UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FELD ENTERTAINMENT, INC.,

Plaintiff,

v.

Civil Action No. 2:08mc4

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.,

Defendant.

OPINION AND ORDER

Currently before the court are objections to a July 22, 2008 Order by Magistrate Judge Stillman (the "Order"), filed by defendant People for the Ethical Treatment of Animals, Inc. ("PETA"). The Order and PETA's objections relate to a subpoena duces tecum and Amended Requests for Production (collectively, the "Requests") issued to PETA by plaintiff Feld Entertainment, Inc. ("FEI") in connection with American Society for the Prevention of Cruelty to Animals, et al. v. Ringling Bros. and Barnum & Bailey Circus, et al., Case No. 1:03cv2006 (D.D.C.) (the "underlying litigation"), in which FEI is a defendant and PETA is a non-party, albeit an interested one. After examination of the briefs and the record, this court determines that oral argument is unnecessary, as the facts and legal arguments are adequately presented, and the decisional process would not be aided significantly by oral argument. For the reasons detailed below, the court **OVERRULES** all of defendant's objections, **DENIES** defendant's request for vacatur of the Order, and **DIRECTS** defendant to comply with the Order and to respond to plaintiff's Amended Requests for Production, as modified by that Order.

FACTUAL AND PROCEDURAL HISTORY

The extensive procedural history preceding the issuance of the Order is discussed in detail in that Order, and therefore will not be repeated here. PETA filed its Objections to Magistrate Judge's Order and Memorandum in Support (the "Objections") on August 4, 2008. FEI filed its Brief in Response to Defendant's Objections to Magistrate Judge's Order (the "Response") on August 12, 2008. The court is also in receipt of correspondence from both parties in connection with this matter.

STANDARD OF REVIEW

Title 28, Section 636(b)(1)(A) of the U.S. Code provides in relevant part that United States magistrate judges may be designated "to hear and determine any pretrial matter pending before" a district court, excepting dispositive and certain other motions. 28 U.S.C. § 636(b)(1)(A). Rule 72(a) of the Federal Rules of Civil Procedure provides that a party may file objections to a magistrate judge's order on non-dispositive matters, such as discovery orders. Fed. R. Civ. P. 72(a); see also Tafas v. Dudas, 530 F. Supp. 2d 786, 792 (E.D. Va. 2008); Fed. Election Comm'n v. Christian Coal., 178 F.R.D. 456, 459 (E.D. Va. 1998). The relevant section of the U.S. Code further provides that a "judge of the court may reconsider any pretrial matter [determined by a magistrate judge] under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). However, "[r]eview of a Magistrate's ruling before the District Court does not permit consideration of issues not raised before the Magistrate." Jesselson v. Outlet Assocs. of Williamsburg, LP, 784 F. Supp. 1223, 1228 (E.D. Va. 1991); see also Giganti v. Gen-X Strategies, Inc., 222 F.R.D. 299, 307–08 (E.D. Va. 2004) (denying objection to a magistrate

judge's recommendation because "it was not argued before the magistrate judge and cannot be raised for the first time as part of plaintiffs' Rule 72 motion.").

The U.S. Supreme Court has indicated that a factual "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); see also Harman v. Levin, 772 F.2d 1150, 1152–53 (4th Cir. 1985); Tafas, 530 F. Supp. 2d at 792. With respect to a magistrate judge's conclusions of law, several courts have held the "contrary to law" standard to allow plenary review by the district court. See Haines v. Liggett Group Inc., 975 F.2d 81, 91 (3d Cir. 1992); Jochims v. Isuzu Motors, Ltd., 151 F.R.D. 338, 340 (S.D. Iowa 1993); Gandee v. Glaser, 785 F. Supp. 684, 686 (S.D. Ohio 1992); Jernryd v. Nilsson, 117 F.R.D. 416, 417 (N.D. Ill. 1987); Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 205–06 (N.D. Cal. 1983). Overall, however, although a reviewing district court is certainly within its authority to modify or set aside the decision of a magistrate judge, or portions thereof, a leading treatise notes that doing so is "extremely difficult to justify," and that "an abuse-of-discretion attitude should apply to many discovery and related matters." 12 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3069 (2d ed. 1997).

