23, 2007 Order, issued an order setting a status hearing on January 8, 2008 to review the procedures for the evidentiary hearing. See Order (12/20/07) (Docket # 241). At the January 8 status hearing, the Court indicated it was trying to simplify matters with an evidentiary hearing:

I went through these materials as carefully as I possibly could and I kept finding myself running into the same problem of not really understanding and knowing what people did as they responded. Because the papers didn't tell me that. So hence, my question would be to get a sense of that, by just hearing people as to the interpretations they made of the orders and what they did.

Hearing Tr. at 20:25-21:6 (1/8/08).

Plaintiffs' counsel explained at the status hearing that in response to the August 23, 2007 Order, they drew a line between media strategy documents, which could be withheld, and documents on funding Mr. Rider, which should be disclosed. Id. at 9:25-10:9. Exactly where this line was drawn, however, is unclear because plaintiffs also argue that "media strategy involved payments to Rider." See id. at 9:16-24. Counsel advised the Court that it sent a contemporaneous memo out to the plaintiffs that apparently reflects what they did in response to the August 23, 2007 Order. Id. at 28:2-29:24. The Court also granted FEI leave to file a motion to bring HSUS before the Court with regard to the discovery order issued as to HSUS. Id. at 26:13-27:6. FEI then filed its Motion to Enforce the Court's December 3, 2007 Order against HSUS on 1/25/08 (Docket # 247). HSUS responded on February 5, 2008 (Docket # 251), and plaintiffs responded on February 7, 2008 (Docket # 252). FEI filed a consolidated reply to both oppositions on February 12, 2008 (Docket # 255).

The evidentiary hearing was then scheduled for February 26, 2008 and March 6, 2008. See Order 2/12/08 (Docket # 254)). The parties exchanged witness lists and exhibits on February 15, 2008 and provided a copy of same to the Court. See Exhibit 2 (Witness & Exhibit Lists). HSUS was joined in the proceedings by minute order dated February 19, 2008. The contempt hearing commenced on February 26, 2008, continued on March 6, 2008, and concluded on May 30, 2008. The evidence presented during the hearing is contained in FEI's Proposed Findings of Fact and Conclusions of Law filed herewith and will not be repeated; rather, FEI incorporates its Proposed Findings of Fact and Conclusions of Law herein by reference.

II. LEGAL STANDARD

A civil contempt proceeding is a three-stage process. First, there must be a court order. Second, if there is disobedience of that order, the court issues a conditional “purgation” order finding the recalcitrant party in contempt and setting forth the penalty to be imposed if the contempt is not purged. Third, the penalty must be executed if the purgation conditions are not fulfilled. See, e.g., U.S. v. Philip Morris USA Inc., 287 F.Supp.2d 5, 10-11 (D.D.C. 2003) (finding contempt and ordering production and privilege log by date certain with \$25,000 fine for every day thereafter) (citing NLRB v. Blevins Popcorn, Co., 659 F.2d 1173, 1184-1186 (D.C. Cir. 1981)).

A federal district court has two bases for finding a party in civil contempt of its discovery orders: Fed.R.Civ.P. 37(b) and the court’s inherent powers. Cobell v. Babbitt, 37 F.Supp.2d 6, 9 (D.C. Cir. 1999). The analysis under both bases is “essentially the same” for failure to comply with a discovery order. Id. (citing Webb v. District of Columbia, 146 F.3d 964, 971 (D.C. Cir. 1998)). See also Food Lion, Inc. v. United Food & Comm. Workers Int’l Union, 103 F.3d 1007, 1016 (D.C. Cir. 1997) (same standard applies for subpoenas pursuant to Rule 45(e)).

Thus, Rule 37(b) is generally triggered by a production order. Shepherd v. ABC, Inc., 62 F.3d 1469, 1474 (D.C. Circuit 1995). Courts have broad discretion to impose sanctions for discovery violations. Bonds v. District of Columbia, 93 F.3d 801, 807 (D.C. Cir. 1996). If a party fails to obey an order to provide discovery, the court may issue further orders (i) deeming matters or facts established for the prevailing party; (ii) prohibiting claims or defenses; (iii) striking pleadings; (iv) staying proceedings; (v) dismissing the action in whole or in part; (vi) entering a default judgment; and/or (vii) treating the failure to obey as contempt of court. See Fed.R.Civ.P. 37(b). The court may also award reasonable costs and fees caused by the failure to

provide discovery. Id.; accord Cobell, 37 F.Supp.2d at 37. The sanctions, however, must be proportional to the offense. Bonds, 93 F.3d at 808.

In addition to the authority granted under the Federal Rules, courts have the inherent power to protect their integrity and prevent abuses of the judicial process. Shepherd, 62 F.3d at 1474. Inherent powers include the ability to sanction misconduct, enter default judgment, levy fines, award attorneys' fees and expenses, issue contempt citations, disqualify counsel and draw adverse evidentiary inferences or preclude evidence. Id. at 1475. Appropriate restraint, however, must be exercised in the use of inherent powers because they are potent. Id.; Cobell, 37 F.Supp.2d at 11 (court should look first to rules for appropriate remedies and then its inherent powers). The sanction must be proportionate to the misconduct, and the court must consider first the lesser sanctions of fines, attorneys' fees or adverse evidentiary rulings before considering dismissal. Shepherd, 62 F.3d at at 1478-79; Petties v. District of Columbia, 897 F.Supp. 626, 629 (D.D.C. 1995)(goal is to exert only so much court authority as necessary to assure compliance); see also Food Lion, 103 F.3d at 1017 n.14 (district court should be authorized to include legal fees associated with contempt even absent a showing of willful disobedience by the contemnor).

Two elements must be met prior to a finding of civil contempt. Cobell, 37 F.Supp.2d at 9. First, there must be a court order that is "clear and reasonably specific." This is an objective standard including the language of and circumstances surrounding the issuance of the order. Id. at 9, 16. Second, the respondent must have violated that order. Id. at 9. The burden is on the movant to demonstrate these two elements through clear and convincing evidence. Id. A finding of bad faith by the contemnor is not required. Civil contempt may arise even where the failure to comply with a court order was unintentional. Food Lion, 103 F.3d at 1016 (citing NLRB v.

Blevins Popcorn Co., 659 F.2d 1173, 1183 (D.C. Cir. 1981)); Lee v. Dept. of Justice, 401 F.Supp.2d 123, 131 (D.D.C. 2005) (contemnor's intent is immaterial). Civil contempt is a remedial sanction for the dual purpose of obtaining compliance with the court's order and compensating for damages caused by the non-compliance. Food Lion, 103 F.3d at 1016; Cobell, 37 F.Supp.2d at 10.

