

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

ANIMAL WELFARE INSTITUTE, et al.,

Plaintiffs,

V.

FELD ENTERTAINMENT, INC.,

Defendant.

Case No: 03-2006 (EGS/JMF)

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE UNDER SEAL
CONFIDENTIAL RATE DATA AND SUPPORTING POINTS AND AUTHORITIES**

EXHIBIT 10

Pardo, Michelle

From: Simpson, John
Sent: Thursday, October 24, 2013 5:48 PM
To: 'Caridas, Andrew'; 'Stephen Neal'; Pardo, Michelle
Cc: Zuckerman, Roger E.; Logan Smith; Andrea Moseley; David H. Dickieson (ddickieson@schertlerlaw.com); rspagnoletti@schertlerlaw.com; bragalaw@gmail.com
Subject: RE: Sealed exhibits

It is my understanding that that has already happened when the Court issued the RICO Case discovery order. See No. 07-1532-EGS/JMF, Order at p. 10 (ECF No. 157). If the concern is that RICO defendants MGC, Katherine Meyer, Eric Glitzenstein, Howard Crystal, Jonathan Lovvorn and Kimberly Ockene are not mentioned in the Order at ECF No. 157 in the RICO case modifying the 09/25/07 ESA Case protective order, then we would consent to have that made clear, but the 09/25/07 ESA Case protective order granted access to counsel of record and they were all counsel of record in the ESA Case. See No. 03-2006-EGS/JMF, Order at p. 4 (ECF No. 195). So they are already covered which is why the parties did not list them along with WAP and HSUS when the ESA Case protective order was modified in the RICO Case scheduling order that the parties proposed. To be clear, however, the 09/25/07 ESA Case protective order does not cover the Peer Monitor materials or the filings that make reference to them.

From: Caridas, Andrew [mailto:acaridas@zuckerman.com]
Sent: Thursday, October 24, 2013 5:29 PM
To: Simpson, John; 'Stephen Neal'; Pardo, Michelle
Cc: Zuckerman, Roger E.; Logan Smith; Andrea Moseley; David H. Dickieson (ddickieson@schertlerlaw.com); rspagnoletti@schertlerlaw.com; bragalaw@gmail.com
Subject: RE: Sealed exhibits

Setting aside for the moment the Peer Monitor materials, would you consent to a motion to modify the *existing* protective order in the ESA Action to permit sharing of currently sealed documents with the RICO defendants?

From: Simpson, John [mailto:john.simpson@nortonrosefulbright.com]
Sent: Thursday, October 24, 2013 4:58 PM
To: Caridas, Andrew; 'Stephen Neal'; Pardo, Michelle
Cc: Zuckerman, Roger E.; Logan Smith; Andrea Moseley; David H. Dickieson (ddickieson@schertlerlaw.com); rspagnoletti@schertlerlaw.com; bragalaw@gmail.com
Subject: RE: Sealed exhibits

It would have been helpful to know on October 9 that plaintiffs had a problem with the reference to the phrase "other confidential data" in the proposed order as that issue could have been addressed. This is the first time that plaintiffs have articulated the reason why they refused to consent to the proposed sealing order. Furthermore, there was no draft of the Motion to Seal to show you because one would not have been necessary had there been consent. What ultimately we had to prepare and file came afterwards when there was no consent. Again, this is the first time we have been told that consent was withheld because a draft motion to seal had not been sent with the proposed order.

The terms of the contract with West do not permit dissemination of the information beyond the fee petition in the instant case, so we are in no position to consent to the motion you have described as to the RICO action. We do not agree that these materials are relevant to the RICO action, but if they are ruled relevant to that case, the matter can be addressed at that time. Furthermore, a protective order has not yet been entered in the RICO case, so this is premature. What happens in the RICO action is collateral to the pending question. As we have stated before, we have no objection to the distribution of the sealed

material in the ESA Case to the parties, their counsel, their experts and consultants and to the sanctioned counsel and her firm and their experts and consultants, provided that the required sealing order is entered. Once the sealing order is entered, you will receive the materials immediately by electronic transmission.

From: Caridas, Andrew [<mailto:acaridas@zuckerman.com>]

Sent: Thursday, October 24, 2013 3:49 PM

To: Simpson, John; 'Stephen Neal'; Pardo, Michelle

Cc: Zuckerman, Roger E.; Logan Smith; Andrea Moseley; David H. Dickieson (ddickieson@schertlerlaw.com); rspagnoletti@schertlerlaw.com; bragalaw@gmail.com

Subject: RE: Sealed exhibits

John,

When you raised the issue with us prior to filing, we repeatedly stated that we would consent to the Peer Monitor materials being filed under seal, and sought your assurance that you would not seek to seal any other material. You were unwilling to make that representation. When you sought our consent for your motion on October 8, you included not the draft motion, but only the draft proposed order, which referenced "the Peer Monitor Survey *and other confidential rate data*." We could not consent to that open-ended language, and did not.

