

RAS 9096



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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Via Federal Express

Annette L. Vietti-Cook
Secretary to the Commission
Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852

Re: *Case No. 1-2003-037*

Dear Ms. Vietti-Cook

I represent Rene Chun, a New York journalist who has been issued a subpoena by the Commission in the above referenced matter. Enclosed please find an original and four copies of Mr. Chun's Motion for Clarification of and Amendment to the Commission's Order of December 8, 2004. Attached to Mr. Chun's motion is the original and copies of the Declaration of Rene Chun. Please direct any inquiries concerning this matter to me at 202/662-9540, and please ensure that no one from the Commission contacts Mr. Chun without my prior approval.

Please let me know if you have any questions regarding this filing.

Sincerely,

David C. Vladeck

Enclosures

BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of Subpoena Issued to)
) Investigation No. 1-2003-037
Rene Chun)

**MOTION FOR CLARIFICATION OF AND AMENDMENT TO
THE COMMISSION'S ORDER OF DECEMBER 8, 2004**

On December 8, 2004, the Commission issued a Memorandum and Order denying in part and granting in part Mr. Chun's motion to quash the subpoena directed to him demanding that he appear before NRC investigators to provide testimony and to produce for the NRC "[a]ny and all handwritten notes and any and all recordings of any interviews with Mr. Foster ZEH that were made in preparation for your article entitled: 'The China Syndrome 2003.'"

In its Memorandum and Order, the Commission denied Mr. Chun's motion insofar as it sought to quash the testimonial portion of the subpoena. While Mr. Chun strenuously disagrees with the Commission's reasoning and conclusions on this issue, he will not press his objection to providing oral testimony to Commission's investigators, assuming that the parties can arrive at a mutually agreeable time and date, and assuming that the Commission modifies its Order of December 8, 2004, in accordance with the objection set forth in the remainder of this motion.¹

Mr. Chun objects to one portion of the Commission's Memorandum and Order regarding the Commission's demand for notes and tapes of interviews with Mr. Zeh. Indeed, in one critical respect, the Commission's Order mischaracterizes (and unfairly impugns) Mr. Chun's position

¹ The date proposed in the Commission's order – January 13, 2005 – conflicts with Mr. Chun's counsel's teaching schedule.

and makes an unreasonable – and unlawful – demand, namely that Mr. Chun “releas[e] *without reservation* any claim of ownership or creative right in the materials themselves to the magazine [i.e., Playboy].” (Emphasis added). While Mr. Chun is willing to waive any objection based on ownership or any other ground for the purpose of this subpoena enforcement case, he is unwilling to accede to the Commission’s demand that he waive his ownership interest in his work-product “without reservation.” The Commission apparently fails to appreciate the gravity of its demand that Mr. Chun waive his ownership interest in his property – a demand forbidden by the Fifth Amendment to the United States Constitution.²

The Commission’s error begins with its statement that on page 3 of the Order that “Mr. Chun now claims, through counsel, that he does not possess the subpoenaed materials, *i.e.*, the tapes and notes of his interviews with the former employee.” The Commission’s statement, which is unsupported by citation, is simply untrue. Mr. Chun’s motion to quash sought the withdrawal of the subpoena in its entirety and did not address the Commission’s document demand, let alone state that he did not possess the tapes and notes of his interviews with Mr. Zeh. Nor has Mr. Chun’s counsel ever “claim[ed]” that Mr. Chun does not possess the subpoenaed material. In fact, Mr. Chun’s counsel, in his discussions with Commission investigators, has always taken the exactly opposite position: namely, that Mr. Chun and not Playboy possesses those records, in the sense that these records “belong” to Mr. Chun, which, of course, is the basic

² The Commission’s Order also makes two demands to which Mr. Chun has no objection; that he state “that he returned the materials to the magazine pursuant to his employment contract prior to the issuance of the subpoena (including the date he returned the materials)” and that he provide “a copy of the employment contract (with personal information such as his salary, etc., redacted.” Mr. Chun’s attached Declaration complies with these aspects of the Commission’s order.

dictionary definition of the word “possess,” as well as its legal definition. *See, e.g., Webster’s Ninth New Collegiate Dictionary* at 918 (1983) (defining “possess” to mean “to make the owner or holder” and “to have and hold as property”); *Black’s Law Dictionary* at 1043 (5th ed. 1979) (defining possess to mean “to have and to hold as property” and “to own or be entitled to”).