In determining whether the language of the order was unambiguous, the court can consider whether the contemnor failed to seek clarification, explanation or modification of the order's language. Cobell, 37 F.Supp.2d at 16; Food Lion, 103 F.3d at 1019 (upholding contempt based on failure to comply with production order's time limits when no clarification or extension was sought). A party's misunderstanding or misinterpretation of an order does not equate to an ambiguity in the order. Cobell, 37 F.Supp.2d at 17-18 (court viewed ambiguity argument with skepticism where attorney in charge of document production did not know what language of the order meant).

The district courts in this Circuit have recognized the defense of good faith substantial compliance for contempt. Food Lion, 103 F.3d at 1017. The defense requires the respondent to bear the burden of showing that it "took *all* reasonable steps within [its] power to comply with the court's order." Id. (citations omitted) (emphasis added). "Some attempts" at compliance will not satisfy the good faith element. Philip Morris, 287 F.Supp.2d at 13 (to assess good faith, court must balance respondent's rights with need to prevent respondent from "flouting the law").

Good faith alone, however, is not sufficient to excuse contempt. Rather, it is a factor in whether substantial compliance occurred and may be considered for mitigation of damages. Food Lion, 103 F.3d at 1017. Substantial compliance should be measured by "the percentage of documents produced that in fact exist, not simply the number of documents produced that should

in theory exist.” Cobell, 37 F.Supp.2d at 19. Substantial compliance is not satisfied when categories of documents required by the order are not produced. See id. at 22 (listing categories of documents required by order but not produced); see also Philip Morris, 287 F.Supp.2d at 11, 13 (failure to log privileged materials did not satisfy “substantial compliance”).

If a respondent’s inability to comply is self-induced, it is not a defense to a finding of contempt. SEC v. Showalter, 227 F.Supp.2d 110, 120 (D.D.C. 2002). A party can put itself in a posture of non-compliance from the outset by instructing a search for certain documents as opposed to all documents called for by the order. Cobell, 37 F.Supp.2d at 25 (in-house counsel sent memo directing search for “ownership and income documents” as opposed to all documents relating to accounts at issue).

III. ARGUMENT

This Court has the ability through the authority granted it by Rule 37(b) and Rule 45(e), Fed.R.Civ.P., and through its inherent power, to enforce its own production orders dated August 23, 2007 (Sullivan, J.) and December 3, 2007 (Facciola, J.). Numerous remedies are available for violations of those orders, including a finding of contempt and the award of reasonable costs and fees caused by the disobedience. As the movant, it is FEI’s burden to show through clear and convincing evidence that the orders are “clear and reasonably specific” and that plaintiffs and HSUS (collectively, “respondents”) violated them. The respondents’ intent is irrelevant as the violation need not be willful or intentional for civil contempt and sanctions to arise.

The August 23, 2007 order is clear and reasonably specific. This is an objective standard that is evaluated by the language of the order and the circumstances surrounding its issuance. The Discovery Order’s language required Rider to produce all responsive documents and information concerning his income and payments from other animal advocates. It likewise

required the Organizational Plaintiffs to produce all responsive documents and information concerning payments to Tom Rider, regardless of whether such payments were made directly or indirectly to him. See, supra, at 2-4.

The Discovery Order did not require the plaintiffs to produce documents regarding media or legislative strategy. However, that exception to production cannot be misinterpreted to swallow the production rule regarding payments. See Hearing Tr. (2/26/08) at 21 (Judge Facciola: “But the point that Judge Sullivan is protecting there is quite narrowly defined. Quote, ‘Plaintiffs need not produce documents or – information related to any media or legislative strategies, communications or any documents or information about litigation strategy or communications that are properly protected by the attorney/client or work product privileges.’”). The Court explicitly recognized that funding and the public campaign were related, but that relevant financial information must nonetheless be produced:

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, Rider’s relevant financial information shall be produced without a protective order but with appropriate redactions approved by this Order.

Discovery Order at 5. The plain language of this Order contradicts plaintiffs’ arguments that “media strategy involved payments to Rider” and thereby did not need to be produced. See Hearing Tr. at 9:16-24 (1/8/08).

Moreover, the HSUS Order, which is also clear and reasonably specific, follows the rulings of the Discovery Order and explains them as follows:

Judge Sullivan has concluded that the only information that should be compelled pertaining to fund raising are documents that pertain to Tom Rider’s “funding for his public education and litigation efforts,” if the funding came from “a party, any attorney for any of the parties or any officer or employee of the plaintiff organizations or WAP” or to donations that pertain to payments made to Rider by any such person. Judge Sullivan further indicated that the names of the donors would be redacted if the donor is not “a party, any attorney

for any of the parties, or any officer or employee of the plaintiffs organizations or WAP.” I will therefore order the HSUS to do the same exact thing, i.e., produce documents that pertain to Tom Rider’s “funding for his public education and litigation efforts” provided the funding came from “a party, any attorney for any of the parties, or any officer or employee of the plaintiff organizations or WAP” or that pertain to payments made to Rider by any such person. HSUS will also provide documents that pertain to donations relating to payments made to Rider by any such person.

Mem. Op. to HSUS Order at 4 (12/3/07) (Docket # 232). As for documents pertaining to Rider, the Court ordered HSUS to produce:

FEI seeks all documents that “refer, reflect or relate” to Tom Rider, including all communications with or to him, and documents that pertain to payments made to him. Like Judge Sullivan, I find that Rider is a central player in this litigation and I will compel what FEI seeks.

Id. at 5.

These orders are clear. There is no ambiguity in what was required – *all* documents relating to Rider’s funding *regardless of whether the purpose of the payments was for media or legislative efforts*. Nor were these production orders limited to only those documents that would reflect each payment made. FEI’s discovery requests were broader than that. FEI asked Rider to produce all documents related to any payments or gifts made to him by any animal advocate. FEI Ex. 1 at No. 21. It also asked him to describe all income, compensation or other items he has ever received from an animal advocate, as well as any communication he has had with an animal advocate regarding defendant. FEI Ex. 11 at Nos. 4, 24. FEI asked the Organizational Plaintiffs to produce “all documents that refer, reflect or relate to any expenditure by you of ‘financial and other resources’ made while ‘pursuing alternative sources of information about

defendants' actions and treatment of elephants' each year from 1996 to the present." FEI Ex.3 at No. 20.²