We will consent to your motion to seal the Peer Monitor survey and references to the Peer Monitor survey in the remaining filings. In return, we seek your consent to our filing a motion allowing us to share any sealed material in the ESA Action with all parties to the RICO action, and all counsel, experts, and other litigation consultants in the RICO and ESA Actions.

Regards,
Andrew

-----Original Message-----

From: Simpson, John [<mailto:john.simpson@nortonrosefulbright.com>]

Sent: Thursday, October 24, 2013 10:13 AM

To: 'Stephen Neal'; Caridas, Andrew; Pardo, Michelle

Cc: Zuckerman, Roger E.; Logan Smith; Andrea Moseley; David H. Dickieson (ddickieson@schertlerlaw.com); rspagnoletti@schertlerlaw.com; bragalaw@gmail.com

Subject: RE: Sealed exhibits

This is not how it works in this Court with materials that must be sealed in advance. See discussion below and in FEI's Motion to Seal. The sooner you consent, the sooner you get the documents. Otherwise, the Court will first have to rule on the Motion to Seal.

-----Original Message-----

From: Stephen Neal [<mailto:SNeal@dimuro.com>]

Sent: Thursday, October 24, 2013 10:01 AM

To: Simpson, John; 'Caridas, Andrew'; Pardo, Michelle

Cc: Zuckerman, Roger E.; Logan Smith; Andrea Moseley; David H. Dickieson (ddickieson@schertlerlaw.com); rspagnoletti@schertlerlaw.com; bragalaw@gmail.com

Subject: RE: Sealed exhibits

John, why don't you just give us the sealed materials and we will treat them as under seal until the Court rules otherwise? That is how it works in this Court. Steve.

From: Simpson, John [john.simpson@nortonrosefulbright.com]
Sent: Thursday, October 24, 2013 9:19 AM
To: 'Caridas, Andrew'; Pardo, Michelle
Cc: Zuckerman, Roger E.; Logan Smith; Stephen Neal; Andrea Moseley; David H. Dickieson (ddickieson@schertlerlaw.com); rspagnoletti@schertlerlaw.com; bragalaw@gmail.com
Subject: RE: Sealed exhibits

The only "non-sequitur" in the discussion has been plaintiffs' still unexplained refusal to agree to a straightforward sealing order that has been routinely entered in attorneys' fee litigation in this District. In McKesson, in which the Islamic Republic of Iran consented to the sealing order, it was entered the next day. Had plaintiffs consented to the sealing order proposed by FEI here, it would have been entered in all likelihood with the same speed that the Court entered the order on the consent motion to adjust the schedule, i.e., by October 15, 2013, nearly a week ahead of the filing deadline. However, plaintiffs chose to be difficult and forced FEI to do it the hard way with a formal, presumably contested motion. Having been presented with this unreasonable conduct, FEI was under no obligation to file its motion any earlier than on the deadline set by the Court, particularly since FEI was forced to prepare a formal motion and points and authorities on top of all the other work involved with filing the petition for attorneys' fees.

Your further statement that FEI has been "unwilling[]" to represent precisely what you would be filing under seal" is inaccurate. The October 9 email seeking plaintiffs' consent to the sealing order specifically stated that "FEI intends to submit under seal the part of its petition for attorneys' fees that consists of hourly rate information compiled by Peer Monitor and references to the same in the petition and other documents." ECF No. 665-9 at p. 2. This was a reiteration of prior conversations that were had with counsel for plaintiffs on at least two occasions in the discovery meet and confer. What FEI stated on October 9 it would submit under seal is exactly what it submitted: the Peer Monitor rate information (Exhibit 8 to the Simpson Declaration; Exhibit 16 to the Gulland Declaration) and redacted references to that rate information (the graphs attached as Exhibit 9 to the Simpson Declaration) and redactions in the Simpson Declaration (contained in 2 out of 264 paragraphs) and a redaction in the petition itself (part of single footnote)).

FEI was perfectly willing to provide the entire petition for attorneys' fees in a "timely fashion" and took steps well in advance to make that happen, but plaintiffs chose not to cooperate. If any "delay" results it will be delay of plaintiffs' own making.