To be sure, Mr. Chun fulfilled his contractual duty to Playboy to provide the magazine “all supporting documentation” pertaining to the article. *See Declaration of Rene Chun*, at ¶ 9 (explaining that he provided these materials to Playboy in early 2003 when he completed a draft of the article) (Mr. Chun’s Declaration is attached hereto).³ For that reason, Playboy, not Mr. Chun, has *custody* of his notes and tape recordings. Mr. Chun did not, however, as the Commission asserts, “return” those materials to Playboy because Playboy had never before seen them. But more importantly, Mr. Chun’s contract with Playboy in no way transferred *ownership* of the materials to Playboy. Indeed, it is and has always been Mr. Chun’s position that, he, not Playboy, “owns” the documentation and that, at this point, Playboy is simply a bailee or custodian of Mr. Chun’s property. For this reason, Mr. Chun’s position – which his counsel made crystal clear to Commission staff – has always been that physical custody of the documentation was immaterial for the purposes of the Commission’s subpoena. Ownership, not physical location, is a controlling factor, and Mr. Chun is the owner. Thus, had the Commission enforced the subpoena and had Playboy not misplaced the documentation, Mr. Chun would have been obligated to produce it, even though the documentation was not in Mr. Chun’s custody at the time.

³ As Mr. Chun explains in his Declaration, he did not retain for his files a signed copy of his contract with Playboy. We assume that Playboy has retained a signed copy. A copy of the unexecuted contract appears as Exhibit A to the Chun Declaration.

This understanding, of course, accords with black letter law as well as the established legal requirements for document demands and subpoenas under the Federal Rules of Civil Procedure, which, in contrast to the Commission, do not treat "possession" and "custody" as synonyms. See Rules 34 & 45, Fed. R. Civ. P. The text of Rule 34 confirms that the "party upon whom the request" for documents is served is required to provide documents or assert privilege claims for all documents in their "possession, custody *or* control." (Emphasis added). This tripartite requirement applies with equal force to subpoenas issued pursuant to Rule 45. See generally 8A & 9A C. Wright & A. Miller, *Federal Practice and Procedure*, §§ 2210, 2456 (1998). Thus, had the subpoena at issue here been served by a party in ordinary federal court litigation, Mr. Chun could not have argued that he was free to ignore it simply because Playboy had custody of the records.⁴

We had assumed, perhaps wrongly, that the Commission shared this broadly-accepted view that one is obligated to produce records one owns when confronted with a validly-issued subpoena. But the Commission's order does not take that position. Under the logic laid out in the Commission's order, possession and custody are one and the same. No one facing a Commission subpoena would have an obligation to retrieve responsive documents from a bailee or, we presume, to make an effort to obtain them from a third-party, because the subpoenaed party is not in physical possession of the documents. As currently written, the Commission's order suggests that, had Playboy not misplaced the records, Mr. Chun would have had no legal obligation to produce them. That is a truly bizarre position for the Commission to take. Mr.

⁴ Nor could Playboy have resisted a subpoena directed to it, since it had "custody" of the materials.

Chun should hardly be faulted for failing to assume that the Commission would construe the obligations imposed by its subpoenas in such a truncated and narrow fashion. Nonetheless, the Commission's gratuitous name-calling, suggesting that Mr. Chun's counsel was engaged in "game" playing and submitted less than forthright pleadings, is premised on that legal theory, as odd and unsupported as it may be.⁵ Ironically, the Commission attacks Mr. Chun and counsel for construing their obligations under the subpoena more expansively than did the Commission.

This error is compounded by the Commission's demand that Mr. Chun relinquish his ownership rights *in their entirety* in the notes and tape recordings *he made* in preparation of his article. The Commission cites no authority to make such an unreasonable demand, and we know of none. To the contrary, the Commission's demand is a clear-cut violation of Mr. Chun's Fifth Amendment rights – the Commission is attempting to effect a taking of Mr. Chun's property without due process and without furthering a compelling governmental interest. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). We are at loss to understand why the Commission believes it is necessary for it to force Mr. Chun to transfer his ownership interests in his notes and tape recordings to Playboy. This concern takes on special force here, where it is apparent that the Commission's purposes would be fully served by having Mr. Chun agree that, should Playboy find his notes and tape recordings, he will not object to Playboy providing them to the Commission for inspection in compliance with either the subpoena issued to Mr. Chun, or a subpoena issued to Playboy. Mr. Chun is willing to make

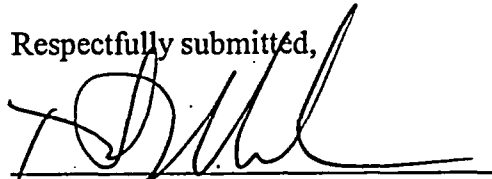
⁵ The Commission's Order also rests on two additional unwarranted and groundless assumptions: (1) that Mr. Chun and his counsel knew at the time they spoke to Commission investigators that Playboy had misplaced Mr. Chun's research materials; and 2) that they nonetheless sought to mislead the Commission as to the materials' whereabouts. Suffice it to say that neither of these assumptions is correct.

such a representation, and does so in his accompanying declaration. But Mr. Chun will not succumb to the Commission's demand that he surrender his property interest in his notes and tape recordings in Playboy's favor. And he certainly will not comply with the Commission's subpoena until he is assured that the Commission will modify its demand that he do so.

