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

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No.** 2:08mc4
	:	
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS,	:	
	:	
Defendant.	:	

FELD ENTERTAINMENT, INC.'S MEMORANDUM IN SUPPORT OF IT'S MOTION TO COMPEL DOCUMENTS SUBPOENAED FROM PETA

Feld Entertainment, Inc. ("FEI") hereby respectfully moves pursuant to Fed. R. Civ. P. 45(c)(2)(B) to compel the production of documents subpoenaed from defendant People for the Ethical Treatment of Animals ("PETA"). See Ex. 1, FEI Subpoena to PETA (9/21/07) & Ex. 2, FEI Subpoena for Hagan Documents (1/21/05). FEI's subpoenas are narrowly focused upon documents and evidence in PETA's possession relating to the credibility of parties or witnesses, or refuting allegations of animal abuse made by plaintiffs in the litigation currently pending in federal court in the District of Columbia, captioned as *ASPCA, et al. v. Ringling Bros., et al.*, Civil Action No. 03-2006 (D.D.C.–EGS-JMF), and which was previously captioned as *ASPCA, et al. v. Ringling Bros., et al.*, Civil Action No. 00-1641 (D.D.C.) (hereinafter, "Litigation"). The documents commanded by FEI's subpoenas are not being withheld pursuant to any recognized claim of privilege or based upon any objection recognized under the Federal Rules of Civil Procedure. PETA, therefore, should be compelled by the Court to comply with FEI's subpoena immediately.

I. FACTUAL BACKGROUND

A. The Underlying Litigation and the Purpose of FEI's Subpoena

In the Litigation, one individual, Tom Rider, a former barn man for FEI, and several "animal advocacy" organizations, The American Society for the Prevention of Cruelty to Animals ("ASPCA"), the Animal Welfare Institute ("AWI"), The Fund For Animals ("FFA") and the Animal Protection Institute ("API") (collectively referred to as the "Organizational Plaintiffs"), have sued FEI, d/b/a Ringling Bros. & Barnum and Bailey Circus, under the citizen-suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq. The plaintiffs allege that FEI's treatment of its Asian elephants violates the "taking" prohibitions of section 9 of the ESA.

Mr. Rider's credibility, both as a plaintiff and a witness, is at the center of the Litigation, as the Organizational Plaintiffs' standing depends ***entirely*** on Mr. Rider's allegations of emotional attachment to the Asian elephants and his alleged aesthetic injury resulting from FEI's purported ESA violation. Without Rider, there would be no Litigation. See American Society for the Prevention of Cruelty to Animals v. Ringling Bros., 317 F.3d 334, 338 (D.C. Cir. 2003) (Rider's standing allegations survive a Rule 12(b)(6) motion to dismiss).[1] The veracity of Rider's standing allegations has yet to be tested on summary judgment and/or at trial. Any evidence, therefore, that supports or rebuts those standing allegations – including whether they are credible – is relevant to such a standing challenge. Moreover, Rider's credibility will again be challenged in his role as an actual witness to alleged elephant "abuse." The allegations of abuse in plaintiffs' complaint are premised entirely on what Rider allegedly saw and heard while

[1] The district court held that the Organizational Plaintiffs do not have standing to bring the ESA Action and that holding was not disturbed by the D.C. Circuit. See Performing Animal Welfare Society v. Ringling Bros., Civ. Act. No. 00-1641 (D.D.C. June 29, 2001) (slip op.) (Docket No. 20). In fact, the Court recently held that the plaintiffs only have standing as to the six elephants to which Mr. Rider alleged an emotional attachment and *which* are subject to the ESA. See American Society for the Prevention of Cruelty to Animals v. Ringling Bros., Civ. Act. No. 03-2006, 2007 U.S. Dist. LEXIS 78778, at *8 (D.D.C. Oct. 25, 2007).

working at FEI and Rider is expected to testify to the same at trial. Compl. ¶ 19. Therefore, any evidence tending to show Rider's ***bias*** – such as his receipt of "funding" from the other plaintiffs and from other "animal advocacy" organizations – will be paramount to FEI's defense.

