UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No.**
	:	
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS,	:	
	:	
Defendant.	:	
	:	

FELD ENTERTAINMENT'S MOTION TO COMPEL DOCUMENTS SUBPOENAED FROM PETA

EXHIBIT 5

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From: Philip J. Hirschkop
Date: October 10, 2007

This facsimile is 6 pages, not including this cover sheet.

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October 10, 2007

VIA FACSIMILE & FIRST CLASS MAIL
George Gasper, Esquire
FULBRIGHT & JAWORSKI
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

RE: *ASPCA v. Ringling Bros. et al.*
Subpoena *duces tecum* to PeTA

Dear Mr. Gasper:

In accordance with our discussion of September 28, 2007, I hereby file with you the following objections, pursuant to Rule 45 of the Federal Rules of Civil Procedure, on behalf of People for the Ethical Treatment of Animals (PeTA). As stated in our September 28th conversation, I will be happy to discuss these with you.

General Objections Applicable to All Seven Requests for Production Included in September 20, 2007 Subpoena *Duces Tecum* Served on PeTA Under Federal Civil Rule 45

A. Case History, Prior Orders

Plaintiffs American Society for the Prevention of Cruelty to Animals, Animal Welfare Institute, The Fund for Animals, Tom Rider, and Animal Protection Institute filed the above-referenced lawsuit under the Endangered Species Act ("ESA"), 16 U.S.C. §1531 *et seq.*, against Ringling Brothers and Barnum & Bailey Circus and Feld Entertainment, Inc. (collectively referred to as "Ringling") for "taking" Asian elephants in violation of the ESA. *See* Memorandum Opinion entered in same action, August 23, 2007, Docket No. 173, p. 1. Specifically, Plaintiffs allege that Ringling routinely beats elephants, chains them for long periods of time, hits them with sharp bull hooks, breaks baby elephants with force to make them submissive, and forcibly removes baby elephants from their mothers before they are weaned, thus "taking" them in violation of law. *Id.* at p. 2.

The central issue of whether Ringling has taken elephants in violation of the ESA was first brought to the court's attention seven years ago in a companion case, ASPCA v. Ringling Bros. and Barnum and Bailey Circus, U.S.D.C., Dist. of Columbia, Case No. 00-1641. *See*

Memorandum Opinion, August 23, 2007, Docket No. 176, p. 1. This action regarding the same issue was filed in 2003. Fact discovery in this case was originally scheduled to close years ago, on December 20, 2004, with expert discovery to close on March 4, 2005. *Id.* at p. 5. However, apparently as a result of Ringling's failure to timely produce documents, the court allowed discovery to continue. *Id.* Discovery now has been going on for more than three and a half years, with the new date for closure less than three months away—December 31, 2007. *Id.* at p. 4; Memorandum Opinion, August 23, 2007, Docket No. 178, p. 11. The court expects only "very limited discovery" at this stage, and "only as a result of the parties' failure to be able to resolve discovery disputes without intervention of the Court." Memorandum Opinion, August 23, 2007, Docket No. 176, p. 4.

Ringling has already filed a motion for summary judgment in this action, which has been decided. *Id.* at p. 4. The issues in the case have been narrowed. *Id.* The focus of the only remaining claim in this case is whether or not Ringling's treatment of certain of its elephants constitutes a taking within the meaning of the ESA. *Id.* at p. 5. The litigation continues only on this "very narrow issue." *Id.* at p. 8. Ringling's attempts at this late stage to add defenses, issues, and parties have been denied. *Id.* at pp. 9, 11. The court's intolerance for attempts to expand the issues, add parties, or engage in new, far-reaching discovery has been made abundantly clear: "The Court reminds these parties that the purpose of this litigation is to determine whether or not [Ringling'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." Memorandum Opinion, August 23, 2007, Docket No. 178, p. 12. The court will view requests for the extension of discovery with disfavor, given that the parties have already been engaged in discovery for more than three and a half years. *Id.* at p. 11.

Even discovery related to the remaining "very narrow issue" has been limited by court order. Documents already produced from other sources need not be produced. *See Id.* at pp. 3, 4. Documents or communications between the plaintiffs and others about media or legislative strategies has been found irrelevant and over burdensome to produce. *Id.* at pp. 4, 5, 7. Discovery aimed at communications between plaintiffs and non-party animal rights advocates and animal rights organizations have been ruled overbroad and the information irrelevant. *Id.* at p. 9. The court has found that any further information about individual or organization donors would be irrelevant and would tread on core First Amendment rights. *Id.* Even as to documents produced by parties, plaintiffs may redact the names of individual donors and organizations, (unless they are parties to the litigation). *Id.* at pp. 3, 4, 6-7, 8.

