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)**
FELD ENTERTAINMENT, INC.,	:	
Defendant.	:	

DEFENDANT FELD ENTERTAINMENT, INC.'S
REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND EXHIBIT LIST

Contrary to plaintiffs' representations, FEI's Motion for Leave to Amend is anything but an "eleventh hour proffer of new evidence": FEI subpoenaed the videotapes and documents now at issue ***more than a year in advance of trial.*** Thereafter, the custodian of those records, PETA, fought bitterly to avoid producing them, particularly after FEI moved to compel their action. PETA filed a miscellaneous action with *this Court* to quash the subpoena five months after it issued. See generally Docket, Misc. Action No. 08-69 (D.D.C.). It also filed motions in the Eastern District of Virginia to transfer (to D.C. or Alexandria) or to stay FEI's Motion to Compel. See Ex. 1, Docket, Misc. Action No. 08-04 (E.D. Va.). Although that effort ultimately failed, PETA was very successful at delaying the production. PETA nearly succeeded in its gambit to run the clock out by delaying production until only one month before the trial of this matter. (Notwithstanding their appeal of the magistrate judge's order compelling production in July, PETA's objections were overruled and they were again ordered to produce materials on September 8, 2008.)

Once PETA finally produced the videotapes and documents, FEI immediately began reviewing the materials at issue, selected materials to copy, identified its exhibits, and offered everything it received to plaintiffs. FEI has kept the Court and plaintiffs advised of the progress of its litigation with PETA every step of the way. See, e.g., Notices (7/28/08) & (9/30/08). Plaintiffs have known about FEI's outstanding subpoena for well over a year, and about FEI's intent to use these materials at trial and to amend its exhibit list for several months. See FEI's Pre-Trial Disclosures ¶ 196 (7/18/08) (Docket # 318).

Moreover, as plaintiffs themselves acknowledge, PETA is anything but an arms-length third party in this litigation. PETA is a client of plaintiffs' counsel, Meyer, Glitzenstein and Crystal. PETA has worked hand-in-glove with plaintiffs in this action by, *inter alia*: (1) sending plaintiffs videotape footage of the treatment of FEI's elephants that plaintiffs have marked as trial exhibits; (2) providing reimbursements and/or funding to four of plaintiffs' fact witnesses (Frank Hagan, Archele Hundley, Robert Tom, Jr. and Margaret Tom) to participate in "press conferences" orchestrated by PETA; and, (3) funding lead plaintiff Tom Rider's "media"/"public relations"/"public education" campaign both directly and through the Wildlife Advocacy Party ("WAP"). Indeed, ***plaintiffs' counsel themselves*** appear on PETA's documents and privilege log.[1] Any notion that plaintiffs and their counsel were unaware of the events leading to PETA's September production is frivolous.

Most importantly, however, the subpoenaed materials bear directly on FEI's defense of this case: Plaintiffs want to call former Red Unit employees, Archele Hundley, Robert Tom, and Margaret Tom (via deposition) as witnesses at trial. Ten of the thirteen exhibits FEI wants to add

[1] There are e-mails and a privilege log from PETA's production that FEI could use as exhibits. However, the Eastern District has sealed these documents, while this Court has ordered no more sealed filings at this point in the proceedings. Because FEI is subject to both orders and does not want to violate either one, it will await further guidance from this Court on the issue.

relate to these witnesses: FEI Exhibits 280, 281, 282, 283, 285, 286, 288, 290, 291 and 292. Exhibit 284 contains the statements made by Carol Buckley and Tom Rider to the Chicago City Council in a lobbying effort to ban the circus there. Exhibit 287 is more complete footage of one of the snippets contained in plaintiffs' will call exhibit 137. Exhibit 289 is footage of a Blue Unit animal walk. Most of these exhibits are for impeachment purposes, but FEI may ultimately want to move for their admission, and hence, has disclosed and marked them as exhibits. The exhibits are highly relevant to this case as they bear on the credibility of plaintiffs' witnesses and the legal issues. While plaintiffs clearly do not like this material and want to exclude it, it presents a more accurate and complete evidentiary picture for this Court. FEI's Motion should be granted so that this evidence may be considered by the Court during the trial on plaintiffs' "taking" claim.

