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

FELD ENTERTAINMENT, INC.,	:	
	:	
Plaintiff	:	
	:	
v.	:	CIVIL ACTION NO. 2:08mc04
	:	
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.,	:	
	:	
Defendant	:	

PeTA'S SUPPLEMENTAL OPPOSITION TO MOTION TO COMPEL

COMES NOW People for the Ethical Treatment of Animals ("PeTA"), by counsel, in response to the Court's directive to file further memorandum with attached and highlighted material (attached hereto as exhibits).

As a preliminary matter, PeTA feels it is important for the Court to understand PeTA's concern that the Court may be influenced by representations by FEI counsel that are not correct and are without basis. It is in this context that PeTA appreciates the Court's desire to see the actual rulings and other written materials from the underlying litigation in the District of Columbia (hereinafter "the ASPCA case").

In its Motion to Compel, FEI raises several very specific issues about which it seeks an Order compelling production. In its argument section, FEI discusses videos of elephants (page 9); documents concerning former employees (page 10); documents concerning ASPCA plaintiffs' and their counsels' request for funding regarding the ASPCA case or witnesses (page 14); and documents provided to plaintiffs in the ASPCA case (page 15). As this Court will discover at hearing, all documents that fall

within the rulings of the District Court in the ASPCA case have, in fact, been produced by PeTA. In fact, PeTA's production exceeded those rulings. The real issues seem to be: (1) statements concerning, or to, former employees, which apparently Judges Sullivan and Facciola specifically ruled out; and (2) the issue of PeTA's videotapes which, when the Court sees the truthful facts, clearly should not be producible.

I. THE COURT SHOULD HAVE THE FACTS UPON WHICH TO DECIDE

A core issue is whether FEI is entitled to statements by PeTA or former Feld employees, whether or not they have been delineated as witnesses in the ASPCA case. In argument for this, FEI counsel Mr. Gasper told the Court to look at page 3 of Judge Sullivan's August 23, 2007 discovery Order (Exhibit 1).[1] However, Mr. Gasper misstated that ruling. Page 3 only applies to what Mr. Rider (a party to the case) should produce. On that same page, Judge Sullivan specifically eliminates, even from Mr. Rider, information identifying the source of income from other animal advocacy organizations "unless they are parties to this litigation." Mr. Rider also did not need to produce communications related to any media or legislative strategies or even common interest doctrine. Contrary to Mr. Gasper's suggestion to this Court that Judge Sullivan did not rule out payments from animal advocacy organizations as being out of bounds (*see* 3/14/08 Tr., 64/13-18), Judge Sullivan specifically ruled on page 4 of his August 23, 2007 discovery Order (*see* Exhibit 1) that:

> "any documents or communications between Rider and others about media or legislative strategies is irrelevant to this litigation and would be over burdensome to produce. The Court finds that Rider's funding for his public education and litigation efforts related to defendants is relevant. However, the Court finds that the source of any such funding is irrelevant unless it is a party, any attorney for any of the parties, or any officer or employee of the plaintiff organizations or WAP."

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[1] Judge Sullivan entered several Orders and/or Memorandum Opinions on August 23, 2007. Where each may be cited herein, PeTA will include a descriptive phrase in its citation to delineate the appropriate Order/Opinion.

The Court repeats, at pages 6-7 of its August 23, 2007 discovery Order (*see* Exhibit 1), that Rider may redact the names of organizations unless they are parties with regard to any donations, and that the plaintiffs need not produce documents related to any media or legislative strategies. The Court further stated, at the bottom of page 7,

> "As to defendant's request for all responsive documents and information concerning communications with animal advocates and animal advocacy organizations, the Court finds this request over broad, over burdensome to produce and irrelevant to the claims and defenses in this lawsuit."

These rulings are repeated and expounded upon in Judge Facciola's December 3, 2007 Memorandum Opinion (Exhibit 2). The issue is not whether FEI counsel is misleading this Court, but whether the Court can rely on the representations of FEI's counsel in light of FEI misstatements regarding a number of major matters relating to the subpoena.

