

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

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. 07- 1532 (EGS)
	:	
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY ANIMALS, <u>et al.</u>	:	
	:	
Defendants.	:	
	:	

PLAINTIFF’S AMENDED DISCOVERY PLAN

Pursuant to the Court’s August 3, 2012 Order (DE 94) and Fed. R. Civ. P. 26(f)(3), the parties hereto met and conferred through counsel on several discovery issues on August 21, 2012. While there was some agreement on some issues, major areas of disagreement on the scope of discovery and other issues remain. Therefore, the parties agreed that a brief introduction (limited to 5 pages) in each respective discovery plan would assist the Court. Plaintiff offered to coordinate the filing of a single document containing the parties’ respective discovery plans, but Defendants declined that offer. Accordingly, Plaintiff Feld Entertainment, Inc. (“FEI”) hereby submits its Amended Discovery Plan.

I. INTRODUCTION

Before the stay of discovery that was issued pending Defendants’ motions to dismiss, Defendants issued to Plaintiff a cumulative total of 1,460 discovery requests, including 809 document requests, 430 requests for admission, and 221 interrogatories. Plaintiff issued a total of 212 document requests. Plaintiff’s requests were relevant to this case; Defendants’ in the main were not. With judicial guidance on these scope, the best course of action is for the parties

to retract and re-issue written discovery to comply with the Court's guidance so that discovery will proceed in an orderly and efficient manner.

The Court is well-versed in the facts that give rise to FEI's RICO and other statutory and tort claims, having presided for more than a decade over the Endangered Species Act action (No. 03-2006-EGS) ("ESA Action") that concluded with a nearly seven-week trial in 2009, the issuance of 108 findings of fact and 32 conclusions of law on December 30, 2009, and a unanimous, unqualified affirmance by the D.C. Circuit. Recovery of FEI's attorney's fees and costs is the only remaining issue in the ESA Action. Originally filed in 2007, the parties are finally poised to commence discovery in the instant matter (the "RICO Action"). However, the parties disagree on the scope of discovery. Defendants have clarified that they intend to re-litigate the ESA Action in this case – a position that not only has no legal foundation but would also generate pointless disputes over irrelevant and burdensome discovery. The Court's early guidance regarding the appropriate scope of discovery would streamline it and avoid innumerable disputes.

The Court already has described the relationship between the ESA Action and the RICO Action. In its July 9, 2012 Memorandum Opinion, the Court made clear:

The issues of fact and law raised in the ESA claim, and the evidence required to sustain it, concerned whether FEI's treatment of elephants constituted a taking under the Endangered Species Act. ***These are entirely distinct from the issues of fact and law raised in the RICO case, which has nothing to do with the law of endangered species or FEI's treatment of elephants;*** rather, it concerns whether the prosecution of the ESA Action was a racketeering scheme.

Mem. Op. (7/9/12) (DE 90) at 16 (emphasis added). Defendants ignore this, and apparently view the RICO Action as a green light for a complete "do over" of the ESA Action. Defendants have stated in no uncertain terms (and as recently as the meet and confer on August 21, 2012), that in order to mount a defense to the RICO Action, they intend, *inter alia*, to do the following:

- Re-litigate the merits of the ESA Action, including the manner in which FEI treats and cares for its Asian elephants (including those which the Court excluded from the ESA Action on summary judgment), including discovery into facts occurring years *after* the conclusion of the ESA Action;
- Re-litigate Tom Rider's relationship with or attachment to FEI's elephants;
- Re-litigate Tom Rider's credibility, including discovery, and presentation of testimony, of additional witnesses to "corroborate" or "bolster" the credibility of Tom Rider and his version of events;
- Re-litigate the "motivation and credibility of" Archele Hundley, Robert and Margaret Tom, the individuals who attempted to become plaintiffs in the ESA Action;
- Engage in discovery regarding the manner in which FEI treats any and all species of animal, *including those that are not endangered and never have been subject to the ESA*;
- Engage in discovery regarding numerous aspects of FEI's business, including but not limited to its "financial information, including profit and loss statements, tax returns, ticket sales, etc.", and data on its "public relations and advertising practices."

