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 OBJECTIONS TO MAGISTRATE JUDGE'S ORDER
AND MEMORANDUM IN SUPPORT

Defendant, People for the Ethical Treatment of Animals, Inc. ("PeTA"), by counsel, and pursuant to Rule 72(a), hereby submits the following objections and memorandum in support to the ruling of Magistrate Judge F. Bradford Stillman, dated July 22, 2008 (Attachment 1), which requires PeTA to comply with seven requests for production, as amended, of the Rule 45 subpoena duces tecum served by Plaintiff Feld Entertainment, Inc. ("FEI").

As set forth below, the Magistrate Judge's order is clearly erroneous and contrary to law because (1) the order requires PeTA to produce documents as to matters that are beyond the scope of discovery as delineated by the U.S. District Court for the District of Columbia in the underlying litigation in which FEI is a defendant; (2) the order is unduly broad in scope and vague as to what documents PeTA is required to produce, thereby placing PeTA in jeopardy should it attempt to reasonably respond to such an overbroad order; (3) complying with the order would be unduly burdensome to PeTA, a non-party in the underlying District of Columbia litigation, and would obligate PeTA to review more than 500 hours of videotapes and review

untold numbers of documents relating to FEI, which PeTA has compiled over the 12 year period from 1996 through the present as called for in the FEI subpoena; (4) the order requires that PeTA produce documents clearly protected from disclosure under the attorney-client, work product or common interest privileges inasmuch as they pertain to communications with one of its long time counsel, Meyer Glitzenstein & Crystal ("MGC"), who also is counsel to the plaintiffs in the D.C. Litigation; (5) the order fails to specifically provide that any documents or videotapes produced by PeTA pursuant to the subpoena are protected from disclosure under a protective order; (6) the order places an undue burden upon PeTA by failing to provide PeTA with reasonable time to review potentially thousands of documents and more than 500 hours of videotapes to determine whether they fall within the requirements of the subpoena requests and, then, to produce relevant, non-privileged documents; and (7) the order is vague as to which costs of production, especially costs relating to PeTA's review and production of the videotapes, that FEI is obligated to pay and potentially places non-party PeTA in the position of incurring very substantial unreimbursed expenses. For all of these reasons, the Magistrate Judge's order should be vacated.

I. PROCEDURAL BACKGROUND

The subpoena duces tecum to non-party PeTA was issued by FEI on September 21, 2007 from the Eastern District of Virginia, Norfolk Division. FEI is a defendant in a lawsuit pending in the United States District Court for the District of Columbia, *American Society for the Prevention of Cruelty to Animals, et al. v. Ringling Bros. & Barnum & Bailey Circus, et al.*, Case No. 1:03cv2006 ("D.C. Litigation"). In summary, the subpoena sought documents and videotapes ostensibly for purposes of that lawsuit and was comprised of seven separate requests,

including requests for communications with any current and former FEI employees and any payments made to those individuals; any documents for the last 12 years that mention FEI employees; videotapes and photographs in the possession of PeTA of anything owned by FEI, including its elephants, and any of FEI's former employees; and communications between PeTA and the plaintiffs or their counsel in the D.C. Litigation.[1]

In response to the subpoena, PeTA lodged both general and specific objections explaining, *inter alia*, that the scope of documents and videotapes subpoenaed by FEI ran afoul of various orders limiting discovery in the D.C. Litigation. Additionally, PeTA pointed out the subpoena was unduly burdensome and sought privileged information, including information protected by the attorney client and common interest privileges. Notwithstanding these objections, PeTA voluntarily provided FEI with documents and information responsive to FEI's subpoena, including a chart and supporting documentation containing the date and amount of payments made by PeTA to various individuals referenced in the subpoena requests.[2]

Not satisfied with this response, on January 28, 2008, two days before the close of discovery in the D.C. Litigation, FEI filed with this Court a motion to compel the production of

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[1] These are but a summary of the numerous categories of documents requested by FEI. The actual requests go much further and are much more expansive in their scope, as discussed in more detail below.

[2] For example, the documents provided by PeTA show payments were made for travel and board on behalf of Tom Rider, a plaintiff in the D.C. Litigation, for two legislative matters for which he testified before legislative bodies concerning legislation over the use of exotic animals. The documents actually are exempt under rulings of the trial court, as monies received not from a party and for legislative efforts. See Section II, *infra.* PeTA never paid Mr. Rider for any services, nor did PeTA provide him with any funds for pursuing the D.C. Litigation.

documents subpoenaed from PeTA. FEI's motion requested, *inter alia*, that PeTA be ordered to produce all documents and videotapes responsive to its seven document requests.

FEI's subpoena went far beyond the scope of discovery authorized by the trial court in the D.C. Litigation and sought documents and videotapes with no conceivable evidentiary bearing on the limited matters at issue in the D.C. lawsuit.[3] As explained in PeTA's opposition, FEI's subpoena was nothing but a blatant attempt to seek documents and information far beyond the scope of the underlying D.C. Litigation and to obtain unrelated discovery of PeTA's campaign against the use of animals in circuses and, in particular, Ringling Bros. circus owned by FEI.