It is of particular concern because of this Court's preliminary statements at the March 14, 2008 hearing that "Archele Hundley and PeTA have worked together, which implicates PeTA as someone who is shadowing the underlying litigation . . . [and] that conforms to the point [FEI is] trying to make that PeTA is not merely an innocent third party, . . . but PeTA's, [FEI has] suggested, a sponsor of the litigation" (3/14/08 Tr., p. 11). The Court further stated: "apparently there is at least one contribution made to this litigation by PeTA . . ." (3/14/08 Tr., p. 13); "Well, give me your [FEI's] connection. How is PeTA so far into this case? I noted this information about Archele Hundley because it was supplied to me" (3/14/08 Tr., p. 40). It is understandable how the Court could come to these preliminary thoughts based on the misrepresentations. The Court is entitled to accurate representations of counsel.

II. PeTA IS NOT A PARTY IN INTEREST

FEI's counsel stated that PeTA "appears to be the real party in interest" (3/14/08 Tr., p. 8); PeTA

"has no such hesitation in providing the very same videotape and videotape that was being sought by Feld Entertainment to the named plaintiffs in the case. And so from a context standpoint, we're looking for a level playing field" (3/14/08 Tr., p. 8). "PeTA is in our view the de facto party in interest" (3/14/08 Tr., p. 12). None of these statements by FEI counsel is, even in part, correct.

PeTA never made any contribution to this litigation. In 2004, PeTA was requested to make a contribution to WAP for a publicity campaign concerning problems elephants were experiencing in circuses and made a $2,000 contribution to WAP. FEI has nothing to show that PeTA was ever told it would go to Mr. Rider as a payment to him, or would be used in any way in this litigation. Indeed, that is not the case – PeTA never knew or received that information. Further, Archele Hundley and Mr. and Mrs. Tom have assisted PeTA only in its publicity and legislative efforts campaigns, all of which have been specifically excluded from discovery by Judges Sullivan and Facciola. They have been paid nothing by PeTA to participate or be witnesses in the ASPCA case. FEI's counsel has nothing upon which to base the false allegations that PeTA is the real party in interest, because there is nothing.

Lastly, FEI counsel's representations about the "level playing field" is fallacious. (This will be more specifically set forth *infra* about the supplying of videotape.) Apparently, plaintiffs' counsel in the ASPCA case has nine videotapes which counsel, apparently, over a period of time, got from PeTA, and some of which were gotten unrelated to the ASPCA case. All these videotapes – every one of them – have been in the public domain for a number of years and are almost surely in the possession of FEI.[2] Two of the videotapes were received by PeTA pursuant to requests by PeTA to government agencies. Two other tapes were recorded from an NBC news program and another TV show. One is a tape that PeTA received from someone at another circus about that other circus (Carson & Barnes Circus). Three

[2]Upon information and belief, ASPCA plaintiffs produced these videos to FEI a long time ago.

or four concern elephants in the Red Unit of Ringling Bros. circus, which PeTA has had on its website for two years or more, and has widely distributed to public officials, including mayors, chiefs of police, the USDA, etc. FEI has taken extensive depositions in the ASPCA case, including depositions of the plaintiffs' lawyers, and has absolutely not one scintilla of evidence to show that plaintiffs' counsel, plaintiffs, or any representative of plaintiffs ever went through any of PeTA's videos, from which to make FEI's unsubstantiated accusations. Indeed, PeTA's counsel represents to this Court that never happened. Accordingly, under the rulings of Judges Sullivan and Facciola, even these videotapes, which are documents concerning third parties in terms of their statements, would not be discoverable. Nor could it possibly get to a "level playing field" as FEI counsel asks for something that the ASPCA's counsel never had, never asked for, and was never offered by PeTA.

