

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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AMERICAN SOCIETY FOR THE))
PREVENTION OF CRUELTY))
TO ANIMALS, *et al.*,))
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Plaintiffs,))
))
v.) Civ. Action No. 03-2006 (EGS)
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RINGLING BROTHERS AND BARNUM))
& BAILEY CIRCUS, *et al.*,))
))
Defendants.))
_____)

ORDER

Pending before the Court are several discovery motions and motions for protective orders concerning communications between plaintiffs, Tom Rider, and other animal advocates, and funding of Tom Rider. Also pending before the Court is plaintiffs' motion to compel Rule 34 inspections. Upon consideration of the motions, responses and replies thereto, it is by the Court hereby

ORDERED that defendant's Motion to Compel Testimony of Plaintiff Tom Eugene Rider and for Costs and Fees [Dkt. No. 101] is **GRANTED IN PART AND DENIED IN PART** and Plaintiff Tom Rider's Motion for a Protective Order to Protect His Personal Privacy [Dkt. No. 106] is **GRANTED IN PART AND DENIED IN PART**. Defendant may not inquire into Rider's marital history or the substance of any prior proceedings involving marital or child custody disputes. The Court finds that Rider's marital history is

irrelevant to the claims and defenses presented in this case. Defendant already has sufficient evidence of the existence of these proceedings that it can use to challenge Rider's failure to mention these proceedings in response to interrogatories. As to Rider's arrest record, misdemeanor convictions, and military record, the Court finds that such information is "reasonably calculated to lead to the discovery of admissible evidence" regarding Rider's credibility and is therefore relevant. See Fed. R. Civ. P. 26(b)(1). Because of the personal nature of this information and in order to prevent defendant from using this information solely to embarrass or oppress Rider in advance of trial, however, such information shall be subject to a protective order with the terms discussed below.

At a mutually agreeable time, Rider shall provide deposition testimony to defendant concerning his military background, any arrests for felony or misdemeanor crimes, and any felony or misdemeanor convictions. All such testimony shall be kept confidential by defendant and not used for any purpose other than this litigation without prior authorization from the Court. Such information shall not be disclosed in any way other than to defendant, its counsel, and this Court under seal.

Neither party shall be awarded any costs or fees in connection with these motions.

It is **FURTHER ORDERED** that defendant's Motion to Compel Discovery from Plaintiff Tom Rider and For Sanctions, Including Dismissal [Dkt. No. 126] is **GRANTED IN PART AND DENIED IN PART**. To the extent not duplicative of what has already been produced by Tom Rider or other plaintiffs, Rider shall produce to FEI by no later than **September 24, 2007**:

- All responsive documents (with the exceptions discussed below) within his possession, custody, or control, including but not limited to, documents in the files of his attorneys;
- 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. Rider may also redact out any personal identifying information for himself beyond his name including, but not limited to, his social security number or home address;
- 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 under 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, spoiled or otherwise disposed of;

- A precise identification, by bates number, of any documents produced by Rider or his co-plaintiffs that are incorporated by reference into his response to interrogatories or document requests;
- A privilege log that complies with the law of this Circuit, is consistent with the privilege log provided by defendant, and provides a description of the authors, 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;
- Complete and truthful answers to interrogatories 2, 4, 7, and 24 with the exception of any information the Court has already found to be irrelevant or otherwise not subject to discovery as outlined above.

The Court emphasizes that Rider need not produce any documents or information already produced by him or other plaintiffs. If documents have already been provided by him or other plaintiffs, however, Rider must identify (by bates number) which documents have already been produced that pertain to him. The Court finds that any documents or communications between Rider and others about media or legislative strategies is irrelevant to this litigation and would be over burdensome to produce. The Court finds 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 plaintiff organizations or WAP. The Court does not find dismissal to be an

appropriate sanction in this case. Neither party shall be awarded any costs or fees in connection with this motion.

It is **FURTHER ORDERED** that Plaintiff Tom Rider's Motion for a Protective Order with Respect to Certain Financial Information [Dkt. No. 141] is **DENIED**. 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.

It is **FURTHER ORDERED** that defendant's Motion to Compel Discovery from the Organizational Plaintiffs and API [Dkt. No. 149] is **GRANTED IN PART AND DENIED IN PART**. As the Court has already indicated with reference to the motion to compel discovery from Tom Rider, any documents, communications, or information concerning the media and legislative strategies of the plaintiffs are irrelevant to the claims and defenses in this case and would be over burdensome to produce. The Court finds that the supplemental responses to interrogatories provided by the ASPCA cures any deficiencies in not referring to bates numbers for documents incorporated by reference. To the extent ASPCA or any other plaintiffs have not provided bates numbers when referencing documents incorporated by reference, they shall

provide supplemental responses to defendant's interrogatories by no later than **September 24, 2007**.

The Court finds that any inspections of FEI's circus performances or facilities conducted by ASPCA are highly relevant to this case. To the extent any such information exists as to inspections for which no report was generated, ASPCA shall supplement its response to defendant's interrogatories by **September 24, 2007** to provide the name of any inspectors, date of any inspections, details of how inspections were conducted, locations of such inspections, and results. To the extent no further information is available about inspections for which there are no reports, ASPCA shall provide sworn declarations or affidavits explaining why no such evidence exists.

To the extent any "confidential or proprietary" documents or information exist that are responsive to defendant's discovery requests, plaintiffs shall include an adequate description of such documents or information on their privilege log in compliance with the case law in this Circuit by no later than **September 24, 2007**.

In addition to the documents and information referenced above, plaintiffs shall produce all of the following to FEI by no later than **September 24, 2007**:

- 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 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, spoiled or otherwise disposed of;
- 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, 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.