Discovery in the Litigation to date demonstrates that the Organizational Plaintiffs, together with plaintiffs' counsel, Meyer, Glitzenstein & Crystal ("MGC"), the Wildlife Advocacy Project ("WAP"), a purported non-profit organization that is the alter-ego of plaintiffs counsel, and others have provided a substantial sum of money and other non-cash compensation – at least $150,000 – to Mr. Rider since the Litigation was filed. Some of the payments have been made directly from the Organizational Plaintiffs and MGC to Rider. Most of the payments, however, have been funneled from the Organizational Plaintiffs through WAP, who in turn sent the payments to Rider at MGC's expense. ***PETA has made at least one such payment to WAP that was then funneled to Rider.***

The district court judge presiding over the Litigation has ruled that the payment documents ***are relevant*** to Rider's credibility and ***ordered*** not only the plaintiffs, but also third-party WAP to produce them. See Ex. 3, Discovery Order (8/23/07) (Docket No. 178) at 8 (WAP shall provide ***any*** non-privileged documents or information that it has not already provided ... related to payments or donations for or to and expenses of Tom Rider in connection with this litigation or his public education efforts related to the Circus's treatment of elephants ... .") (emphasis added). The magistrate judge now presiding over discovery in the Litigation has likewise ordered another third-party, the Humane Society of the United States ("HSUS"), to produce all of its Rider payment documents. Ex. 4, HSUS Order & Mem. Op. (12/3/07) (Docket Nos. 231 & 232) at 2 ("The HSUS will produce ***all*** documents that 'refer, reflect or relate' to Tom Rider, including all communications with or to him, and documents that pertain to

payments made to him ... .") (emphasis added).

The payment scheme does not end with Rider, however. PETA also made payments to one Frank Hagan, a former employee of FEI who was deposed in the Litigation and is now deceased. FEI previously subpoenaed documents from PETA regarding these payments, and PETA produced only redacted versions of some documents. See Ex. 2, FEI Subpoena for Hagan Documents. FEI also has learned that three other witnesses identified by plaintiffs, who also sought but were prohibited from joining the Litigation as plaintiffs (Archele Faye Hundley, Robert Tom, Jr. and Margaret Tom), have received compensation from PETA at least in the form of travel, lodging and cell phone payments. In fact, PETA has issued numerous press releases regarding these individuals' allegations of elephant "abuse." See, e.g., Ex. 11, PETA Press Release Regarding Archele Hundley. Any evidence relating to these individuals' prior statements about FEI or to payments made to or for them by animal advocacy organizations such as PETA, therefore would be, as in the case of Rider, relevant to their credibility as trial witnesses and therefore FEI's defense.

FEI also has learned that PETA has a number of videotapes and photographs of FEI's elephants and that PETA has shared that evidence with plaintiffs in the Litigation. This evidence is likewise important to FEI's defense in the Litigation, because at trial, FEI will be demonstrating a negative: that it ***does not*** abuse or mistreat its elephants. Any and all videotaped and photographic evidence of FEI's elephants, therefore, is relevant to FEI's defense. Evidence that shows what plaintiffs purport to be "abuse" may be relevant to their "taking" claim and FEI's rebuttal thereof that claim, just as evidence that shows no abuse or mistreatment of FEI's elephants will also be relevant.

Pursuant to Rule 45, FEI subpoenaed these documents from PETA on September 21,

2007. See Ex. 1, PETA Subpoena. Specifically, FEI requested: (1) videotapes and photographs of anything owned by FEI, including its elephants, and of any former FEI employees; (2) documents relating to former FEI employees, including Mr. Rider, who are parties or witnesses in the Litigation; (3) documents concerning plaintiffs and their counsel's request for funding relating to the Litigation or witnesses in it; and (4) documents provided to plaintiffs in the Litigation.

B. PETA's Deficient Response to FEI's Subpoena

PETA has refused to comply fully with FEI's subpoena and, after much delay through correspondence, has posited no cognizable privilege claim or appropriate objection under the Federal Rules of Civil Procedure for its failure to do so. Instead, PETA has responded with carefully worded and purposefully evasive rhetoric and repeatedly asserted its political and philosophical adversity to FEI. See, e.g., Ex. 5, Hirschkop Letter to Gasper (10/10/07). That the circus and PETA are at odds comes as no news to anybody, and does not resolve the real matter at hand – compliance with the subpoena. The few documents that PETA has produced are woefully insufficient as explained below.

