UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	**REDACTED**
Plaintiffs,	:	
v.	:	**Case No. 03-2006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.,	:	
Defendant.	:	

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY FROM DEFENDANT

Since the Court convened a hearing on January 8, 2008 to determine whether plaintiffs themselves have complied with the Court's discovery orders, plaintiffs have embarked on a paper campaign to harass Feld Entertainment, Inc. ("FEI") about discovery. The recent barrage of paperwork from plaintiffs has resurrected discovery matters closed for years, raised first-time issues regarding documents produced years ago, and made numerous erroneous accusations that FEI had not produced documents, when in fact it had. Plaintiffs' Motion to Compel Discovery (2/5/08) ("Motion") is one of the many papers plaintiffs launched in the recent onslaught. FEI considers plaintiffs' tactics to be retaliatory for the upcoming February 26, 2008 contempt hearing.[1] Moreover, the documents at issue in the Motion were not produced because they were never requested, are not responsive, were subject to valid objections, and/or already adjudicated by prior court order. Accordingly, FEI hereby opposes plaintiffs' Motion.

[1] Plaintiffs chastise FEI's counsel for referring to the matter as a "contempt hearing." The terminology, however, is appropriate: The purpose of the hearing is to determine whether plaintiffs should be held in contempt for violating the Court's discovery orders. (Hearing Tr. at 1:12-21 (1/8/08)).

I. The Master Schedules

The starting point for any document dispute is necessarily the requests themselves. The requests, and the responses thereto, must be read in full. U.S. ex rel. Fago v. M&T Mortg. Corp., 518 F. Supp. 2d 108, 116 (D.D.C. 2007) ("Moreover, Magistrate Judge Facciola agreed when he denied Plaintiff's earlier Motion to Compel a supplemental response to the interrogatory, holding that the requested additional information was not responsive to any of Plaintiff's discovery requests.") (citing United States ex rel. Fago v. M&T Mortgage Corp., 238 F.R.D. 3, 12 (D.D.C. 2006)). The Motion tries to gloss over this by selectively excerpting from plaintiffs' document requests. Plaintiffs claim that their Document Request Numbers 21 & 22 cover the Master Schedules. They do not. Those requests state:

Produce all documents and records identified in response to Interrogatory No. 13.

See Motion at Ex. B (Request No. 21, misnumbered as 15).[2]

Produce all documents and records identified in response to Interrogatory No. 14.

Id. (Request No. 22, misnumbered as 16).

Interrogatory numbers 13 and 14, respectively, state:

> Describe Ringling's ***practices and procedures*** with respect to the ***chaining of elephants when they are not actually performing and when they are not on the train***, including, but not limited to, when the circus is stationed in one venue for a period of time, and when the elephants are maintained at the CEC or at the Williston facility, and describe the other conditions in which the animals are kept, including, but not limited to, their housing and bedding. Identify all documents and records that reflect or pertain to such practices or procedures.

Id. at Interrogatory No. 13 (emphasis added).

> Describe Ringling's ***practices and procedures for maintaining the elephants on the train when traveling*** from one venue to another, including but not limited to whether the animals are chained, how much space each elephant is

[2] Notwithstanding the purported command to both answer the interrogatory *and* identify all documents, Rule 34 permits a party to either answer an interrogatory *or* identify and produce documents containing the information sought by the interrogatory. See Fed.R.Civ.P. 33(d). FEI answered the interrogatories.

> provided, how the elephants are fed, the bedding provided to the animals, whether and how often the animals are taken off the train for exercise or for other reasons, whether the animals are bathed, and if so, how often and by what means, the longest period of time Ringling permits the elephants to be kept on the train without being taken off the train, and the average number of weeks each year the elephants are on the train. Identify all records that reflect such practices and procedures.

Id. at Interrogatory No. 14 (emphasis added).

As Mr. Andacht testified,

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Finally, plaintiffs also rely on Document Request No. 4 to claim that FEI should produce the Master Schedules. Request No. 4 states:

> 4. Produce the programs and schedules for the Blue Unit, Red Unit, and Home Town Edition for each of the last ten years.