Notably, at no time did the respondents seek clarification, explanation or modification of the two orders' language, which undermines any claim that the orders were ambiguous. Plaintiffs have sought modification or explanation on prior occasions, see Emergency Motion for Clarification of the September 25, 2007 Order (9/26/08) (Docket # 196), but did not do so here. In addition, any misunderstanding or misinterpretation of the orders by the respondents does not make the order ambiguous. Several of the witnesses were unable to express an understanding of what the August 23, 2007 order meant independent of what their lawyers told them to which they objected on grounds of privilege. See, e.g., Hearing Tr. (2/26/08) at 134-35 (N.Paquette); Hearing Tr. (3/6/08) at 29 (T.Silverman). Yet they all testified conclusively that they believed their responses were accurate and sufficient. See Hearing Tr. (2/26/08) at 70-79 (L. Weisberg); id. at 152-57 (N. Paquette); Hearing Tr. (3/6/08) at 47-49 (T. Silverman); Hearing Tr. (5/30/08) at 66-75 (M. Markarian); id. at 129-35 (C. Liss). This undermines rather than fosters any argument by plaintiffs that the order was ambiguous.

Moreover, the respondents may have put themselves in a posture of non-compliance from the outset depending upon what they were instructed to search for based on counsel's statement at the January 8, 2008 hearing that they "drew a line" and then wrote a memo to the clients about it. If this memo was incorrect in what it instructed plaintiffs to search for and produce, *i.e.*, produce only documents sufficient to reflect all payments rather than produce all documents related to payments, then plaintiffs were non-compliant from the outset. It is unclear whether

² This document request contains the same language found in Interrogatory No. 22. See FEI Ex. 16 at Interrog. 22. Both API and ASPCA identified payments to or for Rider as responsive to this interrogatory. FEI Ex. 17 at pp. 33-34; FEI Ex. 29 at pp.33-34.

HSUS also followed this memo, but given the significant and substantial overlap between FFA and HSUS, including Mr. Markarian's dual role with both organizations, HSUS and FFA should be required to explain any distinctions between the two entities' files and information in responding to the two orders. (Facts ¶¶ 101-05).

In order to assert the defense of good faith substantial compliance, the respondents would have to show they took *all* reasonable steps within their power to comply with the court's order. Taking "some" steps is insufficient. This showing is the respondents' burden and they have not met it. While the Organizational Plaintiffs claimed to have thoroughly searched, they all were impeached with examples of materials that they either had not searched, had not accounted for, or had not produced. See FEI Ex. 51; Hearing Tr. (2/26/08) at 48-49 (ASPCA withheld materials on alleged "proprietary" grounds); id. at 24-25 (ASPCA did not search certain files of former President); id. at 92, 131-32 (API did not search computer of former CEO); Hearing Tr. (3/6/08) at 32, 48 (AWI withheld emails concerning fundraiser); Hearing Tr. (5/30/08) at 12-13, 19-20 (FFA did not produce FEI Ex. 51 or its attachment); id. at 42 (FFA did not produce letter enclosing payment for Rider). The evidence shows that the witnesses did not take all reasonable steps, and thus, the defense of good faith substantial compliance does not apply.

Moreover, the Court issued a minute order on June 5, 2008

directing plaintiffs to submit, by COB Tuesday, June 10, 2008, to chambers for an in camera review those documents that are the subject of defendant's motions to enforce the court's August 23, 2007 and December 3, 2007 orders. They appear as [#233] and [#247] on the docket. Plaintiffs are instructed to submit a copy of the documents that were withheld completely, a copy of the redacted version given to defendant and a copy of the unredacted versions.

Plaintiffs responded to this order by actually producing documents labeled as “IC” and “UR.” See Exhibit 3 (cover letter for June 10, 2008 in camera submission).³ FEI objected to this submission to the extent that “collected” was anything less than all “those documents that are the subject of [FEI’s] motions to enforce.” See Exhibit 5 (6/11/08 letter). By definition, these documents were the subject of FEI’s motions to enforce, plaintiffs collected them, but then did not produce them to FEI. Plaintiffs were thus capable of producing them to FEI but chose not to. The refusal to produce the documents was therefore “self-induced” and is not a defense to contempt.

Clear and convincing evidence demonstrates that the respondents did not make full production or full disclosures. Plaintiffs, in particular, did not produce their communications about payments to Rider. None of ASPCA, AWI, or FFA produced to FEI an e-mail those organizations received from WAP regarding payments to Rider. FEI Ex. 51. Indeed, neither these organizations nor API have produced any e-mail communications among each other concerning the payments to Mr. Rider. Rider testified that he e-mailed AWI approximately 100 times in 2007 alone. (Facts ¶ 93). Similarly, ASPCA has only produced two internal e-mails, see FEI Exs. 54-55, and the other organizations have not produced any concerning payments to Mr. Rider. It is not credible that these four organizations could pay an individual approximately \$120,000 without little or no written communications about such payments. Indeed, the organizations exchanged e-mails about a fundraiser held to raise money for Rider, yet those e-mails have not been produced. Hearing Tr. at 32, 48 (3/6/08) (T. Silverman).

³ Plaintiffs’ correspondence did not provide the bates numbers for their submission, so there is currently nothing in the record to reflect the volume of what exactly was produced. FEI wrote to plaintiffs’ counsel on June 16, 2008 asking for these Bates numbers, see Exhibit 4 (6/16/08 letter), but at the time of this filing, FEI has received no response to its inquiry.

Plaintiffs have also failed to describe in response to FEI's interrogatories their oral communications about such payments. Each of the organizations, for example, has participated in conference calls with each other to discuss the payments to Rider, yet those communications were not disclosed in the organizations' interrogatory responses. Hearing Tr. (2/26/08) at 115-17 & 121-22 (N.Paquette); id. at 195 & 213-14 (T.Silverman); Hearing Tr. (3/6/08) at 9 (T.Silverman); Hearing Tr. (5/30/08) at 81-83, 120 (C.Liss). Indeed, the organizations had several communications amongst themselves or with other people concerning these payments. See, e.g., Hearing Tr. (2/26/08) at 43-47, 60-64 (L.Weisberg); Hearing Tr. (5/30/08) at 30. The organizations also had internal communications about the payments that were not disclosed, see, e.g., Hearing Tr. (2/26/08) at 42-43 (L.Weisberg); id. at 109 (N.Paquette); Hearing Tr. (3/6/08) at 14 (T.Silverman); id. at 68 & Hearing Tr. (5/30/08) at 22 (M.Markarian), and communications with Rider that were not disclosed, see, e.g., Hearing Tr. (2/26/08) at 48-49 (L.Weisberg); id. at 206-11 (T.Silverman); Hearing Tr. (3/6/08) at 18-19 (T.Silverman); Hearing Tr. (5/30/08) at 78-80 & 122-23 (C.Liss).