FEI has made repeated attempts to reach an agreement with PETA regarding its subpoena. PETA first responded to FEI's subpoena with a misconceived, wordy and irrelevant "case history" of the Litigation, which it supposedly has no role in. See Ex. 5, Hirschkop Letter to Gasper (10/10/07) at 1-3. Although not a party, PETA somehow was able to proffer detailed – albeit inaccurate – knowledge of the Litigation.[2] PETA also made a number of frivolous objections. For example, PETA initially asserted that FEI should obtain information from parties to the Litigation, from the potential witnesses themselves and from public sources before it sought them from PETA. See id. at 4. All of these objections are without merit, see Ex. 6,

[2] Plaintiffs' counsel in the Litigation has served as PETA's counsel in other matters.

Gasper Letter to Hirschkop (11/15/07) at 2-3, and were later abandoned by PETA. FEI's subpoena seeks documents that are solely in PETA's possession (internal e-mails, for example) and not documents that are in the Litigation plaintiffs' possession. Further, PETA cannot dictate which third party FEI should subpoena for documents, and more broadly, how it should defend itself in a lawsuit. Nor is there any provision in Rule 45 that permits a recipient of a subpoena to withhold documents simply because they are not the sole holder of them and because they may be otherwise publicly available. See, e.g., Gabby v. Maier, No. 04-04765, 2006 WL 2794316, at *3 (E.D. Wis. Aug. 31, 2006) ("[T]he fact that documents are available from another source is not a valid basis, by itself, for refusing to produce such documents."); Sabouri v. Ohio Bureau of Employment Svs., No. 97-715, 2000 WL 1620915, at * (S.D. Ohio Oct. 24, 2000) ("Fed. R. Civ. P. 34 requires production of a document that is in the 'possession custody or control' of a party; the fact that the document may also be available from another source is irrelevant."). Indeed, when the tables are turned, PETA has demanded – and succeeded – in other cases that FEI produce documents directly to PETA that were otherwise publicly available. Now that PETA is faced with a subpoena, it asks that the very relief it previously obtained from FEI be blocked.

Counsel for FEI and PETA then conferred via a telephone conference, the parameters of which FEI confirmed in a letter to PETA shortly thereafter. See Ex. 7, Gasper Letter to Hirschkop (12/7/07). That letter clearly articulated FEI's position on the document requests that are now at issue in this motion to compel. Specifically, FEI indicated that it expected PETA to produce "*all* documents" concerning certain former FEI employees who have or may testify in the ESA Action (including Frank Hagan and the three individuals who attempted to join the ESA Action as plaintiffs, Archele Faye Hundley, Robert Tom, Jr. and Margaret Tom) and are referenced in Request Nos. 1-4. See id. at 1. Specifically with respect to Hagan, FEI made clear

that the redacted documents produced in response to FEI's prior subpoena had since been deemed relevant by the Court and that it must produce unredacted copies of those documents. As a courtesy, FEI enclosed copies of PETA's prior production (i.e., the redacted documents) for its review. FEI also stated that it expected to receive "documents concerning requests for funding that were made by *plaintiffs, WAP and/or plaintiffs' counsel* and that related to this litigation and/or FEI and its current or former employees." Id. at 2. Further, FEI indicated that it and PETA were at an impasse regarding the production of ***all*** of PETA's videotapes and photographs of FEI's elephants and all communications between PETA and plaintiffs, and that it would be moving to compel on those issues.

PETA then responded via letter and produced a limited number of documents on two occasions. Ex. 8, Hirschkop Letter to Gasper (12/14/07) & Ex. 9, Hirschkop Letter to Gasper (12/17/07). For the first time in almost three months of correspondence over the subpoena, PETA announced that it was producing a "table" reflecting payments to former FEI employees instead of ***all*** of the payment documents. PETA's approach is directly at odds with Judge Sullivan's order requiring the production of all payment documents. Third-party WAP already attempted to produce such a "table" and its argument was flatly rejected. Ex. 3, Discovery Order at 8-9. Moreover, PETA failed to provide a cogent reason for its failure to produce all of its payment documents, stating only that "[t]he material it encompasses came from diverse entries which, if produced, would be cumbersome and not as readily identifiable." Ex. 8, Hirschkop Letter to Gasper (12/14/07) at 2. The information was clearly compiled for purposes of producing a chart in lieu of the actual documents, so it would now not be difficult to produce the actual documents – as opposed to a chart that filters them from FEI – commanded by the subpoena. Further, PETA failed to produce ***any*** documents relating to Hagan. PETA merely

