**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,** | : | |
| **Plaintiffs,** | : | |
| **v.** | : | **Case No. 1:03-CV-02006 (EGS)** |
| **RINGLING BROS. AND BARNUM & BAILEY CIRCUS, et al.,** | : | |
| **Defendants.** | : | |

**REPLY IN SUPPORT OF DEFENDANT FELD ENTERTAINMENT INC.'S EXPEDITED MOTION TO ENFORCE THE COURT'S SEPTEMBER 26, 2005 ORDER**

Defendant Feld Entertainment, Inc. ("FEI") hereby submits this reply in support of its expedited motion to enforce the Court's order of September 26, 2005 ("Motion") (Docket No. 152) and in response to plaintiffs' opposition to the motion ("Pl. Opp.") (Docket No. 154). Although no hearing is necessary for the straightforward issue presented by the motion, FEI does not oppose plaintiffs' request for a hearing. *See id.* at 2. Indeed, a hearing would further elucidate the point that plaintiffs' actions are contrary to the Court's September 26, 2005 order (Docket No. 50) ("9-26-05 Order").

## INTRODUCTION

Plaintiffs' opposition basically makes a mockery of the Court's 9-26-05 Order. According to plaintiffs, if a document produced in discovery in this case is not under a protective order and/or has been filed as an exhibit to a pleading or motion in this case, then plaintiffs are free to do whatever they want with the document. However, plaintiffs' position cannot be squared with the Court's clear direction that:

> the purpose of discovery is to produce and seek evidence for use *in litigation* and the Court will not take lightly any abuse of the discovery process for purposes of publicity or to argue the merits of plaintiffs' claims in the media, as opposed to the Court.

9-26-05 Order at 2 (original emphasis). This was not, as plaintiffs apparently assume, some kind of "green light" to conduct a media campaign with discovery documents as long as they are first filed with the Court. The Order contains no such "safe harbor." Indeed, if the only point of the Order was to make plaintiffs file documents before giving them to the media, then the admonition against using discovery for publicity or to argue the case in the media would have no meaning.

What plaintiffs would like to forget -- and apparently hope the Court will overlook -- is the fact that the 9-26-05 Order was not just about whether veterinary records should be placed under a protective order. To be sure, the Court granted a limited protective order as to certain veterinary records used in research. *Id.* at 1. But there is more to the 9-26-05 Order than that. Plaintiffs do not deny that one of the issues expressly raised by FEI, both in the protective order briefing and in the September 16, 2005 hearing, was the fact that plaintiffs already were using discovery materials produced in this case – not simply to litigate their claims – but also to conduct a media campaign against FEI. *See* Motion at 4. And FEI's point was not based on veterinary records, but on plaintiffs' use of other discovery material (an elephant video). Docket No. 29 at 1-2, 26-27; Docket No. 38 at 7. It was evidently in response to this broader concern that the Court included the admonition in the 9-26-05 Order.[1]

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[1] Plaintiffs find it significant that the Court did not place the elephant video under protective order. Pl. Opp. at 17 n. 6. However, there was nothing that the Court practically could have done about this because, by the time of the hearing, the video had been distributed to a non-party over whom the Court had no control. However, the Court could warn plaintiffs not to do this sort of thing again – which is exactly what the Court did in the 9-26-05 Order.

There is a fundamental difference between, on the one hand, litigating a civil case in full public view in court with documents produced by both sides in discovery and, on the other, taking those same documents outside the litigation process and conducting a media campaign. The former is a proper purpose of the discovery process; the latter is not. Plaintiffs are perfectly free to do the former, but the 9-26-05 Order admonished them not to do the latter. In simple English, plaintiffs are free to use discovery materials essentially without restriction to ***litigate this case***. FEI's Motion has no impact whatsoever on that. But what plaintiffs are not free to do is take such materials ***outside the litigation to argue their case in the media.*** FEI's Motion seeks a halt to that.

