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 REPLY BRIEF IN SUPPORT OF ITS
MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Plaintiff, Feld Entertainment, Inc. (hereinafter, "FEI"), by counsel, as and for its brief in reply to the Defendants' Brief in Opposition to FEI's Motion to Compel Production of Documents, states as follows:

PROCEDURAL BACKGROUND TO THE MOTION

The action from which the subpoena at issue stems is pending in the United States District Court for the District of Columbia. FEI is a party in that action. People for the Ethical Treatment of Animals (hereinafter, "PETA") is not. In September of 2007, counsel for FEI issued a subpoena *duces tecum* to PETA (hereinafter, the "FEI subpoena"). Because PETA is headquartered in Norfolk, the documents to be produced pursuant to the subpoena are believed to be located in Norfolk, and the production ordered by the subpoena was to be in Norfolk, FEI issued its subpoena out of the Eastern District of Virginia, as it was required to do under the Rules of Civil Procedure. Thereafter, PETA sought to avoid production under the subpoena. A protracted period of FEI and PETA trying informally to resolve their dispute followed. When

that effort proved unsuccessful—and mindful that the discovery cut-off in the underlying case had been set for January 30, 2008—FEI moved to compel production by PETA on January 28, 2008. That motion was brought in this district because Rule 37 required it to be. PETA has filed its Brief in Opposition to PETA's Motion to Compel (hereinafter, the "Opposition Brief"). With the filing of this Reply by FEI, the briefing of FEI's Motion is complete and the matter is ripe for adjudication by this Court.[1]

ARGUMENT

I. FEI's Motion to Compel is Timely

As noted above (and as conceded by PETA), the discovery cut-off in the case giving rise to the FEI subpoena was January 30, 2008. FEI filed its instant Motion prior to that deadline. FEI attempted to work with PETA informally to resolve their differences concerning its production under the FEI subpoena over a period of several months. However, with the discovery cut-off looming and the issue still unresolved, FEI had no recourse but to properly (and timely) bring the matter before this Court for resolution. The deadline was the deadline. Not two days, nor two weeks, nor two months earlier. FEI filed its motion before the deadline. By definition, it is not untimely.

[1] PETA seeks to have FEI's Motion to Compel transferred to and decided by the District Court for the District of Columbia. PETA first asked FEI to agree to the D.C. court's jurisdiction. However, FEI is unaware of any means by which parties to a dispute over a subpoena can confer jurisdiction on one tribunal to quash a subpoena issued by another tribunal. By FEI's understanding of the law, a court either has jurisdiction or it does not. In this instance, Rules 37 and 45 make it clear that jurisdiction over the production at issue rests exclusively with this Court. Faced with FEI's rather obvious decision to comply with the Rules and the law pertaining to its Motion, PETA has moved this Court for a protective order, to stay these proceedings, and to transfer the matter to D.C. FEI will respond to each of those PETA motions in due course. For the time-being, however, it is sufficient to note that FEI believes that PETA has misstated both the facts and the law pertaining to them and that, at the end of the day, there is no reason why this Court cannot and should not promptly rule on FEI's pending Motion to Compel.

II. FEI's Motion is Pending in the Appropriate Forum

In a separate, but related, filing with this Court, made coincident with the filing of its Opposition Brief, PETA makes the startling claim that FEI's seeking to enforce its subpoena in the Court from which it issued (and where the production was to be had) somehow constitutes cynical "judge shopping" on FEI's part. *See* Motion for Protective Order to Transfer This Matter to the District of Columbia, or to Stay the Matter, Document 7, Filed February 13, 2008, p. 2. FEI did not such thing. In fact, it advised the D.C. court at a status hearing on November 20, 2007 that it likely would have to file a motion to compel against PETA and that such motion would arise in the Norfolk Division of the Eastern District of Virginia.

Both PETA and this Court need look no farther than Rule 37 to know that "[a]n application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken." FRCivP 37(a)(1). To the extent that any "judge shopping" is associated with FEI's instant motion, that would appear to be entirely on PETA's part After all, it is PETA—and not FEI—that seeks to avoid this Court's hearing and deciding FEI's Motion. PETA is in Norfolk. The documents and things to be produced are believed to be in Norfolk. The production requested was to be made in Norfolk. The FEI subpoena was issued from this Court, which sits in Norfolk. Rule 37 requires any enforcement motion to be filed in Norfolk. And FEI moved this Court, in Norfolk, to enforce that subpoena.[2] Still, PETA—which is doing everything within its power to have a court in the District of Columbia decide the

[2] As PETA concedes in the related motions it filed with this Court, neither the Eastern District of Virginia nor the Fourth Circuit has ruled on whether a court before which a discovery motion is pending should stay its decision it until such time as the court in a different jurisdiction where the underlying action arose has addressed the discovery question presented. Neither does the law where the underlying action pends in *this* case mandate either a stay or a deferral to another court's judgment. Rather, the law in the District of Columbia is that such steps *may* be taken. It manifestly does not mandate that they be taken, nor even suggest that they *should* be. *See, e.g.*, In re Sealed Case, 141 F.3d 337 (D.C. Cir. 1998).

question instead—is willing to accuse FEI of "judge shopping." Its doing so stands logic squarely on its head.