All of these communications – whether written or oral – should have been produced in response to the Court's August 23, 2007 Order. Simply put, plaintiffs were required to produce all documents concerning payments to Rider, not merely documents sufficient to reflect the amount of each payment. Cf. Hearing Tr. (2/26/08) at 74, 75, 77, 87 (cross-examination of L.Weisberg); id. at 151-52 (cross-examination of N.Paquette); Hearing Tr. (3/6/08) at 47 (cross-examination of T.Silverman); Hearing Tr. (5/30/08) at 67 (cross-examination of M.Markarian); id. at 133 (cross-examination of C.Liss). Plaintiffs, accordingly, should have produced the communications described above as well as all other documents concerning payments, such as check requests, checks, accompanying correspondence, etc. Plaintiffs have failed to produce all

such documents. See, e.g., Hearing Tr. (5/30/08) at 42 (discussion of letter not produced by FFA or HSUS). See also FEI Ex. 36 (Rider Dep.) (12/18-19/07) at 507-08 (discussion of Airbills accompanying payments not preserved for production); FEI Ex. 82 (the mere six check-cashing receipts Rider produced).

The non-compliance with the Court's orders affects the plaintiffs' interrogatory responses, the declarations submitted pursuant to the Discovery Order, and the documents produced by the respondents. In its motion to enforce the August 23, 2007 order, FEI requested an order commanding immediate production of all documents and information required by the Discovery Order, including those concerning payments to Rider and all communications concerning such payments; all documents in the files of Rider's attorneys (including WAP-related documents) that are responsive to the document requests issued to Rider – this would include all documents that were never logged as privileged as that claim has now been waived; and a complete response to Rider's Interrogatory No. 24. FEI also requested its costs, expenses and attorneys' fees incurred as a result of plaintiffs' non-compliance, and any other relief that the Court deems just. See Motion to Enforce August 23, 2007 Order at 19 & proposed order (11/6/07) (Docket # 223).

As for HSUS, FEI asked the Court to order that all documents and information required by the December 3, 2007 order be produced, including documents and information regarding Rider, this litigation, and payments to Rider regardless of whether HSUS and/or FFA has possession, custody or control of the documents. FEI also asked for its costs, expenses, and attorneys' fees resulting from the non-compliance with the December 3, 2007 order. See Motion to Enforce December 3, 2007 Order at 11 & proposed order (1/25/08) (Docket # 247).

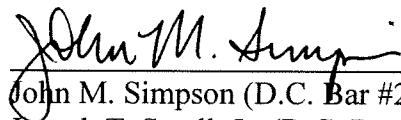
IV. CONCLUSION

This matter has now been set for trial on October 7, 2008. FEI's document requests and interrogatories to plaintiffs were served over four years ago. FEI subpoenaed HSUS for documents approximately 1 year ago. The Court ordered plaintiffs and HSUS, clearly and specifically, to produce discovery related to, *inter alia*, payments to Rider and communications. The respondents failed to produce the discovery compelled by the Court, which then required FEI to have to move to enforce those orders.

At the evidentiary hearing, FEI presented clear and convincing evidence that information and documents had been omitted from the respondents' productions. The evidence taken at the hearing and the legal conclusions related to the same are set forth in FEI's Proposed Findings of Fact and Conclusions of Law. For the reasons set forth herein, and in the memoranda in support of FEI's motions to enforce, FEI asks that its motions be granted, that the discovery be ordered produced immediately, and that it be awarded its expenses, costs and attorneys' fees incurred for having to prosecute this matter.

Dated this 19th day of June, 2008.

Respectfully submitted,



John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Michelle C. Pardo (D.C. Bar #456004)
George A. Gasper (D.C. Bar #488988)

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Counsel for Defendant Feld Entertainment, Inc.

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Washington, D.C. 20009-1056

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Erin M. Tobin

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September 24, 2007

By Hand Delivery

Lisa Joiner
Fulbright & Jaworski
801 Pennsylvania Avenue, NW
Washington, D.C. 20004

Re: ASPCA v. Ringling Bros., Civ. No. 03-2006

Dear Ms Joiner:

Accompanying this letter are the following series of documents, which plaintiffs are producing pursuant to the Court's August 23, 2007 Order (Docket No. 178): AWI 9928-10057, API 7203-7259, F 4483-4516, and TR 221-614, on behalf of the Animal Welfare Institute, Animal Protection Institute, the Fund for Animals, and Tom Rider respectively. We are also producing documents labeled PL 11429-11529 on behalf of all of the plaintiffs. In addition, we are producing verified supplemental interrogatory responses on behalf of AWI, API, the Fund, and Tom Rider (collectively, "plaintiffs"), as well as a declaration from each of the plaintiffs as ordered by the Court. As you know, on September 26, 2007 we will be separately producing the ASPCA's response to the Court's Order.¹

Also accompanying this letter are revised Privilege Logs for each of the plaintiffs. Plaintiffs have revised the Logs to comply with the Court's August 23, 2007 Order, which instructed plaintiffs to provide:

A Privilege Log that complies with the case law of this Circuit, is consistent with the privilege log provided by defendant, and provides a description of the authors,

¹ At this time the plaintiffs have not completed a general supplemental production of documents or prepared supplemental responses for any document requests or interrogatories other than what the Court specifically ordered on August 23, 2007. Plaintiffs will, however, soon be completing such further supplemental productions in accordance with the Federal Rules.



addressees, and contents sufficient to adequately assess the claim of privilege. The privilege log need not include information determined by the Court to be irrelevant or over burdensome to produce.

Pursuant to this directive, certain information included in the original Logs is no longer listed. First, the Logs no longer contain “true litigation material,” *see* FEI’s Reply in Support of Motion to Compel at 13 (“FEI Reply”) (Docket No. 159) - *i.e.*, the material exchanged among counsel and between counsel and the clients that directly concern their strategies and plans for this lawsuit. As we have explained to you previously, although plaintiffs provided categorical Privilege Log entries for this material in their original Logs, FEI has never similarly logged this material at all, and, instead, successfully argued to Judge Facciola that simply to identify such records would “disclose their attorneys’ mental processes, as well as their attorneys’ avenues and means of investigation.” *See* Feb. 14, 2007 Letter from Tanya Sanerib, quoting *ASPCA v. Ringling Bros.*, 233 F.R.D. 209, 213 (D.D.C. 2006).

