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

FELD ENTERTAINMENT, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2:2008mc00004**
	)	
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT'S OBJECTIONS TO MAGISTRATE'S ORDER OF JULY 22, 2008

Plaintiff, Feld Entertainment, Inc. (hereinafter, "FEI"), by counsel, as and for its brief in response to the Objections to Magistrate Judge's Order, filed by Defendant People for the Ethical Treatment of Animals (hereinafter, "PETA"), states as follows:

BACKGROUND

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, FEI issued to PETA a subpoena *duces tecum* ("Subpoena") out of the Eastern District of Virginia. The underlying action for which that subpoena was issued pends in the United States District Court for the District of Columbia. While FEI is a party to that action, brought by the American Society for the Prevention of Cruelty to Animals and several others (hereinafter, "the Plaintiffs"), PETA is not. Because of PETA's refusal to comply with the Subpoena, FEI filed a Motion to Compel ("Motion") pursuant to Rule 37. PETA opposed the Motion and filed a Motion for a Protective Order to Transfer the Matter to the D.C. Circuit or to Stay, and then a Motion to Transfer for

Forum *Non Conveniens.* This Court denied PETA's motions to transfer or stay and, after two hearings on the Motion (held on March 14, 2008 and on April 8, 2008) and after additional briefing by the parties, Magistrate Judge F. Bradford Stillman issued his Order on July 22, 2008 ("Order"). That Order granted FEI's Motion to Compel in part and denied that same Motion in part. PETA has now filed objections to the July 22nd Order ("Objections"). Although PETA did not file a Motion to Stay[1], it continues to refuse to comply with this Court's Order.

STANDARD OF REVIEW

A court reviews a magistrate judge's nondispositive orders under a "clearly erroneous or contrary to law" standard. See Fed. R. Civ. P. 72(a); 28 U.S.C.§ 636(b)(1)(A); Federal Election Comm'n v. The Christian Coalition, 178 F.R.D. 456, 459 (E.D. Va. 1998). There is no question in this case that Judge Stillman's Order is nondispositive. Therefore, Rule 72(a) governs.

As the Fourth Circuit has explained, the "clearly erroneous" standard that must be applied in this case is "deferential." 178 F.R.D. at 460. A magistrate judge's findings should be affirmed unless the Court, after review of the record, is left with "the definite and firm conviction that a mistake has been committed." Id. (citing Harman v. Levin, 772 F.2d 1150, 1153 (4th Cir. 1985)). According to the Fourth Circuit, a "mistake" exists "if the factual finding seems so improbable as to belie belief, or is incredible on the admitted facts, or is inconceivable or is internally inconsistent." Id. (citations omitted.)

[1] Well after the deadline for PETA's compliance with the Court's July 22nd Order had passed, and only after FEI advised PETA that its objections to the Court's July 22nd Order did not work automatically to stay its enforcement, PETA belatedly has filed a Motion for Protective Order seeking to be spared having to comply with the Court's Order pending a ruling on its most recent objections. It has also asked the Court, by letter, to conduct a "pre-emptive" hearing on that Motion, although the meaning of that term is not altogether clear.

Curiously, PETA argues in its Objections that, in this case, no basis exists for giving deference to the Magistrate Judge's ruling because this is the first occasion that discovery issues in the underlying litigation have been addressed by this Court. Not surprisingly, PETA cites no law to support its novel argument. While PETA cites two cases for the proposition that a magistrate judge's ruling on discovery is entitled to deference only when the magistrate has managed discovery in the case and developed a thorough knowledge of the proceedings (Objections at p. 9), those cases say nothing of the sort. In point of fact, the New Jersey District case cited by PETA explains that "a Magistrate Judge's Order is entitled to great deference in this District, *since the Magistrate Judges have full authority to manage the civil cases and to determine all such matters of discovery and case management under General Rules 15 & 40A*." Public Interest Research Group v. Hercules, Inc., 830 F. Supp. 1525, 1546 (D. N.J. 1993) (emphasis added). Thus, the deference to which magistrate judges' rulings on discovery matters is entitled stems not from the magistrate judge having developed a thorough knowledge of the proceedings, but because of the authority granted to him under the Rules and applicable statutes. Precisely the same deferential standard must be applied to Judge Stillman's ruling in this case.

