

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division**

**FELD ENTERTAINMENT, INC.,** )  
 )  
 **Plaintiff,** )  
 )  
 v. )  
 )  
 **PEOPLE FOR THE ETHICAL** )  
 **TREATMENT OF ANIMALS,** )  
 )  
 **Defendant.** )  
 )

**Case No. 2:2008mc00004**

**PLAINTIFF’S COURT-ORDERED, SUPPLEMENTAL BRIEF CONCERNING ITS  
MOTION TO COMPEL DOCUMENTS SUBPOENAED FROM PETA**

Plaintiff, Feld Entertainment, Inc. (hereinafter, “FEI”), by counsel, submits this brief in accordance with the Court’s Order dated March 17, 2008. (Docket No. 24). Listed below are “all rulings of U.S. District Judge Sullivan and Magistrate Judge Facciola which [FEI] contend[s] bear on the issues raised by the instant motion”:

- Order of August 23, 2007 (Sullivan, J.) (hereinafter “8/23/07 Order”) (attached as Exhibit 1).
- Order and Memorandum Opinion of December 3, 2007 (Facciola, M.J.) (hereinafter “12/3/07 Order at Op. p. \_\_\_\_”) (attached as Exhibit 2).

As further directed by this Court’s order, the parts of the foregoing orders that FEI believes are relevant are highlighted (by underlining for documents filed electronically).

These orders compelled third parties no differently situated than the People for the Ethical Treatment of Animals (hereinafter, “PETA”) to produce the same kind of information PETA seeks to withhold here. No order in D.C. authorizes PETA to withhold anything. *See*

Pacer Docket for *ASPCA, et al. v. Feld Entertainment, Inc.*, Civil Action No. 03-2006 (D.D.C.) (hereinafter, the “D.C. action”). Furthermore, the record of the D.C. action does not support the claims PETA’s counsel made during the March 14, 2008 hearing as to what should or should not be produced or logged. *Id.*

**I. Two Orders Bear on FEI’s Request for Documents Concerning Witnesses and Payments Made to or for Them**

Two of the D.C. orders address an issue directly analogous to the issue before this Court. First, Judge Sullivan compelled the Wildlife Advocacy Project (hereinafter, “WAP”), a non-party, to produce “any non-privileged documents or information that it has not already provided, with the exceptions discussed below, 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.” Ex. 1, 8/23/07 Order at 8. The only exception to this rule was that WAP could “redact the *names and identifying information* of individual donors or organizations who are not parties to this litigation, attorneys for any of the parties or employees or officers of any of the plaintiff organizations or WAP,” and WAP was not required to produce “media and legislative contacts and strategies” or “monthly financial reports, bank statements, or phone bills.” *Id.* at 8-9 (emphasis added).

Second, relying upon Judge Sullivan’s ruling of August 23, 2007, Judge Facciola ordered another third party, the Humane Society of the United States (“HSUS”), to 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.” Ex. 2, 12/3/07 Order at Op. p. 5. *Cf.* FEI’s Subpoena to PETA (Docket No. 2, Ex. 1) at Request Nos. 1-4 (“All documents that refer, reflect, or relate to” potential witnesses including Tom Rider.)

These two orders compelled third parties to produce all of their documents concerning payments to Tom Rider because they bear, *inter alia*, upon Rider's credibility. See Ex. 1, 8/23/07 Order at 5. PETA claims incorrectly that only payments to Rider by his co-plaintiffs, his attorneys, or WAP have been ruled to be relevant in D.C. See Hr'g Tr. at 58-59 (attached as Exhibit 3). The D.C. orders, however, prove otherwise. In the August 23, 2007 order, Judge Sullivan instructed Rider and the organizational plaintiffs to produce "[a]ll responsive documents and information concerning his income and payments from *other animal advocates and animal advocacy organizations*." Ex. 1, 8/23/07 Order at 3, 6-7 (emphasis added). In that same order, Judge Sullivan required third-party WAP to produce documents concerning *all* payments to Rider – regardless of whether the payor was WAP, a party, or any other person or entity. The only things WAP could withhold were "the *names and identifying information* of individual donors or organizations who are not parties to this litigation, attorneys for any of the parties or employees or officers of any of the plaintiff organizations or WAP." *Id.* at 8 (emphasis added).