Thus, the items with the following reference numbers in the attached, numbered copy of plaintiffs’ original Logs have been removed from the current logs because they concern communications about this lawsuit, and thus, consistent with FEI’s Logs and the relevant Court rulings, need not be logged: 24, 25, 27, 29-32, 34-38, 40, 42-46, 49, 51-53, 59, 60, 63, 66, 69, 74, 76-89, 92, 95-98, 100-104, 107, and 108. *See* Attachment A (copy of original Logs with reference numbers for each Log entry).

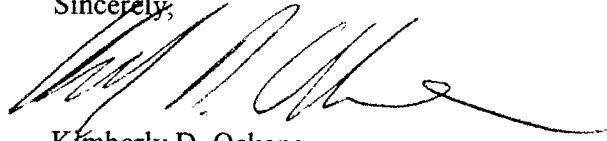
If for some reason FEI continues to maintain that this privileged material should be logged, and is prepared to provide plaintiffs with a Log for FEI and its counsel’s communications concerning this lawsuit, plaintiffs are willing to revisit this issue. However, particularly in light of Judge Sullivan’s directive that plaintiffs’ logs be “consistent with the privilege log provided by defendant,” Aug. 23, 2007 Order at 7 (Docket No. 178), and the fact that FEI’s Log contains absolutely no entries about this lawsuit, we assume that this approach is appropriate.

Second, to the extent the plaintiffs, and/or their counsel, have had communications concerning media or legislative strategies - an issue FEI raised in its motion to compel, *see* FEI Reply at 13 - Judge Sullivan has now ruled that such material need not be produced or identified at all because it is “irrelevant to this litigation and would be over burdensome to produce.” *See* Aug. 23, 2007 Order at 4 (Docket No. 178); *see also id.* at 7 (“plaintiffs need not produce documents or further information related to any media or legislative strategies or communications”). Thus, the following items from the original Logs have also been removed: 33, 41, 90, and 91.

Finally, with respect to the following original Log entries, we have either released responsive documents, or provided additional details concerning withheld documents:

56, 58, 93, and 94. Any such newly released material is contained in the "PL" series of documents being produced today.

Sincerely,

A handwritten signature in black ink, appearing to read "Kimberly D. Ockene". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Kimberly D. Ockene
Katherine A. Meyer

Enclosures

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September 26, 2007

By Hand Delivery

Lisa Joiner
Fulbright & Jaworski
801 Pennsylvania Avenue, NW
Washington, D.C. 20004

Re: ASPCA v. Ringling Bros., Civ. No. 03-2006

Dear Ms Joiner:

Accompanying this letter are documents labeled A 1202-1248, which we are producing on behalf of the American Society for the Prevention of Cruelty to Animals ("ASPCA") pursuant to the Court's August 23, 2007 and September 24, 2007 Orders. Also accompanying this letter are the ASPCA's verified supplemental interrogatory responses, and the Declaration of Lisa Weisberg on behalf of the ASPCA, as ordered by the Court.

We are also producing a revised Privilege Log for the ASPCA. As explained in my letter to you of Monday, September 24, 2007, plaintiffs have revised their Logs to comply with the Court's August 23, 2007 Order. The explanations in my September 24 letter also apply to the ASPCA's Log.

Sincerely,



Kimberly D. Ockene
Katherine A. Meyer

Enclosures



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October 26, 2007

By Hand Delivery

George Gasper
Fulbright & Jaworski
801 Pennsylvania Avenue, NW
Washington, D.C. 20004

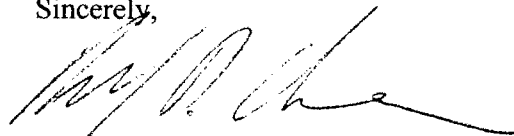
Re: ASPCA v. Ringling Bros., Civ. No. 03-2006

Dear Mr. Gasper:

Enclosed is the ASPCA's supplemental response to Interrogatory Number 21, and documents labeled A 01249-01250. The ASPCA did not yet have this information in its possession when it submitted its supplemental responses on September 26, 2007.

Also enclosed are the original signed verifications and declarations of the organizational plaintiffs in connection with their September 2007 supplemental discovery responses, copies of which you have already received.

Sincerely,



Kimberly D. Ockene

Enclosures



recycled paper

FULBRIGHT & JAWORSKI L.L.P.

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February 15, 2008

BY HAND DELIVERY

Ms. Sara Podger
Career Law Clerk to
the Honorable John M. Facciola
U.S. District Court for the District of Columbia
333 Constitution Avenue, NW
Washington, DC 20001

Re: ASPCA v. Feld Entertainment, Inc., Civil Action No. 1:03-cv-2006

Dear Ms. Podger:

Pursuant to the February 12, 2008 Scheduling Order, enclosed please find Defendant's List of Witnesses and Exhibits for the Court's February 26, 2008 Hearing Concerning Plaintiffs' Failure to Comply with the Court's August 23, 2007 Order. Also enclosed are two copies of Defendant's exhibits. By copy of this letter, defendant is serving its List of Witnesses and Exhibits (together with a copy of all exhibits) upon plaintiffs' counsel.

Very truly yours,


George A. Gasper

Enclosures

cc: Katherine A. Meyer (counsel for plaintiffs)

**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. :

Case No. 03-2006 (EGS/JMF)

**DEFENDANT’S LIST OF WITNESSES AND EXHIBITS
FOR THE COURT’S FEBRUARY 26, 2008 HEARING CONCERNING
PLAINTIFFS’ FAILURE TO COMPLY WITH THE COURT’S AUGUST 23, 2007 ORDER**

Witnesses

Defendant Feld Entertainment Inc. (“FEI”) may call the following witnesses:

1. Tom Rider
2. Nicole Paquette (Animal Protection Institute)
3. Lisa Weisberg (ASPCA)
4. Cathy Liss (Animal Welfare Institute)
5. Tracy Silverman (Animal Welfare Institute)
6. Michael Markarian (Fund for Animals / Humane Society for the United States)
7. Jonathan Lovvorn (Fund for Animals / Humane Society for the United States)
8. Katherine Meyer (Meyer Glitzenstein & Crystal / Wildlife Advocacy Project)
9. Eric Glitzenstein (Meyer Glitzenstein & Crystal / Wildlife Advocacy Project)
10. Records Custodian for Meyer Glitzenstein & Crystal
11. Records Custodian for Wildlife Advocacy Project
12. D’Arcy Kemnitz (former Executive Director of Wildlife Advocacy Project)

FEI reserves the right to call any witnesses identified by plaintiffs in this matter. FEI further reserves the right to call additional witnesses for impeachment or rebuttal purposes.