acknowledged receipt of the redacted Hagan documents and indicated that it would search for and review the original, unredacted documents. PETA offered to produce a "table, like the one being produced for the other witnesses" if it could not locate the originals. Id. It is inexplicable how a "table" in lieu of the documents could be created while PETA simultaneously claims to be unable to locate the originals. In addition to its failure to produce all payment documents, PETA refused to produce ***any*** videotapes or photographs of FEI's elephants and ***any*** of its communications with plaintiffs regarding the ESA Action.

FEI responded by letter just one day after PETA's second inadequate production. Ex. 10, Gasper Letter to Hirschkop (12/18/07). FEI's letter set forth its objections to PETA's document production, which are now set forth in this motion to compel. PETA failed to make any further production of documents or contact with FEI regarding its subpoena. FEI, accordingly, has filed this action. Two judges presiding over the Litigation, Judge Sullivan and Magistrate Judge Facciola, have already held that this very type of payment documents sought by FEI's subpoena are relevant and must be produced. Ex. 3, Discovery Order at 8-9; Ex. 4, HSUS Order at 1-2. FEI has already been prejudiced by having to take depositions without the underlying documents from PETA's subpoena due to the upcoming close of discovery, and it should not be further prejudiced by PETA's failure to comply.

II. ARGUMENT

PETA's obligation to comply with FEI's discovery requests is the same as if it were a party to the Litigation. Castle v. Jallah, 142 F.R.D. 618 (E.D. Va. 1992) ("[T]he scope of discovery from a nonparty by means of a subpoena *duces tecum* under Rule 45 is coextensive with that of a motion for production from a party under Rule 34."); see also Wright & Miller, Federal Practice & Procedure § 2452 ("Rule 26 still governs the scope of discovery. This

applies, of course, to the discovery of documents, electronically stored information, and tangible things under Rule 34, which continues not to require a court order, a motion, or a showing of good cause."). FEI "may obtain discovery [from PETA] regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ... ." Fed. R. Civ. P. 26(b)(1). Its subpoena seeks just that: evidence which has already been ruled discoverable and relevant to the Litigation. It is PETA's burden to show that discovery should not be allowed, see Castle, 142 F.R.D. at 620, and its has failed to set forth any cognizable claim of privilege or any objection recognized under the Federal Rules for its non-compliance. Accordingly, PETA should be compelled to comply with FEI's subpoena immediately, and costs and fees should be awarded to FEI for the time and expense of filing this motion.

A. Videotapes and Photographs of FEI's Treatment of Elephants, Which Is the Central Focus of the Underlying Litigation (Request No. 6)

Videotapes and photographs that evidence FEI's treatment of its elephants are highly relevant to the underlying Litigation; the Litigation is premised entirely upon plaintiffs' allegations that FEI is "taking" its elephants. PETA has taken video footage and photographs of FEI and the manner in which it treats its elephants. FEI requested from PETA ***all*** such evidence in its possession.[3] PETA admits that such video footage exists and that it is in its possession, custody and control, yet it has refused to comply with FEI's subpoena as overly burdensome.

PETA refuses to comply with the subpoena because it claims, without merit, that a search

[3] See Request No. 6 ("All pictures and video or audio recordings (such as tapes, CDs or DVDs) (in complete and unedited form) that you or anyone else has taken of anything owned by Defendant (such as its boxcars or bullhooks), of any of Defendant's animals (such as its elephants), or of anyone who has ever worked for Defendant (such as Sacha Houcke, Alex Vargas, Carrie Coleman, Tom Rider, Glenn Ewell, Gerald Ramos, James Stechcon, Garrison Christianson, Kelly Tansy [a.k.a. Kelly Tansey], Archele Faye Hundley, Margaret Tom and/or Robert Tom, Jr.").

for and production of the requested materials would allegedly be too "burdensome."[4] PETA has failed to explain – in any detail whatsoever – why such a search and production would be so "burdensome." In reality, the production of such material should present no burden at all: PETA took the videos and photos for a specific purpose, so it is inconceivable that these materials are not highly organized and that PETA cannot put its hands on them immediately by subject matter. PETA knows exactly what is on its videos and photos. That is why the videotapes and photographs were taken in the first place and why PETA has failed to articulate why it would be "burdensome" for it to produce them.