III. FEI's Motion Is Not Contrary To, Nor Violative Of Any Order of the D.C. Court

Notwithstanding PETA's implication to the contrary, no order concerning the production it has been asked to make has been issued by the district court before which the underlying action is pending. Nor could such an order exist, given that PETA is not located within that district. Likewise the district court in the District of Columbia has not issued any order that would preclude FEI from requesting the documents it sought through its subpoena. The closest thing to which PETA can cite is an order stating that one of the plaintiffs to the underlying action (Mr. Rider) need not identify the sources of certain of his non-party funding. Of course, the discovery at issue is not directed to Mr. Rider. Nor is there any rule or law that would preclude FEI from double-checking the accuracy of Mr. Rider's own court-ordered disclosures concerning his financial support by seeking corroborative information from likely third-party donors. As it is, PETA either has the documents requested or it does not. If it does, it must produce them. If it wants to produce them pursuant to a protective order, it should say so. The same Rules apply to PETA as apply to anyone else to whom a subpoena is sent. No more, and no less. And, in any event, no court has yet to rule on the discovery at issue.

IV. If PETA Claims Documents Are Privileged, It Should Submit a Privilege Log

The instructions that accompanied the FEI subpoena advised PETA to do what the Rules likewise require in the event PETA believes responsive documents are subject to a valid claim of privilege: note them on a privilege log accompanying its non-privileged production. While

PETA makes noise about the existence of privileged communications, it has yet to produce such a log. Were it to do so, then both FEI and this Court could address the matter properly. Until then, PETA should not be heard to complain about the FEI subpoena somehow encroaching on a claim of privilege.

V. The Dispute Concerning the Documents Pertaining to Mr. Hagan Has Not Been Amicably Resolved

If it had been, FEI would not still be seeking them. Nor would PETA still be refusing to provide them. As it is, Frank Hagan is a key witness who has since died, but whose testimony was preserved by deposition. FEI is entitled to impeach that testimony by any means permissible under the Rules of Evidence. Hence, its request to PETA concerning him. Remarkably, having first complained about producing the documents requested, PETA then observes that it has no responsive documents anyway (not anymore, at least). One has to assume, therefore, that much of what PETA has to say on this topic is complaining essentially for its own sake. Of course, it could be that PETA is seeking to throw up enough of a smokescreen to obscure the more interesting question of why it no longer has in its possession documents it reasonably could have believed were relevant in the underlying litigation, of which it was—and for sometime now—has been well aware. Since those documents evidently once existed and no longer do, PETA seems to be avoiding the obvious question of when they disappeared, and why.

VI. PETA Fails to Explain How the Requests Contained in the FEI Subpoena are Overbroad or Unduly Burdensome

PETA makes the conclusory statement that certain of FEI's requests are overly broad and unduly burdensome. Yet, in virtually every instance, it fails to state how that is so. A few illustrations will serve to make the point:

(1) PETA balks at producing documents containing communications with FEI's current and former employees. That it has responsive documents in its possession is not in dispute. Instead, PETA complains that the documents at issue somehow implicate its "trade secrets" and that the information they contain would be inadmissible anyway. If PETA truly has a valid concern about protecting "trade secrets" (whatever those might be) in its communications with FEI's own employees, then it must identify them and move for an appropriate protective order. As for PETA's concern about admissibility, FEI refers this Court to the December 18, 2007 Order of Magistrate Judge John M. Facciola in the underlying litigation (a true copy of which is attached as Exhibit 1 to this Reply). In it, Judge Facciola notes that it would be "reckless" for him to try to predict how the trial judge will rule on the admissibility of evidence. However, he notes that he need not run that risk, as the test for information's discoverability is distinctly different from that concerning its admissibility at trial. *Id*., pp. 2-3. The same is equally true here. Admissibility is another question for another day. The issue on the table now is whether the information FEI seeks is discoverable. Plainly, it is.