Exhibits

FEI may introduce the following exhibits:

1. FEI's Document Requests to Tom Rider (3/30/04)
2. Tom Rider's Responses and Objections to FEI's Document Requests (6/9/04)
3. FEI's Document Requests to the Organizational Plaintiffs (3/30/04)
4. ASPCA's, AWI's, and FFA's Responses and Objections to FEI's Document Requests (6/9/04)
5. API's Responses and Objections to FEI's Document Requests (1/15/07)
6. Plaintiffs' Original Privilege Log (6/9/04)
7. API's Original Privilege Log (1/15/07)
8. Organizational Plaintiffs' First Supplemental Privilege Log (1/31/07)
9. Tom Rider's First Supplemental Privilege Log (1/31/07)
10. Plaintiffs' Second Supplemental Privilege Log (9/24/07)
11. FEI's Interrogatories to Tom Rider (3/30/04)
12. Tom Rider's First Response to FEI's Interrogatories (6/9/04)
13. Tom Rider's Supplemental Response to FEI's Interrogatories (1/31/07)
14. Tom Rider's Second Supplemental Response to FEI's Interrogatories (9/24/07)
15. Tom Rider's Supplemental Response to FEI's Interrogatories (1/30/08)
16. FEI's Interrogatories to the Organizational Plaintiffs (3/30/04)
17. ASPCA's First Response to FEI's Interrogatories (6/9/04)
18. ASPCA's Supplemental Response to FEI's Interrogatories (1/31/07)
19. ASPCA's Supplemental Response to FEI's Interrogatories (9/26/07 & 10/26/07)
20. ASPCA's Fourth Supplemental Response to FEI's Interrogatories (1/30/08)
21. AWI's First Response to FEI's Interrogatories (6/9/04)

22. AWI's Supplemental Response to FEI's Interrogatories (1/31/07)
23. AWI's Supplemental Response to FEI's Interrogatories (9/24/07)
24. AWI's Fourth Supplemental Response to FEI's Interrogatories (1/30/08)
25. FFA's First Response to FEI's Interrogatories (6/9/04)
26. FFA's Supplemental Response to FEI's Interrogatories (1/31/07)
27. FFA's Supplemental Response to FEI's Interrogatories (9/24/07)
28. FFA's Supplemental Response to FEI's Interrogatories (1/30/08)
29. API's First Response to FEI's Interrogatories (1/15/07)
30. API's Supplemental Response to FEI's Interrogatories (9/24/07)
31. API's Supplemental Response to FEI's Interrogatories (1/30/08)
32. Rule 30(b)(6) Deposition Testimony of AWI (Cathy Liss / Designated Witness) (5/18/05)
33. Rule 30(b)(6) Deposition Testimony of FFA (Michael Markarian / Designated Witness) (6/22/05)
34. Rule 30(b)(6) Deposition Testimony of ASPCA (Lisa Weisberg / Designated Witness) (7/19/05)
35. Deposition Testimony of Tom Rider (10/12/06) (Noticed by Plaintiffs)
36. Deposition Testimony of Tom Rider (12/18-19/07) (Noticed by Defendant)
37. Rule 30(b)(6) Deposition Testimony of WAP (Eric Glitzenstein / Designated Witness) (12/21/07 + 1/29/08)
38. Rule 30(b)(6) Deposition Testimony of API (Nicole Paquette / Designated Witness) (1/29-30/08)
39. Deposition Testimony of D'Arcy Kemnitz (to be taken on 2/20/08)
40. Tom Rider's Court-Ordered Declaration of September 24, 2007
41. AWI's Court-Ordered Declaration of September 24, 2007
42. FFA's Court-Ordered Declaration of September 24, 2007
43. API's Court-Ordered Declaration of September 24, 2007

44. ASPCA's Court-Ordered Declaration of September 26, 2007
45. HSUS's Declarations of February 5, 2008
46. Letter From Katherine Meyer to George Gasper (12/15/06)
47. Letter From Katherine Meyer to George Gasper (1/16/07)
48. Letter From Katherine Meyer to Lisa Joiner (2/8/07)
49. Letter From Katherine Meyer to George Gasper (10/12/07)
50. Tom Rider's Tax Returns (2000-2006) (TR 00546-611)
51. Partial Email (pages 2 and 3) From Katherine Meyer to Lisa Weisberg, Michael Markarian, and Cathy Liss (11/5/03) (270)
52. FFA Accounting Record Concerning Payment to Rider (7/22/04) (FFA 04485-86)
53. AWI 2000 Form 990 (AWI 09948-09971)
54. Email from Lisa Weisberg to Larry Hawk (5/7/01) (A 00046)
55. Email from Lisa Weisberg to Larry Hawk (1/29/02) (A 00073)
56. Memorandum from D'Arcy to Kath (2/13/02) (87)
57. WAP Ledgers of Payments Made to or for Tom Rider (September 24, 2007: WAP-004-009; November 30, 2007: WAP-001) (Bates-Labeled by FEI)
58. WAP Ledgers of Payments Received for Tom Rider (September 24, 2007: WAP-002-003; November 30, 2007: WAP-002) (Bates-Labeled by FEI)
59. IRS Forms 1099 Issued to Rider by WAP (2002-2006) (Produced by WAP)
60. IRS Forms 1099 Issued to Rider by WAP (2002-2006) (TR 00457-461, TR 00197)
61. IRS Forms 1099 Issued to Rider by WAP (2002-2006) (M 107-111, 113)
62. IRS Form 1099 Issued to Rider by MGC (TR 00456)
63. IRS Form 1099 Issued to Rider by MGC (M 106)
64. Fundraiser Invitation (AWI 09925)
65. Letter from Jonathan Lovvorn / HSUS to Eric Glitzenstein (5/24/05)

