UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL COMPLIANCE WITH A THIRD PARTY SUBPOENA SERVED ON PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS

Despite the completely unnecessary ad hominem attacks that comprise the bulk of defendant's Opposition to plaintiffs' motion to compel against People for the Ethical Treatment of Animals (PETA), the only issues for the Court to decide on this matter are whether the subpoenaed deposition transcripts are discoverable within the meaning of Rule 26(b), and whether their production pursuant to a federal subpoena is consistent with the protective orders entered in People for the Ethical Treatment of Animals v. Kenneth Feld, et al., Law No. 204452 (Cir. Ct. Fairfax County, VA) (PETA v. Feld). The answer to both of those questions is yes.

Notably, the subpoenaed party, PETA, does not object to complying with plaintiffs' subpoena, see Non-Party People for the Ethical Treatment of Animals' Reply to Plaintiffs' Motion to Compel Compliance with Third Party Subpoena (Docket No.

278) (PETA's Response) at 1, and believes that compliance would not violate the protective order entered in PETA v. Feld to do so. See id. While defendant makes much of the fact that PETA is willing to comply with plaintiffs' narrowly-tailored subpoena and calls the subpoena a "sham," see, e.g., Defendant Feld Entertainment, Inc.'s Opposition to Plaintiffs' Motion to Compel Compliance With a Third Party Subpoena Served on People for the Ethical Treatment of Animals (Def. Opp.) at 1-2, there is no grand conspiracy or "collusion" occurring here, see id. at 8, and there is nothing untoward about PETA's willingness to comply with a lawfully-issued subpoena for relevant material. Nor does the fact that plaintiffs and PETA have worked together to end the abuse of elephants in the past lend any credibility to defendant's scurrilous accusations. See Def. Opp. at 15 (suggesting something inappropriate about the fact that "one of the plaintiffs and PETA regularly exchange information"). It is not unlawful or inappropriate for parties who share a common goal – i.e., to reduce the suffering of endangered Asian elephants at the hands of Feld Entertainment employees – to share information in an effort to achieve that goal. See U.S. Const. amend. I.

Plaintiffs make the following additional points in reply to defendant's Opposition.

1. The subpoena was procedurally adequate. The corrected subpoena that plaintiffs issued to PETA was prepared in full compliance with Rule 45 of the Federal Rules of Civil Procedure, see Attachment 1, and defendant was provided immediate (same day) notice of that subpoena.[1] And while defendant does not have standing to complain about

[1] Defendant continuously references the "sham subpoenae," see, e.g., Def. Opp. at 1 (emphasis added), and makes arguments based on the defective nature of the first subpoena that plaintiffs issued to PETA. See id. at 11 ("Subpoena I is not addressed to any person or party.") Plaintiffs do not disagree that the first subpoena issued failed to include the party from whom the information was sought, which is the very reason why

the adequacy of time for PETA's compliance with the subpoena, see Fed. R. Civ. P. 45(c)(3)(A)(i) (authorizing a court to quash a subpoena that does not allow adequate time for compliance with the subpoena), contrary to defendant's contention, Def. Op. at 11, PETA was in fact given ample time to comply with the subpoena within the discovery cut-off. Indeed, given the discrete nature of the items subpoenaed – several deposition transcripts – compliance with the subpoena easily could have been accomplished, and PETA was prepared to do so had defendant not obstructed its compliance. See PETA's Response at 1.[2]

The subpoena was also properly served on PETA through its attorney, Philip Hirschkop, who maintains custody of the subpoenaed material on behalf of PETA. Mr. Hirschkop accepted service voluntarily on behalf of PETA, and hence there was no need for plaintiffs to execute a certificate of service. See Fed. R. Civ. P. 45 (b)(4) (proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served) (emphasis added).[3]

Finally, contrary to defendant's argument, the subpoena properly named PETA rather than Mr. Hirschkop as the subpoenaed party. See Def. Opp. at 12-13. Thus, while

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plaintiffs re-issued a corrected subpoena. See Attachment I. Defendant's arguments concerning "Subpoena I" are therefore totally irrelevant.

[2] Defendant states that had it been afforded more time to object to the subpoena, it might have come up with additional grounds for objecting by reading the transcripts that plaintiffs have subpoenaed. See Def. Opp. at 12. However, the objections that defendant did make halted PETA's compliance with the subpoena, which was defendant's objective. Moreover, defendant states that it would not have been able to review the transcripts in any event, negating its own argument. Id.

[3] Notably, Mr. Hirschkop also voluntarily accepted service of a subpoena served on PETA by defendant, and, despite defendant's suggestions to the contrary, see Def. Opp. at 11 n. 5, PETA voluntarily produced a large stack of documents in response to that subpoena.