[3] See Ex. 2, FEI's Objections and Responses to Plaintiffs' First Set of Requests for Admissions, Interrogatories, and Requests for Documents ("FEI's Objections") (6/9/04) at Responses to Request Nos. 21& 22, Inter. Nos. 13 & 14.

Id. at Request No. 4. FEI, however, objected to Request No. 4 as follows:

> Defendants [sic] object to this document request on the grounds of the General Objections and further object that it is overbroad in both time and scope and vague and ambiguous in its reference to "programs" and "schedules." Subject to and without waiving these general and specific objections, defendants [sic] will produce responsive, non-privileged documents sufficient to show programs and schedules for the Blue Unit, Red Unit and Home Town Edition since January 1, 1996.

See Ex. 2, FEI's Objections, Response to Request No. 4; see also id. Gen. Objection No. 4.

That is exactly what FEI did. It produced the show programs and schedules. See, e.g., FEI 1675-1682 (show schedule). The show schedules and times are also publicly available on the Ringling website at http://www.ringling.com/schedule/index.aspx (each unit's show schedule) and http://www.ringling.com/schedule/schedule.aspx?id=96908 (example of show times that appear by clicking on each venue). In addition, FEI also produced

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Cf. Order & Op. at 8-9 (2/23/06) (declining to order production of documents that have "little, if any relation to whether defendants' treatment of the elephants violates the statute"); Softel, Inc. v. Dragon Med. & Scientific Commc'ns, Inc., 118 F.3d 955, 968 (2d Cir. 1997) (A trade secret is

"any formula, pattern, device or compilation which is used in one's business, and which gives [the owner] an opportunity to obtain an advantage over competitors who do not know or use it."); Am. Building Maintenance Co. of New York v. Acme Property Svs., 515 F. Supp. 2d 298, 309 (N.D.N.Y. 2007) (business "operating practices and methods" afforded trade secret protection).

Plaintiffs speculate that the Master Schedule contains "other documents generated by defendant that apparently have more complete information concerning the amount of time the elephants spend on the trains in chains, as well as detailed information about other time periods that the elephants may be on chains." (Motion at 3).

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Notwithstanding the protective order currently in place, the discovery should not be permitted at all because it overreaches and is not reasonably calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P. 26(b) & (c). FEI is voluntarily submitting a recent Master Schedule from the Blue Unit *in camera* so that the Court can see for itself that it is immaterial to this case. Ex. 3, Master Schedule (submitted *in camera* only).

What really seems to have rankled plaintiffs here is that FEI did not supplement its production sooner with regard to the Transportation Orders. Plaintiffs' claim that current counsel made a deliberate decision to stop producing these documents is false. Since entering this case approximately two years ago, FEI's current counsel have worked diligently to produce

FEI's documents and supplement its discovery responses, constantly prioritizing the myriad of demands made by plaintiffs (which all too often included frivolous requests for such things as documents related to elephants that never existed or documents already produced). FEI's current counsel has produced more than 52,000 pages of material and supplemented to plaintiffs more than 18 times in the past two years. Current counsel did not realize that the Transportation Orders had not been supplemented, and once plaintiffs raised the issue – for the first time ever on January 18, 2008 – supplementation promptly followed.

Notwithstanding the production, plaintiffs claim that current counsel "abruptly (and without any notice to plaintiffs) stopped producing any" Transportation Orders. (Motion at 3 & n.3). Tellingly, plaintiffs decline to produce their own correspondence sent to FEI on January 18, 2008 regarding this subject. In it, plaintiffs' counsel feigns outrage that the Transportation Orders were not supplemented sooner and claims they are responsive to Document Request No. 16 (which attempts to relate back to Interrogatory No. 8 regarding elephant acquisition and lineage information). See Exhibit 4, Meyer letter to Joiner (1/18/08). In that letter, however, plaintiffs' counsel admits that FEI had produced these documents for the period through June 2004. Id. In response, FEI pointed this out as well as the fact that plaintiffs clearly knew about these documents because they used them to prepare for depositions, marked them as exhibits and questioned FEI's 30(b)(6) witness at the deposition taken by plaintiffs that very day. So rather than asking FEI to supplement the documents it used to prepare for deposition, plaintiffs waited until after the deposition to raise the matter, thereby trying to manufacture a discovery dispute where none exists. See Exhibit 5, Joiner letter to Meyer at 2 (1/23/08). FEI also advised plaintiffs of its position for purposes of conferring so that plaintiffs could represent it to the Court:

> As for your threat to seek leave to file a motion to compel with Judge Facciola, our position is that the performance reports are non-responsive and were never requested by plaintiffs, the transportation orders will be supplemented, and this latest entire complaint by plaintiffs regarding these documents is bogus and arises solely as retaliation for the January 8 hearing. FEI will not be deterred from defending itself in this case no matter how many discovery disputes plaintiffs try to manufacture.

See id. at 2-3. Not surprisingly, plaintiffs fail to attach this letter to their Motion, and state instead that they "certify that they have made a good faith effort to confer with defendant in an effort to secure the disclosure of the requested materials without court action." (Motion at 1 n.1). Plaintiffs had four years to raise the issue of Transportation Orders and FEI's objection to Request No. 4. They did not. Instead, plaintiffs decided to take issue with it for the first time only after the January 8, 2008 hearing regarding their own discovery conduct and just two weeks before the close of fact discovery.[4] FEI does not consider the timing and nature of plaintiffs' Motion to be coincidental. The Motion to produce Master Schedules should be denied.

II. The Performance Reports

Plaintiffs next claim that FEI should be ordered to produce the performance reports because they were "clearly covered by plaintiffs' discovery requests." (Motion at 6). This too is false.

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[4] Plaintiffs also claim now for the first time that the timing of the supplementation of the Transportation Orders "has seriously impaired plaintiffs' ability to prepare its expert reports." (Motion at 3 n.2). They do not explain how this could be or why it is that if this were such a problem for them that they waited so long before raising the matter with FEI. FEI suspects that this is another example of plaintiffs crying wolf just as they have done in the past. The last time there was an expert report deadline, plaintiffs sought a seven-week extension of time from defendant on the grounds that they had not yet been able to contact their experts, and then two days before the next time extension was to expire blamed their lack of preparation on defendant's failure to produce medical records. Cf. Plaintiffs' Unopposed Motion to Suspend Date for Exchange of Initial Expert Reports (9/2/04) ("The suspension is needed because plaintiffs' experts, who are located both in this country and abroad, have not yet had an opportunity to complete their review of relevant materials and to prepare their reports.") (granted by minute order on 9/7/04) with Defendants' Response to Plaintiffs' Motion to Suspend the Date for Exchanging Expert Reports at ¶¶ 3-5 (describing how plaintiffs unilaterally suspended exchange of expert reports).

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The Motion claims that Document Request No. 17 commands the production of the performance reports, which states:

> Produce all documents and records identified in response to Interrogatory No. 9.

See Motion at Ex. B (Request No. 17, misnumbered as 11). Interrogatory No. 9 states:

> For each of the elephants identified in response to Interrogatory No. 8, provide information ***regarding the Ringling employees who worked with each such elephant, including but not limited to, identifying the persons who worked with each such animal, the time period of such work, and each such person's responsibilities with respect to the animal, and identifying all veterinarians who treated or cared for each such animal.*** Identify all documents and records that in any way relate to the information requested by this Interrogatory.

Id. (Inter. No. 9) (emphasis added). FEI objected to Document Request No. 17 on the "same grounds" it objected to Interrogatory No. 9 and to "conducting a specific search for personnel who worked with each elephant, because defendants' [sic] records are not kept in that manner." See Ex. 2, FEI's Objections to Request No. 17. FEI objected to Interrogatory No. 9 as follows:

> Defendants [sic] object to this interrogatory on the grounds of the General Objections, the objections stated in response to Interrogatory No. 5, and on the further grounds that it is overbroad, unduly burdensome, vague and ambiguous in its reference to 'provid[ing] information' and 'work[ing] . . . with elephant[s],' seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and would require defendants[sic] to perform a special study in order to determine which employees worked with each elephants at any time. Without waiving these objections, defendants [sic] respond by referring to the information provided in response to Interrogatories 5 and 8, and documents being produced.