66. E-mail from Katherine Meyer to Eric Glitzenstein (1/9/06) (April 24, 2007: WAP-004) (Bates-Labeled by FEI)
67. E-mail From Katherine Meyer to Eric Glitzenstein (1/12/06) (April 24, 2007: WAP-011) (Bates-Labeled by FEI)
68. E-mail From Leslie Mink to Cathy Liss, Eric Glitzenstein, Ethan Eddy, Jennifer Pryor, Jonathan Lovvorn, Katherine Meyer, Kim Ockene, Lisa Weisberg, Nicole Paquette, Tanya Sanerib, and Tracy Silverman (1/25/06) (April 24, 2007: WAP-006) (Bates-Labeled by FEI)
69. E-mail From Leslie Mink to Cathy Liss, Eric Glitzenstein, Ethan Eddy, Jennifer Pryor, Jonathan Lovvorn, Katherine Meyer, Kim Ockene, Lisa Weisberg, Nicole Paquette, Tanya Sanerib, and Tracy Silverman (1/26/06) (April 24, 2007: WAP-005) (Bates-Labeled by FEI)
70. E-mail From Leslie Mink to Cathy Liss, Eric Glitzenstein, Ethan Eddy, Jennifer Pryor, Jonathan Lovvorn, Katherine Meyer, Kim Ockene, Lisa Weisberg, Nicole Paquette, Tanya Sanerib, and Tracy Silverman (1/26/06) (April 24, 2007: WAP-007) (Bates-Labeled by FEI)
71. E-mail From Leslie Mink to Cathy Liss, Eric Glitzenstein, Ethan Eddy, Jennifer Pryor, Jonathan Lovvorn, Katherine Meyer, Kim Ockene, Lisa Weisberg, Nicole Paquette, Tanya Sanerib, and Tracy Silverman (2/10/06) (April 24, 2007: WAP-008) (Bates-Labeled by FEI)
72. E-mail From Leslie Mink to Cathy Liss, Eric Glitzenstein, Ethan Eddy, Jennifer Pryor, Jonathan Lovvorn, Katherine Meyer, Kim Ockene, Lisa Weisberg, Nicole Paquette, Tanya Sanerib, and Tracy Silverman (6/21/06) (April 24, 2007: WAP-009) (Bates-Labeled by FEI)
73. E-mail From Leslie Mink to Cathy Liss, Eric Glitzenstein, Jennifer Pryor, Jonathan Lovvorn, Katherine Meyer, Kim Ockene, Lisa Weisberg, Nicole Paquette, Tanya Sanerib, and Tracy Silverman (7/14/06) (April 24, 2007: WAP-003) (Bates-Labeled by FEI)
74. E-mail From Tracy Silverman to Cathy Liss, Nicole Paquette, Michelle Thew, Lisa Weisberg, Jon Lovvorn, Katherine Meyer, Kim Ockene, and Leslie Mink (1/9/06) (March 30, 2007: WAP-128) (Bates-Labeled by FEI)
75. Fax from Tom Francis to "Tracy" (7/7/06) (March 30, 2007: WAP-257-60) (Bates-Labeled by FEI)
76. AWI Credit Card Statements Reflecting Payments for Rider (AWI 09940-44)
77. ASPCA Credit Card Statements Reflecting Payments for Rider (A 01242-50)
78. Letters from Eric Glitzenstein to Tom Rider (8/15/05-9/12/07) (TR 00376-455)

79. Federal Express Airbills from Meyer Glitzenstein & Crystal to Tom Rider (M 001-105)
80. Federal Express Airbill from Tom Rider to Meyer Glitzenstein & Crystal (TR 00468)
81. Receipt for Wire Transfer to Tom Rider (M 141)
82. Tom Rider's Check Cashing Receipts (TR 00221-22 and two "Ace" Receipts Not Bates-Labeled)
83. Meyer Glitzenstein & Crystal Invoices Produced by ASPCA (A 01203-15, A 01219-20)
84. Meyer Glitzenstein & Crystal Invoices Produced by AWI (AWI 10054-57, AWI 09934-35, AWI 10048-49, AWI 009938-39, AWI 10050-53, AWI 09936-37, AWI 09932-33)
85. Meyer Glitzenstein & Crystal Invoices Produced by FFA (F 04513-16, F 04493-512)
86. AWI Check to an Employee for Wire Transfer to Tom Rider (AWI 09946)
87. Meyer Glitzenstein & Crystal Memorandum to "Plaintiffs" Regarding "Status of Manatee Case Against Federal Agencies and Request for Continued Support for Grassroots Organizing Efforts of Susannah Lindberg" (3/28/03) (Produced by HSUS on December 13, 2007)
88. Notice of Defendant's Deposition of AWI (4/14/05)
89. Notice of Defendant's Deposition of FFA (4/14/05)
90. Notice of Defendant's Deposition of ASPCA (4/14/05)
91. Subpoena for Defendant's Deposition of WAP (11/27/07)
92. Notice of Defendant's Deposition of API (1/22/08)
93. ESA Action Payment Timeline (Exhibit 3 to Defendant's Opposition to Plaintiffs' Motion Under Rule 11) (8/16/07)

FEI reserves the right to introduce any and all pleadings (together with exhibits) submitted in this case. FEI further reserves the right to introduce any exhibit(s) that may be necessary at the hearing for impeachment or rebuttal purposes.

Dated this 15th day of February, 2008.

Respectfully submitted,

/s/

John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Michelle C. Pardo (D.C. Bar #456004)
George A. Gasper (D.C. Bar #488988)

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Counsel for Defendant Feld Entertainment, Inc.

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February 15, 2008

By Hand Delivery

Lisa Joiner
Fulbright & Jaworski
Market Square
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2623

Re: ASPCA v. Ringling Bros., Civ. No. 03-2006 (EGS/JMF)

Dear Ms. Joiner:

Pursuant to the Court's February 12, 2008 Order in the above-captioned matter, I am writing to provide defendant with plaintiffs' exhibits and witness list for the evidentiary hearing scheduled for February 26, 2008 and March 6, 2008.

1. Exhibits

Along with this letter plaintiffs are transmitting four binders, which contain tabs labeled A through S. These binders contain all of the exhibits that plaintiffs may rely on at the hearing.

2. Witnesses

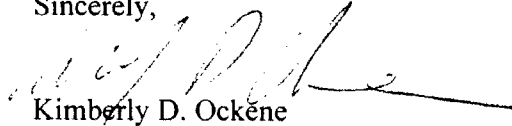
Plaintiffs intend to rely on the live testimony of the following individuals at the hearing: Tracy Silverman on behalf of the Animal Welfare Institute, Lisa Weisberg on behalf of the American Society for the Prevention of Cruelty to Animals, and Michael Markarian on behalf of the Fund for Animals.

Plaintiffs also intend to rely on the December 18, 2007 and December 19, 2007 deposition testimony of Tom Rider, as well as the January 29, 2008 and January 30, 2008 deposition testimony of Nicole Paquette, on behalf of the Animal Protection Institute.



Those transcripts, as well as the DVD recordings of Ms. Paquette's testimony, are also included in the exhibit binders transmitted with this letter.¹

Sincerely,

A handwritten signature in black ink, appearing to read "Kimberly D. Ockene", with a long horizontal flourish extending to the right.