The accessibility and relevance of PETA's videos and photographs is underscored by PETA's own admission that plaintiffs, in response to FEI's document requests, produced ***some***, but not all, of PETA's videos in the Litigation. See Ex. 8, Hirschkop Letter to Gasper (12/14/07) at 3 ("I had seen a list of the videos that the plaintiff [sic] had produced and I understood they were videos of PeTA's that the plaintiffs had."). ***PETA has not denied that it provided those videos to plaintiffs.***[5] This belies PETA's argument that it would be too "burdensome" to produce the rest of the videos and photographs requested by the subpoena. If PETA cannot easily locate the videos, as it now claims, how could it have done so when it previously provided them to plaintiffs? If it is not too "burdensome" for PETA to have provided the videos to plaintiffs, then it is not too "burdensome" for PETA to do the same for FEI.

Further, PETA's argument that it need not comply with FEI's request because FEI is already in possession of the handful of videos that plaintiffs produced is of no moment. FEI has

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[4] PETA has incorrectly taken the position that FEI is seeking photographs and videotapes of "any" circus. PETA misconstrues FEI's request. Request No. 6 seeks only photographs and videotapes of: (1) anything owned by ***FEI***; (2) ***FEI's*** animals; and (3) ***FEI's*** current and former employees. See supra note 3.

[5] PETA maintains that it is not certain whether plaintiffs got the videos produced in the ESA Action directly from PETA or if they got them from "public r[e]sources." Ex. 8, Hirschkop Letter to Gasper (12/14/07) at 3.

no way to confirm that plaintiffs produced all of the videos that they received from PETA to FEI. This point is particularly significant because FEI must prove a negative – that its treatment of its elephants is not a "taking." Videos that do not show alleged elephant "abuse," therefore, are relevant to FEI's defense, which would include all footage of FEI's elephants. FEI has reasonable basis to believe that PETA has taken far more footage of FEI than what plaintiffs have actually produced in the Litigation, meaning that footage that is exculpatory or helpful to FEI is being ignored, weeded out or otherwise not produced by plaintiffs in the Litigation. Moreover, it is not for plaintiffs, or PETA, to decide unilaterally which videos and photographs are relevant to Litigation. FEI, and not plaintiffs or PETA, will determine what is relevant to ***its*** defense. The subpoena clearly calls for materials that are reasonably calculated to lead to the discovery of admissible evidence, and FEI will decide which, if any, such evidence it will ultimately use in its defense whether during summary judgment or at trial. PETA cannot have it both ways – providing materials to plaintiffs and at the same time denying FEI's request for the rest of it. PETA, therefore, should be ordered to produce ***all*** of the requested videos and photographs.

B. Documents Concerning Former FEI Employees Who Are or Were Parties or Witnesses in the Underlying Litigation (Request Nos. 1-4)

Plaintiffs in the Litigation are expected to rely heavily upon the testimony of former FEI employees. FEI's subpoena, accordingly, requests all documents relating to the former employees who plaintiffs have identified as parties or potential witnesses in the underlying litigation.[6] PETA, however, has yet to produce all documents relating to payments to former

[6] See Request Nos. 1-4 "All documents that refer, reflect, or relate to" Archele Faye Hundley, Robert Tom., Jr., Margaret Tom, and/or any other current or former employee, consultant, agent, attorney, director, or other representative of Defendant (including but not limited to Tom Rider, Glenn Ewell, Gerald Ramos, James Stechcon, Garrison Christianson, and/or Kelly Tansy [a.k.a. Kelly Tansey]).

employees.[7]

All documents relating to payments to witnesses are relevant and must be produced. PETA's status as a third-party to the Litigation does not justify its refusal to comply with FEI's subpoena. The two judges presiding over the ESA Action specifically have held that two third-parties – WAP and HSUS – must, like the Organizational Plaintiffs, produce ***all*** payment documents.[8] See Ex. 3, Discovery Order at 8 (Judge Sullivan ordering WAP to produce ***"all"*** documents concerning payments to Rider); Ex. 4, HSUS Order at 2 (Magistrate Judge Facciola ordering HSUS to produce the same).