I. FEI TIMELY SUBPOENAED, REVIEWED AND DISCLOSED THE PETA MATERIALS

A. The Eastern District of Virginia Litigation and FEI's Notice Thereof

FEI issued a Fed. R. Civ. P. 45 document subpoena to PETA on September 21, 2007, over ***four months before*** the close of fact discovery in this case (January 30, 2008), and ***eight months before*** a trial date had been set. Cf. Potomac Elec. Power Co. v. Elec. Motor Supply, Inc., 190 F.R.D. 372, 380 (D. Md. 1999) (cited by plaintiffs) (subpoenas issued four days before discovery deadline). FEI, in good faith, engaged in correspondence with PETA literally for months before it was forced to file a Motion to Compel in the Eastern District of Virginia. Ironically, one of PETA's major objections to the subpoena was that it did not want to have to produce Red Unit material because it claimed such material was irrelevant to this case. FEI advised Judge Facciola in a November 2007 status hearing that it was having problems with the PETA subpoena and would probably have to file a motion to compel. Subsequently, Judge

Facciola ordered Red Unit discovery to proceed. See Order at ¶ 2 (12/18/07) (Docket #239). FEI filed its motion to compel against PETA on January 28, 2008. See Ex. 1, (E.D. Va. Docket Report) (Docket # 1 & 2). Following hearings in mid-March and early April of this year, FEI's Motion ultimately was granted in large part by the magistrate judge on July 22, 2008. Then, without producing a thing, PETA promptly appealed the magistrate judge's order compelling production. That appeal was flatly rejected by the district court, which affirmed the magistrate judge's order by Order entered on September 8, 2008 and served electronically on counsel for FEI and PETA on September 9, 2008. Significantly, FEI sought ***the very next day*** to receive from PETA the materials ordered to be produced. PETA refused FEI's request and did not begin its production until September 15, 2008. Even then, the production was on a limited basis, and PETA initially refused to allow FEI to even review, much less copy, many of the videotapes relevant to this case. During a September 23, 2008 hearing regarding the production, PETA requested a protective order, which the magistrate judge in the Eastern District of Virginia issued on September 29, 2008.[2] For its part, FEI dutifully filed Notice of each of the foregoing Orders with this Court on September 30, 2008. See Notice of Orders (Docket No. 363) (9/30/08).

Meanwhile, during the time that the Eastern District of Virginia action was pending, FEI provided plaintiffs and the Court with repeated notice that it intended to rely upon the subpoenaed materials at trial. See FEI's Fed. R. Civ. P. 26(a)(3) disclosures (7/18/08) (Docket # 318) (¶ 196) (indicating that FEI's Motion to Compel was pending); FEI's Pretrial Statement (Docket # 342) (8/29/08) (¶ 276) (indicating that FEI's Motion to Compel was granted in part by the magistrate judge and that PETA had appealed that order). Plaintiffs, therefore, have for quite some time (and at all times relevant to this inquiry) been apprised of the existence and content of

[2] The order was served electronically on September 30, 2008.

FEI's subpoena, the Virginia litigation to enforce it, and FEI's unambiguous intent to amend its exhibit list with the subpoenaed materials.

B. PETA's Compliance with the Orders and Review of the Subpoenaed Materials

Following the district court's order, FEI commenced its review as quickly as possible. As noted above, just one day after the order finally compelling PETA's production was served on September 9, 2008, FEI contacted PETA and indicated that it was ready to proceed with that production at once. It was PETA, not FEI, who then worked to delay the production process: claiming that it did not have the materials organized for review (despite the magistrate judge's April, 2008 explicit advice to it to do so) and could not proceed until five days later, on September 15, 2008. PETA's failure to comply with the Court's order and the impediments it immediately began placing in the way of FEI's reviewers necessitated a telephone conference call with the Court within the first several hours of production on that very first day. See Ex. 1 (E.D. Va. Docket Report), 9/15/08 Minute Order.

Not only did PETA fail to comply with the Court's Order until September 15, it consistently sought to impose restrictions on FEI's review and copying of the subpoenaed video footage thereafter. These restrictions invariably delayed FEI's viewing and copying efforts in a timely fashion. From the outset, PETA refused to provide FEI with copies of the video footage responsive to its subpoena. Instead, it insisted that FEI review the more than seven hundred videos it reluctantly was producing at PETA's counsel's law office. To further complicate (and, as a consequence, delay) matters, PETA would only permit FEI to copy what PETA unilaterally deemed to be "responsive" videos – but only if FEI did so at PETA's counsel's office. It was not until after FEI again forced the issue and the Court then ordered that the videos PETA deemed to be "nonresponsive" were to be available for copying (coincident with the entry of the Court's

protective order on September 29, 2008) that FEI finally was able to copy many of the videos of greatest relevance to this case. See id. Thereafter, even though PETA finally consented to FEI's review and copying of the PETA videos at FEI's counsel's office (where reviewing and copying could be conducted more quickly and efficiently than in the limited and very cramped space FEI's reviewers were given to work at PETA's counsel's office), PETA still insisted on assigning a custodian to bring the videos to and from FEI's counsel's office each day and staying with them there during set hours of the day. Working within those constraints, FEI's counsel in Norfolk used the entire fourteen-hours alloted each day by PETA to view and copy videos.

