

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs, :

v. :

Case No. 03-2006 (EGS/JMF)

RINGLING BROS. AND BARNUM & :
BAILEY CIRCUS, et al., :

Defendants. :

MOTION TO COMPEL DOCUMENTS SUBPOENAED FROM THE
WILDLIFE ADVOCACY PROJECT AND MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT THEREOF

EXHIBIT 33

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June 13, 2006

VIA HAND DELIVERY AND FACSIMILE

Richard Thomas, Esq.
Lichtman, Trister & Ross, PLLC
1666 Connecticut Avenue, N.W., Suite 500
Washington, DC 20009

Re: ASPCA et al. v. Ringling Bros. and Barnum & Bailey Circus, No. 03-2006
(D.D.C.)

Dear Mr. Thomas:

I am writing to address the outstanding issues associated with the July 26, 2005 subpoena ("Subpoena") that was served upon the Wildlife Advocacy Project ("WAP") by our client, Feld Entertainment, Inc. ("FEI"), in connection with the above-referenced case. As FEI's new counsel in this case, we would like to confirm our understanding of the subpoena-related issues and to finalize this matter. We find several deficiencies in the production and do not agree that the objections raised are valid.

Our understanding of this matter is based upon our review of the documents produced by WAP together with the several letters exchanged between Eric Glitzenstein and FEI's prior counsel, Joshua Wolson, as well as those letters between yourself and Mr. Wolson. Our understanding of the current status of the subpoena is as follows:

I. WAP's First Amendment Objections

We understand that WAP is withholding certain documents and information that it believes is privileged on First Amendment grounds. We do not believe, however, that WAP's compliance with the subpoena would present any First Amendment issues. WAP has not demonstrated that disclosure of the documents and information sought would injure the organization's or the members' constitutional rights. See *Shelton v. United States*, 404 F.2d 1292, 1299 (D.C. Cir. 1968) (distinguishing *NAACP v. Alabama*, 357 U.S. 449 (1958), because, among other things, the party seeking protection did not show "the deterrent effect the furnishing of the lists would have on the members' right of association protected by the First Amendment"); *United States v. Duke Energy Corp.*, 232 F.R.D. 1, 3 (D.D.C. 2005) (denying First Amendment protection to party that made "no showing that enforcement of the subpoenas will chill associational activities by discouraging membership"). Indeed, we do not see how such an injury could be established here. Even if, moreover, WAP made such a showing, we believe that

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compliance with the subpoena is justified in light of the substantial effect that this information would have on FEI's right to present a defense in the underlying litigation. *Cf. NAACP v. Alabama*, 357 U.S. 449, 464 (1958) (quashing subpoena where, unlike here, information requested did not have a "substantial bearing" on the issues presented by the underlying litigation). Plaintiffs' standing hinges upon the alleged injury of Tom Rider and the documents sought bear directly on his motives and credibility.

Please produce all documents you have withheld, in whole or in part, without any redactions no later than close of business on June 23, 2006. If you do not, we will move to compel.

II. Specific Requests

Request No. 1: "All documents that refer, reflect, or relate to Defendant or any of Defendant's current or former employees, consultants, agents, attorneys, directors, or other representatives."

We understand that, after Mr. Glitzenstein indicated that WAP would produce "documents that *discuss*" Defendant and its employees, consultants, etc., FEI agreed to limit this request to documents that "discuss or allude to" such entities and individuals. We understand, however, that Mr. Glitzenstein subsequently indicated WAP's intent to produce documents that "discuss or '*clearly* allude to'" such entities and individuals.

To the extent that WAP did not produce documents that "discuss or allude to" Defendant or any of Defendant's current or former employees, consultants, agents, attorneys, directors, or other representatives, WAP has not complied with FEI's request. Although Mr. Wolson asked you to confirm that WAP did not communicate with any relevant entities or individuals other than Mr. Rider, this request is not limited to such communications or documents concerning such communications. It requires the production of *all* documents that *discuss or relate to* such entities or individuals. Please produce these documents by June 23, 2006 or we will move to compel.

Request No. 2: "All documents that refer, reflect, or relate to Tom Rider, including without limitation all correspondence with or about Mr. Rider, all documents that reflect anything of value, whether monetary or in kind, requested by or on behalf of, given to, directed to, or made at the direction of Mr. Rider, all documents that relate to the purpose of any payments made to or requested by Mr. Rider, all documents that relate to any payments received, requested, or solicited by You or on Your behalf for purposes of paying Mr. Rider, funding any activities to be undertaken by Mr. Rider, or funding any activities relating to Defendant or any other circus."