(2) PETA complains that it should not have to produce videotapes in its possession of, *inter alia*, FEI's elephants (which are, after all, what the underlying suit is all about). PETA first complains that there are too many of them and it would take too long to review them all. Yet it should be noted that PETA has had since September of last year to do so and, evidently, has

chosen not to make thoughtful use of the intervening four months' time.[3] PETA also complains that it does not know which tapes it gave to the plaintiffs in the underlying action. If that is the case, then PETA has even less of an argument against producing *all* of its responsive tapes. After all, PETA concedes that it provided videotapes of FEI's property (presumably, its elephants) to the plaintiffs in the D.C. action. It hardly seems fair that it would be permitted to benefit from its own sloppy recordkeeping in an effort to deny FEI the same information PETA long ago willingly provided FEI's opponents in this suit.

PETA also complains that the request extends beyond the six elephants at the heart of the plaintiffs' claim. While that certainly is true, it should also be remembered that, over FEI's objection, the D.C. court has permitted the *plaintiffs'* discovery to extend to all of FEI's elephants. If that scope is not too broad for the plaintiffs, then it manifestly is not too broad for the defendant, FEI.

Finally, PETA suggests that it is entitled to withhold the tapes at issue because they contain an audio track and that FEI somehow has an ulterior motive in seeking to hear it. Once again, PETA either has responsive documents or it does not. If they are privileged in some way, they need to be put on a privilege log. If they require special protection from additional disclosure, they should be the brought under the aegis of a protective order. The one thing that clearly is not appropriate is for PETA to challenge the motives of FEI (a party attempting to defend itself in litigation in which PETA is not even involved) and then refuse to produce the documents on that ground.

[3] It should also be noted that, earlier in the underlying action, FEI was required to make available for the plaintiff's inspection and copying in the underlying action all of its videotapes showing its elephants—opening to discovery an FEI library of nearly thousands of tapes, which the parties then had to cull for elephant footage.

As the foregoing examples make clear, when PETA claims that production would be unduly burdensome, what it really means is that it does not want to share the information with FEI. The law requires PETA to do more than merely intone the words "overbroad" and "unduly burdensome" and then sit back to wait and see what happens. FEI's requests are reasonable in scope and—in the absence of any credible showing by PETA why it would be otherwise—clearly do not impose an undue burden on the respondent.

CONCLUSION

FEI stands by what it said in its Brief in Support of its instant Motion to Compel. And, for all its histrionics, nothing in PETA's Opposition Brief excuses or precludes its producing the documents FEI properly requested nearly five months ago.

WHEREFORE Plaintiff Feld Entertainment, Inc. respectfully repeats its earlier request that this Court grant its Motion to Compel production of the documents at issue, that it be awarded its fees and costs incurred in making that Motion, and that it be awarded such other and further relief as to this Court may be deemed meet and proper.

FELD ENTERTAINMENT, INC.

By: _____/s/_____

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

Dawn L. Serafine, Esquire
Virginia Bar Number 48762
Attorney for Plaintiff
Troutman Sanders LLP
150 West Main Street, Suite 1600
Norfolk, Virginia 23510
Telephone: (757) 687-7558
Facsimile: (757) 687-1537
E-mail: dawn.serafine@troutmansanders.com

Of Counsel:

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

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

Counsel for Plaintiff Feld Entertainment, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2008, I will electronically file the foregoing Plaintiff FEI's Reply Brief on its Motion to Compel 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:

Counsel for Defendant PETA
J. Bryan Plumlee, Esquire
Virginia State Bar No. 44444
Dorinda S. Parkola, Esquire
Virginia State Bar No. 65808
Attorney for Defendant
HUFF, POOLE & MAHONEY, P.C.
4705 Columbus Street
Virginia Beach, VA 23462
Telephone: (757) 499-1841
Facsimile: (757) 552-6016
Email: bplumlee@hpmlaw.com
Email: dparkola@hpmlaw.com

Philip J. Hirschkop, Esquire
Virginia State Bar No. 04929
HIRSCHKOP & ASSOCIATES, P.C.
908 King Street, Suite 200
Alenandria, Virginia 22314
Telpehone: (703) 836-6595
Facsimile: (703) 548-3181
hirschkoplaw@aol.com

And I hereby certify that I will mail the document by U.S. mail to the following non-filing user:

Co-Counsel for Plaitniff
Lisa Zeiler Joiner, Esquire
George Gasper, Esquire
FULBRIGHT & JAWORSKI, LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 200004

/s/
Christopher A. Abel, Esquire
Virginia Bar Number 31821

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