For example, the several hundred hours of videotapes in PeTA's possession of elephants being paraded in walks to and from FEI's circus train and in full public view (and where no abuse appears to have occurred) not only would never be admitted as evidence at the trial in the D.C. Litigation, but the videotapes have no possible relevance even for discovery purposes.[4] Furthermore, FEI has admitted it already has in its possession thousands of hours of its own videos of the same matters. However, the audio portions of PeTA's videotapes may contain statements by PeTA videographers or staff that may disclose PeTA's investigatory methods,

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[3] On February 8, 2008, PeTA also filed in the United States District Court for the District of Columbia a motion to quash FEI's subpoena. On March 7, 2008, the District of Columbia court indicated its intent to stay the proceedings on PeTA's motion to quash unless this Court stayed the proceedings in Virginia.

On February 13, 2008, PeTA also filed with this Court a motion for a protective order to stay the matter or to transfer the proceeding to the District of Columbia. In a memorandum opinion, dated March 11, 2008, this Court denied the motion without hearing.

[4] There are a few videotapes that show abuse during elephant walks, but those tapes already are in the possession of both FEI and the plaintiffs in the D.C. Litigation. Therefore, any tapes showing elephant abuse are not at issue.

proprietary information, or conversations with counsel about legal strategy. This information undoubtedly would be of interest and use to FEI in countering PeTA's public campaign against animal abuse. This interest by FEI, of course, has nothing to do with the D.C. Litigation, but it does pertain to an interference with PeTA's First Amendment rights.

Notwithstanding the clearly over broad nature of FEI's subpoena to PeTA, especially given the narrow issues remaining in the D.C. Litigation, on July 22, 2008, the Magistrate Judge issued his Order (the "Order") granting almost entirely FEI's motion to compel and directing PeTA to respond to amended requests for production within ten days as set forth in the order.[5] Although the Magistrate Judge's Order professed to take into account the rulings of the trial court in the D.C. Litigation limiting the scope of discovery, particularly from animal welfare and animal rights groups, the Order requires PeTA to undertake expensive and time-consuming review of thousands of documents and over 500 hours of videotapes that have absolutely no evidentiary value in the D.C. proceedings.

In sum and substance, the Magistrate's Order allows FEI to use the subpoena power of this Court for the improper purpose of obtaining wide-ranging discovery as to PeTA's efforts in investigating and opposing the use of elephants and other animals in FEI's circuses and in seeking to halt such use through its public information campaigns.

II. PROCEEDINGS IN D.C. LITIGATION NARROWLY LIMITING DISCOVERY

In the D.C. Litigation, the plaintiffs American Society for the Prevention of Cruelty to Animals (ASPCA), the Animal Welfare Institute, the Fund for Animals, Tom Rider and the Animal Protection Institute have sued Ringling Bros. & Barnum & Bailey Circus and Feld Entertainment, Inc. (collectively "FEI") under the Endangered Species Act ("ESA"), 16 U.S.C. §

[5] The Magistrate's order denied FEI's request for attorney fees and costs.

1531, *et seq.* See Memorandum Opinion entered in the same action, August 23, 2007, Docket No. 173, p. 1 (Attachment 2). More specifically, the plaintiffs allege that FEI chains, beats, and forceably removes baby Asian elephants from their mothers before they are weaned, thus "taking" them in violation of the ESA. *Id.* at p. 2. The D.C. action was filed in 2003, and discovery closed approximately five years later on January 31, 2008. The parties have submitted their Rule 26 pretrial statements, and trial is set to commence in early October, 2008 although a conference call will be held by the trial judge on August 6, 2008 that possibly could involve trial scheduling matters.

Since the lawsuit was filed, the issues in the D.C. Litigation have been narrowed significantly. As explained by the trial court in its Memorandum Opinion, dated August 23, 2007, the focus of the only remaining claim in this case is whether or not FEI's treatment of six (or, perhaps, seven) specifically named elephants constitutes a taking within the meaning of Section 9 of the ESA, and the district court specifically has recognized that the litigation continues on only this "very narrow issue." Memorandum Opinion, Aug. 23, 2007, Docket No. 176, pp. 5, 8 (Attachment 3). Indeed, in its opinion dealing with further discovery in the case, the district court stated it expected only "very limited discovery," and it "remind[ed] these parties that the purpose of this litigation is to determine whether or not [FEI'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 (Attachment 4).[6]

[6] Magistrate Judge Facciola allowed some tangential discovery covering FEI elephants other than the six or seven named elephants, but plaintiffs in the D.C. Litigation were limited in their inspection to the named elephants, and there is no question the focus of the D.C.