We understand that Mr. Glitzenstein informed FEI's prior counsel that WAP would produce "documents concerning Tom Rider's work and any other activities funded by WAP concerning Ringling Bros." FEI, however, has not agreed to any such modification. Indeed, FEI has not agreed to modify this request in any way.

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WAP, accordingly, is required to produce all documents that refer, reflect or relate to Tom Rider. Yet, WAP has acknowledged withholding responsive documents. Specifically, we understand that WAP has asserted (a) that producing the actual documents requested would "merely duplicate" information reflected in a six-page chart, (b) that it has an alleged First Amendment privilege over certain such documents or information contained therein, and (c) that it has an alleged interest in its financial information requiring that a protective order be executed in advance of production. These three positions are addressed in turn below, but in short, none of these is an adequate basis for WAP to continue withholding requested documents.

First, there is no disagreement that WAP was required to produce all documents relating to funding that it provided to Tom Rider or that it received for the purpose of supporting Tom Rider's activities. Instead of producing all such documents, WAP has created a four-page chart identifying limited information regarding the expenditures that it made on Tom Rider's behalf and a two-page chart identifying limited information regarding the funds it received for the purpose of funding Tom Rider's activities. This is wholly unacceptable. Plainly stated, the subpoena does not merely seek WAP's limited description of these funds. It requires WAP to produce all documents relating to such funds. For example, copies of cancelled checks, copies of bank records, and copies of financial statements should be produced along with any 1099's or W-2's issued to Mr. Rider. This request also includes any communications with or about Mr. Rider by or between any WAP Board members, employees or volunteers and any Board resolutions or minutes from Board meetings. Federal Rule of Civil Procedure 45(d)(1) states that: "[a] person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand." The Rules of Civil Procedure do not allow someone to provide its own newly-created documents purporting to summarize the responsive documents in lieu of providing the actual documents requested. Judge Sullivan already has made clear that he has no tolerance for such "hide the ball" tactics. *See* Hearing Tr. at 36 (Sept. 16, 2005).¹

Second, as described above, neither WAP nor its members have a First Amendment privilege with respect to the documents and information requested. Accordingly, the documents reflected on the privilege log provided on September 29, 2005 should be produced promptly. This includes, but is not limited to, the identity of donors as well as documents like the "memo to file describing Tom Rider's and WAP's strategy for governing media and public interest in Ringling Bros. treatment of elephants" and the handwritten notes between Tom Rider and Katherine Meyer regarding "Tom Rider's media strategy." Certainly, if any documents withheld on the basis of a First Amendment privilege were not identified in the privilege log they should be produced immediately. *See Bregman v. District of Columbia*, 182 F.R.D. 352, 363 (D.D.C.

¹ We also note that Mr. Glitzenstein's assertion that the documents requested from WAP relating to Tom Rider are duplicative of those already requested from plaintiffs in the underlying litigation, including Tom Rider, is factually inaccurate. There is no reason to believe that all of WAP's documents relating to Tom Rider are duplicated in Mr. Rider's personal files. In fact, documents produced by WAP (e.g., the internal WAP memo regarding the \$6,000 check that plaintiff ASPCA sent WAP as a grant for Tom Rider) dispel that notion.

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1998) (“Plaintiff’s failure to comply with Fed. R. Civ. P. 26(b)(5), requiring him to file a privilege log, bars in itself any claim of privilege, whatever its basis.”).

Finally, we understand that you have proposed a protective order to be executed before WAP produces information it considers to be confidential financial information. We note the irony of WAP now seeking to have their materials protected when plaintiffs have fought tooth and nail – and succeeded – in preventing our clients from designating their materials as confidential. Notwithstanding WAP’s hypocrisy, we are willing to negotiate a protective order that will facilitate discovery in this case. Our comments on your proposed protective order are attached. If WAP cannot resolve these issues with us prior to June 23, 2006, the protective order will become an issue for the Court to resolve in our motion to compel. Once the Court enters the protective order, you will have no basis for redactions.

Please note that we are willing to execute a protective order, but that we are not willing to allow WAP to re-write the subpoena. Your proposal that WAP produce a new log of documents instead of the documents themselves, therefore, is unacceptable. FEI is interested in learning, for example, the identity of the individuals or entities that provided funding for the relevant activities, the amounts that were provided, the dates that such funding was provided, etc. That is precisely why FEI served a subpoena requiring WAP to produce all of the relevant documents. Again, WAP will not be able to cherry-pick the information that it chooses to share in response to this subpoena. WAP’s production should include non-redacted copies of the documents that were partially redacted and produced on September 29, 2005. For example, WAP should produce a non-redacted copy of the letter from Tom Rider to Mr. Glitzenstein requesting a grant to “allow [him] to continue [his] efforts to educate the public about Ringling Bros.’ mistreatment of elephants.” It should also produce all documents wholly withheld on the basis that it contains financial information, including the 80 pages of Tom Rider-related receipts described in the privilege log.