An explicit admonition in an order issued by a United States District Court is not to be taken lightly. *Cf. United States v. Cutler*, 840 F. Supp. 959, 964 (E.D.N.Y. 1994) (an "admonition" is a "warning;" although not ultimately a basis for criminal contempt, a judicial admonition to an attorney not to talk to the press during a trial should have been "understood and taken . . . to be an order of the Court which must be obeyed"). If what plaintiffs admit they are doing with discovery documents is permissible, then the Court's admonition would have been a nullity. While plaintiffs apparently are willing to assume that the Court's admonition was an empty gesture, FEI believes that the Order means what it says, *i.e.*, that plaintiffs are to make their case in court, not in the media.

What is even more troubling than the cavalier attitude about the 9-26-05 Order expressed in plaintiffs' brief, is the conduct of plaintiffs that came to light only ***after*** FEI filed its motion to enforce. Instead of merely quoting from discovery documents on their websites, plaintiffs now are actually taking proactive steps to distribute the discovery documents themselves to the media. And this has come in disclosures that appear timed to correspond to the schedule of at least one

of FEI's circus units. Thus, on or about June 22, 2007, coincident with the opening of FEI's Red Unit show in Las Vegas, a Las Vegas television station (Channel 8) posted on its website a link entitled "Fact Sheet: Federal Lawsuit Against Ringling Brothers and Barnum & Bailey Circus." http://www.klas-tv.com/Global/story.asp?S=6694310, Ex. 1 hereto. The station broadcast a story based on the material appearing at the link. *Id.* Moreover, that link, when accessed, leads to 25 pages of material -- a memorandum and attachments – that, on its face, was issued jointly by all four of the organizational plaintiffs, bearing a facsimile transmission date of "June 11, 2007." Ex. 2 hereto. Attached to that memorandum are, among other things, the same discovery documents giving rise to the instant motion to enforce. *Compare id. with* Ex. 5 to Motion.

On June 22, 2007, that same Las Vegas television station aired further stories about the circus. "Face to Face: Out of Their Element? June 22, 2007" (http://www.lasvegasnow.com/Global/story.asp?S=1560638), Ex. 3 hereto. This broadcast exhibited one discovery document produced by FEI in this case, and featured a video of plaintiff Tom Rider actually reading from another. "Face to Face" DVD at Segment 1 (Ex. 4 hereto.) None of these actions was a proper use of discovery documents produced in a civil case, and all of them plainly were undertaken by plaintiffs for purposes of publicity or to argue the merits of their claims in the media. It is as if plaintiffs are daring this Court to enforce the 9-26-05 Order.

Instead of responding to the Motion on its merits, plaintiffs resort to the now-predictable tactic of trying to distract the Court with irrelevant issues. Thus, plaintiffs rehash the events concerning FEI's production of the vet records – issues that already have been the subject of rulings by the Court and certified compliance by FEI. (Docket Nos. 98 & 112). None of this has anything to do with whether ***plaintiffs' actions*** are contrary to the 9-26-05 Order.

Similarly, plaintiffs make the same tired claim that FEI's Motion is some kind of "trick," Pl. Opp. at 1, to avoid the merits of this case. To the contrary, FEI has pending a fully briefed motion for summary judgment, Docket Nos. 85-87, 96, 97, 100, 113, 122, 123, 145 & 147, that, if granted, would terminate this case on the merits forthwith. And even if there ultimately were something in this case to try (and there is not), FEI has no problem with a trial in a court of law presided over by a judge applying the rules of evidence. FEI has hidden nothing and has nothing to hide about the way it cares for its Asian elephants; it has been under a federal regulatory microscope for decades with no decision that any of the things plaintiffs complain about are illegal or abusive. What FEI does have a problem with – and what the 9-26-05 Order clearly admonishes plaintiffs not to do – is trying this case in the media.

## ARGUMENT

**1. The motion to enforce has nothing to do with plaintiffs' "freedom of speech."**

Plaintiffs argue that "if defendants [*sic*] have their way, the public will never know whether plaintiffs' ESA claims have any validity – while defendants continue to tell the public that they give their elephants the highest standard of care . . . ." Pl. Opp. at 1-2. Plaintiffs further argue that they "have a First Amendment right to discuss these matters" in the media and that FEI is seeking an "impermissible gag order." *Id.* at 16, 2. Plaintiffs' efforts to wrap themselves in the First Amendment are unavailing.