Thus, the trial court found that documents or communications between the plaintiffs and other individuals and organizations about media or legislative strategies were irrelevant and overly burdensome to produce. *Id.*, pp. 4, 5, 7. Significantly, for purposes of addressing FEI's subpoena to PeTA, the D.C. court ruled that discovery aimed at communications between plaintiffs and non-party animal rights advocates and organizations (which would encompass PeTA) was overbroad and the information irrelevant. *Id.* at 9. Also, the D.C. court found that "further information about individual or organization donors to the plaintiffs or their counsel would tread on core First Amendment rights" and not be allowed. *Id.*

In keeping with these precepts, the district court limited the obligation of plaintiff Tom Rider to provide information as to the names of individuals and organizations from whom he received income or payments solely to (1) parties to the D.C. Litigation, (2) attorneys for any of the parties, (3) employees or officers of any of the plaintiff organizations, or (4) the Wildlife Advocacy Project ("WAP"), a nonprofit organization established by the plaintiffs' counsel in the D.C. Litigation.[7] Memorandum Opinion, Aug. 23, 2007, p. 3 (Attachment 4). The trial court held that Rider was not required to disclose the names of any other persons or animal rights organizations from whom he received payments. By its terms, the court's exclusion would encompass PeTA.

The only exception to this rule severely limiting discovery as to communications and payments by animal rights organizations was with respect to the Humane Society of the United States ("HSUS"). HSUS is not a named party in the D.C. Litigation, but in November, 2004,

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Litigation is on these elephants.

[7] In the D.C. Litigation, FEI argued that WAP is an alter-ego of plaintiffs' counsel, MGC, and was used to funnel monies to Mr. Rider. No such allegations conceivably could be made concerning PeTA.

after the D.C. lawsuit had been filed, HSUS announced a "merger" between itself and the Fund for Animals ("FFA"), which is a plaintiff in the D.C. Litigation.[8] Given this announcement, Magistrate Judge Facciola in the D.C. Litigation held that HSUS would be obligated to produce documents showing "what had occurred between the FFA and the HSUS." Judge Facciola also found that documents in HSUS' possession created by "any other party to this litigation" in which the litigation was discussed (except for attorney client or work product privileged documents), documents pertaining to the funding of individual plaintiff Tom Rider, and documents reflecting communications with Mr. Rider also should be produced. Memorandum Opinion, Dec. 3, 2007, pp. 2, 4 (Attachment 5).

Significantly, for purposes of reviewing the proper scope of FEI's subpoena to PeTA, Magistrate Judge Facciola refused to require HSUS to produce documents pertaining to "media or public relations campaigns regarding the litigation, elephants in the circuses, Tom Rider, FEI itself, and WAP." Memorandum Opinion, Dec. 3, 2007, p. 4 (Attachment 5). As Magistrate Judge Facciola explained, the trial court "has concluded . . .that these topics are irrelevant." *Id.*, pp. 4-5.

III. STANDARD OF REVIEW

Fed. R. Civ. P. 72(a) provides that a district court "shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." See also 28 U.S.C. § 636(b)(1)(A) (providing for review of pretrial decisions made by a magistrate "where it is shown that the magistrate judge's order is clearly erroneous or contrary to law."). The clearly "erroneous standard" is limited to factual findings of the magistrate judge, and an order has been

[8] Unlike HSUS, there is no allegation in the D.C. Litigation or in these proceedings PeTA has merged with any of the plaintiffs in the D.C. Litigation, including FFA.

said to be "clearly erroneous" if the reviewing court, considering the entirety of the evidence, "is left with the definite and firm conviction that a mistake has been made." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). See also *Harman v. Levin*, 772 F.2d 1150, 1152 (4th Cir. 1985). The phrase "contrary to law" has been said to indicate "plenary review [by the district court] as to matters of law." *Haines v. Ligget Group, Inc*., 975 F.2d 81, 91 (3d Cir. 1992). See also *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338 (S.D. Iowa 1993) (magistrate's conclusions of law are reviewed under the more lenient "contrary to law" standard).

In most cases, the courts have followed the general principle that a magistrate judge's ruling on a discovery motion should be entitled to deference because the magistrate has "managed discovery in the case from the outset and has developed a thorough knowledge of the proceedings." See *Public Interest Research Group v. Hercules, Inc*., 830 F.Supp. 1525, 1547 (D.N.J. 1993). See also *Neighborhood Dev't Collaborative v. Murphy*, 233 F.R.D. 436, 438 (D. Md. 2005). However, the case at bar is not ordinary. This is the first occasion that issues in the D.C. Litigation have been addressed by this Court. The prior rulings on discovery have been made by the trial court or Magistrate Judge Facciola in D.C. Hence, unlike the typical appeal under Fed. R. Civ. P. 72(a) of a magistrate judge's ruling, there is no basis for this Court to give deference to the Magistrate Judge's interpretation of the D.C. Court's discovery orders. The interpretation of those orders is a matter of law for which this Court may exercise its plenary review.

Moreover, as the Magistrate Judge recognized, FEI's subpoena of PeTA raises a number of significant First Amendment issues as to PeTA's rights to pursue constitutionally protected activities and as to the impingement on those constitutional rights by being compelled to produce documents and videotapes relating to its constitutionally protected activities. In situations such

as this, the district court should be vigilant in protecting the rights of the parties. As Wright and Miller have emphasized, "[a]t bottom, the power [of a district court] to review [a magistrate's non-dispositive decision] is necessary to avoid constitutional difficulties, and an absolute prohibition on revision by the district judge creates risks of undermining that essential review authority." Wright, Miller & Marcus, Federal Practice and Procedure, Civil 2d § 3069, p. 353-354 (1997). Thus, as Wright & Miller explain, "a district judge should not be hamstrung by the clearly erroneous standard . . . . Although a discovery ruling may not be dispositive, it can be extremely important. Indeed, one of the most important cases the Supreme Court ever decided was in the nature of a discovery dispute – whether there could be discovery of the Watergate tapes – and discovery matters before magistrate judges may have similarly momentous implications on occasion." *Id*., p. 355.