While PETA stresses that Judge Sullivan ruled that the "source" of any payment to Rider is irrelevant if the payment was not made by plaintiffs, their counsel, or WAP, see Ex. 3, Hr'g Tr. at 64, PETA overlooks the context in which this statement was made. See Ex. 1, 8/23/07 Order at 4. Immediately prior to his comment regarding the source of funding, Judge Sullivan stated that "Rider's funding for his public education and litigation efforts related to defendants is relevant." *Id.* Thus, it is clear that although donor "identity" or payment "source" may be redacted, payments (and the corresponding documentation) to Rider by an animal advocate or animal advocacy organization are relevant to the issue of Rider's credibility and were ordered to be produced. Ex. 1, 8/23/07 Order at 4, 8-9. Judge Facciola's order of December 3, 2007, reflects this understanding of the context of Judge Sullivan's comments. Had Judge Sullivan

ruled that funding from sources other than the plaintiffs in the underlying litigation was irrelevant, neither he nor Judge Facciola would have ordered the other third parties to produce funding information.

It is clear why any and all payments to Rider are relevant. Rider worked for FEI for more than two years, but it was only after Rider left FEI's employment and began receiving money and other gifts from animal advocacy organizations that he became a purported advocate for elephant welfare. Whether a payment came from ASPCA or PETA, it bears heavily upon the credibility of Rider's testimony. It is no secret that PETA (like the D.C. plaintiffs) expends resources to interfere with the operations of FEI's circus. *See Ex. 3*, Hr'g Tr. at 17. Payments by PETA to someone now expected to testify in furtherance of their agenda is no less relevant than any such payment by ASPCA.

PETA claims that the only reason WAP and HSUS were compelled to produce documents concerning payments was because "they are really parties to the case." *Ex. 3*, Hr'g Tr. at 37. However, WAP, HSUS, and plaintiffs strenuously denied any alter ego status, and it was not the basis for the D.C. court's rulings. Indeed, Judge Facciola ruled that HSUS need not produce certain documents it created about the underlying litigation because it is *not* a party to the case. *See Ex. 2*, 12/3/07 Order at Op. p. 3. PETA is not simply a "bystander" to the D.C. action in any event. PETA provided selected video of FEI's personnel and animals to plaintiffs in the D.C. action and, in addition to paying Rider, PETA has paid other witnesses for plaintiffs in the case: Hagan, Hundley and the two Toms. Whether a fact finder believes that any of these witnesses is credible will be affected by any payments they have received from groups such as PETA, which openly shares the D.C. plaintiffs' agenda.

**II. PETA Inaccurately Cites Other Orders In Support of Its Request for Relief From This Court**

*1. No Order Supports PETA's Refusal to Produce Photographs and Videos of FEI and its Elephants*

Contrary to PETA's claims (Ex. 3, Hr'g Tr. at 19-21), no order in the D.C. action limits the photographs and videos that FEI must produce. Indeed, FEI has been required to permit plaintiffs to review any video that might possibly depict an elephant for whatever reason. Plaintiffs spent months reviewing hundreds and hundreds of videotapes – *footage that was never altered, edited or had audio deleted prior to plaintiffs' review*. While stipulated protective orders protect some of these videos from production to the outside world, *see* Stipulated Protective Orders, 8/4/06 & 8/16/06 (attached, collectively, as Exhibit 4), plaintiffs are free to use them in the litigation.

Indeed, the only order remotely pertinent to this issue is the protective order entered by Judge Facciola on September 25, 2007, requiring that *all* information received by the parties after that date “be sealed and both parties and their counsel are prohibited from disclosing it to any person who is not a party to this lawsuit or counsel to one of the parties.” *See* Order, 9/25/07 at 4 (attached as Exhibit 5). With this protection in place, PETA has no legitimate basis for not producing its videos and photographs.

The audio parts of PETA's videos are highly relevant to the underlying litigation. PETA and other activists like to film FEI personnel employing bullhooks to manage the elephants. Yet the audio will show that the elephants almost always move on the basis of voice commands, rather than a bullhook. Elephant behavior videotaped by PETA also often is caused by the actions of the activists or the videographer, which, again, would be masked without the audio portion. *See* Ex. 3, Hr'g Tr. at 44-45. Video without the audio therefore is highly misleading.

