

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

	)	
AMERICAN SOCIETY FOR THE	)	
PREVENTION OF CRUELTY TO	)	
ANIMALS, <u>et al.</u> ,	)	
	)	Civ. No. 03-2006 (EGS)
Plaintiffs,	)	
	)	
v.	)	
	)	
RINGLING BROS. AND	)	
BARNUM & BAILEY CIRCUS, <u>et al.</u> ,	)	
	)	
Defendant.	)	
	)	

**JOINT STATUS REPORT REGARDING DISCOVERY**

Pursuant to the Court’s request during the September 16, 2005, motions hearing that the parties engage in further discussions concerning plaintiffs’ motion to compel discovery and defendant’s motion for a protective order, the parties have conferred and submit this status report to apprise the Court of the matters that remain in dispute.<sup>1</sup>

**I. Plaintiffs’ Motion To Compel.**

**A. Issues Currently Withdrawn From Plaintiffs’ Motion to Compel**

At this time, plaintiffs have agreed to withdraw their motion to compel with respect to the following categories of information as a result of defendant’s agreement to produce (or expressly claim a recognized privilege for) information responsive to plaintiffs’ discovery requests

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<sup>1</sup> It is plaintiffs’ position that the discovery obligations discussed in this status report and at issue in plaintiffs’ motion to compel apply to both defendants Ringling Bros. and Barnum & Bailey Circus, and Feld Entertainment, Inc. However, in this status report the parties will use the term “defendant” instead of “defendants” because it is defendant Feld Entertainment’s position that it (Feld Entertainment, Inc.) is the only corporate defendant in this action.

concerning these matters. Defendant will search for and produce all such non-privileged information by no later than October 28, 2005.

1. Identification of individuals and employment responsibilities. Defendant will produce additional documents and information agreed-upon by the parties and responsive to plaintiffs' discovery requests concerning employees of Feld Entertainment.

2. Information related to Asian elephants in defendant's custody. Defendant will produce documents and information concerning the Asian elephants in defendant's custody, including for the elephants listed on page 5 of plaintiffs' April 5, 2005 Notice of Filing. Defendant will produce such information whether or not a particular elephant in defendant's custody was actually owned by defendant.

3. Information related to defendant's alleged conservation efforts. Defendant has assured plaintiffs that it has produced – or will search for and produce – all non-privileged information that relates to what defendant considers to be its efforts to conserve Asian elephants in the wild. Defendant will expressly indicate, in a privilege log or other comparable format, if it is withholding any information otherwise responsive to this request based on an identifiable privilege or objection. Defendant has informed plaintiffs that defendant will not attempt to rely in this litigation on information relating to its alleged conservation efforts that defendant had not previously disclosed to plaintiffs.

Defendant also will search for and produce all information related to defendant's efforts to breed Asian elephants. Such information will include, but not be limited to, the type of information listed on page 18 of Plaintiffs Reply in Support of Plaintiffs' Motion to Compel Discovery Responses, and listed in plaintiffs' Interrogatory Number 11.

4. Information related to tuberculosis. Defendant has agreed to withdraw its objection – for purposes of discovery – to producing information related to tuberculosis in elephants, and it will search for and produce all such non-privileged information. Defendant will expressly indicate, in a privilege log or other comparable format, if it is withholding any information otherwise responsive to this request based on an identifiable privilege or objection.

5. Information related to plaintiffs’ report. Defendant has agreed to withdraw its objection – for purposes of discovery – to producing information related to the matters discussed in plaintiffs’ report entitled “Government Sanctioned Abuse, How the United States Department of Agriculture Allows Ringling Brothers Circus to Systematically Mistreat Elephants,” and will search for and produce all such non-privileged information. See Exh. R. to Pl. Mem. Defendant will expressly indicate, in a privilege log or other comparable format, if it is withholding any information otherwise responsive to this request based on an identifiable privilege or objection.

However, with respect to Chapter 9 of the report, which concerns the allegation that a Ringling Bros. trainer – Mark Oliver Gebel – struck and wounded an elephant named Asia with an ankus, defendant is still determining whether it will object to providing information related to the subsequent criminal trial and acquittal of Mr. Gebel. Plaintiffs believe that such information relates directly to the matter discussed in Chapter 9 of the report and that it is therefore clearly encompassed within the original discovery request. Defendant will inform plaintiffs as to its position on the issue no later than October 19, 2005, at which time plaintiffs may decide to renew their motion to compel on this point.

6. Video, audio, and other recordings. With respect to videos or other recordings in defendant’s possession, defendant has agreed to make available to plaintiffs the approximately

150 recordings that it believes contain materials likely to be responsive to the six categories identified in plaintiffs' letter dated October 19, 2004. With respect to the remaining recordings that defendant has already located but not reviewed, defendant has agreed to generate a list of the recordings and to allow plaintiffs to review the recordings at the offices of Covington & Burling, subject to a protective order that the parties will negotiate. In addition, defendant has agreed to determine, and inform plaintiffs, whether additional recordings covered by plaintiffs' discovery requests are at the Ringling Bros. Center for Elephant Conservation ("CEC") or in the possession of any other officer, employee, or agent of Feld Entertainment.