In this case, the issues before this Court involve significant First Amendment concerns, particularly because FEI is seeking to use its subpoena power in the D.C. Litigation to obtain wholesale discovery of non-party PeTA's activities over a 12-year period in opposing the use of animals in circuses and in exercising its First Amendment rights to encourage public opposition. FEI's misuse of the discovery process in the D.C. Litigation is further compounded by the fact that the Magistrate Judge's Order likely will require PeTA to devote over a thousand hours in time and tens of thousands of dollars in financial resources in searching for and reviewing all the documents and video tapes potentially falling within the vague and overbroad requests. The abusive nature of FEI's document requests, even as amended by the Magistrate Judge, call for this Court's active intervention to put a halt to such a clear violation of constitutional rights.

IV. MAGISTRATE JUDGE'S ORDER IS CLEARLY ERRONEOUS AND CONTRARY TO LAW

A. Magistrate's Order is Contrary to Legal Rulings Limiting Discovery in D.C. Litigation

In granting virtually all of the requests in FEI's motion to compel, the Magistrate Judge entered an order that on its face is overbroad and contrary to the limited discovery delineated by the trial court in the D.C. Litigation. The Magistrate Judge apparently accepted the representations by FEI's counsel as to the scope of the orders and rulings in the D.C. Litigation. In doing so, the Magistrate Judge did not recognize the limiting nature of the D.C. discovery orders that render the documents subpoenaed by FEI well outside of the narrow scope of discovery fashioned by the trial court in the D.C. Litigation.

For example, in the D.C. Litigation the trial court ruled that the identity of sources of payments to Mr. Rider was irrelevant unless the payment was made by one of the plaintiffs, their counsel, and a non-profit organization created by counsel (WAP). (Subsequently, HSUS was included in the list due to its announced "merger" with plaintiff FFA.) Without any explanation, the Magistrate Judge's Order added PETA to this list. The addition of PeTA to the list of persons and organizations who must disclose payments to Tom Rider or any other witness in the D.C. Litigation finds no support in the orders in the D.C. Litigation and, indeed, runs directly counter to these orders. There has been no showing, and indeed there could be none, that PeTA has "merged" with any of the plaintiffs in the D.C. Litigation or is the alter ego of any of the plaintiffs.

In the D.C. Litigation, Magistrate Judge Facciola specifically ruled documents pertaining to any current or former FEI employee, other than plaintiff Tom Rider, were not relevant and would not need to be produced. As Judge Facciola stated, "I know of no reason why this information would be relevant." Memorandum Opinion, December 3, 2007, *Id.*, p. 5. In this proceeding, however, the Magistrate Judge ruled that PeTA must produce all documents

pertaining to any payments made to any other former FEI employee and documents concerning any statements they may have made about elephants in FEI circuses – documents the D.C. court specifically found were not relevant to the D.C. Litigation and would not need to be produced.

The Magistrate Judge's Order should be vacated on this ground alone as being contrary to the law of the case. *Arizona v. California*, 460 U.S. 605, 618 (1983) (Under the "law of the case" doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.") See also *GlaxsoSmithKline Consumer Healthcare, L.P. v. Merix Pharm. Corp*., 2007 U.S. Dist. LEXIS 24969, *16-20 (D. Utah. Apr. 2, 2007) (where court previously limited scope of discovery with respect to expert deposition because information sought "was far beyond that which would legitimately be discoverable," law of the case doctrine prevented party from later seeking to depose expert on excluded matters).

B. The Magistrate Judge Erroneously Treated PeTA as the "Real Party in Interest" in the D.C. Litigation

In ordering such broad-based and wide-ranging discovery from PeTA, the Magistrate Judge apparently accepted erroneous representations by FEI's counsel, or otherwise concluded, that PeTA was the "real party in interest" in the D.C. Litigation. Hearing Tr. 3/14/08, p. 8, ln. 7-10 (Attachment 6). Nothing could be further from the truth, and nothing in the record remotely supports such a conclusion. In point of fact and as PeTA's counsel explained at the April 8, 2008 hearing, prior to receiving the FEI subpoena, "PeTA has had arm's length from this case [D.C. Litigation]." Hearing Tr. 4/8/08, p. 30, ln. 20 (Attachment 7). PeTA "had nothing to do with the case [D.C. Litigation]," "never attended a hearing," and "never reviewed pleadings in the case." Hearing Tr., 4/8/08, p. 29, ln. 23; p. 30, ln. 1. Moreover, PeTA has not provided any financial support to any parties or witnesses relative to the D.C. Litigation.