None of these subjects has anything to do with the RICO Action. FEI's claims herein are based upon Defendants' fraudulent actions in manufacturing Article III jurisdiction in the ESA Action. The fraud and other wrongdoing occurred in connection with Defendants' allegations of standing to sue in the ESA Action. Standing either exists or does not exist as an independent legal proposition regardless of whether the underlying claims have any merit. Indeed, when determining standing, courts will assume that the plaintiff's underlying claims would prevail just as Judge Tatel did here: "[T]he court must be careful not to decide the questions on the merits for or against the plaintiff.' ... For purposes of this appeal, therefore, *we shall assume that the use of bullhooks and tethering amounts to a 'take' prohibited by ESA section 9.*" *ASPCA v. Feld Entertainment, Inc.*, 659 F.3d 13, 20 (D.C. Cir. 2011) ("ASPCA II") (emphasis added; citation omitted). If the determination of standing itself is made independent of the "merits" (or lack thereof) of a case, then whether there was fraud on the court, racketeering or other misconduct committed in the course of manufacturing standing obviously is a matter wholly

separate from any merits analysis. *ASPCA v. Feld Entertainment, Inc.*, 677 F. Supp. 2d 55, 66 (D.D.C. 2009); *ASPCA II*, 659 F.3d at 17. Since the courts already have assumed that there was a “take” and still found no standing, whether there was a “take” – which is what Defendants’ propose to waste enormous amounts of time and money litigating here – would be totally irrelevant in determining whether Defendants are liable for wrongfully manufacturing standing.

Notably, Defendants have loudly proclaimed repeatedly that the “merits” of the ESA Action was never decided, yet now they want to re-litigate the merits as a defense to the RICO Action.¹ But there is no such defense even if they could prove it: the merits were *presumed* in the plaintiffs-now-turned-defendants’ favor when the Circuit upheld the lack of standing found by the trial court in the ESA Action. The RICO Action, however, concerns whether or not FEI was injured by having to defend a case that lasted 12+ years due to a concocted Article III jurisdictional anchor point. That either was an invasion of FEI’s rights or it wasn’t.²

Defendants’ discovery position continues the recurring theme that their misconduct somehow will be excusable if it is shown that the ESA Action was “just.” However, defendants have never cited any authority for the proposition that fraud, racketeering or other misconduct in connection with creating standing to sue is excused by the merits of the claim sought to be brought. Indeed, in a recent disbarment proceeding, the D.C. Court of Appeals rejected the proposition that “altruistic” motives or unethical conduct motivated by “highly important public

¹ See, e.g., <http://awionline.org/cases/protection-asian-elephants> (last visited 9/5/12) (AWI’s website proclaiming that: “[s]ince the Court found a lack of jurisdiction, it did not rule on the merits of the case”); http://www.bornfreeusa.org/a1a6_ringling.php (last visited 9/5/12) (Born Free USA’s website, quoting Katherine Meyer about the disposition of the ESA Action: “*Had the Court addressed the merits* of the case and ruled favorably for the plaintiffs. . .”) (emphasis added).

² Defendants’ position is analogous to that of the pedestrian who witnesses a bus accident and then gets on the bus in the aftermath so that he can claim he was “injured” in the crash and sue the bus company for “damages.” Whether the bus company was injured by having to defend such a fraudulent claim of “injury” would in no way depend upon whether there was a bus accident, whether the bus company really was negligent or whether someone else who actually was injured in the crash could recover.

goals” were excuses for ethical violations otherwise warranting disbarment. *In re Howes*, 39 A.3d 1, 16 (D.C. 2012) (“[e]ven if respondent had laudable intentions, he was, nonetheless, ethically dishonest in this fraudulent use of public funds such that his behavior cannot be distinguished from that of other dishonest conduct warranting disbarment.”). Defendants’ plan to defend the RICO Action through re-litigation of the ESA Action should not be permitted.