Furthermore, a magistrate's ruling cannot be disturbed on the basis of arguments not presented to him. Jesselson v. Outlet Assoc. of Williamsburg, LP, 784 F. Supp. 1223, 1228 (E.D. Va. 1991). This rule prohibiting raising new issues and arguments "is based upon the same concept which prevents parties from arguing in the appellate courts issues and arguments not raised below." Id. at 1228. See also Giganti Veritas Media Group, Inc. v. Gen-X Strategies, Inc., 222 F.R.D. 299, 308 (E.D. Va. 2004) (denying objection because it was "not argued before the magistrate judge and cannot be raised for the first time as part of plaintiff's Rule 72 motion"); Proffitt v. Veneman, 2002 U.S. Dist. LEXIS 13892, *9 (W.D. Va. July 15, 2002) (noting that an

issue "was not argued before the Magistrate Judge" and that "[i]t is improper, therefore, . . . to raise this issue for the first time as part of [a] Rule 72 motion"). Indeed, federal courts are reluctant to receive new evidence, even when reviewing *de novo* a Magistrate's Report and Recommendation pursuant to Rule 72(b). See, e.g., Housing Works, Inc. v. Turner, 362 F. Supp. 2d 434, 438 and n.8 (S.D.N.Y. 2005) (explaining that "litigants cannot be permitted to use litigation before a magistrate judge as something akin to [a] spring training exhibition game, holding back evidence for use once the regular season begins before the district judge").

PETA has raised several new arguments as to why it should not have to respond to the Subpoena. In reviewing Judge Stillman's ruling, the District Judge should not consider those arguments, which PETA did not raise in its briefs filed in opposition to the Motion or at the hearings.

ARGUMENT

I. PETA's First Amendment Argument

PETA argues that substantial issues bearing on its First Amendment rights are at stake in this matter. Yet it offers absolutely no legal or factual analysis as to why this is so, nor can it conjure up any rationale to support that claim. In fact, although PETA now stresses that First Amendment issues are central to the question of whether it should be compelled to respond to FEI's Subpoena, prior to this point in these proceedings, the only time PETA even remotely connected the First Amendment to this matter was in a single quote from the D.C. Court's ruling in one of its briefs. Though both Judge Stillman and FEI briefly discussed the First Amendment implications of this dispute, at no time before filing its Objections did PETA ever premise its opposition to the Subpoena on First Amendment grounds. To be sure, in neither its briefs filed

with the Court nor its oral arguments before the Court did PETA offer any evidence or argument to show that FEI's Subpoena would have any effect whatsoever on PETA's or any PETA member's freedom of association.

As Judge Clarke of this Court explained in Jesselson, "[r]eview of a Magistrate's ruling before the District Court does not permit consideration of issues not raised before the Magistrate." 784 F. Supp. at 1228. In Jesselson, Judge Clarke reviewed a ruling on a Motion in Limine under Rule 72(a), applying the clearly erroneous standard. Id. Judge Clarke declined to consider issues and arguments not raised before the Magistrate, explaining that "[a]llowing Plaintiffs to present their case to the Magistrate, and then, because they were unsuccessful, present new issues and arguments to this Court frustrates [the] purpose [of the Magistrates Act]" because the Act "was not intended to 'give litigants an opportunity to run one version of their case past the magistrate, then another past the district court.'" Id. at 1228-29 (citations omitted).

In this case, PETA never gave any indication that it was in the least bit concerned about the possible effects of the Subpoena on its First Amendment rights. Even now, although it throws the term "First Amendment" around several times in its Objections, PETA does not bother to cite a single case or point to a single fact to support its conclusory statement that the July 22nd Order is a "threat" to its First Amendment rights. PETA does not even claim that applying the July 22nd Order to the facts of this case imperils any Constitutional right that it enjoys in the context of this litigation. Rather, PETA makes the startling claim that Judge Stillman's Order somehow threatens the First Amendment rights of *all persons who publicly support litigation.* (Notably, even though Judge Stillman, in reaching his decision, considered PETA's First Amendment right of association, PETA's only mention of any right in its

Objections is its "First Amendment rights to encourage public opposition." (Objections at p. 10.).)

In view of the above, no evidence is before the Court on which it can make an informed decision about the effect of the Subpoena on *any* of PETA's rights, Constitutional or otherwise. Neither is there any indication of what portion(s) of the Order supposedly imperil those same rights. As a consequence, none of PETA's Objections founded on its First Amendment claim should be considered.