Nonetheless, the Magistrate Judge's Order found that "PeTA clearly has an interest in an outcome favorable to the animal rights organizations," including ASPCA, which is a plaintiff in the D.C. Litigation. Moreover, the Magistrate Judge concluded that because of this interest "[t]o the extent . . . that PeTA has provided support, whether directly or indirectly, to any of the parties or putative parties" involved in the D.C. Litigation, the Court deems such information as entirely relevant and discoverable under the auspices of the subject subpoena." Order, p. 6, ln. 9 (emphasis added) (Attachment 1).[9]

Under the Magistrate Judge's reasoning, any individual who philosophically supports the outcome of a legal proceeding could be subject to a Rule 45 subpoena like that served upon PeTA to discover whether the individual has provided any direct or indirect support to one of the parties in the case. This would mean, for example, that a person who publicly supported the recent litigation overturning the District of Columbia's ban on handguns could be subject to a subpoena to determine whether that individual provided any direct or indirect support to the plaintiffs in that case for any reason and at any time, whether or not relevant to the issues in the lawsuit. To fashion a legal rule that philosophical support for the outcome of a lawsuit creates a legitimate basis to be subpoenaed by the opposing party in the case creates a pernicious justification for litigants to use their subpoena power as a weapon to attack the supporters of their adversaries. Clearly, this is not a result the Magistrate Judge intended, but it is a very real consequence and a threat to First Amendment rights should this Court affirm the Magistrate Judge's Order.

C. The Order Is Confusing and Vague

[9] It is unclear as to what entities the Magistrate Judge considered to be "putative parties" in the D.C. Litigation or from what source such a reference was obtained.

The Magistrate Judge's order additionally is confusing and vague concerning the scope of production that PeTA is required to make. For example, Request No. 4, as amended, could be interpreted to require that PeTA produce all of the documents in its possession for over a 12 year period referring to FEI or any of its current or former employees. To comply with such a request, PeTA would need to review many thousands of documents that might be encompassed within this description.

Requiring PeTA to undertake the Herculean task of reviewing all such documents to determine whether they actually come within the terms of such a vague subpoena request and, additionally, whether any of them would be exempt from disclosure pursuant to a claim of privilege would exceed the bounds of appropriate discovery as delineated by the D.C. trial court. As a matter of basic fairness, PeTA certainly is entitled to know what it is obligated to produce, and not be faced with the possibility of a sanctions motion filed by FEI should it guess wrong.

D. PeTA Objections to Magistrate's Order as to Specific Document Requests

1. Request Nos. 1 - 4 (Documents Relating to Current or Former FEI Employees)

The first four document requests, as modified by the Magistrate Judge, require PeTA (1) to produce, *inter alia*, documents reflecting any statements made by current or former FEI employees concerning the D.C. Litigation or elephants in FEI's circuses in general and (2) to produce documents pertaining to payments made or anything of value given to current or former FEI employees. As set forth below, these requests are overly broad and seek documents from PeTA far in excess of the discovery limitations imposed by the trial court in the D.C. Litigation. As such, they are contrary to law.

a. Request Nos. 1 - 3 (Documents Pertaining to Specific Former FEI Employees)

Document Request Nos. 1 - 3 each request the production of "[a]ll documents that refer, reflect, or relate to" the following former employees of FEI: Archele Faye Hundley, Robert Tom, Jr. and Margaret Tom.[10] The documents to be produced are not limited to those that reflect payments made to them by PeTA (or solicited by PeTA on their behalf), or that reflect statements made by them concerning the D.C. Litigation or FEI.[11] Additionally, the Order requires that PeTA produce documents that reflect statements concerning "any current or former employee, consultant, agent, attorney, director, or other representative of [FEI]." This is directly contrary to the rulings of the trial court discussed above. The Magistrate Judge's Order further requires PeTA to produce "documents that relate to . . . funding any activities relating to [FEI] or any of the elephants in FEI['s] circus[es], including but not limited to IRS forms 1099." Order, pp. 15-16. This also runs afoul of the trial court's rulings.

Although document requests Nos. 1-3 appear to be limited to documents that "refer, reflect or relate to" Hundley, Robert Tom, Jr. and Margaret Tom, the wording of the request is so broad that its meaning and reach is unclear. Does the request mean, for example, that PeTA is obligated to produce documents that relate not just to Hundley and Mr. and Mrs. Tom, but also to elephants in FEI's circuses? Must PeTA seek out and possibly produce all documents in its possession that reflect statements by or about any current or former FEI employee? Under a

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[10] In proceedings before the Magistrate Judge, FEI contended that nine named individuals in the subpoena (Alice Faye Hundley, Robert Tom, Jr., Margaret Tom, Tim Rider, Glenn Ewell, Gerald Ramos, James Stechcon, Garrison Christianson, and Kelly Tansy) had been identified as potential witnesses in the D.C. Litigation, although now only three of the nine have been included as likely or possible trial witnesses in either plaintiffs' or FEI's recently filed Rule 26 witness lists filed in the D.C. Litigation.