In dealing with this issue, the Court should realize that it was not just simple misstatement from FEI counsel about PeTA's role – or, in fact, lack of role – in the ASPCA litigation, or PeTA's handling of the videotapes that ASPCA plaintiffs' counsel possesses. There are other misstatements.[3]

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[3]Apparently, this has unfortunately been the history of the ASPCA case. For the Court's edification, attached are a number of orders (highlighted) where the District of Columbia Court has repeatedly found that "defendants failed to turn over all the veterinary records, failed to properly object to the production of records, . . . the Court does not condone defendants' delay for over a year and a half in producing thousands of pages of relevant veterinary records." Memorandum Opinion, 2/26/07, pp. 3-4, 7 (Exhibit 3). "Although defendant alleges an elaborate coverup that prevented it from becoming 'fully aware of the extent, mechanics and purpose of the payment scheme until at least June 30, 2006' [citation omitted], such a statement ignores the evidence in this case that was available to defendant before June 30, 2006 and does not excuse defendant's delay . . . . The Court will not allow a proposed counterclaim to be used as a tool to indefinitely prolong this litigation on a very narrow issue . . . ." Memorandum Opinion regarding FEI's Motion to Amend Answer, etc., 8/23/07, pp. 6-8 (Exhibit 4). "Such delay provides strong evidence of a dilatory motive aimed at prolonging the ultimate disposition of the one issue in this case . . . ." Memorandum Opinion regarding FEI's Motion to Amend Answer, etc., 8/23/07, p. 9 (Exhibit 4).

III. A PRIVILEGE LOG IS NOT YET DUE

At the March 14, 2008 hearing, this Court also questioned PeTA's counsel about not having filed a privilege log, and Mr. Hirschkop indicated the Court in the underlying ASPCA case had ruled that need not be done until there were rulings on what was discoverable so someone would then know what documents to review for a privilege log. Mr. Gasper said he had "never seen any such ruling remotely resembling" the timing of a privilege log (3/14/08 Tr., p. 47). This Court is directed to the attached Memorandum Opinion of Judge Facciola dated February 23, 2006 (Exhibit 5), pp.4-5:

> Rule 34 requires a party who objects to a document request to state the 'reasons for the objection.' . . . If, however, an objection is made and that objection has not been ruled on, then the objected to documents are not yet 'otherwise discoverable' within the meaning on Rule 26(b)(5). As this circuit has explained:
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> > '[I]f a party's pending objections apply to allegedly privileged documents, the party need not log the document until the court rules on its objections.' *Philip Morris*, 314 F.3d at 621."

Further in responding to this Court, Mr. Gasper forgot, as set forth at page 5 of Judge Facciola's February 23, 2006 Memorandum Opinion, "Defendants [FEI] argue that they had no obligation to list the documents on their privilege log because the Court had not yet ruled on its responsiveness objection." Thus, FEI took the same position in the ASPCA case that PeTA has taken here, on the timing of providing a privilege log, and Judge Facciola ruled in FEI's favor. It is clear that counsel's response to this Court was not correct. On August 23, 2007, Judge Sullivan ordered a privilege log after he ruled on objections (*see* Exhibit 1, p. 4) and, indeed, later in that same Order, he stated, "The privilege log need not include information determined by the Court to be irrelevant or over burdensome to produce" (*see* Exhibit 1, p. 7).[4]

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[4]PeTA is also attaching its letter to Mr. Gasper dated September 28, 2007 (Exhibit 6), as the Court raised this issue at the March 14, 2008 hearing about PeTA not apparently timely filing its objections to the subpoena. Indeed, it is germane because FEI counsel have suggested to this Court that PeTA has

IV. DISCOVERY SHOULD BE NARROWLY CONSTRUED AT THIS STAGE

In Judge Sullivan's August 23, 2007 discovery Order, after ruling that the privilege log need not include anything that was ruled to be irrelevant or burdensome and that communications between plaintiffs and animal rights organizations generally are over broad and irrelevant, as are media and legislative contacts and strategies, the Court stated:

> "[t]he Court reminds these parties that the purpose of this litigation is to determine whether or not defendant'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 needless diverting the Court's attention away from the central issues in this case and the numerous other cases on its docket."

Order (discovery), August 23, 2007 (Exhibit 1), p. 12.