Defendants also seem to believe that the Court’s final decision in the ESA Action has no collateral estoppel effect on any of the issues or over any of the parties in the instant case. To the contrary, the 12/30/09 decision has already determined what the purpose of the Rider payments really was and that, without Rider, the case could not have been brought. *ASPCA*, 677 F. Supp. 2d at 78-81, 89 (FOF 48-53, COL 5). These findings, in turn, bear on FEI’s claimed predicate acts and RICO injury. Thus, determining the collateral estoppel effects of the 12/30/09 decision at the outset could greatly focus the parameters of discovery and streamline the litigation.

While Defendants have a different view, each of Plaintiff’s categories of discovery is tailored to the claims in the First Amended Complaint, including discovery of each Defendant’s role in the scheme and accompanying claims, the nature and extent of the schemes to defraud, the details of the payments to Rider, including calling them “grants”, the promotion of the ESA Action for publicity or fundraising, the fraud upon Defendants’ other donors, and assessments of Rider’s credibility during the pre-filing, and litigation, of the ESA Action. None of these topics strays from what is necessary to prove the RICO and the other statutory and tort claims. While Plaintiff seeks discovery into the organization, ownership, structure and formation of the Meyer, Glitzenstein & Crystal (“MGC”) law firm as well as the discovery of the partners’ individual tax returns, both are directly related to the defenses raised by various Defendants. The law firm documents go to Defendants’ argument that only some attorneys in the MGC general partnership

are liable. The personal tax returns are relevant due to Meyer and Glitzenstein's domination of the Wildlife Advocacy Project (the vehicle for the Rider payments) as well as the injury alleged in MGC's abuse of process counterclaim.³ Having directly placed these facts in issue, Defendants cannot now claim discovery is not warranted.

II. PLAINTIFF'S AMENDED DISCOVERY PLAN

A. Initial Disclosures. The Court's December 9, 2010 Limited Discovery Order required the parties to exchange initial disclosures pursuant to Fed. R. Civ. P 26 (f) (1)-(2) by January 28, 2011.

B. Subjects On Which Discovery Is Necessary/Timing And Phases For Discovery/Plaintiff's Proposed Areas For Discovery. It is clear that the parties hold significantly divergent views as to proposed areas/appropriate subjects for discovery. Consequently, in order to avoid costly and time-consuming discovery disputes at the outset of discovery, Plaintiff believes that the Court should determine at the outset the appropriate scope of discovery so that the parties may reasonably tailor their discovery plan and requests accordingly.

Subjects On Which Discovery Is Necessary. Subject to further case investigation, Plaintiff believes that discovery is necessary on the following subjects:⁴

1. Payments/financial or other support to Tom Rider, or to any actual or contemplated witness or plaintiff in *ASPCA et al. v. Feld Entertainment, Inc.*, (03-2006-EGS and 00-1641-EGS) ("ESA Action"), made directly to any of these individuals or by or through WAP and the planning, coordinating dividing, accounting for and/or characterization of any such payment by defendants or any other individual or organization.

³ FEI has moved to dismiss or stay MGC's counterclaim. DE 113.

⁴ Unless otherwise indicated, the relevant time frame for discovery is January 1, 1998 to the present. The categories listed herein take into account the Court's July 9, 2012 ruling on the motions to dismiss.

2. Monitoring of sums paid to Rider, WAP and/or any ESA Action witness or plaintiff and documentation of expenses and other expenditures regarding same.
3. Decision(s) to start and to stop funding Tom Rider, WAP and/or other ESA Action witnesses.
4. Defendants' grant practices and procedures and related recordkeeping/auditing related to same.
5. Authorization and approval for ESA Action Plaintiffs (organizations) to join the ESA Actions as plaintiffs.
6. Evaluation of Tom Rider as an ESA Action plaintiff and credibility of his claims and testimony.
7. Selection process for identifying the defendant in the ESA Action.
8. Plans to use, or use of, the ESA Action and/or Rider for fundraising or publicity agendas.
9. The damages claimed by Plaintiff in this case.
10. Communications with or about Tom Rider.
11. Tom Rider's "media" work.
12. Defendants' media strategy that is in any way connected to payments to Tom Rider with respect to the ESA Action (from January 1, 1998 through December 30, 2009, unless Defendants will stipulate to a date certain that they ceased paying Rider), including all Rider payments withheld from production in the ESA Action on the grounds of "media strategy."
13. Preservation measures taken by all Defendants.
14. Defendants' document retention and/or destruction policies and practices.

