

FULBRIGHT & JAWORSKI L.L.P.

A REGISTERED LIMITED LIABILITY PARTNERSHIP
801 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2623
WWW.FULBRIGHT.COM

GGASPER@FULBRIGHT.COM
DIRECT DIAL: (202) 662-4504

TELEPHONE: (202) 662-0200
FACSIMILE: (202) 662-4643

November 15, 2007

VIA FACSIMILE AND FIRST-CLASS MAIL

Philip J. Hirschkop
Hirschkop & Associates, P.C.
908 King Street, Suite 200
Alexandria, VA 22314-3013

Re: ASPCA v. Feld Entertainment, Inc. (Subpoena *duces tecum* to PETA)

Dear Mr. Hirschkop:

I am writing in response to PETA's October 10, 2007 objections to the subpoena served by Feld Entertainment, Inc. ("FEI") in connection with the above-referenced litigation in the District of Columbia. FEI takes issue with your one-sided recitation of the "case history" and "prior order," but none of that has anything to do with the subpoena served upon PETA. Quite ironically, upon receiving your response, we agreed that the Court's prior orders meant that discovery was limited. Plaintiffs, however, have disagreed and the Court has ruled that discovery would not be limited as your letter suggests. Notwithstanding your efforts to characterize the proceedings in this case, several of your points are incorrect. For example, FEI is entitled to discover documents relating to payments by an animal advocacy group such as PETA to a witness in this case. FEI also is entitled to discover evidence, such as PETA's videotapes of FEI's operations, that would refute plaintiffs' allegations of animal abuse.

Each of PETA's general objections are addressed in turn below.¹

1. FEI's subpoena is not for an improper purpose and PETA's speculation to the contrary is completely unfounded. Unlike HSUS, PETA has not merged or otherwise combined with an existing plaintiff. FEI has no intention of joining PETA to the ongoing litigation. FEI's subpoena commands nothing but discoverable information relating to the claims and defenses in the current litigation and to the credibility of its parties and witnesses.

2. FEI's subpoena is narrowly focused upon documents relating to the credibility of parties or witnesses in the underlying litigation or upon evidence in PETA's possession that would refute plaintiffs' allegations of animal abuse. PETA's objection that the subpoena is over-

¹ PETA's specific objections simply duplicate issues raised in its general objections and, thus, will not be addressed separately here.

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broad conveniently misconstrues the requests at issue and misrepresents what it is that FEI has actually asked for. FEI has not requested all documents concerning the funding of any activities relating to any circus; rather, FEI has requested only those such documents that *also* pertain to a handful of individuals, all of whom are witnesses in the underlying litigation. FEI has no interest in receiving all of PETA's documents concerning www.circuses.com, only those presumably few documents that *also* concern individuals such as Archele Hundley and Tom Rider. The subpoena's first four requests are clear: PETA must produce all documents relating to certain individuals who are witnesses in this case. PETA cannot misconstrue such requests and then complain that they are overbroad when read only in part.

3. FEI's subpoena does not seek more documents or information than allowed under prior court orders. The court presiding over the underlying litigation already has ruled that FEI is entitled to discover documents concerning payments to or for witnesses by animal advocacy organizations (such as PETA). That the court permitted plaintiffs to redact the *identity* of donors who are not plaintiffs or counsel in this case does not mean that relevant documents need not be produced. In fact, the Court ordered that all documents relating to such payments be *produced*. PETA's objection also conveniently ignores that the purpose of redacting the identity of certain donors is to prevent the disclosure of an unknown donor's identity, which could potentially infringe (according to plaintiffs) on the donor's freedom of association. Any such concern has no relevance here because FEI knows that PETA has made payments for Rider and other potential witnesses. PETA's association with plaintiffs, Rider, and other witnesses is no secret. *See, e.g.*, PETA Press Release Regarding Archele Hundley (3/13/07) (available at <http://www.peta.org/mc/NewsItem.asp?id=9591>).