ANALYSIS

Defendant PETA raises several objections in support of its request for vacatur of the Order. In brief, defendant argues that the Order (1) is beyond the scope of discovery as defined by the court in the underlying litigation; (2) is unduly broad and vague; (3) is unduly burdensome as to the volume of materials called for; (4) requires defendant to produce privileged documents; (5) fails to provide that documents produced are governed by the protective order(s) in the

underlying litigation; (6) is unduly burdensome as to the required timing of defendant's response; and (7) is vague as to the allocation of costs of review and production among the litigants. PETA also raises possible First Amendment implications at several points in its Objections. The court shall deal with each of PETA's objections in turn.

A. THE SCOPE OF DISCOVERY IN THE UNDERLYING LITIGATION

With respect to PETA's first argument–that the production required by the Order goes beyond the scope of discovery in the underlying litigation as defined by various orders entered by the court in that case–the Order explicitly indicates that "this Court will endeavor to craft the instant decision consistent with such rulings." Order at 5–6 n.8. The Order clearly reflects Magistrate Judge Stillman's awareness and understanding of the orders relating to the permissible scope of discovery in the underlying litigation (see, e.g., Order at 6, 9, 14–15).

Several orders in the underlying litigation do, in fact, appear to limit or deny allegedly overbroad requests by FEI with respect to other entities. For example, in his December 3, 2007 Memorandum Opinion, Magistrate Judge Facciola of the U.S. District Court for the District of Columbia denied FEI's motion to compel the Humane Society of the United States ("HSUS") to produce all documents that referred, reflected, or related to the underlying litigation except with respect to "documents in its possession, control or custody that were created by any other party to this litigation in which that party discusses the litigation or any aspect of it," because "HSUS is not a party to this litigation and its statements about it are hearsay and irrelevant." Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, Case No.

1:03cv2006, 2007 WL 4261699, *2 (D.D.C. Dec. 3, 2007).[1] Elsewhere in that same order, with respect to a request that HSUS provide FEI with "documents that pertain to any 'other [other than Rider] current or former employee'" of FEI, Magistrate Judge Facciola indicated that he knew "of no reason why this information would be relevant." Id. at *3.

Although the language of Request 4 in the instant subpoena largely tracks that of the request denied by Magistrate Judge Facciola's order, FEI points out in its Response to PETA's objections that "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 the time" should not be overstated to preclude discovery of specific categories of documents for which relevancy has been demonstrated. Response at 9. In the same vein, the fact that FEI did not name all of the individuals listed in the Requests in its pretrial disclosures is not necessarily dispositive of the question of those individuals' relevance to the underlying litigation. FEI notes in its Response that two of the individuals named in the Requests, Archele Faye Hundley and Robert Tom, have already been named as witnesses in the pretrial disclosures of the plaintiffs in the underlying litigation, and that other individuals named in FEI's Requests were identified in correspondence between the parties in the underlying litigation as witnesses of conduct at issue in that litigation. Requests at 17–18; Exh. E at 2; Exh. F at 2. In other words, FEI clearly did not pick the names in its Requests out of a hat. Moreover, Magistrate Judge Stillman's Order specifically modifies the Requests to focus them on the underlying litigation.

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[1] It should be noted, however, that other non-parties such as the Wildlife Advocacy Project have received, and responded to, subpoenas and requests for deposition testimony issued by defendants in the underlying litigation. PETA's status as a non-party, in and of itself, does not preclude FEI from seeking or obtaining discovery from PETA.

See Order at 13–20.

PETA's argument that the Order "fashion[s] 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" (Objections at 13) is entirely speculative and clearly overstated, and does not merit extensive discussion. The standards for discovery set by Rule 26 of the Federal Rules of Civil Procedure are that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense" and that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). The fact that PETA, in the course of negotiations with FEI, has already produced documents responsive to FEI's Requests, including a chart and supporting documentation detailing payments, suggests that PETA, though not a party, is also not merely a "philosophical supporter" of the plaintiffs in the underlying litigation.