Even assuming, *arguendo*, that this Court could consider PETA's new First Amendment argument, PETA has presented no evidence or argument to suggest that Judge Stillman's Order is contrary to the law regarding its (or anyone else's) First Amendment rights. Nor could it. It is evident from Judge Stillman's several comments in his Order and at the hearings that he did take the issue into consideration in making his ruling (see Hr'g Tr. of 3/14/08 at 70:4-7, a copy of which is attached as Exhibit A; Hr'g Tr. of 4/8/08 at 7:6-11, a copy of which is attached as Exhibit B.) The Order is in no way contrary to the law of the case nor to the case law relied upon by the D.C. Court, Wyoming v. U. S. Dep't of Agriculture, 208 F.R.D. 449[2] and PETA has offered no evidence or law suggesting that it is.

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[2] The D.C. Court's order only briefly discussed the issue of the First Amendment and gave no analysis or explanation of how it applied the Wyoming decision to the discovery issue that was before it. (See Objections at Ex. 2 (Order of 8/23/07) at p. 9.) While PETA seems to imply that the D.C. Court believed that any information about funding for the individual plaintiff and witnesses in this case was protected from discovery because of the First Amendment, as Judge Stillman accurately discerned in his Order, the D.C. Court found only that the source of the funding, *i.e.*, the names of donors, could be redacted from documents that otherwise had to be produced. This is exactly what Judge Stillman has ordered in relation to PETA's responses to the Subpoena: PETA may redact the names of *its* donors when providing responsive documents in order to protect the First Amendment freedom of association rights of both PETA and its members.

II. PETA's Status in the Underlying Litigation

One of PETA's objections to Judge Stillman's Order is made on the ground that he "apparently" concluded that PETA is a real party in interest in the underlying litigation in D.C. Yet PETA can point to no place in either the July 22nd Order or either of the transcripts of Judge Stillman's extensive hearings on FEI's Motion where Judge Stillman articulated any such conclusion. In fact, the very footnote referenced by PETA to support this objection plainly shows that Judge Stillman *rejected* FEI's argument that PETA is a real party in interest. Judge Stillman repeated both FEI's argument that PETA was a *de facto* party, and PETA's argument that it was entirely disinterested in the D.C. litigation, and then noted that "the truth appears to lie somewhere in the middle of these extremes." (Order, at p. 6 and n.9.)

PETA's notion that Judge Stillman's Order means a person who publicly supports litigation could be made subject to a subpoena on that basis alone is wholly unsound. At no time did PETA even remotely suggest that FEI's Subpoena was premised solely upon PETA's public encouragement of the Plaintiffs or of the underlying litigation against FEI. In making its argument, PETA fails to account for the videotapes it has which are highly relevant to FEI's defenses in the underlying litigation.[3] Further, PETA acknowledges providing monetary support

[3] PETA's repeated statement that the videotapes are irrelevant because PETA's videos of the elephant walks do not show abuse and because FEI has its own videos of its elephants misses the point. As Judge Stillman noted at the hearing of April 8th, the issue in the underlying litigation is FEI's treatment of elephants. That PETA's videos may show no mistreatment is precisely the reason they are relevant. Moreover, FEI contends that the PETA videos that have been provided to the Plaintiffs, some of which have been offered by the Plaintiffs in the underlying litigation as evidence, have been edited. It is FEI's position that the complete, unedited footage is necessary to ensure that any admissible evidence is accurate and not misleading. For example, if the elephants have been provoked by those taking the video in order to film the elephants' reaction, this complete footage, and not just the reaction, would be relevant to FEI's defense. Similarly, the audio component of the footage is equally important to tell whether, for example, verbal

to both the individual plaintiff in the D.C. case as well as to some of the witnesses. (Hr'g Tr., 4/8/08, at 22 – 27.) And at this Court's hearing on April 8, 2008, FEI offered a copy of an affidavit filed by the Plaintiffs in the D.C. Litigation in which PETA specifically was mentioned throughout. PETA is, therefore, a proper non-party to be subject to a subpoena in the context of the underlying case.