[11] As noted above, PeTA already has voluntarily provided FEI with documents and other information currently in its possession relating to payments made by PeTA on behalf of these individuals.

reasonable interpretation of the requests, the answer to both of these questions should be "no". However, PeTA should not be subject to potential legal jeopardy if it responds in a reasonable fashion, but this Court later determines that PeTA misinterpreted the scope of the order.

PeTA recognizes that in ruling upon a motion to compel, a court has discretion to fashion an appropriate discovery order. However, a court should not expand the scope of clearly defined litigation and in doing so, contravene three years of rulings by the trial court. This would represent an abuse of the court's discretion, especially where the order is not clear on its face as to what is and is not required.

b. Request No. 4 (Documents Pertaining to Current and Former FEI Employees)

In document request No. 4, the Magistrate Judge ordered that PeTA produce all documents, that "refer, reflect, or relate to" current or former FEI employees, including, but not limited to, Tom Rider, Glenn Ewell, Gerald Ramos, James Stechcon, Garrison Christianson, and/or Kelly Tansy. As noted above, Tom Rider is a named plaintiff in the D.C. Litigation, and the trial court has allowed limited discovery as to him. However, the trial court has not allowed additional discovery as to the other individuals. Indeed, as noted above, in ruling upon FEI's subpoena of documents from HSUS with respect to "other [than Rider] current or former [FEI] employee[s]," Magistrate Judge Facciola stated "I know of no reason why this information would be relevant." Memorandum Opinion, Dec. 3, 2007, p. 5 (Attachment 5). If discovery from HSUS pertaining to any current or former FEI employee, other than Mr. Rider, is "not relevant" for purposes of FEI's subpoena of HSUS, it certainly is not relevant for purposes of FEI's subpoena of PeTA.

Moreover, document request No. 4 includes not only former, but also current employees of FEI. It also potentially could include all of PeTA's fund-raising letters referencing its

campaign against the use of animals in FEI circuses – documents that have absolutely no relevance and that never would be admissible in the D.C. Litigation. Additionally, the request conceivably could even extend to all of PeTA's internal and confidential documents pertaining to litigation in Fairfax County Circuit Court that PeTA brought several years ago against Kenneth Feld and others for their unlawful surveillance and tortious conduct in disrupting the activities not only of PeTA, but also of other animal rights organizations. Such discovery, if allowed by this Court, could simply open the flood gates and provide FEI unlimited discovery of all of PeTA's activities concerning FEI and its circuses for a 12 year period. If read in this fashion, request No. 4 is so obviously overbroad and unrelated to the specific matters at issue in the D.C. Litigation that it would be clearly contrary to the discovery orders entered in that case and tread upon PeTA's First Amendment rights to publicly oppose the use of animals in FEI circuses.

2. Request No. 5 (Solicitations of Contributions For or Concerning the D.C. Litigation, Elephants in FEI's Circuses, or Any Current or Former Employee of Feld)

The Magistrate granted FEI's motion to compel its request No. 5, as amended, by requiring that PeTA produce all documents that refer to requests for financial contributions concerning not only the D.C. Litigation (which, as discussed above, goes beyond the scope of discovery delineated by the trial court), but also all elephants in FEI's circuses and any current or former employee of Feld. Although the language of Request No. 5 appears to be limited to requests for donations by the plaintiffs in the D.C. Litigation, MGC, and WAP, the text of Magistrate's Order additionally refers to payments made "by PeTA itself." This represents an undue and unwarranted expansion of Request No. 5, goes beyond the scope of discovery as

limited by the district court in the D.C. Litigation, and, like Request No. 4, impinges upon core First Amendment rights. As such, it is contrary to law.

3. Request No. 6 (Pictures and Videotapes in PeTA's Possession Pertaining to FEI's Elephants or FEI Personnel)

In his Order, the Magistrate required that PeTA respond to FEI's request No. 6, as amended, by producing all pictures and videotapes (including the audio component of the videotapes) in PeTA's possession of anything "owned by [FEI] (such as its boxcars or bull hooks) [and that pertains to] any of [FEI's] elephants, or anyone who has ever worked for [FEI] [with respect to the elephants in FEI's care]." The time period in FEI's subpoena covers 12 years from 1996 through the present. PeTA literally has countless pictures that it would need to review and over 500 hours of videotapes to screen in order to locate material potentially within the scope of request No. 6. Requiring PeTA to comply with such a broad brush request runs directly counter to the trial court's August 23, 2007 order limiting the issues in the D.C. Litigation and the scope of appropriate discovery.

There is no conceivable relevance in the D.C. Litigation of PeTA's videotapes of elephants walking to and from the circus train and some other public appearances of elephants. FEI already has admitted that it has thousands of hours of its own videotapes of the elephant walks (Joint Stipulated Protective Order Regarding Video Recordings, Aug. 2, 2006, p. 1 (Attachment 8)), and FEI has the nine videotapes that plaintiffs' counsel in the D.C. Litigation obtained from PeTA, most of which were already in the public domain and could have been obtained by FEI through public sources.[12] Neither plaintiffs nor their representatives have ever

[12] For example, Video #1, received from the U.S. Department of Agriculture, is available to the public. Video #3 ("Sissy Baby") was received by PeTA in the late 1990's as a result of a public record request; it was not made by PeTA. Video #4, "The Crusaders," was videotaped by PeTA from a public broadcast. Similarly, Video #5 is from NBC Nightly News.

even reviewed these videotapes. Thus, the fact that plaintiff's counsel may have obtained videotapes from PeTA that are publicly available certainly does not justify requiring that PeTA undertake a review of over 500 hours of videotapes (including the audio portions) and produce relevant, non-privileged tapes.