Request No. 3: “All documents that refer, reflect, or relate to anything of value, whether monetary or in kind, requested by, on behalf of, or received from any of the Plaintiffs.”

We understand that this request was subsequently limited to “documents that refer, reflect, or relate to anything of value that was requested by, on behalf of, or received from any plaintiff in the underlying litigation *and* that was used to support WAP’s projects regarding Tom Rider, FEI, Ringling Bros. and Barnum & Bailey Circus, and/or Asian elephants in captivity.” We further understand that Mr. Glitzenstein has indicated that WAP would interpret this request to only encompass such unrestricted or general donations, payments, or contributions that “likely have been used for the identified purposes.” While, as explained by Mr. Wolson, this request does not encompass donations, payments, or contributions that were *demonstratively not used* for the subjects identified above, it specifically encompasses unrestricted or general donations, payments, or contributions that have or *might* have been used in connection with the subjects identified above, as well as any donations, payments, contributions, etc. that were designated for such subjects. To the extent that WAP has withheld documents in accordance with Mr.

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Glitzenstein's interpretation and, thus, contrary to the instructions of Mr. Wolson, WAP should promptly produce such documents.

As described in detail above, we believe that WAP's First Amendment privilege claims are entirely without merit. We, moreover, are willing to execute the attached protective order, which should alleviate WAP's concerns about confidential information and facilitate your prompt production of these documents, as well as all documents responsive to this request, in their entirety. These documents must be produced by June 23, 2006, or we will move to compel.

Request No. 4: "All documents that refer, reflect, or relate to the Litigation."

We understand that, after Mr. Glitzenstein indicated that WAP would produce "documents that *discuss or expressly refer to*" the litigation, FEI agreed to limit this request to documents that "discuss or allude to" the litigation or the treatment of Asian elephants in captivity. We understand, however, that Mr. Glitzenstein subsequently indicated WAP's intent to produce documents that "discuss or *clearly allude to*" the litigation or the treatment of Asian elephants in captivity.

To the extent that WAP did not produce documents that "discuss or allude to" the underlying litigation or the treatment of Asian elephants in captivity, WAP has not complied with FEI's request. The documents that WAP has produced clearly indicate that the organization is particularly interested in this litigation. A copy of the complaint is posted on WAP's website, as is a press release related to the litigation. However, very few, if any, additional documents that discuss or allude to the litigation were produced. Given WAP's project regarding Ringling Bros., its expressed interest in this lawsuit, and the fact that two of its directors are lead plaintiffs' counsel in the case, WAP clearly has additional files that discuss or allude to this litigation. These documents must be produced by June 23, 2006, or we will move to compel.

Request No. 5: "All documents that refer, reflect, or relate to any communications of any kind, whether in person, by telephone, letter, facsimile, e-mail, or other form, with any other animal advocate or animal advocacy organization, as that term is used in Plaintiffs' Initial Disclosures."

We understand that, after Mr. Glitzenstein indicated that WAP would provide only documents "reflecting communications regarding Tom Rider or Ringling Bros.," FEI agreed to limit this request to "documents that refer, reflect, or relate to communications with any other animal advocate or animal advocacy organization that relate to Tom Rider, [FEI], Ringling Bros. and Barnum & Bailey Circus, the underlying litigation, and/or treatment of Asian elephants in captivity." Mr. Glitzenstein, however, again indicated that WAP only would produce documents that "discuss or *clearly allude to*" the identified items.

To the extent that WAP did not produce documents that relate to the identified items, it has not complied with FEI's request. We believe that, as with the requests discussed above, FEI's willingness to accept less documents than those requested by the subpoena is a reasonable effort to reach a compromise that would alleviate any of WAP's concerns that the subpoena is

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overbroad and unduly burdensome. If these documents are not produced by June 23, 2006, we will move to compel.

We hope to reach agreement on all of the issues that WAP has raised without motions practice. However, if we have not received the documents that WAP has withheld or have not otherwise resolved the issues outline above by June 23, 2006, we will file a motion to compel. This matter has dragged on far too long over something that is straightforward, highly relevant, and responsive. Please note that neither our discussions in this regard nor WAP's discussions with FEI's prior counsel should be taken as a waiver of defendant's right to challenge any objections alleged by WAP. If we are put to the time and expense to litigate this by motion to compel, all of our prior concessions to reach resolution of this without the need for court intervention are withdrawn, effective June 23, 2006. If you have questions, please feel free to call me at (202) 662-4504.

Very truly yours,


George A. Gasper

Attachment