III. The D.C. Court's Rulings

PETA next argues that this Court should read the D.C. Court's various rulings relating to discovery (specifically Judge Sullivan's Order of 8/23/2007 and Judge Facciola's Memorandum Opinion of 12/3/2007) to mean that only the Plaintiffs, their counsel, and two named non-party organizations ever can be required to disclose information relating to payments to the individual Plaintiff or to other witnesses in the D.C. Litigation. PETA reaches this bizarre conclusion based on Judge Sullivan's ruling that the *identity* of sources of such payments was irrelevant. There simply is no ruling that a third party cannot be required to respond to discovery relating to payments to Tom Rider (the individual Plaintiff) or to other witnesses in this case. As Judge Sullivan recognized, even though the *source* of the funding may be irrelevant, "Rider's funding for his public education and litigation efforts related to [FEI] is relevant" and "the financing of [Rider's] public campaign is relevant to his credibility." (Objections at Ex. 2 (Order, 8/23/2007) at pp. 4-5.) Obviously, payments to witnesses likewise would be relevant as to their credibility,

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commands are given to the elephants prior to a physical cue, or if other sounds or noises caused an elephant to react. Any such information would be critical to FEI's defense and is one of the reasons that the audio as well as the video are important in this discovery.

PETA has stated in its Objections that the Plaintiffs in the underlying suit are willing to stipulate that FEI does not harm its elephants during their public display. (Objections at p. 19.) This is news to FEI. Even if true, such a stipulation does not negate the need to view original, unedited videotapes.

and finding that information relating to such payments is relevant is entirely in accord with Judge Sullivan's Order. While Judge Sullivan's rulings indicate that FEI may not be able to offer evidence of the source of such payments at trial, the fact that either Rider or other witnesses actually received such payments is quite relevant and fully admissible. It would, therefore, be discoverable.

PETA wrongly interprets Judge Facciola's statement that he knew of no reason why documents held by a particular third-party that refer, reflect or relate to other current or former employees of FEI would be relevant as a ruling that any document pertaining to any current or former employee of FEI, except Rider, was not relevant and need not be produced. (Objections at p. 11.) This is reading far too much into Judge Facciola's statement. Further, PETA ignores Judge Stillman's ruling that restricts the production of such documents to those that specifically refer, reflect or relate either to such employees or former employees' statements concerning the D.C. Litigation, the elephants in FEI's circuses, FEI, representatives of FEI, or PETA's payments to or funding for them. Judge Facciola's refusal to compel the production of all documents pertaining to current and former FEI employees because the relevancy of the documents had not been demonstrated at that time cannot be read to deny FEI the right to discover specific documents relating to statements made by, or to payments made to, such employees when FEI has demonstrated the relevancy of those particular documents.

IV. The Order's Clarity

At no time prior to filing its Objections did PETA ever complain that FEI's Subpoena was vague or confusing. Judge Stillman has done nothing more than to limit and modify the requests originally set forth in the Subpoena. Yet PETA now alleges that those requests, as

narrowed by Judge Stillman, have become confusing and vague because it encompasses twelve years. Because this is the first time PETA has averred that the Subpoena is confusing and vague or has raised any issue regarding the relevant time period, the District Judge should not consider this newly-added complaint about the Subpoena. Jesselson, 784 F. Supp. at 1228.

The only argument previously raised by PETA that could possibly be construed as resembling its "confusing and vague" objection is PETA's claim that the Subpoena was overbroad. Yet never did PETA state that it was overbroad because of the relevant time-period covered by the Subpoena; instead, it argued that the Subpoena went beyond the scope of discovery allowed by the D.C. Court's rulings. PETA's only other identifiable complaints about the breadth of the Subpoena concerned the request for "all communications", because it was not limited to those communications relating to the litigation, and the request concerning elephants in "all circuses", because that request was not limited just to elephants in Ringling Bros. circuses (which are owned by FEI).[4] (Docket No. 5, PETA's Br. in Opp'n at p. 2.) Otherwise, PETA did nothing but reference the language in the Subpoena and call it overbroad. It never complained that the relevant timeframe was overly broad, confusing, or vague.[5] Significantly, at no time in any of its briefs or in either of the hearings held by Judge Stillman on FEI's Motion did PETA ask that the time period of any request be limited in any way.

Even if the Court would consider PETA's argument made for the first time at this late date, it cannot do so because PETA does not bother to explain how or why the July 22nd Order is

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[4] Judge Stillman's Order addresses the specific concerns of over breadth that PETA *did* raise before him. Judge Stillman denied FEI's request for "all communications," modifying Requests 1 through 4 of the Subpoena by removing that category altogether, limited the subpoena's reference to litigation to the "D.C. litigation", and limited the reference to elephants solely to "FEI's elephants." (Order at pp. 15-20.)