Indeed, on that same day that Judge Sullivan entered his opinion on discovery, he entered another order denying FEI's Motion for Leave to Amend Answers and Assert Additional Defense and Counterclaim, and stated:

> "The focus of the only claim in this case is whether or not defendant's treatment of its elephants constitutes a taking within the meaning of Section 9 of the ESA. Any limited information about payments to or the behavior of Tom Rider that defendant is entitled to in order to challenge to[sic] credibility of <u>one</u> plaintiff in this case is far different from the vast amount of information they would be seeking under the guise of attempting to prove

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delayed, obstructed or dodged service, etc. Nothing could be farther from the truth. A process server appeared at PeTA headquarters on Friday, September 14th, and the only person authorized by PeTA to accept service was not there. The process server would not disclose what the process was, other than counsel understands PeTA was able to determine it was related to FEI, although not what litigation. PeTA reached private counsel on Monday, September 18th, and, within 2 days, it was decided to accept service regardless of what the process was. The process server was immediately notified and produced the process on PeTA on September 21, only five business days after the process server first walked into PeTA's offices. As shown in the letter of September 28 to Mr. Gasper, Mr. Hirschkop then called and wrote to Mr. Gasper within five business days of having received the subpoena. As Mr. Hirschkop was going out of the country, he asked for and received from Mr. Gasper a two business day extension to file objections. The representations by FEI counsel that PeTA was not responsive or was obstructive, are equally as lacking in candor to this Court as a number of other things mentioned above.

> an alleged RICO scheme. . . . The far-reaching nature of defendant's RICO claim would likely require substantial additional evidence – including, at a minimum, numerous additional documents and depositions – beyond the evidence already produced on payments to Tom Rider, as defendant's alleged [RICO] scheme is not limited simply to these payments. . . . Moreover, such discovery would sidetrack this litigation away from the remaining, narrowed 'taking' claim that is the central focus of this litigation." [Emphasis in original.]

Memorandum Opinion (FEI Motion to Amend Answer, etc.), August 23, 2007 (Exhibit 4), pp. 5-6. In the same Opinion, Judge Sullivan stated:

> "Through its numerous discovery-related motions, defendant has shown that its efforts to obtain information to impugn plaintiff Tom Rider and learn every detail of the media and litigation strategies of its opponents are relentless. The Court will not allow a proposed counterclaim to be used as a tool to indefinitely prolong this litigation on a very narrow issue – whether or not defendant's treatment of its elephants constitutes a taking under the ESA."

Memorandum Opinion (FEI Motion to Amend Answer, etc.), August 23, 2007 (Exhibit 4), p. 8.

Additionally, on October 25, 2007, Judge Sullivan ruled:

> "Defendant points to evidence in the record supporting its contention that only six elephants – Susan, Lutzi, Jewell, Karen, Mysore, and Nicole – are in the pre-Act category and still in the possession or control of defendant. As such, defendant argues that plaintiff Tom Rider only has standing with respect to those six elephants. . . . Accordingly, defendant's Motion for Reconsideration concerning the standing of Tom Rider is **granted** and plaintiff's claims are limited to the six 'pre-Act' elephants identified above."

Memorandum Opinion, October 25, 2007 (Exhibit 7), pp. 6-7 [emphasis in original]. Although Judge Facciola thereafter allowed some discovery on Red Unit elephants, it is clear the Judges were, after four years of discovery, narrowing and focusing discovery.

As pointed out above, PeTA does not seek to engage in a dispute with FEI's counsel, but solely to resolve the PeTA subpoena consistent with the rulings of the United States District Court for the District of Columbia, based on facts and not unsupportable allegations of counsel.