15. Defendants' decisions to use various terms to characterize payments to Tom Rider or WAP including but not limited to "grants," "reimbursement for media work," and payments for "minimal living expenses."

16. WAP activities and records (from its inception to the present) (including but not limited to website, mission statement, purpose, corporate structure, staffing, financials, grant process, meeting minutes, correspondence, registration as a non-profit, tax documents, etc.).

17. Defendants' Form 990's and proper handling of grants and related matters for tax purposes.

18. Creation, maintenance and/or alternation of Defendants' websites with respect to any reference to Plaintiff, Asian elephants, the ESA Action or any party to the ESA Action.

19. Current and past employment of Tom Rider and reasons for separation from each.

20. Tom Rider's entry into the animal rights' witness network, including but not limited to the retention of Rider as a client of MGC.

21. Tom Rider's tax history/issues from 1990 to the present, including but not limited to any tax advice provided to him by any Defendant or arranged by any Defendant.

22. Fundraising/donations, marketing and/or advertising plans, programs or campaigns that refer to or contemplate using the ESA Action or Plaintiff and/or its elephants to raise funds or to gain media attention or publicity, including proposed plans, strategies, campaigns or programs that were not implemented and what funds were spent on, reports or communications on the efficacy of campaigns or appeals, contracts with fundraising counsel, solicitors and telemarketers, and filings with federal and state authorities regarding same.

23. Identification of all litigation from January 1, 1998 to the present, in which each Defendant (a) was a plaintiff, and any civil litigation which each Defendant contemplated, proposed and/or anticipated filing, and (b) was a civil or criminal defendant.

24. Lectures, speeches, interviews or statements given by Tom Rider regarding any subject and for any time period.

25. Organization, ownership structure and formation of MGC, including but not limited to the Partnership Agreement, corporate formation records, filings with the DC Department of Consumer and Regulatory Affairs, and insurance policies.

26. MGC tax returns for tax years 2000 through 2009.

27. Individual tax returns of Eric Glitzenstein and Katherine Meyer for tax years 2000 through 2009.

28. Complaints related to Defendants' fundraising, campaigns, tactics or publicity made by members of public, federal, state, or local agencies, or any other organization, entity or individual.

29. Instances in which each Defendant has been investigated by governmental authorities (federal, state, local) concerning fundraising, donations, donor fraud, or tax compliance.

30. Any filing made with the IRS since 2000 that mentions, discloses or refers in any way to payments or grants to Tom Rider, and any documents related to such a filing.

31. The relationship between HSUS and FFA from 2000 to the present, including but not limited to a merger.

32. All information related to the formulation of and the decision to bring the original ESA Action (00-1641) with Tom Rider as a plaintiff, including but not limited to information

related to the 60-day Notice letter, the complaint to the USDA, or any other proposed plaintiff including but not limited to Glenn Ewell, James Stehcon, Archele Hundley, Robert Tom or Margaret Tom.

33. Physical hardware (laptops, desktops, PDAs, etc.) of individuals likely to be involved in spoliation issues, including but not limited to Lisa Weisberg and Tom Rider.

34. Communications with any person listed on the witness lists of the trial of the ESA Action and any payments or financial support to same.

35. Communications with PETA about the ESA Action, including but not limited to any disclosed or proposed ESA Action witness or plaintiff, Tom Rider, Robert Tom, Margaret Tom, Frank Hagan, Gerald Ramos or Archele Hundley.

36. Communications with Animal Defenders, Animal Defenders International, Last Chance for Animals or In Defense of Animals about the ESA Action or Tom Rider.