B. OVERBREADTH, VAGUENESS, AND UNDUE BURDEN

PETA argues that the Order is "confusing and vague concerning the scope of production that [it] is required to make." Objections at 14. The thrust of PETA's arguments in this connection seems to be that the Order's discussion of Requests 1–4 and its corresponding deletion of category (a) from each of those Requests (the category requesting all communications with or about the named and unnamed current or former FEI employees) do not actually limit those Requests, because the Requests as modified still ask for "All documents that refer, reflect, or relate to [each current or former FEI employee], including without limitation" the remaining categories. However, FEI correctly points out in its Response that the Order's modifications to "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." Response at 11. Magistrate Judge Stillman's intent to limit the scope of Requests 1–4 to their respective categories (b) through (e), as modified, is clearly manifested in the text of the Order. See, e.g., Order at 14 ("Specifically, the Court FINDS that subpart (a) of each request is overly broad and unduly burdensome, *thus PETA need not respond to that portion of the request* over and above any other responses directed herein.") (emphasis added). Magistrate Judge Stillman's intent to limit the scope of Request 4 to the individuals specifically named therein is likewise clear from the text of the Order. See id. ("Insofar as each of these persons identified is involved in the D.C. Litigation, potentially or in fact, the Court generally concludes that the information sought to be discovered in the various Requests for Production is relevant.").

PETA also argues that the Order's discussion and modification of Request 5 represent "an undue and unwarranted expansion of Request No. 5." Objections at 17. PETA's argument seems to be that the Order's passing reference to the relevance of any financial contributions by PETA (Order at 18) is intended to modify Request 5 to include PETA. In making this argument, PETA seems to have conflated the nature of Request 5, which seeks documents regarding *solicitations* of contributions by the enumerated persons and entities, with the Magistrate Judge's discussion of which *sources* of contributions would be relevant. The Order does not add any reference to PETA in its actual amendments to Request 5. See id.

PETA further argues that the Requests as modified by the Order are still unduly burdensome, especially with respect to Request 6, which seeks videotapes and pictures. PETA's

repeated reference to the burden associated with the review of "over 500 hours of videotapes" is belied by statements made to the Magistrate Judge by PETA's counsel. At the March 14, 2008 hearing, PETA's counsel acknowledged that PETA already has certain information about their videotapes (e.g., the identity of the cameraperson, the date, the circus being recorded, etc.) that would allow them to be somewhat selective in their review of the videotapes. Hr'g Tr. 23:5–25:2, Mar.14, 2008. Broad statements by PETA's counsel at that hearing also suggest that PETA is already aware of who and what appears–and more importantly, does not appear–in their videotapes. Id. at 24:18–25:2, 30:3–24. Moreover, at the April 8, 2008 hearing, PETA's counsel indicated that PETA had already started reviewing the videotapes in question (Hr'g Tr. 55:25–56:2, Apr. 8, 2008) and that PETA would only need another 20 days to complete their review and produce any responsive videotapes (id. at 56:5). A party should not be denied discovery of relevant nonprivileged documents or other materials simply because the volume of such documents or materials in the possession of the requested person or entity is considerable. This aspect of the analysis might be different if such a burden were being imposed, for example, on an individual. PETA, however, is a well-known international organization which, according to its website, has "more than 2.0 million members and supporters" and "is the largest animal rights organization in the world." See PETA, About PETA, http://www.peta.org/about/ (last visited Sept. 5, 2008). Its website also indicates that PETA is a 501(c)(3) non-profit corporation with an approximately $30 million operating budget. See PETA, About PETA > Financial Reports, http://www.peta.org/about/numbers.asp (last visited Sept. 5, 2008).[2] PETA is a repeat

[2] Pursuant to Rule 201 of the Federal Rules of Evidence, for purposes of deciding this matter, the court, sua sponte, takes judicial notice of the foregoing claims on PETA's website.

player in the courts throughout the United States, is represented by outside counsel in this matter, and has a legal department that has doubtlessly responded (and objected) to many civil subpoenas in the past. The Order and the Requests (as modified by the Order) are not vague, overbroad, or unduly burdensome.

C. PRIVILEGE AND ATTORNEY WORK PRODUCT ISSUES

PETA raises various objections to the effect that the Order directs PETA to produce documents or other materials subject to the attorney-client privilege, the attorney work product doctrine, or the common interest/joint defense doctrine. PETA also claims that production of certain documents or other materials "may reveal PeTA's confidential strategies in uncovering and documenting abuse of elephants in FEI circuses." Objections at 20. Although Rule 45(c)(3)(B)(i) of the Federal Rules of Civil Procedure provides for the protection of trade secrets or other confidential research, development, or commercial information, in the discretion of the court, this court is not convinced that any nonprivileged content of the videotapes sought by the Requests would fall within any of these categories.