Id. at Inter. No. 9.[5]

[5] As noted in its objection, Interrogatory No. 9 is similar to Interrogatory No. 5, which FEI has supplemented three times, most recently on January 30, 2008. On January 18, 2008, plaintiffs wrote to complain about this response as well (also recognizing the similarity between Interrogatory Nos. 9 & 5)

Again, the performance reports were never requested by plaintiffs and they are not responsive. In addition, FEI explained in its objections to these requests that it did not keep records in such a manner.

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This last-minute effort by plaintiffs to conjure up a discovery dispute is contrived. Even though FEI had produced a performance report which was part of a USDA file, see Ex. H to Motion, and plaintiffs had this document in their possession for years, counsel wrote to FEI on January 18, 2008 falsely claiming "Indeed, had I not obtained this testimony from Mr. Feld two days ago, we would not even know of the existence of such records." See Ex. 4, Meyer letter at 1; cf. Ex. H to Motion (performance report from 1998). The performance reports, however, do not contain the information sought in Document Request No. 17/Interrogatory No. 9, as evidenced by the one plaintiffs attach to their Motion. See Ex. H to Motion.

Nor does Document Request No. 4 call for the production of the performance reports for the same reasons indicated above. FEI has already produced the show programs and schedules. The performance reports will not shed any further light on the schedules.

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, it has become clear that plaintiffs would like every piece of paper that FEI has which might contain an elephant reference, but no such document request was lodged. See Ex. 5, Joiner letter at 2. And of the document requests that were propounded by plaintiffs, there is none that calls for the production of the Master Schedule or the performance reports. FEI should

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even though FEI has produced information on ***hundreds*** of employees in response to Interrogatory No. 5. Plaintiffs neither attach this letter, nor do they explain how the performance reports could possibly add any information beyond what plaintiffs have otherwise received in response to Interrogatory No. 5. See Ex. 6, Ockene letter to Pardo (1/18/08).

not be put through the time and expense of having to search records that are not responsive, on the chance that an elephant could be referenced. SEALED PURSUANT TO COURT ORDER REDACTED The utility, if any, of this is marginal, and plaintiffs do not explain why it is necessary. Moreover, given the information that FEI has already provided in response to interrogatories, this request is likely, at most, to yield minimal information which would be duplicative. The Motion regarding performance reports should be denied.

III. Audio Tapes

Three days after the January 8, 2008 hearing, plaintiffs' counsel wrote to resurrect the issue of "audio tapes" that had been closed since June 2006. Again, tellingly, plaintiffs do not attach their January 11, 2008 letter on this topic. In that letter, the issue of audiotapes refers back to correspondence from April 10, 2006, May 12, 2006, and June 19, 2006. See Ex. 7, Meyer/Ockene letter to Joiner/Pardo (1/11/08). Those three letters from 2006 along with a final letter on that topic dated 7/21/06 are attached hereto. See Ex. 8, Ockene letter to Pard (4/10/06); Joiner letter to Ockene (5/12/06); Ockene letter to Joiner (6/19/06); Joiner letter to Ockene (7/21/06). Prior counsel for FEI had repeatedly told plaintiffs' counsel that there were no audio tapes. See id. Ockene's 4/10/06 letter at 2. When current counsel entered the case, FEI had the search repeated, nothing was located, and plaintiffs' counsel were advised of the same. See id. Joiner's 7/21/06 letter at 1.