From: Caridas, Andrew [mailto:acaridas@zuckerman.com]
Sent: Wednesday, October 23, 2013 7:19 PM
To: Simpson, John; Pardo, Michelle
Cc: Zuckerman, Roger E.; Logan Smith; Stephen Neal (SNeal@dimuro.com); amoseley@dimuro.com; David H. Dickieson (ddickieson@schertlerlaw.com); rspagnoletti@schertlerlaw.com; bragalaw@gmail.com
Subject: RE: Sealed exhibits

John,

I assume, from your response, that you are refusing to provide electronic copies of the documents you are filing under seal.

Plaintiffs' lack of consent to the motion to file under seal is a non-sequitur. By your own admission, you will not share the Peer Monitor survey "unless it is pursuant to a sealing order issued by the Court." Even had we

consented to your motion, which, based on your unwillingness to represent precisely what you would be filing under seal, we refused to do, you would have awaited a Court order.

Moreover, Plaintiffs required only one day, until October 9, to inform you that we could not consent. There is no reason why your motion had to wait until October 21, the date on which-pursuant to a one-day extension to which we consented-you were to serve us with your entire attorney fee filing.

Your unwillingness to provide us, in a timely fashion, with documents which we are undoubtedly entitled to review needlessly delays our already daunting task in responding to your lengthy submission.

Regards,
Andrew

From: Simpson, John [<mailto:john.simpson@nortonrosefulbright.com>]
Sent: Wednesday, October 23, 2013 6:36 PM
To: Caridas, Andrew; Pardo, Michelle
Cc: Zuckerman, Roger E.; Logan Smith; Stephen Neal (SNeal@dimuro.com<<mailto:SNeal@dimuro.com>>); amoseley@dimuro.com<<mailto:amoseley@dimuro.com>>; David H. Dickieson (ddickieson@schertlerlaw.com<<mailto:ddickieson@schertlerlaw.com>>); rspagnoletti@schertlerlaw.com<<mailto:rspagnoletti@schertlerlaw.com>>; bragalaw@gmail.com<<mailto:bragalaw@gmail.com>>
Subject: RE: Sealed exhibits

As was explained to counsel for plaintiffs on multiple occasions in the weeks before Feld Entertainment, Inc. filed its petition for attorneys' fees and as repeated in FEI's motion to seal (ECF No. 665), we are authorized by Peer Monitor to provide a copy of the rate survey to a third party provided that a sealing order is first entered that places such materials under seal and limits the use of such materials to the litigation. Absent such a sealing order, we are not authorized to provide such materials to the plaintiffs. See ECF No. 665-1 (prohibiting dissemination of Peer Monitor material to "any third party" absent the entry of a sealing order in advance of the dissemination). We endeavored to get this resolved prior to the filing of the petition for attorneys' fees by consent and provided a simple, non-controversial consent order so that the materials could be provided to plaintiffs. Plaintiffs, however, refused to agree. Had plaintiffs consented to that order, we could have served them with the materials on October 21. Therefore, in a situation like this where the other side will not consent, the party seeking protection has no choice but to do what we did, i.e., file the materials under seal with the Court and seek a sealing order. Rule 5.1(h)(1) provides for that procedure. FEI was required to file the materials sought to be sealed with the Court, but FEI was not required to breach the contract with Peer Monitor in order to obtain the relief sought by disclosing the information to plaintiffs before a sealing order is entered, particularly when the ultimate relief will actually grant access to the information to the plaintiffs. There is nothing in Rule 5.1(h)(1) that requires the contents of the sealed filing to be served on plaintiffs before the sealing order is issued. Indeed, the rule states exactly the opposite: the materials will remain sealed pending court action on the motion. Plaintiffs are no more entitled to be served with these materials now, before the sealing order has been entered, than they would be entitled to receive discovery that has been withheld on a valid objection pending the entry of a protective order or to receive the contents of an in camera submission. The simple solution to your problem is to consent to the order that was tendered to the Court. Plaintiffs have yet to articulate any reason why the sealing order that FEI has been required by formal motion to obtain - the form of which is exactly the same as the form of order that we sought to have entered by consent - is not appropriate.

The manner in which the materials subject to the 09/25/07 protective order were served, first-class mail, is in accordance with the practice that both plaintiffs and the defendant in this case have followed for at least the past seven years.