In the first place, it is not up to the "public" to determine whether plaintiffs' claims have any "validity." That is a matter for the Court, as the Court specifically pointed out during the September 16, 2005 hearing leading to the 9-26-05 Order. Transcript of Hearing at 26-27 (Docket No. 51) ("You're here before me because you've alleged that they're not complying with the Endangered Species Act. . . . [I]t's not up to the public to do that. It's not up to the

public to look at some photos of an injured elephant and say . . . look what they're doing to that elephant").

Nor would enforcement of the Court's admonition impair plaintiffs' right to speak on what they claim is a matter of "undeniable public importance." Pl. Opp. at 20. Regardless of what else the First Amendment may cover, what plaintiffs have no First Amendment or common law right to do – and what the 9-26-05 Order restricts them from doing -- is to disseminate discovery documents to the media, before there has ever been a trial or other judicial resolution in this case.

In this regard, although plaintiffs claim the Motion is "frivolous," they make no effort to refute the points in the Motion that litigants have no First Amendment right to distribute discovery documents outside the litigation process and that (at least in this Circuit) documents filed in the record of a case are not "judicial records" unless they have been the basis for judicial action. Motion at 9-11, 12-13. Similarly, plaintiffs' repeated reference (Pl. Opp. at 5, 16) to a "statutory presumption in favor of open discovery" is off the point. The cases cited by plaintiffs[2] involved restrictions imposed by the courts on parties to a case with respect to use of documents in the case and subsequent access by the public to the court file. Neither case addressed the issue here, namely, the restriction imposed by this Court on plaintiffs' use – outside the litigation – of materials obtained in discovery. Indeed, the modest limitation that the Court imposed here (use the documents in the case but not the media) is no different than the order issued by Judge

[2] *Does v. Yogi*, 110 F.R.D. 629 (D.D.C. 1986); *In re "Agent Orange" Prod. Liability Lit.*, 104 F.R.D. 559 (E.D.N.Y. 1985).

Robinson in *In re Korean Air Lines Disaster of September 1, 1983*, 597 F. Supp. 621, 622-23 (D.D.C. 1984), *see* Motion at 11 – a case that plaintiffs simply ignore.[3]

It likewise makes no difference that the documents at issue here "are readily available to anyone who requests a copy from the courthouse or through the PACER system." Pl. Opp. at 17. The admonition in the 9-26-05 Order is not directed to access by non-parties to the court's file. The admonition addresses the extent to which plaintiffs -- ***existing parties to the litigation*** -- should be permitted to run media campaigns with the fruits of pre-trial discovery in advance of trial or other judicial resolution of the case. Here, it is clear that the Las Vegas television station received material from plaintiffs rather than accessing PACER. As the portions of the September 16, 2005 transcript cited by plaintiffs make clear, Pl. Opp. at 6-7, the Court explored all facets of the issue, ranging from sealing parts of the record completely to no restrictions at all. However, in the end, as the 9-26-05 Order demonstrates, the Court decided against the media free-for-all that plaintiffs had espoused. The only reason that plaintiffs even have the documents at issue is because they were produced in this case by FEI pursuant to the Court's orders and the Federal Rules of Civil Procedure. Therefore, the modest restriction that the Court placed on the use of those materials outside this case (a restriction that plaintiffs are deliberately flouting) was entirely reasonable and within the Court's authority.

Plaintiffs also attempt to justify their conduct on the ground that they need to disseminate discovery information in order to combat public statements made by FEI about its elephants. Pl. Opp. at 1-2. The flaw in this argument is that plaintiffs do not point to a single instance in which FEI has quoted from or used discovery information from this case in the media. Indeed, FEI has

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[3] Plaintiffs miscite *International Action Center v. United States*, 207 F.R.D. 1 (D.D.C. 2002). *See* Pl. Opp. at 16. That case did not hold that parties are free to publicly disseminate discovery to "convey the message of the protest," as plaintiffs imply. The comment by the court arose in the context of deciding whether information arguably relevant could be discovered at all even though it was protected by the First Amendment. 207 F.R.D. at 3.

consistently refused to comment on this case to the press, despite the media inquiries that plaintiffs' activities have fomented. Under plaintiffs' interpretation of the Court's admonition, FEI would be entirely free to hold a press conference and point out that discovery in this case shows that Tom Rider has been bank-rolled by the organizational plaintiffs for the past seven years to the tune of more than $100,000; has no other job; has evaded federal and state income tax by not filing tax returns since 1998; has destroyed discoverable evidence in this case; has committed perjury in his interrogatory answers in this case and was declared a deserter from the United States Army. All of these facts are set forth in exhibits that have been filed in this case and that are not under protective order. *See* Docket Nos. 85, 101, 111, 115. However, unlike plaintiffs, FEI has kept these matters within the litigation. If the Court's admonition is to be disregarded, then these facts about Rider -- all of which are documented in the public court file -- would be germane in any media discussion of the credibility of plaintiffs' primary witness.