Kimberly D. Ockene

cc: Sara Podger
Clerk to Magistrate Judge Facciola

¹ Plaintiffs may also rely on the DVD recordings of Mr. Rider's deposition, but plaintiffs have not yet received a copy of those recordings from the certified videographer. When plaintiffs do receive those recordings, they will provide defendant and the court with copies.

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)

**FELD ENTERTAINMENT, INC.'S MEMORANDUM IN SUPPORT OF ITS PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

EXHIBIT 3

06/10/2008 04:05 2025885049

MEYER GLITZENSTEIN C

PAGE 02/03

Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009-1056

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Joshua R. Stebbins

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June 10, 2008

By Hand Delivery

Honorable John M. Facciola
U.S. Courthouse
3rd & Constitution Ave., N.W.
Washington, D.C. 20001

Re: Plaintiffs' *In Camera* submission in ASPCA, et al. v. Feld Entertainment, Inc.,
No. 1:03-cv-2006

Dear Judge Facciola:

As instructed by the Court on June 5, 2008, plaintiffs are providing to the Court the withheld and partially withheld documents that were collected by plaintiffs and that are the subject of defendant's motions to enforce the Court's August 23, 2007 and December 3, 2007 Orders, *i.e.*, documents pertaining to Tom Rider's public education campaign and/or his funding that have been withheld from defendant for any reason. The documents that were withheld in full are being provided to the Court with the Bates label "IC," followed by the document number. As instructed, plaintiffs are also providing to the Court unredacted versions of any such documents produced to defendant in redacted form. Each unredacted document is clipped together with the redacted version of the same document, and is labeled "UR," followed by the original Bates number. As will be further explained when plaintiffs file their post-hearing brief in several weeks, plaintiffs believe that none of the withheld materials is subject to disclosure under the plain terms of the Orders at issue and the underlying discovery requests.¹

¹ As the Court knows, defendant at one time sought Federal Express labels on packages sent to Tom Rider. In response to a separate subpoena to plaintiff's law firm for these labels, defendant received copies of the labels with the street addresses and phone numbers redacted. Although defendant filed a motion seeking unredacted labels, that motion has since been withdrawn (DE 302). Accordingly, plaintiffs are assuming that there is no reason to burden the Court with another unredacted set of the Federal Express labels (copies of the documents in redacted form were admitted as Plaintiffs' Exhibit 6 at the evidentiary hearing).



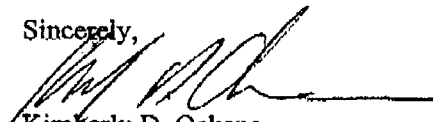
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06/10/2008 04:05 2025885049

MEYER GLITZENSTEIN C

PAGE 03/03

Sincerely,

A handwritten signature in black ink, appearing to read 'Kimberly D. Ockene', with a long horizontal flourish extending to the right.

Kimberly D. Ockene
Counsel for Plaintiffs

cc w/o enclosures: Lisa Zeiler Joiner
Counsel for Defendant

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)

FELD ENTERTAINMENT, INC.'S MEMORANDUM IN SUPPORT OF ITS PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

EXHIBIT 4

FULBRIGHT & JAWORSKI L.L.P.

A REGISTERED LIMITED LIABILITY PARTNERSHIP
801 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2623
WWW.FULBRIGHT.COM

LISA ZEILER JOINER
PARTNER
LJOINER@FULBRIGHT.COM

DIRECT DIAL: (202) 662-4501
TELEPHONE: (202) 662-0200
FACSIMILE: (202) 662-4643

June 16, 2008

VIA E-MAIL & REGULAR MAIL

Kimberly D. Ockene
Meyer Glitzenstein & Crystal
1601 Connecticut Ave., N.W., Ste. 700
Washington, D.C. 20009

Re: ASPCA, et al. v. Feld Entertainment, Inc., Civ. Action No. 1:03-cv-2006

Dear Ms. Ockene:

Your June 10, 2008 letter to the Court accompanying plaintiffs' *in camera* submission indicates that documents bearing two types of Bates labels were included: one set labeled as "IC" for documents withheld, and one set labeled as "UR" for documents previously produced to defendant in redacted format. Would you please provide to us the Bates numbers of the IC and UR documents that have been submitted by plaintiffs to the Court pursuant to the June 5, 2008 order? As it stands right now, we have no record of what has been submitted for the Court's review.

As a follow-up to the Court's June 11, 2008 order denying plaintiff's motion for clarification, would you please produce all documents that plaintiffs have received in response to any of the railroad subpoenae they issued in January 2008? We would like copies of all documents by June 30, 2008, and we will obviously pay for the copying costs.

Please let me know whether plaintiffs will provide the information requested herein.

Sincerely,



Lisa Zeiler Joiner

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.,

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Case No. 03-2006 (EGS/JMF)

**FELD ENTERTAINMENT, INC.’S MEMORANDUM IN SUPPORT OF ITS PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

EXHIBIT 5

FULBRIGHT & JAWORSKI L.L.P.

A REGISTERED LIMITED LIABILITY PARTNERSHIP
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June 11, 2008

BY HAND DELIVERY

Hon. John M. Facciola
United States Magistrate Judge
United States Courthouse
Third Street & Constitution Avenue, N.W.
Washington, D.C. 20001

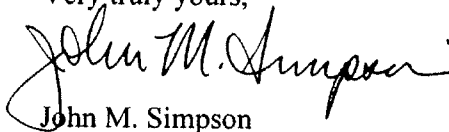
Re: ASPCA, et al. v. Feld Entertainment, Inc., Civil Action No. 03-2006 (D.D.C.)

Dear Judge Facciola:

Defendant Feld Entertainment, Inc. ("FEI") hereby objects to the letter dated June 10, 2008 (and delivered by hand the same date), to the Court from Kimberly D. Ockene, counsel for plaintiffs.

The letter states that "[a]s instructed by the Court on June 5, 2008, plaintiffs are providing to the Court the withheld and partially withheld documents that *were collected by plaintiffs* and that are the subject of defendant's motions to enforce the Court's August 23, 2007, and December 3, 2007 Orders" (Emphasis added). However the Court's Minute Order of June 5, 2007, "direct[ed] plaintiffs to submit, by COB Tuesday, June 10, 2008, to chambers for an in camera review *those documents that are the subject* of defendant's motions to enforce the court's August 23, 2007 and December 3, 2007 orders." (Emphasis added). Thus, to the extent that plaintiffs have limited their submission to only those documents they "collected" as opposed to those documents "subject to the motions to enforce" as ordered, FEI objects.

Very truly yours,


John M. Simpson

cc: Kimberly D. Ockene, Counsel for Plaintiffs
(By facsimile and first-class mail)