Despite these clear Court Orders on the very same issue, PETA produced, in the words of its counsel, a "table ***showing*** expenditures to, or on behalf of" witnesses in the ESA Action and only some, but not all, of the documents reflecting those payments. See Ex. 8, Hirschkop Letter to Gasper (12/14/07) at 2 (emphasis added). PETA unilaterally has interpreted the Orders of Judges Sullivan and Facciola to mean documents ***"sufficient to show"*** payments, when in fact those Orders require the production of ***"all"*** payment documents. For example, PETA's "table" reflects a payment by PETA for Rider's expenses, yet PETA produced no documents (emails, internal check requests, receipts, itineraries, etc.) regarding that payment. This is just one of many payments listed on PETA's "table" for which it has produced no documents. Where are

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[7] In addition to payment documents, PETA has failed to produce other categories of documents reflecting on the credibility of former FEI employees. For example, PETA has carefully stated that it searched for and produced "all correspondence by" former FEI employees and "all correspondence ***by PETA*** to" any of them. Thus, while PETA has produced correspondence by these individuals, regardless of the intended recipient, PETA has failed to produce correspondence to these individual that was created by someone other than PETA. PETA's production is inadequate and the Court should order its full compliance with FEI's subpoena.

[8] Judges Sullivan and Facciola have held that FEI is entitled to discover documents concerning payments to or for witnesses by animal advocacy organizations, such as PETA. The Court permitted plaintiffs to redact the identity of donors who are not plaintiffs or counsel in the ESA Action, ***but at the same time ordered that those redacted documents be produced.*** The purpose of the redactions is to prevent the disclosure of an unknown donor's identity which could, according to plaintiffs, infringe on that donor's freedom of association. That purpose has no application here because PETA itself has publicly disclosed its association with plaintiffs, Rider and other witnesses. See Ex. 9, PETA Press Release Regarding Archele Hundley. Moreover, WAP disclosed PETA's identity as a donor to FEI. Ex. 12, WAP Deposit Ledger Showing Payment by PETA.

the documents for those payments? And what evidence is in those documents that PETA does not want produced? It is suspect that PETA expended "considerable effort," see Ex. 8, Hirschkop Letter to Gasper (12/14/07) at 2, compiling a "table" of payments when at the same time it claimed that it would be too "cumbersome" to produce the documents themselves because the documents are not "readily identifiable." Id. If PETA knows what payments it made, and purportedly created a table reflecting all of them, it is beyond credulity that it cannot locate the documents that support the calculations on the very same table, or that such a search would be unduly burdensome.

Putting the suspect nature of PETA's "table" aside, the real issue here is that PETA's actions are contrary to the rulings in the Litigation and PETA can offer no valid reason as to why it should be treated any differently than the other third parties in the Litigation. Two judges have ruled that the payment documents are relevant and must be produced. Third-party WAP, in fact, argued to Judge Sullivan that a "chart" of payments that it created was sufficient to comply with FEI's request for payment documents. ***That argument was rejected.*** Judge Sullivan ordered WAP to produce ***all*** payment documents except the few that WAP identified as technically responsive but onerous to produce and that had little value to FEI (i.e., phone bills and bank statements). See Ex. 3, Discovery Order at 8-9. PETA should be ordered to comply with the clear Orders of the Court and produce all documents responsive to Request Nos. 1-4: "all" payment documents means "all" payment documents.

Further, PETA should be ordered to produce all documents concerning former FEI employee Frank Hagan, who allegedly witnessed elephant "abuse" and has been deposed in this case. FEI's prior counsel subpoenaed PETA for all documents relating to Hagan after learning that PETA was making payments to him. Ex. 2, FEI Subpoena for Hagan Documents. PETA,

however, produced heavily redacted payment documents. FEI asked PETA to produce unredacted copies of those documents in view of the recent Court Orders and even sent PETA the redacted documents that it previously produced. As with the nine other individuals identified, PETA should be ordered to produce all documents it has concerning him, and it should also produce ***unredacted*** versions of all documents that it previously produced in redacted form. This is particularly imperative because Mr. Hagan is now deceased and, quite obviously, cannot be questioned now about the payments PETA made to him. Moreover, because Mr. Hagan is now deceased, plaintiffs may seek to admit his prior deposition testimony at trial in the Litigation, and FEI has a right to challenge Mr. Hagan's credibility, bias and motive based upon the payments made to him by PETA. Thus, it is even more imperative that PETA produce all documents concerning Hagan because he is no longer available for cross-examination. See Ex. 2, FEI Subpoena for Hagan Documents.