John M. Simpson | Partner

Fulbright & Jaworski LLP

801 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2623, United States Tel +1 202 662 4539 | Fax +1 202 662 4643 john.simpson@nortonrosefulbright.com<<mailto:john.simpson@nortonrosefulbright.com>>

NORTON ROSE FULBRIGHT

Law around the world

<https://urldefense.proofpoint.com/v1/url?u=http://nortonrosefulbright.com/&k=6j5lgBiZB%2FsBfw7E2RAoXg%3D%3D%0A&r=O4R0JmPEVDFZterqxBOf4DvgjuV2I7P3M19jietfus%3D%0A&m=Fq69hNDUI%2FzJVyPiPfrtxSXptdONmMh0DtW7Ug%2BDvv4%3D%0A&s=5d4746d6b4e59f514670f19a60bc33aaba5fe676070bcfe2663e6587b81bede9>

Our website and email addresses have changed-please update your records accordingly.

From: Caridas, Andrew [<mailto:acaridas@zuckerman.com>]

Sent: Wednesday, October 23, 2013 4:16 PM

To: Simpson, John; Pardo, Michelle

Cc: Zuckerman, Roger E.; Logan Smith; Stephen Neal (SNeal@dimuro.com<<mailto:SNeal@dimuro.com>>);

amoseley@dimuro.com<<mailto:amoseley@dimuro.com>>; David H. Dickieson

(ddickieson@schertlerlaw.com<<mailto:ddickieson@schertlerlaw.com>>);

rspagnoletti@schertlerlaw.com<<mailto:rspagnoletti@schertlerlaw.com>>;

bragalaw@gmail.com<<mailto:bragalaw@gmail.com>>

Subject: RE: Sealed exhibits

John,

My apologies. Per the October 10, 2013 revisions, it is indeed Section 5.1(h). However, the remainder of my e-mail below stands.

Thanks,

Andrew

From: Caridas, Andrew

Sent: Wednesday, October 23, 2013 3:56 PM

To: 'Simpson, John'; Pardo, Michelle

Cc: Zuckerman, Roger E.; Logan Smith; Stephen Neal (SNeal@dimuro.com<<mailto:SNeal@dimuro.com>>);

amoseley@dimuro.com<<mailto:amoseley@dimuro.com>>; David H. Dickieson

(ddickieson@schertlerlaw.com<<mailto:ddickieson@schertlerlaw.com>>);

rspagnoletti@schertlerlaw.com<<mailto:rspagnoletti@schertlerlaw.com>>;

bragalaw@gmail.com<<mailto:bragalaw@gmail.com>>

Subject: RE: Sealed exhibits

John,

I assume you refer to Local Rule 5.1(j). While a document is treated as sealed until the motion to seal is decided, that does not alter our right, as opposing counsel, to immediate access. As counsel of record in the case, we should have all received, on Monday, the documents you seek to submit under seal.

Please send the remaining documents. We will, of course, treat these documents as sealed unless and until the Court says otherwise.

I would also renew my request for electronic copies of these documents. Norton Rose Fulbright obviously has electronic versions, since you filed them with the Court.

Thanks,
Andrew

From: Simpson, John [<mailto:john.simpson@nortonrosefulbright.com>]
Sent: Tuesday, October 22, 2013 3:09 PM
To: Caridas, Andrew; Pardo, Michelle
Cc: Zuckerman, Roger E.; Logan Smith; Stephen Neal (SNeal@dimuro.com<<mailto:SNeal@dimuro.com>>); amoseley@dimuro.com<<mailto:amoseley@dimuro.com>>; David H. Dickieson (ddickieson@schertlerlaw.com<<mailto:ddickieson@schertlerlaw.com>>); rspagnoletti@schertlerlaw.com<<mailto:rspagnoletti@schertlerlaw.com>>; bragalaw@gmail.com<<mailto:bragalaw@gmail.com>>
Subject: RE: Sealed exhibits

Andrew,

Exhibits filed under seal in the U.S. District Court for the District of Columbia are not available through Pacer to anyone, including counsel of record. The manner in which Feld Entertainment, Inc. ("FEI") handled the filing yesterday as to sealed materials was described in the certificate of service to FEI's Petition for Attorneys' and Expert Witness Fees ("Petition"), ECF No. 635 at pp. 57-58, and in FEI's Notices of Filing Under Seal, ECF Nos. 635-14 & 665-11.

Exhibits 6 and 7 to the Petition, which are documents that are subject to the existing 09/25/07 protective order entered in this case (ECF No. 195), were filed with the Court under seal. Because that protective order permits access to such material by counsel for plaintiffs, Exhibits 6 and 7 were served by first-class mail on October 21, 2013, to counsel for all parties. (See also letter to the Clerk attached).