V. FUNDING AND COMMUNICATIONS

Judge Sullivan has made specific rulings regarding funding and communications, and Judge Facciola has, in dealing with a subpoena to the Humane Society of the United States, made identical rulings (and, indeed, the HSUS subpoena is almost identical in much of its language to the subpoena issued to PeTA).[5] The judges in the District of Columbia have ruled out any statements to or about parties to the case, unless made by a party in the ASPCA case. Statements to any potential witnesses would be even farther removed and would clearly be in violation of those rulings. Judge Facciola stated, in addition to those statements quoted above by Judge Sullivan on August 23, 2007 (*see* page 2, *supra*):

> "the HSUS is not a party to this litigation and its statements about [the litigation] are hearsay and irrelevant. I will therefore only order the HSUS to produce documents in its possession, control or custody that were created by any other party to this litigation . . . ."

Memorandum Opinion, December 3, 2007, p. 3 (*see* Exhibit 2). In the same Memorandum Opinion, Judge Facciola further stated: "FEI seeks documents pertaining to media or public relations campaigns . . . [and] these topics are irrelevant" (pp. 4-5); and "FEI seeks documents that pertain to any 'other [other than Rider] current or former employee' [citation omitted]. I know of no reason why this information would be relevant" (p. 5).

What is clear is PeTA is not required, consistent with the rulings of Judges Sullivan and Facciola, to produce communications with anybody other than parties, or made by parties, about the ASPCA case. Therefore, any voice statements by PeTA employees on a videotape made by PeTA would clearly not be producible, nor would communications with Archele Hundley or the Toms. Those would further be not producible because all Archele Hundley and the Toms did for PeTA was work on legislation and public

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[5] Interestingly enough, the subpoena to HSUS included requests specifically naming Mr. Hagan, but Hagan's name was eliminated from the subpoena issued to PeTA.

education efforts, which the District of Columbia court even excluded concerning party Tom Rider. Even with regard to Mr. Rider, PeTA has already produced documents where it paid for his travel and motel on two occasions several years ago to testify at a legislative hearing in Chicago and a legislative hearing in Long Island on the treatment of animals. What makes FEI's position even more egregious with regard to requests concerning Mr. Rider is that when he testified in Long Island it was concerning a different circus (Clyde Beatty Circus) for which he previously worked and not concerning Feld Entertainment or Ringling Bros. FEI not only has deposed Mr. Rider, but FEI always has someone watching and listening anywhere these people testify or speak out, so they already know these true facts.

With regard to the issue of funding, the Court is directed to the opinions of Judges Sullivan and Facciola. "Rider may redact the names of . . . organizations unless they are parties to the litigation"; "the Court finds that the source of any such funding is irrelevant unless it is a party . . ."; "plaintiffs may redact the names of individual donors or organizations unless they are parties to this litigation"; "WAP may redact the names and identifying information of individual donors or organizations who are not parties to this litigation"; "[t]he Court finds that any further information about individual or <u>organizational donors</u> would be irrelevant and would tread on core First Amendment rights." Order (discovery), August 23, 2007, pp. 3, 4, 6-9 (*see* Exhibit 1). Similarly, Judge Facciola ruled the same way in his Memorandum Opinion of December 3, 2007 (*see* Exhibit 2)

The PeTA subpoena has nothing to do with discovery in the ASPCA case. There is nothing requested in the PeTA subpoena that Feld hasn't known about for many years. It was only issued to discover what PeTA is doing with regard to FEI and Ringling Bros., independent of the ASPCA case, and misusing the ASPCA case to do it. It is clearly an attempt to use the ASPCA case to conduct discovery for FEI's separate RICO action, which has been stayed by the United States District Court for the District

of Columbia pending the resolution of the ASPCA case.

VI. THE VIDEOS SHOULD NOT BE PRODUCED, AS IRRELEVANT AND BURDENSOME

The only thing left that has not been specifically ruled upon are the videos themselves that PeTA took of animal walks by the Blue or Red Unit over a period of years. These are "materials" under the definition provided by FEI. They are not made by parties, and therefore probably would be ruled out under a reasonable interpretation of the HSUS ruling by Judge Facciola that "FEI seeks documents that pertain to any 'other [other than Rider] current or former employee' [citation omitted]. I know of no reason why this information would be relevant." Memorandum Opinion, December 3, 2007, p. 5 (Exhibit 2).