C. **Documents Concerning Plaintiffs and Their Counsel's Request for Funding Relating to this Lawsuit or Witnesses in This Case (Request No. 5)**

The credibility of the Organizational Plaintiffs will also be at issue in the ESA Action. FEI's subpoena therefore sought documents concerning requests for funding that were made by plaintiffs, WAP, and/or plaintiffs' counsel that relate to the Litigation and/or FEI and its current or former employees.[9]

PETA has not produced any documents concerning requests for funding made by the plaintiffs for the Litigation, Tom Rider, or otherwise; nor has it even articulated a rationale for its refusal to comply with this portion of FEI's request. See Ex. 8, Hirschkop Letter to Gasper

[9] See Request No. 5 ("All documents that refer, reflect, or relate to any solicitation of or request for donations, contributions, payments and/or any thing(s) of value concerning the Litigation, elephants in circuses, Defendant, and/or any current or former employee, consultant, agent, attorney, director, or other representative of Defendant (including but not limited to Tom Rider, Glenn Ewell, Gerald Ramos, James Stechcon, Garrison Christianson, Kelly Tansy [a.k.a. Kelly Tansey], Archele Faye Hundley, Margaret Tom and/or Robert Tom, Jr.), by: (a) Plaintiffs; (b) MGC; and (c) WAP.")

(12/14/07) at 3 ("You also requested information on contributions made to WAP and payments to the Meyer Glitzenstein law firm."). PETA's response to Request No. 5 was conspicuously limited to only WAP and MGC. See id. Even so, its response regarding MGC is evasive and inadequate. PETA has represented only that it has "not paid any ***expenses***" to MGC for the lawsuit. See id. at 4 "([W]ith regard to the lawsuit, PeTA has not paid any expenses, either for costs or legal fees [to MGC]."). That hollow assertion fails to fully respond to FEI's question: whether MGC requested funding for this lawsuit, for Tom Rider, or for other potential witnesses. FEI is entitled to obtain documents to determine whether MGC solicited funding from PETA for Rider's "media campaign" or for the other potential plaintiffs and whether PETA was billed by MGC for Rider's "media campaign" as were the other Organizational Plaintiffs. Ex. 13, Example of Bills from MGC to Plaintiffs for Rider's "Media" Campaign. Documents relating to funding requests by plaintiffs, MGC and WAP are plainly relevant to the Litigation. Judge Sullivan has ruled that the Rider "funding" scheme is relevant to Rider's credibility and all documents regarding that scheme must be produced. PETA has not stated ***any*** reason for its refusal to comply with Request No. 5 and should be ordered to produce all responsive documents immediately.

D. Documents Provided to Plaintiffs in the Underlying Litigation (Request No. 7)

Because FEI believes PETA has provided documents to plaintiffs that likely will be used as evidence in the Litigation, FEI's subpoena specifically requested the production of all documents given to and all communications with plaintiffs concerning FEI's care and treatment of its elephants.[10] PETA has failed to directly address FEI's request and has only vaguely referenced a mutual defense privilege as a basis for withholding documents responsive to this

[10] See Request No. 7 ("All documents provided to, or communications with, plaintiffs or their counsel (including MGC) that refer, reflect or relate to Defendant's care or treatment of its elephants at issue in the Litigation.").

request. Nor has any privilege log been produced. See Ex. 8, Hirsckhop Letter to Gasper (12/14/07) at 3-4 ("We have had a working agreement with [MGC], both on behalf of myself and general counsel's office for PeTA, in the course of various legal efforts that the communication between counsel would remain privileged."). While a common interest or joint defense privilege may apply if PETA were adverse in a lawsuit involving FEI, that is not the case here. See In Re Grand Jury Subpoena, 415 F.3d 333, 341 (4th Cir. 2005) ("The joint defense privilege ... protects communications between ***parties*** who share a common interest in litigation. ... The purpose of the privilege is to allow persons with a common interest to communication with their respective attorneys and with each other to more effectively prosecute or defend their claims.") (citations and quotations omitted) (emphasis added). PETA is not "interested" in the ESA Action "in the sense that the outcome of the litigation would directly affect" it. Cf. Federal Election Comm'n v. The Christian Coalition, 178 F.R.D. 61, 73 (E.D. Va. 1998). Further, any documents exchanged or communications between PETA, plaintiffs and MGC certainly could not have involved a "common legal strategy" in the Litigation and there is "no evidence" that their communications and exchanges of information were "for the purpose of formulating a joint defense." Cf. In Re Grand Jury Subpoena, 415 F.3d at 341. Political and philosophical adversity do not satisfy the test for common interest privilege.