Now suddenly plaintiffs claim that "audio tapes" and "other materials" have been withheld based upon some memo from the USDA. Plaintiffs do not attach this document. Presumably they are referencing the same one identified as Attachment 3 to the April 10, 2006 letter. See Ex. 8. Attachment 3 is double hearsay. It is a report of some statement given by an

unidentified witness. FEI cannot possibly begin to guess what particular materials are referenced by the document. What FEI can say is that the materials sent to Fulbright & Jaworski have been reviewed for responsiveness and produced when appropriate. See, e.g., FEI 38273-280. Thus, there are no "other materials," and plaintiffs' claim to the contrary is speculation without merit.

Plaintiffs claim that the "audio tapes" should be produced pursuant to the request and interrogatory related to the "report" they compiled from various USDA documents. See Motion at 6 relying upon Document Request No. 23 & Interrogatory No. 15. Irrespective of FEI's objections to both of these, the Court ultimately set the time period for discovery to January 1, 1994. See Order & Op. at 9-10 (2/23/06) (Docket # 59). The audio tape held by Fulbright & Jaworski pre-dates the time period set pursuant to this Court's order. The tapes are thus not responsive to these requests.

Plaintiffs next resort to their standard fallback that the tapes are "medical records" and should be produced. This argument likewise fails. Plaintiffs omit the key language from the prior meet and confer letters. They were advised back in May 2006 that: "Although ***we do not agree that those tapes are either relevant or responsive***, the issue is moot: The tapes are beyond the 10-year date range for discovery in this case and are not subject to production." Ex. 8, Joiner (5/12/06) letter (emphasis added). They are not a medical record, and the hearsay in Attachment 3 does not accurately reflect their content.

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This information was never ordered to be produced. See Order Enforcing 9/26/05 Order (9/26/06) (Docket # 94). Nor did plaintiffs raise this issue in their motion leading to that order. See Motion to Enforce the Court's September 26, 2005 Order (Docket # 69). Moreover, plaintiffs have no document request to cover these tapes. The audio tapes are not responsive as we have stated previously and repeatedly, and plaintiffs

should not be permitted to now resurrect a matter that has been dormant for two years, particularly in light of an interceding motion and resultant order (now relied upon by plaintiffs) that never raised this material.[6] The Motion regarding "audio tapes and other materials" should be denied.

IV. Documents Concerning Tom Rider

The final section of the Motion resorts to pure speculation. Plaintiffs mischaracterize a meet and confer letter from June 29, 2007 to claim that FEI has somehow contended that it has additional documents regarding Tom Rider and they are not subject to production because of the February 23, 2006 order. See Motion at 8. Indeed, the February 23, 2006 order already addressed the issue of any documents related to Tom Rider. Nonetheless, the Tom Rider section of the June 2007 letter begins by stating clearly that "FEI already has produced any and all documents within its custody or control that 'in any way concern or relate to Tom Rider.'" See Ex. M to Motion at 4.

Plaintiffs have no basis to claim that FEI "tracks Mr. Rider's media and legislative efforts, and takes measures to counteract the effectiveness of those efforts." (Motion at 8). They cite to documents that FEI produced which are more than six years old. Id. at 9. These stand-alone documents all originate from different sources and are unrelated to the others. Plaintiffs next claim that ***if*** "FEI has hired an outside consulting firm to follow or counteract Mr. Rider's efforts, FEI would be required to produce any such records in the possession of such entities." Id. FEI has not hired anybody to follow or counteract Mr. Rider's efforts, whatever those may be. Plaintiffs again cite to a proposed Long-Term Animal Plan that is well over a decade old to support this theory, but as FEI has repeatedly explained, that proposal was never implemented

[6] Fulbright & Jaworski is holding these materials, including audiotapes, pursuant to court order, so it does not currently have a copy to provide the Court with at this time for *in camera* review. If the Court wishes to undertake such a review, we will make arrangements to have a copy made for the Court.

and remained just that, a proposal. See Response in Opposition to Rider's Motion for Protective With Respect to Certain Financial Information at 16 & Exhibit 9 thereto.

In fact, Mr. Feld testified to

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Thus, there is nothing to compel regarding Tom Rider.