CONCLUSION

For the foregoing reasons, the Commission should modify its order to provide that the subpoena directed to Mr. Chun is quashed insofar as it calls for the production of "[a]ny and all handwritten notes and any and all recordings of any interviews with Mr. Foster ZEH that were made in preparation for your article entitled: 'The China Syndrome 2003,'" provided that Mr. Chun furnishes the Commission with: 1) a Declaration (a) stating that he sent the materials to the magazine pursuant to his employment contract prior to the issuance of the subpoena (including the date he sent the materials), and (b) providing an assurance that should these materials be found he will not object to Playboy providing them to the Commission for inspection in compliance with either the subpoena issued to Mr. Chun or a subpoena issued to Playboy; and 2) a copy of the employment contract (with personal information such as his salary, etc., redacted) between Mr. Chun and Playboy. We would also urge the Commission to modify the Memorandum and Order to remove the unwarranted and unseemly attacks on Mr. Chun and his counsel.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David C. Vladeck', written over a horizontal line.

David C. Vladeck

Richard McKewen

Georgetown University Law Center

Institute for Public Representation

600 New Jersey Avenue, NW

Washington, DC 20001

(202) 662-9540

Attorneys for Mr. Rene Chun

December 22, 2004

**BEFORE THE
NUCLEAR REGULATORY COMMISSION**

**In the Matter of Subpoena Issued to: Rene Chun
Investigation: No. 1-2003-037**

DECLARATION OF RENE CHUN

1. I am a freelance journalist based in Hastings-on-Hudson, New York, and I was served through counsel on July 2, 2004 by a subpoena issued by the Nuclear Regulatory Commission in Case No. 1-2003-037. I am over 18 years old and I make this declaration based on personal knowledge.

2. The subpoena issued to me directed that I appear at the office of Region I of the Commission "to testify in the matter of potential violations of certain NRC regulations" and that I "bring with me" "[a]ny and all handwritten notes and any and all recordings of any interviews with Mr. Foster ZEH that were made in preparation for your article entitled: 'The China Syndrome 2003.'"

3. Because of serious First Amendment concerns about a journalist being compelled to give testimony adverse to a source, I directed my counsel to move to quash the Commission's subpoena. It is my understanding that a motion to quash was filed on my behalf on July 28, 2004.

4. The motion filed on my behalf sought to quash the subpoena in its entirety. For that reason, the motion did not differentiate between the portion of the subpoena calling for my testimony and the portion of the subpoena demanding that I produce records.

5. The article referenced in the subpoena, *The China Syndrome 2003*, was published by Playboy Magazine in its May 2003 issue.

6. I entered into a contract with Playboy in January 2003. I did not retain a signed copy of the contract. Playboy had sent me two copies of the contract — one for me to sign and return to Playboy, the other to retain for my files. Playboy should have the copy of the contract that I signed. I have attached as Exhibit A to this Declaration a true and correct copy of the file-copy of the contract I entered into with Playboy and have redacted only information about the fee I received for my work on the article.

7. The contract with Playboy contains a standard feature in contracts between publishers and authors. The third paragraph of the contract states that Playboy “request[s] that you submit all research materials along with the manuscript in order to facilitate our fact-checking process.” The same paragraph required me to submit to Playboy “all supporting documentation” in my possession and to agree to “cooperate and consult with us in connection with our verification of facts or other elements in the” article.

8. The Commission's Memorandum and Order of December 8, 2004 directs me to provide the Commission with a declaration stating, among other things, that I “returned the materials to the magazine pursuant to his employment contract prior to the issuance of the subpoena (including the date he returned the materials).”

9. I complied fully with my contract with Playboy. I delivered the manuscript and all supporting documentation — including, in the words of the subpoena, “[a]ny and all handwritten notes and any and all recordings of any interviews with Mr. Foster ZEH that were made in preparation for your article entitled: ‘The China Syndrome 2003’” — to Playboy in early of 2003. I cannot recall the exact date I provided Playboy the materials. I should add, for the sake of clarity, that I did not “return” the materials to Playboy at that time because those materials had never previously been provided to Playboy. The first time Playboy took custody of my notes and recordings was when I sent them to Playboy along with my manuscript in early 2003.