Moreover, the documents are relevant to FEI's defense of the Litigation. FEI is entitled to discovery of all evidence that would support or rebut plaintiffs' allegations of "abuse." To that end, FEI has subpoenaed PETA to discover the full set of documents, as that term is defined in the subpoena, relevant to the Litigation so that it can access such evidence directly without the filter and interference of plaintiffs in the Litigation. That is the purpose of Rule 45. It is neither unreasonable nor unexpected that FEI would seek discovery of not only every document PETA

has shared with plaintiffs in the Litigation, but also all documents that PETA has regarding the Litigation that the plaintiffs have declined to produce to FEI. PETA should be ordered to produce the documents, including communications, that FEI properly subpoenaed immediately.

III. LOCAL CIVIL RULE 7(E) CERTIFICATION

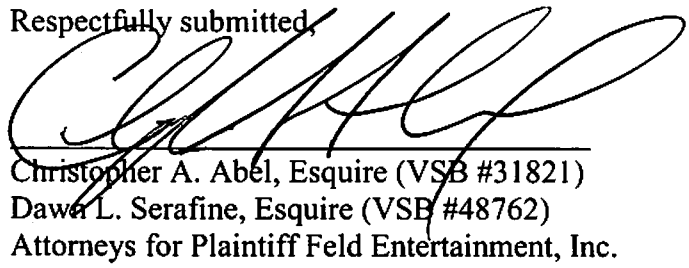
Pursuant to Local Civil Rule 7(E), FEI hereby certifies that it attempted in good faith to confer with PETA prior to filing this motion to compel. The parties exchanged written correspondence about the issues presented herein, see Exs. 5-10, and discussed this matter via telephone on December 5, 2007.

IV. CONCLUSION

The documents FEI has subpoenaed from PETA are relevant and must be produced. The judges presiding over the Litigation already have ordered the same with respect to two third-parties. FEI has conferred with PETA in good faith to no avail. PETA's only apparent interest is in attempting to escape production under the subpoena by engaging in protracted letter-writing and trickling out redacted documents, or even worse charts created in lieu of documents to stymie FEI's discovery. FEI already has had to depose trial witnesses without the benefit of a complete production by PETA, and PETA's interference with FEI's defense should not be permitted to continue. PETA has not articulated any claim of privilege and it has not offered any objection recognized under the Federal Rules to justify its non-compliance. For all the reasons stated above, FEI's motion to compel documents subpoenaed should be granted and FEI should be awarded its costs and fees for having to file this motion.

This, the 28th day of January 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify on this 28th day of January, 2008 that I caused the foregoing Memorandum to be personally served upon People for the Ethical Treatment of Animals in the manner as follows:

VIA FACSIMILE & HAND DELIVERY TO:

Philip J. Hirschkop
Hirschkop & Associates, P.C.
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Alexandria, V.A. 22314-3013
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Counsel for PETA

VIA PROCESS SERVER ON:

Registered Agent
People for the Ethical Treatment of Animals
501 Front Street
Norfolk, V.A. 23510

VIA FIRST CLASS MAIL

Katherine A. Meyer, Esquire
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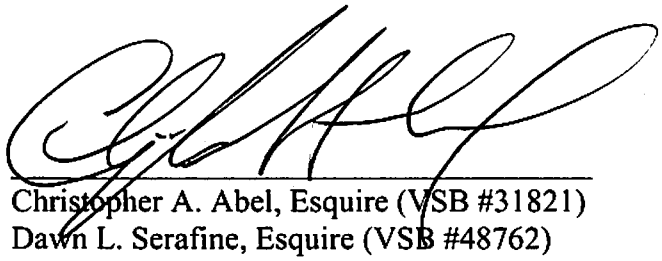

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