At bottom, while plaintiffs profess an interest in litigating this case in the open, their position is disingenuous. If plaintiffs were sincere about complete transparency in this case of "undeniable public importance," Pl. Opp. at 20, they would not have filed two motions for protective order to keep damaging, but highly relevant, information about Rider from public view. Docket Nos. 106 & 141. Nor would they have forced FEI to file three motions to compel compliance with interrogatories and document production requests directed to all of the plaintiffs and to compel compliance with a subpoena issued to the organization (controlled by plaintiffs' counsel) that is funding Rider. Docket Nos. 85, 126 & 149.

2. **Plaintiffs' actions are an abuse of the discovery process.** Plaintiffs claim that their dissemination of discovery documents is not an abuse of the discovery process because their websites "have simply quoted directly from defendants' own internal documents." Pl. Opp.

at 17. This is not accurate.[4] To the contrary, plaintiffs have done exactly what FEI argued they would do prior to the issuance of the Court's admonition – they have taken these materials out of context and mischaracterized them. There is ample evidence of plaintiffs' abuse of the discovery process.

For example, plaintiffs acknowledge in their brief before the Court that the document written by Deborah Fahrenbruck was "never sent." Pl. Opp. at 11. However, that acknowledgment appears nowhere in plaintiffs' website references to this document. *See* Exs. 4, 6-10 to Motion. Furthermore, while plaintiffs include in their exhibits here the Fahrenbruck email stating that the document was not sent to its addressee, *see* Pl. Opp., Ex. 2, that same email was ***omitted*** from the facsimile package that was sent to the television station in Las Vegas and posted on the station's website. Ex. 2 hereto. Thus, the Fahrenbruck "letter" was essentially presented to the media as a document that had been transmitted to the Chief Executive Officer of FEI -- when that in fact never happened. That is an abuse of the discovery process.

Furthermore, while plaintiffs admit that they have had the Fahrenbruck document since July 19, 2006, Pl. Opp. at 9, they do not tell the Court that, since July 19, 2006, plaintiffs have also taken and completed the depositions of three of the FEI employees who are referred to in the Fahrenbruck document – Troy Metzler, Robert ("Suny") Ridley and Alex Vargas. However, in none of those depositions did plaintiffs show the witnesses the Fahrenbruck document and ask them about it. Nor have plaintiffs deposed Fahrenbruck. Thus, instead of using the document for a proper purpose – discovery in this case to find out what the facts are – plaintiffs gave the

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[4] This statement is particularly troubling given the events in Las Vegas that occurred after FEI filed the Motion. All of those events, including the June 11 facsimile transmission and the June 22 broadcast of Rider's interview, occurred ***before*** plaintiffs filed their opposition to the Motion on June 25. Docket No. 154. So, for plaintiffs to continue the pretense that all they are doing is quoting from discovery documents on their websites – when they know that they are doing much more than that – is contrary to plaintiffs' duty of candor to the Court.

document to the media to make their case there without knowing what the facts surrounding that document were. That also is an abuse of the discovery process.[5]

It also is clear that plaintiff Tom Rider is directly involved in plaintiffs' abuse of the discovery process. Despite plaintiffs' inaccurate speculation[6] about why Rider's conduct was not called into question by the Motion, the fact is, at that time, FEI suspected, but did not have direct evidence, that Rider's actions were contrary to the admonition in the 9-26-05 Order. Rider had been overheard outside Madison Square Garden reading from a document that appeared to have been a discovery document, but that could not be confirmed, so he was not included in the original Motion (although in the pre-Motion correspondence, plaintiffs' counsel did not deny Rider's involvement, Motion, Ex. 2 at pp. 5-7). However, since the filing of the Motion, FEI learned of an interview Rider gave that was televised in Las Vegas on June 22, 2007, in which he read directly from the Fahrenbruck document on camera. Ex. 4 hereto. In doing so he, falsely stated that Fahrenbruck "was sending it" to the CEO of FEI, but it was held by the unit manager – thereby implying some kind of "cover up." *Id.* There is no evidence to support this claim. It is patently untrue.