Portions of the Petition, portions of the Declaration of John M. Simpson, Exhibits 8 and 9 to that declaration, and Exhibit 16 to the Declaration of Eugene Gulland also were filed under seal with the Court pursuant to the Motion to File Under Seal Confidential Rate Data (and are Exhibits 2-6 to that motion). ECF No. 665. (See second letter to the Clerk attached). These materials and exhibits are not discovery materials and were never subject to the 09/25/07 protective order or to any other protective order. However, as FEI explains in the motion to seal and as FEI has explained on multiple occasions over the past six (6) weeks to counsel for the plaintiffs, we are not permitted by the contract with the survey company, West Publishing Company, to share the details of the Peer Monitor survey on law firm rates unless it is pursuant to a sealing order issued by the Court. FEI sought on more than one occasion well in advance of the filing of the Petition to obtain plaintiffs' consent to such a sealing order so that everything could be distributed on October 21, but plaintiffs refused, without explanation, to consent to the sealing order which would have given plaintiffs immediate access to the sealed materials. Therefore, FEI was required to proceed by formal motion to seal and to submit the material in question to the Court under seal. Pursuant to LCvR 5.1(h), these exhibits and materials shall remain sealed pending the outcome of the ruling on the pending motion. When the Court enters the sealing order, the exhibits will be provided to counsel for the other parties.

John M. Simpson | Partner
Fulbright & Jaworski LLP

801 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2623, United States Tel +1 202 662 4539 | Fax +1 202 662 4643 john.simpson@nortonrosefulbright.com<<mailto:john.simpson@nortonrosefulbright.com>>

NORTON ROSE FULBRIGHT

Law around the world

[nortonrosefulbright.com<https://urldefense.proofpoint.com/v1/url?u=http://nortonrosefulbright.com/&k=6j5lgBiZB%2FsBfw7E2RAoXg%3D%3D%0A&r=O4R0JmPEVDFZterqxBOf4DvgjuV2I7P3M19jieqtfus%3D%0A&m=NEc1dv1l2gb7bhKj6Zps0QXx6vZl8hFWrcvsZ%2FVji8c%3D%0A&s=22e1d46be3325ff761bbe88cfcfd86b972457d347759b1ea3249d5256168039>](https://urldefense.proofpoint.com/v1/url?u=http://nortonrosefulbright.com/&k=6j5lgBiZB%2FsBfw7E2RAoXg%3D%3D%0A&r=O4R0JmPEVDFZterqxBOf4DvgjuV2I7P3M19jieqtfus%3D%0A&m=NEc1dv1l2gb7bhKj6Zps0QXx6vZl8hFWrcvsZ%2FVji8c%3D%0A&s=22e1d46be3325ff761bbe88cfcfd86b972457d347759b1ea3249d5256168039)

Our website and email addresses have changed-please update your records accordingly.

From: Caridas, Andrew [<mailto:acaridas@zuckerman.com>]

Sent: Tuesday, October 22, 2013 1:12 PM

To: Simpson, John; Pardo, Michelle

Cc: Zuckerman, Roger E.; Logan Smith; Stephen Neal (SNeal@dimuro.com<<mailto:SNeal@dimuro.com>>); amoseley@dimuro.com<<mailto:amoseley@dimuro.com>>; David H. Dickieson (ddickieson@schertlerlaw.com<<mailto:ddickieson@schertlerlaw.com>>); rspagnoletti@schertlerlaw.com<<mailto:rspagnoletti@schertlerlaw.com>>; bragalaw@gmail.com<<mailto:bragalaw@gmail.com>>

Subject: Sealed exhibits

John and Michelle,

I'm not sure if everyone shares my problem, but I have not been able to access the exhibits you filed under seal via PACER despite being an attorney of record in this case. Can you please forward any filed-under-seal exhibits in electronic format to counsel of record?

Thanks,
Andrew

Andrew Caridas
ZUCKERMAN SPAEDER LLP
1800 M Street NW, Suite 1000
Washington, DC 20036-5802
P: 202-778-1855 F: 202-822-8106
acaridas@zuckerman.com<<mailto:acaridas@zuckerman.com>>

This email message and any attachments are for the sole use of the intended recipient(s). Any unauthorized review, use, disclosure, copying or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message and any attachments.

To reply to our email administrator directly, send an email to nrfus.postmaster@nortonrosefulbright.com<<mailto:nrfus.postmaster@nortonrosefulbright.com>>.

Fulbright & Jaworski LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright Canada LLP, and Norton Rose Fulbright South Africa (incorporated as Deneys Reitz Inc), each of which is a separate legal entity, are members of Norton Rose Fulbright Verein, a Swiss Verein. Details of each entity, with certain regulatory information, are at nortonrosefulbright.com. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.