With respect to PETA's claim that some of its videotapes "may include conversations with PeTA counsel or comments by PeTA personnel as to the advice they received from counsel" (Objections at 20) and other arguments to that effect, this court need only remind PETA that Rule 45(d)(2) of the Federal Rules of Civil Procedure provides the proper mechanism for withholding materials on the basis of the attorney-client privilege or work product doctrine and, as noted in the Order, requires PETA to produce a privilege log.

PETA's argument that Request 7, as modified by the Order, requires PETA to produce communications with counsel regarding litigations other than the underlying litigation is without

merit. Request 7, as modified, explicitly relates only to "[FEI]'s care or treatment of its elephants at issue in the [D.C.] litigation." Order at 19–20. Moreover, even if Request 7 were as broad as PETA maintains, pursuant to Rule 45(d)(2), PETA could conceivably withhold any documents subject to the attorney-client privilege or attorney work product doctrine.

PETA also apparently seeks to shield documents from production by capitalizing on the fact that both it and various plaintiffs in the underlying litigation employ the law firm of Meyer, Glitzenstein & Crystal ("MGC") as legal counsel. However, PETA's argument in this connection is belied by the plain language of the Request as modified by the Order. Request 7 clearly seeks documents relating to the underlying litigation that PETA has provided to the plaintiffs in that litigation or counsel *acting in their capacity as counsel for plaintiffs in the underlying litigation* (as opposed to in their capacity as PETA's counsel). To the extent PETA provided otherwise responsive documents to MGC in connection with MGC rendering legal advice *to PETA*, those documents might be subject to the attorney-client privilege and, consequently, withheld under Rule 45(d)(2). However, PETA is also reminded that, pursuant to Rule 45(d)(2)(A)(ii), it must provide in its privilege log sufficient detail as to the nature of the withheld documents to enable both parties to assess its privilege claims.

PETA also attempts to raise the common interest/joint defense doctrine as a shield to production. This argument stands in stark contrast with PETA's repeated emphasis of its utter lack of involvement in that litigation. As noted above, PETA is a non-party to the underlying litigation, albeit an interested one. Although PETA notes in its Objections that it has, in the past, engaged in litigation against FEI, it does not claim to be currently engaged in any relevant litigation against FEI or any other defendant in the underlying litigation. As the Fourth Circuit

has noted on more than one occasion, the common interest/joint defense doctrine is intended to protect "parties who share a common interest in litigation." In re Grand Jury Subpoena, 415 F.3d 333, 340 (4th Cir. 2005). PETA appears to read this broadly to encompass even common policy goals shared by individuals or organizations. See Objections at 21. However, although the doctrine has been extended in a variety of circumstances, including situations involving separate, parallel litigations–see, e.g., In re Grand Jury Subpoenas 89-3 and 89-4, John Doe 89-129, 902 F.2d 244, 248–49 (4th Cir. 1990)–the parties claiming common interest or joint defense privilege must share a common interest in a *particular* litigation or family of litigations, whether ongoing, pending, or prospective. PETA's repeated insistence that it has no role whatsoever in the underlying litigation, combined with its failure to direct the court's attention to any current ongoing, pending, or prospective litigation(s) in which it shares a common interest with the plaintiffs in the underlying litigation, demonstrate that the common interest/joint defense doctrine is inapplicable here.

D. ALLOCATION OF THE COST OF REVIEW FOR PRODUCTION

The Order provides that "all costs associated with the inspection, viewing and copying of any responsive photographs and videotapes, including the provision of any necessary equipment and/or personnel, are to be borne solely by FEI." Order at 19. However, PETA asks for more, arguing that FEI, not PETA, should "have to foot the bill for reviewing over 500 hours of videotapes" and "incur the costs of reviewing thousands of documents" for responsiveness to FEI's requests.

There is a question as to whether or not PETA raised this particular objection before the Magistrate Judge; if it did not, PETA would be precluded from raising the issue before this court.