Paragraph 9 of the PETA v. Feld protective order requires the return of all "Confidential Discovery Material" to the producing party, it also explicitly permits "chief counsel for plaintiff and defendant" to "retain a set of all produced material." Exhibits 13, 14, 15 to Def. Opp. at ¶ 9. This clause clearly permits counsel to retain the records on behalf of their clients. Indeed, Mr. Hirschkop came into possession of the materials only through representation of PETA, and he is authorized to maintain them only on behalf of PETA. See also PETA's Response at 2 ("Mr. Hirschkop, as 'chief counsel' for the plaintiff in Law No. 204452 and Law No. 220181, holds the documents subpoenaed as an agent of PETA. Accordingly, the subpoena being directed to PETA was appropriate . . . .").

2. The subpoenaed deposition transcripts contain discoverable information.

As explained in plaintiffs' opening memorandum, plaintiffs have good reason to believe that the subpoenaed deposition transcripts contain information that is relevant both to plaintiffs' claims that defendant is abusing its elephants, as well as to defendant's defensive assertions that plaintiffs are liars who are engaged in conspiracies to bribe witnesses. See Plaintiffs' Motion at 6-7; Fed. R. Civ. P. 26(b) (party entitled to obtain discovery "regarding any matter, not privileged, that is relevant to the claim or defense of any party").

Thus, while plaintiffs have not contended that PETA v. Feld was an "animal welfare" case, see Def. Opp. at 18, plaintiffs have seen some of the trial transcripts and exhibits from that case, and know for a fact that the treatment of the elephants arose repeatedly because, as plaintiffs have explained, the very reason why Feld infiltrated PETA was to counteract the allegations of animal abuse. See, e.g., Trial Testimony of Kenneth Feld (attached as Exhibit 1) at 2031-2032 (testimony concerning defendant's

care of the elephants), 2106-2107 (testimony concerning the use of bull hooks on the elephants), 2119-2120 (testimony concerning mistreatment of two baby elephants); Trial Testimony of Charles Smith (attached as Exhibit 2) at 727-735 (testimony concerning the treatment of the elephants, including chaining and confinement of the elephants, use of "hot shots" and bull hooks on the elephants); see also Plaintiffs' Exhibit 784 in PETA v. Feld (attached as Exhibit 3) at page 5 (noting that one elephant was "tethered to a chain whilst in the middle of the play pen"); Plaintiffs' Exhibit 801 in PETA v. Feld (attached as Exhibit 4) (noting actions taken to "offset the activists three major claims against the circus: chained for life[,] life of boredom[, and] cruel treatment"). Indeed, during the trial testimony of Mr. Feld, portions of his deposition testimony specifically discussing the use of the bull hook on the elephants were referenced. See Trial Testimony of Kenneth Feld at 2121-2126 (Exhibit 1).

Accordingly, there is likely to be highly relevant information pertaining to defendant's treatment of the elephants in each of the deposition transcripts that plaintiffs have subpoenaed. Moreover, whether or not defendant is correct that "PETA used what it believed to be its best evidence at trial," Def. Opp. at 19, that has no bearing on whether there is additional information contained within the deposition transcripts that is relevant to this case.

In addition, all of the transcripts that plaintiffs have subpoenaed bear on the credibility and impeachment of defendant's witnesses, and their willingness to take extreme measures to discredit and destroy their opponents – including by accusing plaintiffs in this case of engaging in criminal behavior. See, e.g., Defendant Feld Entertainment, Inc.'s Motion for Leave to Amend Answers to Assert Additional Defense

and RICO Counterclaim (Docket No. 121). The fact that a jury "found for Mr. Feld" in the PETA v. Feld matter, Def. Opp. at 18, does not negate the fact that Kenneth Feld, who owns defendant's circus, admitted to paying various individuals to gather "intelligence" on and infiltrate organizations who were opposed to Feld's treatment of animals. See Trial Testimony of Kenneth Feld at 1985, 2111, 2114-15, 2414-2415, 2096-97 (Exhibit 1); see also, e.g., Exhibit 4 (noting defendant's consultant's plans to "attack[] the credibility of [a] free-lance writer"); Exhibit 5 (June 25, 1991 letter from Richard Froemming to Charles Smith) (discussing an "undercover operative" and noting "plans for this operative" to go to Black Beauty Ranch, which is owned by plaintiff Fund for Animals).