Despite these very explicit court orders, Ringling apparently persists in its efforts to add parties and engage in new, far-reaching discovery, including discovery precluded by these orders. Ringling recently served a 67 page subpoena *duces tecum* on non-party Humane Society of the

United States (HSUS). *See* Docket No. 192-2, filed September 21, 2007. Ringling admits that one of the purposes of serving that subpoena on HSUS is to determine whether HSUS should be made a party to this litigation. See Ringling's Motion to Compel the Production of Documents Subpoenaed from HSUS, Docket No. 192, filed September 21, 2007, at pp. 2, 4, 6.

It is against this backdrop that Ringling served its subpoena *duces tecum* on non-party PeTA on September 20, 2007.

B. General Objections

1. **Subpoena for Improper Purpose.** Ringling has admittedly used service of a subpoena *duces tecum* on non-party HSUS to determine whether to move to add HSUS as a party, PeTA questions whether Ringling is using service of a subpoena *duces tecum* on non-party PeTA to determine whether to move to add PeTA as a party, or to otherwise delay, hinder, and complicate this litigation and prejudice the plaintiffs. If so, then this is an improper use of a subpoena *duces tecum*, and subjects PeTA to expedited, unilateral discovery on a tight schedule and without reciprocal rights in a way that would not be allowed were PeTA a party. Plaintiffs' claim of Ringling's abuse of the judicial process in this action and the long-history of acrimony and litigation between Ringling and PeTA make it all the more likely that Ringling's service of a subpoena *duces tecum* on PeTA at a very late stage of this now-narrowed litigation is for an improper purpose. If so, no discovery from PeTA should be allowed.

2. **Irrelevant, Overly Broad, Burdensome.** Ringling served non-party PeTA with an 11 page subpoena *duces tecum* on September 20, 2007. This subpoena includes seven requests for production of documents and other tangible items. These requests are collectively irrelevant, overly broad, burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. For example, Request No. 1 asks for "[a]ll documents [from January 1, 1996 to present] that refer, reflect, or relate to ... funding any activities relating to [Ringling] or any other circus," even though a cursory review of one of PeTA's web site, **www.circuses.com**, shows that PeTA has investigated and reports on the activities of at least 30 circuses other than Ringling. Similarly, Request No. 4 seeks "[a]ll documents [from January 1, 1996 to present] that refer, reflect, or relate to any solicitation of or request for donations, contributions, payments and/or any things(s) of value concerning ... elephants in circuses." Again, this Request covers numerous circuses other than Ringling. And these two Requests, like the other five Requests, would require PeTA to search electronic, hard-copy, archived, web, and even destroyed records created or maintained at any time in the last twelve years, regardless of what time period (if any time period) is the relevant time period for each individual Request. These are but examples of the irrelevant, overly broad, and burdensome nature of Ringling's seven requests.

3. **Precluded Information Sought.** Ringling seeks more information than allowed under prior court orders, which orders limit the issues, claims, defense, and discovery in this

litigation, as discussed earlier in this letter. For example, Ringling requests documents from PeTA showing payments (if any) by PeTA to plaintiffs, even though Memorandum Opinion, August 23, 2007, Docket No. 178, at pp. 3, 4, 6-7, 8, provides for the redaction of identifying information about non-party animal advocacy organizations that have made payments to plaintiffs. In blatant disregard for this prior court order, Ringling's subpoena served on PeTA—a non-party animal advocacy organization—would require production of information on payments, if any, PeTA made to plaintiffs, which would have the effect of revealing information—namely PeTA's identity—that the court has already ruled could be redacted and is protected by the First Amendment to the United States Constitution. *Id.*

4. **Duplicative Requests.** The requests served on PeTA ask for documents previously produced in this litigation, despite the language of one of the judicial orders discussed above to the effect that documents already produced from other sources need not be produced again. For example, as reflected in Memorandum Opinion, August 23, 2007, Docket No. 178, at pp. 3-4, plaintiff Tom Rider has already produced or is required to produce relevant, non-privileged, non-precluded documents pertaining to this litigation and payments from animal advocacy organizations (with the names of those non-party organizations redacted). Yet Ringling asks again for many of those same documents that may be in PeTA's possession in its Request No. 4.