In short, while plaintiffs now bemoan their not having been provided copies of all of the materials that FEI took the time, money, and energy to sort through and review, that is a problem entirely of their ally, PETA's, and not FEI's, making. It was PETA who insisted that FEI engage in an unnecessarily laborious, inefficient, and time-consuming review and copying process at its own counsel's office.[3] And plaintiffs, knowing that FEI had issued the subpoena well before the end of discovery, could have issued a subpoena to PETA for the same documents and videotapes. Plaintiffs' counsel could have certainly called PETA at any time and asked for their own copies especially since PETA has apparently been feeding the plaintiffs video footage during this case. See, e.g., Ex. 2, API's Depo. (Paquette) at 95:13-17 (1/29/08) ("I receive regularly footage from PETA."). They also could have asked PETA to stop playing games and just produce the material. Instead, they watched as PETA tried to run the clock out so that plaintiffs could claim "too late" in the hopes of precluding this evidence at trial. Moreover, FEI

[3] It was only after a week and two days of that difficult effort had passed and PETA's production protocol was placed before the Court that PETA finally consented to the more efficient expedient of allowing the process to be conducted at FEI's Norfolk counsel's office. Even then, the hours when such review and copying could be conducted were strictly controlled by PETA, who retained custody of all of the hundreds of videos produced until the end of the effort another two weeks later.

offered to provide plaintiffs with a complete set of the documents and videos it had selected for copying on October 10, 2008, ***but plaintiffs' counsel refused to accept them***. See Ex. 3, Joiner Letter to Meyer (10/10/08) & Meyer Letter to Joiner (10/10/08). The offer was again repeated when Ms. Joiner and Ms. Meyer discussed this matter on the phone on October 17, 2008. Plaintiffs have not been surprised by this material. FEI suspects that they knew full well what was contained in this material and were hoping to avoid it at trial. PETA almost managed to stall long enough to do that. FEI, however, ***at great expense and effort*** exercised its lawful right to review this relevant material because it is necessary to FEI's defense. Simply because Plaintiffs chose not to spend their time and effort to review it is not a basis to deny FEI its right to use it. If plaintiffs are going to be permitted to call their string of Red Unit and PETA witnesses, then FEI must be able to use this material to question them.

C. FEI's Notice to the Plaintiffs of PETA's Production and Its Amended Exhibit List

FEI again provided plaintiffs and the Court with notice that it intended to update its exhibit list with certain of the PETA materials on October 6, 2008. See Notice of Amended Exhibit List (Docket No. 364) (10/6/08). Shortly thereafter, FEI identified the exhibits on which it intends to rely at trial and ***hand-delivered*** copies of those same exhibits – twelve videos and one document – to plaintiffs on October 17 and October 20, 2008. The total time of all footage on these exhibits is approximately 9 hours. See Exhibit 4. FEI's D.C. counsel spent much of last week reviewing and identifying videos and documents to keep its evidence at trial concise and within the time limits set by this Court. PETA's delay in production prejudiced FEI and interfered with its other trial preparation. Given the steps FEI has taken to identify and select this limited material, Plaintiffs have sufficient time to review these materials in advance of trial. That they do not want to do so, as opposed to the fact that they can do so, is not controlling.

Moreover, while plaintiffs protest that they themselves cannot now possibly review all of PETA's videotapes before trial, that is not the issue. The issue is that despite the year's worth of notice to plaintiffs that FEI was serious about obtaining this material it had subpoenaed from PETA and that FEI was not going to waive or abandon its subponea, ***plaintiffs never acted to review any of it. Instead, with full knowledge of the subpoena and all of the legal wrangling between FEI and PETA, plaintiffs were contented to wait and see if PETA could stall its production past the trial date in this case***. Only after it became clear that FEI would not let that happen did plaintiffs then protest on the eve of trial. See, e.g., Pls' Objections and Responses to FEI's Pre-trial Statement at 33-34 (9/16/08) (Docket # 353) (no objection to FEI 276); Pls' Objection to FEI's Proposed Trial Exhibits at 34 (9/23/08) (Docket # 358) (same).