PETA seeks to suppress the audio on two of the tapes that allegedly record two “young men” discussing where they can stand to shoot the video. *Id.* at 22-23. This does not meet the standard for a protective order under Fed. R. Civ. P. 26. This admittedly “public record,” *id.*, was made for PETA’s public campaign against FEI and therefore with no reasonable expectation of privacy on the part of the people who made them. Whatever, legitimate “privacy” interests exist, moreover, will be protected adequately by the existing D.C. protective orders. If this Court deems it necessary, FEI would have no objection to an order with the same terms entered in this case.

Nor would production of the videotapes (and the audio associated with them) “directly violate” any ruling by the D.C. court. Ex. 3, Hr’g Tr. at 24. Judge Sullivan has issued nothing remotely on point. And Judge Facciola’s ruling that HSUS need not produce certain communications, *see* Ex. 2, 12/3/07 Order, has nothing to do with statements on videotapes, let alone the statements on PETA’s videotapes.

2. *No Order Justifies PETA’s Refusal to Provide a Privilege Log*

PETA has not produced a privilege log to FEI or the Court – notwithstanding FEI’s repeated requests that it do so. Ex. 3, Hr’g Tr. at 33-34. At the March 14, 2008 hearing, PETA argued *for the first time* that it was not required to produce a privilege log because “Judge Sullivan entered ... an order in the case that a privilege log would not be due until there are rulings on the production.” *Id.* at 33. While Judge Facciola stated in one order that documents need not be identified on a privilege log if they “are not within the scope of a request or ... are outside of the scope of what could permissibly be requested,” *see* Order, 2/23/06 at 5 (attached as Exhibit 6), there is no order extending the time for producing a privilege log. *See* Pacer Docket

in Civil Action No. 02-2006 (D.D.C.). Because PETA failed to produce a timely privilege log in accordance with Rule 45, any claim of privilege PETA may have had has been waived.

**CONCLUSION**

The orders of the D.C. Court in the underlying litigation clearly demonstrate that FEI is entitled to the documents and tangible things subpoenaed by it from PETA. No order of the D.C. Court supports the arguments raised by PETA's counsel at the hearing of this matter on March 14, 2008.

WHEREFORE Plaintiff Feld Entertainment, Inc. respectfully requests that this Court grant its Motion to Compel Documents Subpoenaed from PETA, that it award FEI its costs and fees incurred in making and prosecuting this Motion, and that it grant FEI such other and further relief as this Court deems meet and proper.

FELD ENTERTAINMENT, INC.

By: \_\_\_\_\_/s/\_\_\_\_\_

Christopher A. Abel, Esquire  
Virginia Bar Number 31821  
Attorney for Plaintiff  
Troutman Sanders LLP  
150 West Main Street, Suite 1600  
Norfolk, Virginia 23510  
Telephone: (757) 687-7535  
Facsimile: (757) 687-1535  
E-mail: [chris.abel@troutmansanders.com](mailto:chris.abel@troutmansanders.com)

Dawn L. Serafine, Esquire  
Virginia Bar Number 48762  
Attorney for Plaintiff  
Troutman Sanders LLP  
150 West Main Street, Suite 1600  
Norfolk, Virginia 23510

Telephone: (757) 687-7558  
Facsimile: (757) 687-1537  
E-mail: [dawn.serafine@troutmansanders.com](mailto:dawn.serafine@troutmansanders.com)

Of Counsel:

John M. Simpson  
Joseph T. Small, Jr.  
Lisa Zeiler Joiner  
Michelle C. Pardo  
George A. Gasper

Fulbright & Jaworski, LLP  
801 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
Telephone: (202) 662-0200  
Facsimile: (202) 662-4643

*Counsel for Plaintiff Feld Entertainment, Inc.*





Attorney for Plaintiff  
Troutman Sanders LLP  
150 West Main Street, Suite 1600  
Norfolk, Virginia 23510  
Telephone: (757) 687-7535  
Facsimile: (757) 687-1535  
E-mail: [chris.abel@troutmansanders.com](mailto:chris.abel@troutmansanders.com)