See, e.g., Jesselson v. Outlet Assocs. of Williamsburg, LP, 784 F. Supp. 1223, 1228 (E.D. Va. 1991). In any case, however, even if the objection were properly raised, this court would be inclined to agree with Judge Sullivan (the district judge in the underlying litigation) and Magistrate Judge Stillman that this "litigation suffers from a sort of 'poisoned atmosphere,' that has resulted in an inability of counsel for all the parties and nonparties to agree on document production in a timely and efficient fashion." Order at 9 (internal citations omitted). Accordingly, just as Magistrate Judge Stillman declined to award costs or attorney's fees in connection with FEI's motion to compel, this court declines to alter the allocation of the costs of production between the parties.

E. PRODUCTION PURSUANT TO PROTECTIVE ORDER

The court in the underlying litigation ordered on September 25, 2007 that, as of that date, "all information disclosed during discovery . . . will be sealed and both parties and their counsel are prohibited from disclosing it to any person who is not a party to this lawsuit or counsel to one of the parties." Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, Case No. 1:03cv2006 (D.D.C. Sept. 25, 2007) (discovery order). That protective order continues to be binding on the parties in the underlying litigation, including FEI. Magistrate Judge Stillman also explicitly indicated at the April 8, 2008 hearing that the September 25, 2007 protective order in the underlying litigation would also apply to this matter and any production made pursuant to the Requests as modified by the Order. See Hr'g Tr. 34:14–24, Apr. 8, 2008.

F. TIME TO RESPOND

PETA argues that the Order is clearly erroneous because it gave PETA only ten days to

respond to the Requests. PETA contends that Magistrate Judge Stillman indicated at the April 8, 2008 hearing that he would give PETA 20 days to respond. See Objections at 23. However, as already noted above, it was PETA's counsel that represented to the Magistrate Judge at that hearing that it (1) had already begun its review of materials potentially responsive to the Requests and (2) would need approximately 20 more days to complete its review and make its production. Hr'g Tr. 55:25–56:5, Apr. 8, 2008). FEI correctly points out in its Response that Magistrate Judge Stillman provided the parties with his provisional rulings at the April 8, 2008 hearing. Accordingly, PETA was on notice of the rulings over two months prior to the issuance of the Order on July 22, 2008–far more time than PETA claimed it needed to complete its review. In light of the foregoing, the court finds the ten-day deadline imposed by the Order reasonable, and will impose the same deadline in this order.

G. PETA'S FIRST AMENDMENT ARGUMENTS

PETA's Objections are peppered with references to the First Amendment. See, e.g., Objections at 5, 7, 9–10, 13, 17, 18. However, despite its "significant First Amendment concerns" (Objections at 10), PETA provides no substantive discussion or case citations on this issue in its Objections. Moreover, as noted above, "[r]eview of a Magistrate's ruling before the District Court does not permit consideration of issues not raised before the Magistrate." Jesselson v. Outlet Assocs. of Williamsburg, LP, 784 F. Supp. 1223, 1228 (E.D. Va. 1991). In this case, the only First Amendment issue litigated before Magistrate Judge Stillman was the concern that requiring disclosure of the sources of funding might implicate the First Amendment right to freedom of association. At the April 8, 2008 hearing, "the Court acknowledged PETA's First Amendment privacy interests with respect to any support it may have provided to this or any

other animal-rights litigation." Order at 8. The Magistrate Judge's cognizance of and concern for the First Amendment implications in this case are also manifest in the provisions of the Order itself, which, consistent with the orders of the court in the underlying litigation, allow "documents to be redacted to protect the personal identifying information of . . . any person other than a party, an attorney for a party, an employee or officer of any plaintiff-organization or WAP, or PETA itself." Order at 15.

CONCLUSION

For the foregoing reasons, defendant's Objections to Magistrate Judge Stillman's July 22, 2008 Order are **OVERRULED**, and defendant's request to vacate that Order is **DENIED**. Defendant is further **DIRECTED** to comply with all provisions of Magistrate Judge Stillman's July 22, 2008 Order and to respond to plaintiff's Amended Requests for Production (as modified by that Order) forthwith, and in no case later than close of business on Tuesday, September 23, 2008.

The Clerk is **REQUESTED** to send a copy of this order to all counsel.

The Clerk is further **REQUESTED** to send a courtesy copy of this Order and Opinion to the clerk of the United States District Court for the District of Columbia.

It is so **ORDERED**.

Jerome B. Friedman
UNITED STATES DISTRICT JUDGE

September 8, 2008
Norfolk, Virginia