As to defendant's request for all responsive documents and information concerning communications with animal advocates and animal advocacy organizations, the Court finds this request over broad, over burdensome to produce and irrelevant to the claims and defenses in this lawsuit.

It is **FURTHER ORDERED** that defendant's Motion to Compel Documents Subpoenaed from the Wildlife Advocacy Project ("WAP") [Dkt. No. 85] is **GRANTED IN PART AND DENIED IN PART**. The Court finds that defendant's subpoena is over broad and over burdensome in its requests and seeks a lot of information that is completely irrelevant to the "taking" claim in this lawsuit, the credibility of Tom Rider, or any claimed defenses. 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.

By no later than **September 24, 2007**, WAP shall provide any non-privileged documents or information that it has not already provided, with the exceptions discussed below, related to payments or donations for or to and expenses of Tom Rider in connection with this litigation or his public education efforts related to the Circus's treatment of elephants in compliance with Request No. 2 of the subpoena. To the extent there are no such documents that have not already been produced, WAP shall provide a sworn declaration or affidavit to that effect.

In producing such information, WAP may redact the names and identifying information of individual donors or organizations who are not parties to this litigation, attorneys for any of the parties or employees or officers of any of the plaintiff organizations or WAP. WAP shall also provide a sworn declaration

or affidavit indicating that any donors are not plaintiffs' counsel, employees or officers of the organizational plaintiffs or employees or officers of WAP, to the extent that is true. The Court finds that any further information about individual or organizational donors would be irrelevant and would tread on core First Amendment rights. See *Wyoming v. U.S. Dep't of Agriculture*, 208 F.R.D. 449, 454 (D.D.C. 2002).

As to defendant's request for all communications between plaintiffs, WAP, animal rights advocates, and animal rights organizations generally, the Court finds that this request is over broad and the information is irrelevant to the claims and defenses in this litigation. The Court also finds that information about media and legislative contacts and strategies specifically is not discoverable for the same reasons.

The Court further finds that defendant's request for additional financial records is over burdensome and duplicative. WAP need not produce monthly financial reports, bank statements or phone bills provided that WAP submits a sworn declaration or affidavit indicating that the financial information underlying the transaction detail reports exists and that the transaction detail reports, cancelled checks, and 1099s already provided detail every financial transaction made by WAP concerning elephants, defendant, or Tom Rider. WAP's other financial information is irrelevant.

It is **FURTHER ORDERED** that Plaintiffs' Motion to Compel Defendants to Comply with Plaintiffs' Rule 34 Request for Inspections [Dkt. No. 99] is **GRANTED**. The Court finds that such inspections are highly relevant to the question of whether or not defendant's treatment of its elephants constitutes a "taking" under the Endangered Species Act. The Court does not find that the request for inspections qualifies as a "document request[], interrogator[y], and/or request[] for admission" subject to the a March 30, 2004 deadline pursuant to the parties December 5, 2003 Stipulated Pre-Trial Schedule. Moreover, the Court finds that plaintiffs' request for inspections at this time is reasonable given the extraordinary delay in their receiving veterinary records from defendants. Finally, as defendant points out in its reply in support of its motion for summary judgment, evidence on how FEI's elephants are *currently* treated is "material in any trial for the injunctive relief that plaintiffs seek." Reply in Support of Def.'s Mot. for Summ. J. at 2. Consistent with the Court's ruling on the motion for summary judgment, however, plaintiffs are only entitled to inspect those elephants which are not subject to a valid captive-bred wildlife permit.

Because defendants have raised valid concerns regarding security for inspectors and animal safety and because there are numerous issues that need to be resolved regarding the dates and parameters of the inspections, as well as the individuals who

will be involved, the Court refers this case to Magistrate Judge John Facciola pursuant to LCvR 72.2 for purposes of overseeing the inspections, developing a framework under which such inspections will be conducted, and resolving any disputes concerning such inspections.

It is **FURTHER ORDERED** that fact and expert discovery in this case shall close on **December 31, 2007**. This Court will view requests for extension of this discovery deadline with disfavor given that the parties have already been engaged in discovery for more than three and a half years.

It is **FURTHER ORDERED** that this case is referred to Magistrate Judge John Facciola for purposes of overseeing the remainder of discovery pursuant to LCvR 72.2. Any further discovery disputes should be presented to Magistrate Judge Facciola.

It is **FURTHER ORDERED** that Plaintiffs' Motion Under Rule 11 Against Defendants and Their Counsel [Dkt. No. 163] and Defendant Motion for Reimbursement of Excess Costs, Expenses and Attorneys' Fees [Dkt. No. 171] are **DENIED**. As discovery on issues related to payments of Tom Rider has not been completed, the Court cannot assess the validity of accusations by either side on issues related to these payments at this time. Moreover, all parties have needlessly prolonged and multiplied the proceedings in this case because of their constant filing of excessively large

motions, inability to resolve any disputes without assistance of the Court, and overall poisoned relationship and hostile attitude toward each other. The Court reminds these parties that the purpose of this litigation is to determine whether or not defendant's treatment of elephants constitutes a "taking" under the ESA. The remainder of discovery and briefing in this litigation should relate to the claims and defenses in this lawsuit rather than needlessly diverting the Court's attention away from the central issues in this case and the numerous other cases on its docket.

It is **FURTHER ORDERED** that the parties shall file a joint status report and recommendation for further proceedings by no later than **January 15, 2008**. The Court strongly encourages the parties to agree on their proposals for how to proceed with this case and bring it to a resolution after discovery closes.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
August 23, 2007