10. I can state without qualification that I provided my notes and interview recordings to Playboy well in advance of the service of the Commission's subpoena, as I am sure Playboy will confirm. After all, the article was published by Playboy in May 2003 and, as my contract with Playboy contemplated, Playboy's extensive fact-checking on the article was performed prior to its publication. Thus, I represent to the Commission that my notes and tape recordings were given to Playboy at least a full year prior to the Commission's issuance of the subpoena to

me on July 2, 2004.

11. Finally, the Commission has directed me to "releas[e] without qualification any claim of ownership or creative rights in the materials themselves to the magazine," presumably a reference to Playboy. I see no reason to do so. And I cannot fathom why the Commission would direct me to transfer *my* property interest in *my* notes and *my* tape recordings to Playboy Enterprises. Nor do I understand why the Commission should care whether Playboy or I retain ownership rights to my notes and tape recordings. As I understand it, the Commission wants access to these materials, but that interest does not depend on who owns them.

12. For the purpose of this investigation, I am nonetheless willing to state that, should Playboy find my notes and tape recordings relating to Mr. Foster Zeh, I hereby waive any objection I would otherwise have to Playboy providing to the Commission for inspection in compliance with either the subpoena issued to me on July 2, 2004, or a subpoena issued to Playboy, "[a]ny and all handwritten notes and any and all recordings of any interviews with Mr. Foster ZEH that were made in preparation for your article entitled: 'The China Syndrome 2003.'" I do not waive any objection I have to the release of any other note or tape recording of mine in Playboy's custody.

Pursuant to 28 USC § 1746, I, Rene Chun, hereby declare under the penalty of perjury that the foregoing is true and correct. Executed this 21 day of December 2004, in New York, USA.

A handwritten signature in cursive script, appearing to read "Rene Chun", is written over a horizontal line.

Rene Chun

**EXHIBIT A TO DECLARATION OF
RENE CHUN**

Rem.
Please sign &
return.
Copy is to you.
e-

Rene Chun
765 N. Broadway, 14-D
Hastings-on-Hudson, NY 10706

1

We will pay you [REDACTED] if we accept the manuscript. In the event the manuscript is not accepted, we will pay you [REDACTED] as a turndown fee. Advances which have not been accounted for will be deducted from the purchase or turndown fee. A first draft of the piece is due not later than January 17, 2003.

We request that you submit all research materials along with the manuscript in order to facilitate our fact-checking procedures. You agree (upon our request) to deliver to us (and we shall retain possession of) all supporting documentation in your possession and control pertaining to the Work ("the Supporting Material"). You further agree to cooperate and to consult with us in connection with our verification of facts or other elements contained in the Work, and that you will use your best efforts to supply Work that is factually accurate and verifiable.

Playboy will have the exclusive license to publish the Work in all domestic and foreign editions of Playboy. You agree to wait at least six months after publication in the U.S. edition of Playboy (which edition is distributed and sold worldwide) before granting rights to any other publication. If we reprint the Work in one of our foreign editions within that six month period, then you must wait at least six months after our foreign edition's date of publication before granting rights to any other periodical in that country. You will not grant rights of any kind to the Work to any competitor or imitator of Playboy. Playboy will have the right to use the Work or any portion of the Work for advertising and publicity purposes and in any electronic media authorized by Playboy. We require that our credit line ("Originally appeared in Playboy magazine") appear in reprints. We will retain a non-exclusive license to use in anthologies and compilations (print or electronic), subject to payment of our usual royalty.

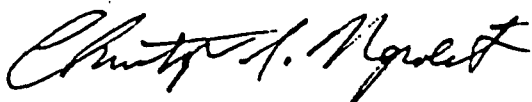
You represent and warrant that you have the right and authority to convey the rights granted herein and that the Work has not previously been published in any media, in whole or in part. The Work will not infringe any copyright, and will not constitute a defamation or invasion of the right of privacy or publicity, or an infringement of any other right of any other kind, of any third party.

If an agent signs this agreement on behalf of the Author, the Agent warrants that the Agent has full authority from the Author to contractually bind the Author to these terms and conditions and to make on behalf of the Author the warranties set forth herein.

Playboy launches a carefully coordinated public relations plan for each issue. You may be contacted by outside media regarding your piece. If you are, it is important that you contact Lorna Donohoe, Public Relations & Promotions, 212-261-5000 before cooperating with their requests.

Kindly acknowledge your agreement to the above terms by signing and returning one of the enclosed copies of this letter which constitutes our entire agreement, supersedes any prior agreement and which may not be modified without prior written consent of each of us.

Sincerely,



Christopher Napolitano
Senior Editor

ACCEPTED AND AGREED TO:

Author _____

Date _____

Social Security # _____