[5] The relevant time period set in the D.C. litigation is 1994.

in any way vague or confusing. PETA only points to a part of Judge Stillman's Order dealing with a portion of Request No. 4 of the Subpoena, and declares that the Order could be interpreted to make PETA produce all documents "referring to FEI or any of its current or former employees." Yet Judge Stillman's modification of Request No. 4 is quite clear. There is nothing vague or confusing about it. The request begins "all documents that refer, reflect, or relate to any other current or former employee . . . including without limitation" and then lists certain categories of documents. Judge Stillman (as he did with Requests 1 through 3) deleted from Request 4 its category (a): "all communication with or about such persons." With this modification, the Requests in the Subpoena can only be interpreted to require PETA to produce documents responsive to the remaining categories: (b) through (e). Judge Stillman's modification of Requests 1 through 4 conclusively demonstrates that the term "including" is used as one of limitation. Otherwise, Judge Stillman's modification by striking category (a) would be meaningless.

V. PETA's claim of privileged communications

A. Claims that privileged communications "may" be on the videotapes

Although PETA makes a passing reference to "confidential strategies" in its Objections, and mentioned the term "trade secrets" in its first brief filed in opposition to FEI's Motion, there is no evidence whatsoever before the Court that anything PETA has is a trade secret or otherwise protected from disclosure. While PETA states that comments on the video "may reveal" such secrets it has given no example of how that would be so. Thus, any attempt now to claim trade secrets or confidential information must be ignored by this Court. Further, as Judge Stillman instructed PETA, if there are communications for which it claims a privilege, it must produce a privilege log (which it has yet to do).

With regard to other privileged communications on the videotapes, all PETA offers in support of its assertion of a privilege is its contention that communications protected by the attorney-client privilege *may* be revealed by the audio on the videotapes.[6] But PETA has not shown that there is any privileged communications at all on any of the videotapes. PETA's principal complaint seems to be the time it would take to review the tapes to determine if there were any privileged communications on them.[7] What PETA is asking this Court to rule is that, because there is a mere possibility that a privileged communication could be on one of the tapes, PETA should not have to produce any of them. If this were the case, no one would ever have to produce any documents simply because it may take time to determine if they contained a privileged communication, an absurd result. Again, the Federal Rules of Civil Procedure provide a mechanism for addressing privilege concerns – a privilege log. If PETA is concerned about privileged communications, it should provide one.

B. PETA's claims of privilege for communications between PETA and counsel for Plaintiffs in the underlying litigation

PETA has asserted that all of its communication with the Plaintiffs and the law firm of Meyer, Glitzenstein & Crystal ("MGC"), which represents the Plaintiffs in the underlying litigation is privileged. Yet PETA has assiduously denied any involvement in the underlying litigation, much less that it is represented by MGC in the underlying litigation. This very assertion is one of the cornerstones of its arguments that its documents are irrelevant. Thus, any communications it has with Plaintiffs or their counsel cannot be protected by either attorney-client privilege or the work-product doctrine.

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6 PETA's concern that the videos may contain any "facts surrounding any police action" does not involve any privilege.

7 It should be noted that PETA told Judge Stillman at the April 8, 2008 hearing that it had already started to review the videotapes. (Hr'g Tr., 4/8/2008, 55:21 – 56:2.)

Seeking some way to hide its documents under the privilege cloak, PETA raises the common interest doctrine. But the doctrine affords it no protection, as Judge Stillman correctly recognized. PETA's only bases for claiming the doctrine's protection is that 1) it has a "common interest about legal matters pertaining to the protection and welfare of animals" and 2) there is a prior case in which PETA was a party and in which its counsel had conversations with MGC pursuant to a joint defense agreement. Interestingly, PETA does not specify what the "legal matters" are that it has in common with the Plaintiffs. As for the prior litigation, PETA was the only plaintiff in that case. Even if a joint defense agreement somehow existed between PETA and a non-party in a separate suit, it is not determinative of whether the common interest doctrine applies, either in this or any other case.