FEI's demand for PeTA's videotapes is harassment pure and simple. What conceivable evidentiary (or even discovery) value could there possibly be from PeTA reviewing for possible production in the D.C. Litigation more than 500 additional hours of video and audio that were never produced to the plaintiffs? FEI cannot truly believe that obtaining hundreds of hours of videotapes of elephants walking along a street will prove that there was no "taking" of the elephants at issue in the D.C. Litigation, especially where FEI already has thousands of hours of its own videotapes. If FEI wants to use the videotapes in the D.C. Litigation to show that its elephants are not normally harmed during their public display, PeTA understands that plaintiffs' counsel in the D.C. Litigation will so stipulate.[13]

Although the videotapes in PeTA's possession have no valid evidentiary value for the narrow remaining issues in the D.C. Litigation, they do contain audio of PeTA employees and volunteers who made the videos. Disclosure to FEI of statements and comments made by PeTA

PeTA received Video #8 from a third party, and it does not pertain to an FEI circus. The remaining videos ##2, 6, 7, 9 have been displayed on PeTA's website and have been widely distributed. Videos ##6 and 7 involve matters where counsel was involved and concern misconduct by the police in preventing PeTA from exercising its First Amendment rights. PeTA has probably distributed thousands of copies of Video #8, and Video #9 has been displayed on PeTA's website since 2006 and has been sent to innumerable city officials throughout the U.S.

[13] The Magistrate Judge also ruled pictures related to FEI must be produced with no safeguards or limitations as to the types of photographs or the use to which they may be put by FEI. By its overly broad terms, the Magistrate Judge's Order would include personal pictures such as family photographs of Archele Fay Hundley, which could have no conceivable relevance in the D.C. Litigation.

personnel that may be part of the audio portion of the videotapes is of significant concern to PeTA. As an initial matter, such comments may reveal PeTA's confidential strategies in uncovering and documenting abuse of elephants in FEI circuses. Additionally, some of the videotapes document incidents in which PeTA videographers were harassed and where police activity occurred. The audio of those tapes may include conversations with PeTA counsel or comments by PeTA personnel as to the advice they received from counsel concerning what to videotape, where to stand, or how to react when confronted by the police, as well as the facts surrounding any police action. Thus, counsel for PeTA could not responsibly produce the videotapes without first viewing and listening to all of them to ensure that privileged and irrelevant statements are not revealed. For the Magistrate Judge to order such a needlessly time-consuming and expensive task to be undertaken clearly constitutes an abuse of discretion.

4. Request No. 7 (Communications Between PeTA and Their D.C. Counsel)

Finally, the Magistrate Judge granted FEI's motion to compel PeTA to respond to request No. 7, as amended, which requires PeTA to produce documents provided to, or communications with, the plaintiffs or their counsel that "refer, reflect[,] or relate to [FEI's] care or treatment of its elephants at issue in the [D.C.] litigation." Significantly, the request is not limited to communications about the D.C. Litigation. The request, as presently worded, appears to encompass communications between PeTA and plaintiff's counsel in the D.C. Litigation, MGC, which has represented PeTA in other matters pertaining to FEI and FEI's general treatment of its animals (not the specific named elephants in the D.C. Litigation).

Thus, as worded, the request invades the attorney client and work product privileges that PeTA shares with MGC on numerous matters involving the protection of animals, including animals in FEI circuses. Although the Magistrate's Order recognized that in responding to this

request, PeTA could produce a privilege log, that does not solve the problem of ordering the production in the first place. It was error for the Magistrate Judge to require PeTA to go through the burdensome process of compiling a privilege log where the request is directed at facially privileged information and communications between PeTA and MGC. In such a circumstance, even providing FEI with a privilege log would create the risk of revealing confidential information at exorbitant expense to non-party PeTA, and provide no *bona fide* benefit to FEI.

In his Order, the Magistrate Judge erroneously concluded that the common interest doctrine did not protect from disclosure PeTA's communications with MGC because PeTA had asserted that it was not involved in the D.C. Litigation. Order, pp. 7-8.[14] In doing so, the Magistrate Judge was mixing apples and oranges. While PeTA may not have been involved in the D.C. Litigation, PeTA certainly has a common interest about legal matters pertaining to the protection and welfare of animals, including elephants in FEI's circuses. Indeed, during the course of PeTA's lawsuits against Feld in Fairfax County Circuit Court, which concluded two years ago, counsel for PeTA in the Feld case had conversations about the case with Katherine Meyers, a named partner in MGC, pursuant to a joint defense agreement. See Hearing Tr. 4/8/08, p. 38, ln. 12-25. Clearly, any such communications were undertaken as part of "a common interest about a legal matter" which, as the Fourth Circuit has recognized, is the standard for asserting a common interest privilege. *In re Grand Jury subpoena*, 415 F.3d 333, 340 (4th Cir. 2005). For the Magistrate Judge to rule that the common interest doctrine is inapplicable to this situation is contrary to the law in this circuit as to the scope of the privilege and the circumstances in which it may be raised.