Rider also continued his pattern of apparently saying anything his financial backers want him to say about how FEI allegedly treats its elephants. Thus, in the June 22 interview, he

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[5] The June 22, 2007 television program in Las Vegas also exhibited another document produced by FEI to plaintiffs in discovery in this case – a report of the so-called Long Term Animal Plan Task Force. *See* Ex. 4 at Segment 1. The television station falsely portrayed this document as FEI's current "playbook" and a "manifesto." *Id.* In fact, as the record in the instant case shows (information which apparently was not part of the communique to Las Vegas), this document is more than 10 years old, and this "plan" was never adopted or implemented by FEI. Response in Opposition to Rider's Motion for a Protective Order With Respect to Certain Financial Information at 16 (May 15, 2007) and Ex. 9 thereto (Docket No. 146). Obviously, the station was misled into concluding otherwise, which is a further abuse of the discovery process.

[6] According to plaintiffs, Rider was not included in FEI's Motion because doing so would somehow be inconsistent with FEI's proposed counterclaim against Rider under RICO which is based on the predicate acts of, *inter alia*, bribery of a witness and illegal gratuities to a witness. Pl. Opp. at 13 n. 5. This is wrong, as was pointed out to plaintiffs before the Motion was even filed. *See* Motion, Ex. 2 at p. 8. That Rider sometimes gives press interviews does not negate the claim that he also is a bribed witness; the two roles are not mutually exclusive.

purported to be knowledgeable about how Asian elephants behave in the wild and how FEI handles elephant births, weaning and the training of young elephants, making the specious allegation that they are "tied up" and "beaten" from birth. *Id.* However, in his deposition -- when he was under oath – Rider admitted that he has ***never*** seen an Asian elephant in the wild, has ***never*** personally witnessed a birth or weaning, and has ***never*** been to the FEI's Center for Elephant Conservation where the training occurs. Deposition of Tom E. Rider at 243-44 (Oct. 12, 2006) (excerpts) (Ex. 5 hereto). And Rider continued to perpetuate the myth (based on his purported observations of 10 years ago) that elephants in the circus are chained 20 hours a day when the evidence in this case shows that they are on restraints only between approximately 10:30 p.m. and 7:30 a.m. so that they do not interfere with each other's sleeping patterns. Deposition of Alex Vargas at 187 (May 31, 2007) (excerpt) (Ex. 6 hereto).

Finally, it is no defense for plaintiffs that the documents they have distributed to the media also have been filed in this case. *First*, plaintiffs' apparent construction of the 9-26-05 Order -- that a media and publicity campaign with discovery documents is permissible as long as the materials are filed with the Court first -- would create a loophole that would negate the admonition entirely. *Second*, whether or not the documents are also exhibits in the court file, plaintiffs' extrajudicial use of them is abusive, because, as shown above, plaintiffs are in fact mischaracterizing the documents.

*Third*, the fact that these documents have even been filed in this case is itself highly suspect. None of these documents has anything to do with the motions that they were purportedly filed to oppose, *i.e.*, FEI's motion for summary judgment and FEI's motion to amend the pleadings to assert affirmative defenses and a RICO counterclaim. As FEI has pointed out on more than one occasion (Docket Nos. 100, 123 & 147), the motion for summary judgment raises

the questions whether the Asian elephants at issue in this lawsuit are either (i) excluded from the "taking" prohibition of the Endangered Species Act by the express exception for "pre-Act" species, *see* 16 U.S.C. § 1538(b)(1) (2000); 50 C.F.R. § 17.4 (2005); or (ii) were bred in captivity in the United States and currently are subject to a valid captive-bred wildlife permit issued by the United States Fish and Wildlife Service authorizing FEI to "take" them. These purely legal questions do not turn on how plaintiffs claim the elephants are treated. Similarly, how FEI treats its elephants has nothing to do with the conduct of plaintiffs that forms the predicate acts alleged in the proposed RICO counterclaim. Yet plaintiffs have seized upon both motions as a pretext for a "data dump" into the court file of extraneous material. This tactic itself is a misuse of the judicial and discovery process. *See* Motion at 13 (*citing In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1333 (D.C. Cir. 1985)).