Although the common interest privilege is broadly extended, see The Christian Coalition, 178 F.R.D. at 72, its bounds are not unlimited. Though the privilege applies "[w]hether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs," the persons claiming the privilege must be at least "potential co-parties to prospective litigation." United States v. Under Seal, 902 F.2d 244, 249 (4th Cir. 1990) (citations omitted). PETA has not claimed that it and any of the Plaintiffs in the underlying litigation are potential co-parties or that there is any prospective litigation, much less that its communications with Plaintiffs and their counsel relate to such litigation. And PETA has denied it had any involvement in the underlying litigation. (Objections at p. 12.)

In an effort to support its theory, PETA has taken a quote from the Fourth Circuit's opinion in *In re* Grand Jury Subpoena out of context. The textual content surrounding the portion relied upon by PETA states:

> The joint defense privilege, an extension of the attorney-client 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 communicate with their respective attorneys and with each other *to more effectively prosecute or defend their claims*. . . . For the privilege to apply, the proponent must establish that the *parties* had some common interest about a legal matter.

415 F.3d 333, 340 (4th Cir. 2005). It is clear that there must be at least the potential for litigation in which the persons claiming a common interest privilege are potential co-parties and that the communications must be pertaining to their common interest in the legal matter at issue in that prospective litigation. Because PETA cannot show that its communications with the Plaintiffs or Plaintiffs' counsel in the underlying litigation have any tie to any present or future litigation in which the Plaintiffs and PETA are or will be co-parties, it cannot claim that its communications with them is privileged. Judge Stillman's ruling that the common interest doctrine is not applicable to the documents requested in the Subpoena is not clearly erroneous and certainly not contrary to any law.

VI. Costs

PETA now appears to be asking the Court to order that FEI, in addition to bearing the costs associated with inspection, viewing, and copying of responsive photographs and videotapes, also compensate PETA for the cost of reviewing "thousands" of documents and "over 500 hours" of videotapes. Yet, other than this blanket statement, PETA has offered no evidence to show the extent of the documents it must review to respond to the discovery as limited by Judge Stillman. PETA complains that Judge Stillman's Order is vague as to whether FEI must reimburse PETA for the costs "it has been forced to incur in reviewing the videotapes" but it is PETA that is vague. Exactly what those costs are, or why they were incurred, is never explained.

Moreover, though PETA now says it must view over 500 hours of videotapes to determine what footage may be responsive, PETA's counsel at the March 14, 2008, hearing

stated PETA knew who took the videos. (Hr'g Tr., 3/14/08 at 23:18-19.) At no time, either at the hearings or in briefs, has PETA given any indication that Judge Stillman was incorrect in observing that PETA had "the date, the circus, and who the cameraman was, and perhaps who was present" for each video. (Hr'g Tr., 3/14/08, at 23:20 – 24:3.) Significantly, PETA's counsel demonstrated his familiarity with the videos, claiming that, other than Archele Hundley, "there is no other witness in that case on any of the videotapes" (Hr'g Tr., 3/14/08 at 30:3-4) and stating that Hundley is on only two or three videos (id. at 30:20-24). Thus, it appears that PETA's lament that it will have to go back and review over 500 hours of videotapes to determine which are responsive is not completely above board. PETA has not heretofore requested that FEI bear the costs of PETA's review of documents, so that issue should not be considered by the District Judge for the reasons discussed, *supra*.

Judge Stillman's ruling that FEI would be responsible for all costs associated with the inspection, viewing, and copying of responsive photographs and videotapes, including the provision of necessary equipment (Order at p. 19) is neither clearly erroneous nor contrary to the law, and PETA has failed to offer any evidence or law to show otherwise.

VII. Time for response

PETA next asks the District Court to vacate Judge Stillman's Order on the grounds that Judge Stillman said he would provide PETA 20 days from entry of the Order to produce documents and videotapes. Yet that is not the case. The April 8, 2008 hearing transcript shows that PETA, in response to Judge Stillman's question, stated that it would need 20 days to look at documents and videotapes and that it had already started reviewing them. (Hr'g Tr., 4/8/08 at 56:3-10.) PETA then noted that it only had ten days to file an appeal. (Id. at 56:11-12.) Judge

Stillman gave the parties his provisional rulings at that April 8th hearing, so the direction to produce the documents and videos required in Judge Stillman's Order comes as no surprise to PETA. And, rather than 20 days, PETA has had since April 8, 2008 to review them -- more than 125 days (or 89 working days). PETA cannot now credibly maintain that the 10 days given in the Order is inadequate. As with the costs, PETA has not shown that Judge Stillman's ruling is either clearly erroneous or contrary to the law.