7. Plaintiffs' "identification" requests. Plaintiffs have agreed to forego responses to their interrogatory sub-parts that ask defendant to "identify" documents that are responsive to the interrogatory, provided that defendant produces all non-privileged documents responsive to the corresponding document requests. In exchange, defendant has agreed no longer to object to the number of interrogatories plaintiffs have propounded. Defendant will expressly indicate, in a privilege log or other comparable format, if it is withholding any information otherwise responsive to the document requests based on an identifiable privilege or objection.

**B. Issues Remaining In Dispute**

The parties have not been able to resolve their disagreements with respect to the following categories of information, and these issues remain in plaintiffs' motion to compel for the Court to decide.

1. The elephants' medical records. Defendant will produce the medical records to plaintiffs only after the Court resolves the pending motion for a protective order, as described in Section II, below.

2. Information concerning plaintiff Tom Rider. Defendant asserts that it has produced all employment records and other documents concerning Tom Rider maintained in defendant's files, that it has not located any other such documents in its files, and that the only material concerning Tom Rider that it continues to withhold is information that has been generated or obtained by defendant's lawyers in the course of this litigation for purposes of cross-examining or impeaching Mr. Rider. Defendant maintains that such information is non-responsive to plaintiffs' request for information concerning Tom Rider. Furthermore, defendant asserts that such information is protected by the work product privilege, but asserts that it is not required to list such information on a privilege log because (1) identifying such information would in itself reveal the work product of defendant's attorneys (see Def. Opp. at 23-24) and (2) because FRCP 26(b)(5) requires only that defendant "make the claim expressly and shall describe the nature of the documents ... in a manner that, without revealing information itself privileged or protected, will enable the other party to assess the applicability of the privilege or protection."

Plaintiffs continue to believe that additional records concerning Mr. Rider exist that have not yet been produced to plaintiffs, that were generated in connection with Mr. Rider's 2.5 years of employment with Ringling Bros. Circus. These records would include, but not be limited to, a background check on Mr. Rider and narratives accompanying the disciplinary warnings Mr. Rider received. In addition, plaintiffs believe that defendant has undertaken efforts to compile additional information on Mr. Rider for purposes of challenging his standing or credibility in this lawsuit, and for other purposes, that defendant has not produced. Plaintiffs vigorously dispute that any such documents in the possession of defendant's lawyers that directly relate to the

subject matter of the discovery request are non-responsive to plaintiffs' request. At minimum, plaintiffs maintain that defendant was required to tell plaintiffs that such information existed, and to list such information on a privilege log or other comparable format if there were some basis for asserting a privilege. It is plaintiffs' position that, because defendant did neither defendant has waived its right to assert such a privilege now and must disclose all such information to plaintiffs. See Pl. Mem. at 17; Pl. Reply at 3.

3. Commercial information. The parties continue to disagree over whether information requested in plaintiffs' document request numbers 11 and 6 – related to the profitability of defendant's circus presenting Asian elephants and the profitability of a non-party corporate affiliate of defendant that handles concessions for Ringling Bros. Circus, and to defendant's public relations efforts – falls within the scope of Fed. R. Civ. P. 26(b). Plaintiffs contend that such information is relevant, see Pl. Mem. at 37-40, Pl. Reply at 19-21, and defendant disagrees, see Def. Opp. at 9-12.

4. Information generated since 1994. The parties continue to disagree over plaintiffs' entitlement to obtain information from 1994 and 1995. See Pl. Mem. at 42; Pl. Reply at 21-23; Def. Opp. at 18-20.

5. Defendant's General Objections. Defendant has today provided plaintiffs with a letter indicating whether it has withheld materials based on each of the general objections. Concerns that plaintiffs may have about defendant's assertions in this letter will be discussed with defendant without the need for judicial intervention at this time, with one exception, as follows.

Defendant objected to plaintiffs' definition of "Ringling" to include "independent contractors, agents, attorneys, and consultants." See Pl. Mem. at 9. In its letter of today, defendant asserts that it has "not produced or identified information gathered by [Covington & Burling] in [that firm's] capacity as trial counsel for use in this case," and it is defendant's position that "any definition that seeks to extend plaintiffs' discovery requests to documents or information gathered by trial counsel is overbroad" (see Def. Opp. at 23-24) and that defendant is not obligated to list all such documents individually in a privilege log under FRCP 26(b)(5). Plaintiffs dispute the legitimacy of this objection as explained in plaintiffs' briefs, see Pl. Mem. at 18-19; Pl. Reply at 4-7, and particularly in light of the requirement in FRCP 34(a)(1) that defendant produce all information in its "possession, custody or control," and ask that the Court resolve this matter.

**II. Defendant's Motion for A Protective Order.**

The parties have not been able to agree on the scope of a proposed protective order with respect to the elephants' medical records. Accordingly, the parties are submitting to the Court separate proposed protective orders.

Respectfully submitted,

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