4. PETA's objection that FEI's subpoena contains "duplicative requests" is premised upon a conveniently incomplete recitation of the court's prior order. Plaintiff Tom Rider was permitted to exclude from his production any documents previously produced to FEI *provided* that he submit to FEI a list of specific responsive documents in his possession, custody, or control that were previously produced by others. If PETA would like to provide such a list, it too may exclude from production any *identical* copies of documents previously produced to FEI.

5. FEI's subpoena requests documents and information that are solely in the possession of PETA, such as internal e-mails relating to the allegations or credibility of certain witnesses. It is irrelevant, therefore, whether FEI could obtain *some* responsive documents that also are in the files of existing plaintiffs. As stated above, PETA need not produce documents FEI already has received from plaintiffs *provided* that it submits a list of such responsive documents that are in its possession, custody, or control. There, moreover, is no basis for PETA to insist that FEI request the documents at issue from three individuals who are not parties to the underlying litigation. PETA may not dictate which third party FEI elects to subpoena in order to discover relevant evidence.

6. PETA may not avoid FEI's subpoena simply because it has previously gathered publicly available documents or because it has made certain documents publicly available by

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posting them on a website. Nothing in Rule 45 permits the recipient of a subpoena to withhold documents simply because they are not the sole holder of them. In prior litigation involving FEI, you have insisted – and prevailed on your demand – that FEI produce publicly available documents to PETA. FEI asks no more than what PETA has demanded from it in the past.

7. PETA's objection that the subpoena commands the production of documentation reflecting privileged material is completely unfounded. Instruction No. 10 specifically permits PETA to withhold such documents provided that it submits, instead, basic information about them, which is commonly required by courts to enable the requesting party to assess the validity of any alleged privilege. You can log privileged documents just as you would in any other case.

8. FEI's definitions neither exceed the requirements of Rule 45 nor are they "over broad and vague." As PETA does not actually identify the specific definitions (and portions thereof) to which it objects, FEI has nothing further to consider on this and expects responsive documents to be produced.

9. FEI's instructions do not exceed the requirements of Rule 45. As PETA does not actually identify the specific instructions to which it objects, FEI has nothing further to consider on this and expects responsive documents to be produced.

10. FEI has served all parties with the subpoena it ultimately was able to serve upon PETA. PETA's objection that "defense counsel" was not served is false. "Defense counsel" issued the subpoena and plaintiffs were served with the subpoena on the same day that FEI received the executed affidavit of service and more than a week in advance of the production deadline established by the subpoena. All parties have been given sufficient notice of the commanded document production. *See* 1991 Adv. Comm. Notes to Fed. R. Civ. P. 45(b) ("The purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things."). FEI served plaintiffs after confirming that PETA had been served, which is precisely the manner in which plaintiffs have served prior subpoenas upon FEI. Plaintiffs apparently forgot to advise you of this when conferring with you about PETA's response to FEI's subpoena. The only complaint that can be made regarding service is by FEI. PETA went to great lengths to avoid service of FEI's subpoena and did so for a week before unilaterally pronouncing the date and time on which it would appear at its front desk to accept service. The process server was apparently familiar with such shenanigans from PETA. Your evasion of service required FEI to extend its response date in a re-issued subpoena.

I trust this letter addresses PETA's objections and indicates FEI's willingness to consider modifications to alleviate any well-grounded complaints of undue burden. You will recall that during our conversation on September 28, 2007, you stated that PETA could produce certain documents in response to FEI's subpoena without much discussion, e.g., documents relating to individuals who have been identified as witnesses in the underlying litigation. Please produce all documents that PETA is willing to produce voluntarily by the close of business on Wednesday,

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November 21, 2007. Please also call me before then to discuss whether any outstanding issues remain with regard to the subpoena in light of our response provided herein.

Very truly yours,


George A. Gasper