5. **Get Information From Parties First.** Ringling's subpoena served on PeTA seeks from a non-party information and documentation that it could and should seek from parties first. Non-party status is to be considered by courts in weighting burdens imposed in providing requested discovery. The standards for nonparty discovery requires a stronger showing of relevance than for simple party discovery. PeTA should not be required to produce documents where Ringling can obtain the same documents or similar information from any of the five named plaintiffs (American Society for the Prevention of Cruelty to Animals, Animal Welfare Institute, The Fund for Animals, Animal Protection Institute, or Tom Rider) or the three individuals previously designated as fact witnesses who have moved to become plaintiffs (Archele Faye Hundley, Robert Tom Jr., or Margaret Tom). Only after Ringling has established that there are relevant, non-duplicative, non-precluded documents, photographs, videos, or sound recordings that it cannot obtain from any existing or imminent party should the court consider allowing discovery from non-party PeTA, especially in light of the totality of circumstances surrounding this litigation and the history of other litigation between Ringling and PeTA.

6. **Get Information From Public Sources First.** Ringling also should be required to obtain documents and other tangible items from readily-accessible public sources where they are available, rather than seeking them from PeTA under a subpoena *duces tecum* at substantial expense to non-party PeTA. For example, where PeTA itself has obtained public records from the federal government though numerous freedom of information act requests over the past twelve years, with the totality of the requests potentially pertaining to up to 31 circuses, Ringling should be required to follow the same procedure as PeTA has, submitting its own public record

requests, rather than seeking those documents from non-party PeTA. And where PeTA-originated information is readily-accessible from a public source at no incremental cost to PeTA, Ringling should be required to seek it there. For example, information, photographs, and videos available on the World Wide Web at a website established or maintained by PeTA should be obtained from the Web, not using the burdensome and expensive process of service of a subpoena *duces tecum* on non-party PeTA.

7. **Privileged Information or Log Sought.** Based on counsel's general familiarity with PeTA and long-time representation of PeTA, counsel believes that if the overly broad, duplicative, irrelevant, precluded, and improperly-motivated discovery requested by Ringling were in fact undertaken, PeTA's twelve years of records would include documentation reflecting attorney work product, attorney-client privilege, trade secrets, and confidential research, development, and commercial information, as well as information entitled to privacy under the United States Constitution (*e.g.*, identification of news sources, membership information, associational information). PeTA would be required to pull from hard-copy, electronic, web, and archived sources; search; review; redact; and catalog twelve years of extensive documentation, all on account of Ringling's excessively burdensome, irrelevant, and precluded discovery requests.

8. **Definitions Objectionable.** PeTA objects to the definitions as exceeding the requirements of Federal Civil Rule 45, and as being, in part, over broad and vague. *See* ¶¶ 1, 4, and 10, particularly.

9. **Instructions Objectionable.** PeTA objects to the instructions as exceeding the requirements of Rule 45.

10. **Service Deficit.** PeTA objects generally to Request Nos. 1-7 in that the subpoena was not appropriately served upon defense counsel in this case.

Additional Objections Specific to Individual Requests for Production

For each of the seven requests for production included in September 20, 2007 subpoena *duces tecum* served on PeTA under Federal Civil Rule 45, PeTA raises all of the general objections set forth above, and further objects to the seven Requests for Production as set forth below:

1. PeTA specifically further objects to the broadness and undue burdensome nature of Request Nos. 1-3. PeTA also objects to those paragraphs in that they may include material that is either protected by work product doctrine or by the attorney-client privilege. PeTA further objects to the scope of these requests, where they involve trade secrets of PeTA. Lastly, PeTA

objects to the scope of these requests, where they go beyond the limitations of this lawsuit or the scope of the recent rulings of the United States District Court.

2. With respect to Request No. 4, PeTA makes the same objections as for Request Nos. 1-3, and would ask the relevance to the current lawsuit of each of the individuals named therein. PeTA objects specifically to documents relating to "any other current or former employee, consultant, agent, attorney, director, or other representative of defendant." PeTA would further object as invading the privacy of individuals, in addition to all the other objections set forth above.

3. PeTA objects to Request No. 5 for the reasons set forth in the general objections above, and particularly as it is over broad and thereby highly burdensome.

4. PeTA objects to Request Nos. 6 and 7, please see the general objections above.

After your review of this letter and reexamination of the subpoena *duces tecum* served on PeTA, I am available to discuss this matter further.

Very truly yours,

PHILIP J. HIRSCHKOP

PJH:er
cc: Katherine Meyer, Esquire
Jeffrey S. Kerr, Esquire