

A. FEI 39507A-REVISED: As indicated on page 15 of FEI's Opposition as well as the face of the document, pages 11-16 of the Memorandum were redacted because these pages are nonresponsive. The material contained in these pages, e.g., Non-Ringling animals, media training, administrative, is not responsive to plaintiffs' document requests. Several pages include public relations information, which this Court previously held to be non-discoverable. Mem. Op. (2/23/06) (Docket No. 59) at 6-9. Furthermore, FEI's position is that this material is irrelevant to the case, particularly in light of the recent orders issued regarding the scope of discovery.

B. FEI 39507B-REVISED-FEI 39507D-REVISED: These pages were produced to plaintiffs without any redactions on January 30, 2008. Consequently, there are no redactions at issue before the Court with respect to these documents.

C. FEI 39507E-REVISED: As indicated on page 15 of FEI's Opposition as well as the face of the document, pages 20-28 of the Memorandum were redacted because these pages are nonresponsive. The material contained in these pages, e.g., risk management, administrative, rental property issues, is not responsive to plaintiffs' document requests. At least two pages at issue include public relations information, which this Court previously held to be non-discoverable. See Mem. Op. (2/23/06) (Docket No. 59) at 6-9. Furthermore, FEI's position is that this material is irrelevant to the case, particularly in light of the recent orders issued regarding the scope of discovery.

D. FEI 39507H-REVISED: As indicated on page 15 of FEI's Opposition as well as the face of the document, pages 31-55 of the Memorandum were redacted because these pages are nonresponsive. The material contained in these pages, e.g., public relations, Non-Ringling animals, proprietary business plan, is not responsive to plaintiffs' document requests.

Numerous pages at issue include FEI's public relations, which this Court previously ruled to be non-discoverable. See Mem. Op. (2/23/06) (Docket No. 59) at 6-9. Furthermore, FEI's position is that this material is irrelevant to the case, particularly in light of the recent orders issued regarding the scope of discovery.

2. **FEI 42475 and FEI 42477:** As explained in FEI's letter to the Court dated June 6, 2008, counsel at one time had the original documents reflected by FEI 42475 and FEI 42477, but is now unable to locate them. See Joiner Letter to Podger (6/6/08) (attached hereto as Exhibit 1). Counsel believes that this facsimile contained a batch of certificates of veterinary inspection for the unit, and that the redacted pages did not relate to elephants. This is consistent both with the process by which counsel redacted such documents in this case and with the client's recollection regarding this particular document. Anything related to elephants in this document was already produced, and the redacted pages are irrelevant as they relate to other animals. See, e.g., FEI 42476 (redactions contain only other animals irrelevant to case). Counsel have re-searched our files for this document in an effort to provide it to the Court and to prove that it is irrelevant, but we still cannot find the redacted pages. We apologize to the Court for this, and would ask the Court to recognize that counsel's inability to produce these pages for *in camera* review is due to no fault of the client.

Motion to Reconsider

3. **FELD 0029097-98:** FEI asks the Court to reconsider its ruling with respect to FELD 0029097-98. Plaintiffs challenged this redacted document solely on the basis of being an inappropriate non-responsive redaction. See Motion to Compel Discovery at Attachment § I(A). FEI therefore responded solely to the non-responsive redaction argument that plaintiffs raised to this document in § II(E) of its Opposition. (Opp. at p.15). FEI explained that this document had

no redactions based upon non-responsiveness but rather attorney-client privilege. Id. The opposition did not mention FEI's work product claim, id., and FEI did no privilege analysis of this document in its opposition as plaintiffs' motion did not challenge this redaction on that basis. This is unfortunate, because on reply, plaintiffs then challenged the attorney-client privilege claim made for this document. See March 17, 2008 Revised Attachment at § B.

FELD 29097-98, however, was included on FEI's privilege log and a claim for both attorney-client and work product privilege was made. See Exhibit 10 to plaintiff's motion at 22 (attached hereto as Exhibit 2). This document was created by FEI's prior counsel. Id. The Court's Order does not address FEI's work product claim (likely because of the imprecise language used in both the Opposition and the Reply that omitted reference to work product). FEI nevertheless asks that the Court consider its work product claim for this document, which was included on its privilege log.

FEI's basis for the work product claim on this document is as follows: The face of the document indicates that it contains excerpts that were selected by outside counsel from witness interviews conducted by the USDA. The USDA does employee interviews when it is conducting an investigation of claims made against FEI. The right to counsel during such interviews attaches, and thus, counsel's presence during them is done for the purpose of rendering legal advice in anticipation of litigation with the USDA. While the employee interviews with the USDA themselves are not privileged, counsel's notes taken from those witness interviews are. See, e.g., In re Grand Jury Subpoena (Zerendow), 925 F.Supp. 849, 854 (D. Mass. 1995) (fact that testimony concerns interview between client and government agents bolsters work product claim).

If it were otherwise, a defense attorney who sought to protect his client's rights by being present at an interview between his client and government

agents would risk being required to expose his thought process to opposing counsel, and even worse, risk becoming a witness against his client. This would have a chilling effect on effective representation by defense counsel[.]

Id. The notes are not a complete transcription of the full interviews. Rather, they are quotes selected by counsel. The actual process of which quotes to select and record that was made by prior counsel is opinion work product that should be afforded the highest protection. See Sporck v. Peil, 759 F.2d 312, 316-17 (3d Cir. 1985) (process of selecting and compiling documents in preparation for pretrial discovery “falls within the highly-protected category of opinion work product”); Hickman v. Taylor, 329 U.S. 495, 511 (1947) (proper preparation of client’s case requires lawyer to assemble information and sift what he considers to be relevant from the irrelevant facts).

Plaintiffs have made no showing of substantial need for this document *and* that they cannot obtain the substantial equivalent, without undue burden, from other sources. Fed.R.Civ.P. 26(b)(3)(A). Indeed, FEI would not be surprised if this information were already provided to plaintiffs directly from the USDA in some other format. FEI, therefore, respectfully requests that the Court reconsider its ruling regarding this document and FEI’s claim for work product protection of it.

For the reasons stated herein, FEI asks the Court to reconsider its Order regarding FELD 0029097-98 to assess FEI’s work product claim. FEI further moves the Court for an extension to produce this document until such time as the Court can provide further guidance. A proposed form of order is attached. FEI is producing the remaining documents in the Order to plaintiffs’ counsel today as directed by the Court.

Dated this 13th day of August 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John M. Simpson", written over a horizontal line.

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