The Court should also note that not once have plaintiffs' counsel in this case ever offered to keep FEI apprised of the status of its third-party subpoenas. FEI has been forced to monitor the status of those independently and to seek affirmatively the documents from third parties and plaintiffs. The USDA documents are a prime example of this: it took plaintiffs approximately two months of repeated requests by FEI for this material before they would produce the subpoenaed documents, and only then, after *they*, not the USDA, redacted witness names from them.

II. THE MATERIALS SOUGHT ARE HIGHLY RELEVANT TO FEI'S DEFENSE AND THAT IS WHY PLAINTIFFS ARE SEEKING TO EXCLUDE THEM.

The subpoenaed materials are highly relevant to FEI's defense in this case. The video footage and documentary evidence obtained from PETA includes, *inter alia*, footage of FEI's employees and elephants surreptitiously taken by "will call" fact witness Archele Hundley through a device in her "fanny pack" and/or "purse" (FEI Exs. 281-283, 285); videotape footage of a PETA press conference in which fact witness Archele Hundley, Robert Tom, Jr., and

Margaret Tom participated; and one document showing a financial nexus between Ms. Hundley, PETA, and Nicole Paquette, API's Rule 30(b)(6) witness.

Plaintiffs themselves have not followed the logic of their own opposition. Indeed, plaintiffs issued last minute subpoenas to several railroad companies on January 25, 2008, just ***five days*** before the close of discovery, making plaintiffs' subpoenas more analgous to the cases cited in their opposition than FEI's subpoena to PETA. Cf. Potomac Electric Power Co. v. Elec. Motor Supply, Inc., 190 F.R.D. 372, 380 (D. Md. 1999) (subpoenas served four days before discovery cut off); Kelly v. Wright Medical Technology, Inc., Civ. Act. No. 00-8808, at *1 (S.D.N.Y. Jan 3, 2003) (subpoenas issued on discovery cut off). Documents produced pursuant to plaintiffs' subpoenas occurred well after the close of fact discovery, but despite their present argument, plaintiffs have, for example, listed documents received from one of the subpoenaed railroads, Burlington Northern Santa Fe, as its "will call" exhibit 51 and provided notice yesterday that they intend to introduce them on the first day of trial. Ironically, at the time when it favored their own position, plaintiffs argued to this Court that as long as a subpoena was served before the discovery cut off (even ***days,*** and not months, beforehand (like FEI's subpoena to PeTA)), compliance with that subpoena was mandatory. See Pls. Mot. for Clarification of Court's Order Concerning the Close of Fact Discovery (Docket No. 287) (4/3/08) at 3 ("Moreover, if the deadline for discovery controlled, a subpoenaed party could simply refuse to comply with the subpoena from some period of time, hoping to 'run out the clock' on the discovery deadline, and then assert that it is absolved of any obligations under the otherwise mandatory subpoena.").

Clearly, plaintiffs want to rely on the PETA footage that they have selected, but deny FEI the right to rely on the PETA footage that it has selected because it is damaging to plaintiffs'

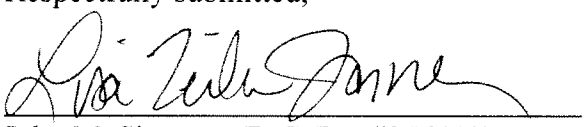
case. See, e.g., Pls. WC Ex. 122, "PETA 'Ringling Bullhooking Incidents in Greenville, SC on 2/1/06" (PL 8982); Pls. WC Ex. 137 Compilation of PETA Footage (Provided to Defendant on 6/10/08) (PL 16717, API 7166). Plaintiffs cannot have it both ways. To proceed in the one-sided manner that they request denies FEI a fair trial.

CONCLUSION

In sum, plaintiffs have been on notice of the subpoena for over a year and of FEI's intent to amend its exhibit list with related videos and documents for several months now. By any reasonable standard, FEI has proceeded as expeditiously as possible. Any delay suffered by plaintiffs has also been suffered by FEI, and all of that delay is the direct result of PETA's stonewalling, and not due to any fault of FEI. The materials at issue are highly relevant to FEI's defense. For these, and all of the other reasons stated above, FEI's Motion should be granted.

Dated this 23rd day of October, 2008.

Respectfully submitted,



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ORDER

Upon consideration of Feld Entertainment, Inc.'s Motion to for Leave to Amend its Exhibit List (Docket # 375 & 376), it is this _____ day of September, 2008,

ORDERED that the Motion is **GRANTED; and it is**

FURTHER ORDERED that FEI's Exhibit List is Amended to include Exhibits 280-292.

_____
JUDGE EMMET G. SULLIVAN