VIII. The Protective Order

FEI does not disagree that the Protective Order entered in the D.C. litigation would be applicable in this discovery issue. Indeed, the Protective Order has been applied to discovery produced by other non-parties.

IX. PETA's supplemental authority

After filing its Objections, PETA provided the Court with "supplemental authority" in support of its Objections. Yet neither the D.C. Court's August 5, 2008 ruling nor the Defendants' disclosures cause Judge Stillman's Order to be either clearly erroneous or contrary to the law. As PETA's own recitation of the D.C. Court's August 5, 2008 ruling shows, the D.C. Court was concerned with additional deposition discovery relating to payments to Tom Rider, not any other witness.[8] The Subpoena is one for documents, not testimony. Second, FEI's discovery requests in the Subpoena are for documents relating to funding of other witnesses in addition to Tom Rider, as well as documents regarding those witnesses (and Mr. Rider's) statements or allegations regarding specific topics, none of which are the subject of the D.C.

[8] The D.C. Court's August 5th Order concerned FEI's motion to compel for instructions not to answer made to the witnesses during depositions taken by FEI. That order did not address the production of documents.

Court's August 5, 2008 ruling. That Order from the D.C. Court is not law that is contrary to Judge Stillman's ruling, and therefore is irrelevant to PETA's objections..

PETA next tries to argue that FEI's pre-trial disclosures conclusively show that the information FEI seeks through the Subpoena is irrelevant to the D. C. litigation because FEI did not name the individuals that are at issue in the Subpoena as witnesses in their pre-trial disclosures or list PETA's videotapes as exhibits. Of course, PETA simply ignores the fact that FEI cannot readily identify as exhibits documents or videotapes it has not yet seen. And PETA likewise ignores FEI's express reservation in its pre-trial disclosures of the right to designate additional exhibits obtained from the Subpoena at issue here. (Docket No 37-3, PETA's Notice of Supplemental Authority at Ex. 2 (FEI's 26(a)(3) Pre-Trial Disclosures) at p. 18.)

Similarly PETA fails to disclose to this Court that Archele Hundley and Robert Tom are named as witnesses by the Plaintiffs in their pre-trial disclosures filed in the D.C. litigation (a copy of which is attached as Exhibit C to this Brief), and that deposition transcripts were not required to be designated in the pre-trial disclosures. It is very likely that at least the deposition of Frank Hagen, who is now deceased, would be designated by one of the parties in the D.C. litigation, as he was identified as a key witness to the alleged behavior that prefaced the D.C. litigation. (See letter from Nicole Paquette to Kenneth Feld, 7/22/2005[9], a copy of which is attached hereto as Exhibit D.) It is possible that the deposition testimony of others could be designated as well.

Of course, any of the parties to the D.C. litigation could amend their disclosures after PETA responds to the Subpoena to include additional witnesses. Importantly, other persons listed in the Subpoena, including Margaret Tom, James Stechon, and Glen Ewell, were

[9] These notice letters are required as a prerequisite to filing an action under the Endangered Species Act. See 16 U.S.C. § 1540(g).

specifically identified by the Plaintiffs as witnesses to the alleged behavior that supports the Plaintiffs' taking claim in the D.C. litigation along with other former employees of FEI. (See, Letter from Katherine Meyer to Kenneth Feld, 4/21/2001, a copy of which is attached hereto as Exhibit E; Letter from Katherine Meyer to Kenneth Feld, 3/30/2007, a copy of which is attached hereto as Exhibit F.) The fact that FEI did not list in its pre-trial disclosures those persons that Plaintiffs have previously relied upon has no relevancy to Judge Stillman's Order, and certainly does not make the Order either clearly erroneous or contrary to the law.

CONCLUSION

As explained above, none of PETA's objections to Judge Stillman's Order of July 22, 2008 have merit. Judge Stillman's Order is neither clearly erroneous nor contrary to the law, and Judge Stillman did not make any mistake in his findings. The Court should overrule PETA's Objections and deny its request to vacate the Order. FEI respectfully asks this Court to order PETA to produce the documents and videotapes as set forth in Judge Stillman's Order immediately.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2008, I will electronically file the foregoing Plaintiff FEI's Brief in Response to Defendant's Objections to Magistrate's Order of July 22, 2008 with the Clerk of Court using the CM/ECF system, which will then send a notification of electronic filing (NEF) to the following file users:

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