Notably, plaintiffs' counsel questioned Mr. Feld at length regarding

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This occurred notwithstanding the Court's order denying plaintiffs' motion to compel such discovery. See Order & Op. at 9 (2/23/06) ("For the foregoing reasons, I will not order defendants to produce profitability, public relations or advertising documents."). Mr. Feld answered all of the questions even though they clearly go to what plaintiffs have now defined quite broadly as "media strategy" and they, themselves, have refused to answer at depositions in the last two months. We trust that the irony is not lost on the Court that plaintiffs have steadfastly refused to produce anything they consider even remotely to be "media strategy," but then come in to depositions and freely ask defendant and its employees to answer questions on the same followed by a motion to compel any documents that could relate to the same. The

difference between FEI and plaintiffs is stark: FEI answered the questions and has produced its documents related to Tom Rider whereas plaintiffs have not. Why is that?

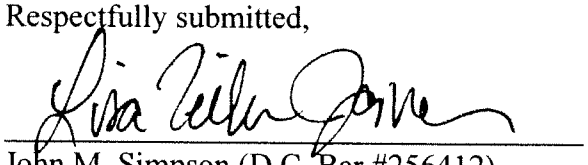
Furthermore, the Motion prompted us to examine what proof we could find of Mr. Rider's "media, legislative, and public relations" efforts. Both Lexis-Nexis and Google were searched without a date restriction for: "Tom Rider" and elephant. The Google results indicate approximately 43 hits regarding Mr. Rider, and the Lexis-Nexis results indicate 107 hits. Both results are attached hereto as Exhibit 10. (Plaintiffs can access and print these public documents for themselves.) Compare those results with the total amount paid to Mr. Rider by or from his co-plaintiffs and counsel, which is now approaching $ 200,000.00. We are not persuaded that those two categories can be reconciled. Nor are we willing to recognize those results as the product of a "highly effective" media/legislative/public education campaign by Mr. Rider.

CONCLUSION

Since January 8, plaintiffs have sent at least seven discovery letters to FEI. The letters have been fraught with errors, have raised first-time matters that could and should have been addressed years ago, have attempted to revive discovery issues that have laid dormant for are at least two years, and basically seek to manufacture discovery disputes with FEI where none exists. FEI is undeterred by such retaliatory tactics. As FEI has shown, however, the documents addressed in the Motion were not requested by plaintiffs, are not responsive to what plaintiffs did ask for, were objected to by FEI, were already ruled on by the Court, and/or previously produced by FEI. The Motion is not well taken, and it should be denied.

Dated this 19th day of February, 2008.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 1:03-CV-02006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.,	:	
Defendant.	:	

ORDER

Upon consideration of Plaintiffs' Motion to Compel Discovery from Defendant and Supporting Memorandum of Law (2/5/08), Feld Entertainment, Inc.'s Response in Opposition thereto, and for good cause shown, it is this _____ day of February, 2008,

ORDERED that the Motion is DENIED.

_____
MAGISTRATE JUDGE FACCIOLA

CERTIFICATE OF SERVICE

I, Lisa Zeiler Joiner, do hereby certify that on February 19, 2008 the foregoing **Response in Opposition to Plaintiffs' Motion to Compel Discovery from Defendant** was served on the following in the manners stated below:

FILED PUBLICLY IN REDACTED/UNSEALED FORM VIA ECF to:

All ECF-registered persons for this case, including plaintiffs' counsel

FILED WITH THE CLERK OF COURT UNDER SEAL IN UNREDACTED FORM to:

Clerk's Office
U.S.D.C. for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

SERVED VIA HAND DELIVERY UNDER SEAL IN UNREDACTED FORM to:

Katherine Meyer, Esq.
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Counsel for Plaintiffs

COURTESY COPY TO CHAMBERS OF HON. JOHN M. FACCIOLA UNDER SEAL IN UNREDACTED FORM with Exhibit 3 submitted for in camera review

Chambers
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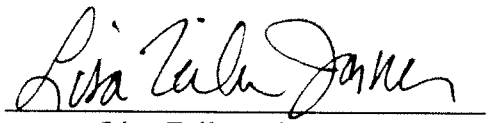

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