Evidence from the Pottker case similarly reveals the lengths to which defendant will go to discredit its adversaries and, as such, is relevant in this case to address defendant's witnesses' credibility and defendant's attacks on plaintiffs. See, e.g., Affidavit of Clair George (attached as Exhibit 6) (stating that "as part of my consulting work for Feld Entertainment, I was also asked to review reports from Richard Froemming and his organizations based on their surveillance of, and efforts to counter, the activities of various animal rights groups"); see also United States v. Quattrone, 441 F.3d 153, 185 (2d Cir. 2006) (inquiry into defendant's fee dispute with another company might have discredited defense theory of the case and was relevant to impeach defendant's credibility); United States v. Van Chase, 137 F.3d 579, 582 (8th Cir. 1998) (testimony was properly admitted where it "was relevant to rebut the defense theory that [the complainant] made up her story");.

Accordingly, while defendant may not want plaintiffs to have access to the information contained within the transcripts that plaintiffs have subpoenaed, it is clearly relevant to both the claims and defenses in this litigation and falls well within the broad scope of permissible discovery under Rule 26(b).

3. Compliance with the subpoena is consistent with existing protective orders. As PETA's counsel has already explained, the protective orders in place in the PETA v. Feld and the Pottker cases do not bar production of the materials pursuant to a validly issued subpoena. See Exhibit 3 to PETA's Response (Feb. 5, 2008 letter from Hirschkop to Porter) at 1. Indeed, the orders specifically contemplate the possibility of production of the protected materials pursuant to a subpoena. See Exhibits 13, 14, 15 to Def. Opp. at ¶ 2(b) ("Subpoenaed material. If any party to this action, or any non-party to whom a subpoena is directed, is requested to produce Discovery Material that has been designated as Confidential Discovery Material, such party or non-party shall immediately notify all parties."). That paragraph requires a party who is subpoenaed to produce protected material to notify all other parties, id., presumably so that the other parties will have the opportunity to lodge objections to such subpoenas. As PETA's attorney explained, see Exhibit 3 to PETA's Response at 1, the paragraph would be meaningless if it were to have no operation independent of the paragraphs that defendant contends are applicable – i.e., Paragraphs 4 and 5, which bar disclosure to anyone other than certain specified parties. See Def. Opp. at 14-15.

Moreover, as plaintiffs have already stated, they are willing to abide by the protective orders in place in the PETA and Pottker cases, and are also bound by the protective order in place in this case which requires all parties to maintain the

confidentiality of the subpoenaed materials. Defendant's only response to these extremely salient facts is that plaintiffs nevertheless should not be permitted to "snoop" through the testimony from those cases. Def. Opp. at 16. However, plaintiffs are not interested in "snooping" through deposition transcripts; rather, they believe that the transcripts contain material that is relevant to both the claims and defenses in this litigation and they are entitled to pursue such evidence in this case. See Wyoming v. USDA, 208 F.R.D. 449, 452 (D.D.C. 2002) ("courts construe the scope of discovery liberally in order to ensure that litigation proceeds with the 'fullest possible knowledge of the issues and facts before trial") (citations omitted).

4. The subpoenas do not seek information inconsistent with this Court's orders.

Finally, it should not go unnoticed by this Court that defendant has seriously mischaracterized this Court's prior ruling by stating that "the Court previously prohibited any discovery related to certain of FEI's financial information." Def. Opp. at 16 (citing Mem. Op. (2/23/06) (Docket No. 58) at 6-9). This Court never held that "any discovery" concerning FEI's finances was "prohibited." The Court merely held that, with respect to producing certain documents concerning the circus' profitability, the relevance of that information was outweighed by, inter alia, the burden placed on defendant in producing it. See Feb. 23, 2006 Mem. Op. at 9. Indeed, contrary to defendant's assertion that the Court ruled such information "irrelevant," Def. Opp. at 16, the Court acknowledged that the amount of money FEI makes from the circus has some "utility" with regard to plaintiffs' ability to challenge the credibility of FEI's witnesses in this case. Id. The Court did not rule that such information was not discoverable through other means,

especially where, as here, there is no burden of any kind placed on defendant to produce this information.

CONCLUSION

For the foregoing reasons, as well as those stated in plaintiffs' opening memorandum, the Court should grant plaintiffs' Motion to Compel Compliance With a Third Party Subpoena Served on People for the Ethical Treatment of Animals.

Respectfully submitted,

/s/ Kimberly D. Ockene
Katherine A. Meyer
(D.C. Bar No. 244301)
Kimberly D. Ockene
(D.C. Bar No. 461191)
Tanya M. Sanerib
(D.C. Bar No. 473506)

Meyer Glitzenstein & Crystal
1601 Connecticut Ave., N.W.
Suite 700
Washington, D.C. 20009
(202) 588-5206

Attorneys for Plaintiffs

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