Further with regard to the videotapes, as stated above, Mr. Abel has argued that the real reason to produce them is to have a level playing field so that FEI has access to material supplied to plaintiffs in the ASPCA case. As pointed out at the hearing, there was a previous order setting forth that Feld has "thousands of videotapes" (*see* Joint Stipulated Protective Order Regarding Video Recordings, August 2, 2006, p. 1 (Exhibit 8)). It is absolutely baseless for FEI to ask PeTA to go through over twelve years worth and several hundred or more hours of videotapes to discern if there are any privileges to state, and then to sit and view hundreds of hours of tapes which replicate thousands of videotapes that FEI already has. No Court is ever going to allow them to be shown. It adds nothing to FEI's case. FEI's only argument in its Motion to Compel was that it showed that nothing untoward generally happens on the animal walks. Apparently no one disputes that. The public is there watching the animal walks and nothing untoward is usually going to happen.

However, FEI suggests to this Court that PeTA has supplied videotapes to plaintiffs in the ASPCA

case, showing all sorts of things on the animals walks. Attached is a list of eight videotapes that have been supplied to FEI by the plaintiffs' counsel in the ASPCA case (Exhibit 9). There is a ninth video, entitled "PeTA: Alleged Animal Welfare Act Violations from February through March, 2006" which also has been supplied by plaintiffs to FEI. These nine videos provide absolutely no basis to go through this kind of enormously burdensome discovery, especially discovery relating to a non-party. Video #1 is a public record that PeTA received from the United States Department of Agriculture, is available to the public, and PeTA is positive that FEI has it. Video #3, the "Sissy Beating", PeTA received in the late 1990's from a public record request, also probably from a government agency or public reporting but not a tape made by PeTA. Video #4, The Crusaders, was a public broadcast where PeTA simply taped the broadcast and did not make the underlying video. Similarly, Video #5, the NBC Nightly News, PeTA took from the airwaves or got from NBC. All of these are completely available to FEI from the same source and FEI unquestionably has these. Video #8 is a tape PeTA got years ago from a third party not related to PeTA, and pertains to a totally different circus.

Accordingly, that leaves Video ## 2, 6, 7 and 9. These four videos are involved in law enforcement matters and albeit made by PeTA, go mainly to that concern. For instance, Video ## 6 and 7 involves matters where counsel were involved and complaints were made to the cities about misconduct of police in stopping PeTA from demonstrating and exercising other First Amendment rights in taping the animal walk. Further, Video ## 2, 6, 7 and 9 have been on PeTA's website and widely distributed. With regard to Video #8, PeTA has probably distributed thousands of copies. Video #9 has been sent to innumerable mayors, chiefs of police, and has been on PeTA's website since 2006, as have Video ## 2 and 3 been distributed and on PeTA's website. There is nothing special in these tapes that were given to the ASPCA case plaintiffs' lawyers, or that merit this Court now setting up a process of going through

hundreds of hours of tapes, listening to audio, etc. It will likely involve countless disputes brought back to this Court, and will not produce any credible evidence useable in the underlying litigation.

PeTA knows of no other videos that plaintiffs or plaintiffs' counsel have regarding this litigation other than these nine videos. However, what is most poignant is neither plaintiffs nor plaintiffs' counsel have ever sought or been allowed, nor has PeTA offered, to have them look through or otherwise to peruse PeTA's videos as FEI requests in its subpoena.

PeTA has offered, in its correspondence, with Mr. Gasper, that if there is a specific incident that FEI is concerned about (and, indeed, FEI knows of all specific incidents because they have people videotaping PeTA people who are videotaping the animal walk, which is why FEI has thousands of videos), that PeTA would then look to produce the specific video incident if it is not otherwise objectionable. But, to produce all the videos, in light of the foregoing, is grossly burdensome and unreasonable, and in violation of Judge Sullivan's ruling that it is time to narrow this discovery and cut out a lot of discovery that could have been had many years ago.

Respectfully submitted,

By___________/s/______________

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

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