3. **Plaintiffs' "good cause" argument is misguided.** Plaintiffs dwell at length on a non-issue, *i.e.*, that FEI's Motion purportedly fails to show "good cause." Pl. Opp. at 18-20. FEI's Motion is not a motion for a protective order; it is a motion to enforce an order that has already been issued. Whatever "good cause" or other standard was required to be satisfied for FEI to obtain the admonition in the 9-26-05 Order was satisfied by the showing that FEI made at the time because the Court issued the Order and included the admonition. Plaintiffs cite no authority that would require FEI to show "good cause" for obtaining enforcement of an existing court order. The only issues now are: (1) What does the 9-26-05 Order say? (2) Are plaintiffs in compliance with it?

What plaintiffs are really suggesting is that the Court did not have "good cause" to include the admonition in the 9-26-05 Order, thereby restricting their extrajudicial use of discovery documents. However, that issue has already been resolved against plaintiffs and in

favor of FEI. Plaintiffs do not seek reconsideration of the 9-26-05 Order, and it binds them as the law of this case.

Furthermore, plaintiffs are wrong when they argue that enforcement of the admonition in the 9-26-05 Order would create the same restrictions that the Court denied when FEI sought a global protective order in 2003. Pl. Opp. at 18-19. The protective order sought in 2003 would have enabled the parties to self-designate discovery materials as confidential and would have placed restrictions on how such materials could be used in the litigation, including filing all pleadings or briefs making reference to such documents under seal. Docket No. 5 (proposed order). The relief that FEI seeks now based on the admonition in the Court's 9-26-05 Order is completely different. With the limited exception of certain vet records used in research, that Order does not restrict plaintiffs at all in how they may use documents discovered from FEI to ***litigate this case.***[7] The Order simply contains the additional -- and reasonable -- restriction that plaintiffs not take such discovery material outside the litigation and use it to conduct a media campaign against FEI. That is all that the Motion seeks to enforce.

4. **Plaintiffs' request for "sanctions" is frivolous.** Although they demand that FEI's counsel be sanctioned under 28 U.S.C. § 1927 for filing the Motion, plaintiffs say nothing more about this other than a single sentence at the end of their brief which claims that the Motion is a "waste of time." Pl. Opp. 22. Since they cite nothing to support this request, and since they admit that they are doing exactly what the Court warned them not to do in the 9-26-05 Order, plaintiffs have no basis for seeking "sanctions." If anyone should be sanctioned, it should be plaintiffs for their cavalier disregard of the Court's admonition not to use discovery materials to argue plaintiffs' case in the media and for their failure to be forthright about the extent of their

[7] Ironically, even though they have made wholesale filings in this case of purported elephant "abuse" evidence, none of those filings included any vet record that was placed under protective order. So, even in plaintiffs' view, the small category of documents under protective order ultimately is irrelevant in any event.

extrajudicial activities. Indeed, in the exchange of correspondence that preceded the Motion, plaintiffs were invited to cite any controlling authority that would render FEI's motion to enforce "frivolous." Motion, Ex. 2 at p. 11. Plaintiffs did not do so then, and have not done so now.

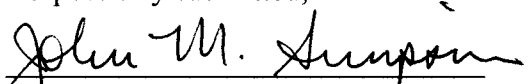
The 9-26-05 Order was the result of a contested motion in which one of the concerns expressed by FEI was plaintiffs' extrajudicial use of discovery material to wage a media campaign. The admonition contained in the Order flowed from that context. Although plaintiffs obviously would prefer not to have to deal with this, FEI does not believe that it is a "waste" of the Court's time for FEI to bring to the Court's attention conduct by plaintiffs that is plainly at odds with the letter and spirit of the Court's Order.

## CONCLUSION

For the reasons stated herein and in the Motion, defendant's Motion should be granted.

Dated this 3rd day of July, 2007.

Respectfully submitted,



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