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[14] The Magistrate Judge's position on PeTA's assertion of the common interest privilege is incongruous given his view, discussed *supra*, that PeTA is a real party in interest in the D.C. Litigation.

E. Production Pursuant to Protective Order

At the April 8, 2008 hearing, counsel for PeTA requested that any documents or videotapes that PeTA might be required to produce in response to FEI's subpoena be produced pursuant to a protective order limiting the use of such production to this litigation. See Hearing Tr., 4/8/08, p. 34, ln. 4. Although the Magistrate Judge indicated that he would incorporate the protective order that was entered on September 25, 2008 in the D.C. Litigation, the Magistrate Judge's Order did not reference the protective order, nor did the order include a protective order.

The absence of a protective order is of particular concern to PeTA because FEI's subpoena is calculated not to lead to the production of documents and videotapes relevant to the narrow issues in the D.C. Litigation, but rather to allow FEI to engage in wholesale discovery of the inner workings of PeTA's long-running campaign to end the use of animals in circuses, and, in particular, FEI's circuses. The documents, videotapes and other information that FEI is seeking have no value to FEI in the D.C. Litigation, but they would provide a treasure trove of information for FEI to use in its many other efforts (many of them surreptitious) to disrupt and cripple PeTA's activities and PeTA's public information campaign.

Accordingly, to the extent that this Court does not vacate the Magistrate Judge's Order in its entirety, PeTA respectfully requests that the order specifically provide that PeTA's production is subject to the protective order of September 25, 2007 as entered in the D.C. Litigation.

F. The Costs and Expenses of Production of Documents and Videotapes Should be Borne By FEI

The Magistrate Judge's Order has placed PeTA and its counsel in the position of having to review thousands of documents and more than 500 hours of videotapes (including the audio) to ensure that privileged and irrelevant matters are not revealed to FEI as part of PeTA's

production. The time and expense of such review, by its very nature, places an undue burden upon PeTA, especially because PeTA is not even a party to the litigation for which the production ostensibly has been sought.

Although the Magistrate Judge's order provides that the costs associated with the "inspection, viewing and copying of any responsive photographs and videotapes" is to be borne by FEI (Order, p. 19), the terms of the order are vague as to whether FEI must reimburse PeTA for the enormous costs it has been forced to incur in reviewing the videotapes prior to their inspection by FEI. Simply put, non-party PeTA should not have to foot the bill for reviewing over 500 hours of videotapes to determine what footage may be responsive to FEI's request No. 6. Likewise, PeTA should not have to incur the cost of reviewing thousands of documents to locate those documents potentially subject to production under the Magistrate Judge's amended production requests. If FEI truly needs the documents and videotapes it is demanding, this is a cost that FEI, not PeTA, should bear. To place the expense of such review and production upon PeTA can only serve to penalize the organization for exercising its constitutional rights in organizing public opposition to FEI's use of animals in its circuses.

G. The Magistrate's Order Failed to Provide PeTA a Reasonable Time to Respond to Requests

At the April 8, 2008 hearing, the Magistrate Judge indicated that he would provide PeTA 20 days after the date of any order he would enter to produce documents and videotapes in response to FEI's subpoena requests. Hearing Tr. 4/8/08, p. 56, ln. 3-10 (Attachment 6). The Magistrate Judge specifically stated that PeTA's request for 20 days was "fine" and "seems to me to be reasonable." *Id.* However, the Order, as entered, allows PeTA only ten days to provide responses. There should be no question that a ten-day period to review thousands of documents and over 500 hours of videotapes (including the audio portions) is insufficient. Hence, it was

clear error by the Magistrate Judge in so limiting the time period for PeTA to conduct its review and produce relevant, non-privileged documents and videotapes.

CONCLUSION

For the reasons set forth above and those stated in its previously filed pleadings, PeTA respectfully submits that this Court should vacate the order of the Magistrate Judge requiring non-party PeTA to comply with FEI's document subpoena, as amended. PeTA already has voluntarily produced to FEI relevant responsive information and documents. Any additional production required of PeTA would be beyond the bounds of the narrow, remaining issues in the D.C. Litigation, would be unduly burdensome and would transgress PeTA's First Amendment right to publicly oppose the use of animals in circuses. Further discovery of PeTA should not be allowed.

Because of the complexities of the issues raised by FEI's Rule 45 subpoena, the interrelationship between the subpoena and the orders of the D.C. trial court, the constitutional implications of the Magistrate Judge's Order, and the enormous burden that order places upon non-party PeTA, PeTA respectfully requests that this Court schedule a hearing on PeTA's objections. In conformity with the understanding of PeTA's counsel as to this Court's practice, PeTA is also filing a separate letter request for a hearing setting forth in more detail the reasons for its request.

Respectfully submitted,

By /s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 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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