37. Previous drafts and versions of selected discovery responses in the ESA Action (specific requests to be identified).

38. Facts and circumstances surrounding HSUS's belief that the Asset Acquisition Agreement could be unenforceable, voidable or otherwise invalid due to FFA's fraud.

39. Facts, circumstances and damages related to MGC's counterclaim for abuse of process including but not limited to the effect the RICO litigation has had upon MGC's ability to represent its clients, attract and retain business, generally conduct its law or advocacy practice, any efforts to curtail or close its public interest practice, and any other damages that are alleged to have been caused by FEI's actions.

40. Any defense raised by any Defendant in their respective Answers.

When Discovery Should Be Completed. Plaintiff submits that an appropriate time frame for which discovery should be completed is premature until the Court determines the appropriate scope of discovery.

Phases of Discovery. Other than establishing separate scheduling for fact and expert discovery, Plaintiff does not anticipate the need for separate discovery phases. Plaintiff favors staging discovery to progress in the following chronology: written discovery (interrogatories and document requests), followed by depositions of fact witnesses, requests for admissions, and then expert discovery.

C. Issues Regarding Electronically Stored Information (“ESI”)

The parties agree that discovery of certain electronically stored information will be necessary. The parties have met and conferred and while the parties have largely agreed on certain aspects of the discovery protocol for the production of documents in this matter,⁵ there are areas of disagreement that require the Court’s attention, and are so noted below as “Area of Disagreement.” Where there is no agreement at all, “Plaintiff’s Position” and “Defendant’s Position” are set forth herein.

⁵ **Plaintiff’s Position:** Plaintiff believes that no one should have to re-produce the documents that were previously produced in the ESA Action litigation to anyone. To the extent that documents produced in the prior litigation -- *ASPCA et al. v. Feld Entertainment, Inc.* (00-1641-EGS or 03-2006-EGS) -- are responsive to requests made in this matter, the parties agree that such documents need not be re-produced to the parties in that action. As such, the production protocols described herein do not apply to the production of any document by any party in the ESA Action. Plaintiff agrees that Defendants may share FEI’s production of documents from the prior matter amongst themselves. While Plaintiff does not believe that this is necessary, Plaintiff consents to add any defendant to the protective order issued in the ESA Action upon request.

Defendants’ Position: Should the production of any paper document previously produced in *ASPCA et al. v. Feld Entertainment, Inc.* (00-1641-EGS or 03-2006-EGS) be required, the parties agree that such documents need not be re-produced. Any other item that previously was made available for inspection or copying in the ESA Action shall not be made available for inspection or copying in this litigation. This does not apply to Defendants who were not parties to the ESA Action. As non-parties to the ESA Action, these Defendants are not in possession of the documents produced by the parties in the ESA Action. The Defendants that were not parties to the ESA Action request to be added to the ASPCA protective order without prejudice to seek relief from the protective order at a later date.

Form of Production.

1. Custodial Documents

Plaintiff's Position: Plaintiff believes that the most efficient form of production is by electronic means. The parties have agreed on many of the procedures for the production of custodial documents in electronic format. Plaintiff does not believe that providing documents for inspection is a sensible way to conduct discovery in this matter. If parties are going to make documents available for inspection, it should be limited to paper documents that do not also exist in electronic form. In this circumstance, the requesting party shall identify the documents that it wants to be copied or scanned and then pay the reasonable costs for said copying or scanning. Plaintiff does not believe that Defendants have established extensive cost or burden of discovery generally in this case or with respect to the specific topics of discovery discussed in this Discovery Plan. Plaintiff objects to any form of production that makes a custodial document less useful to the requesting party.

Defendants' Position: Defendants agree that custodial documents may be exchanged in the following proposed electronic format. However, the extensive cost and burden of discovery in this matter may make it impracticable for some of the Defendants to comply. Those Defendants may produce documents in un-indexed, PDF format only or provide documents for inspection. As to documents provided for inspections, the requesting party shall identify the documents that it wants to be copied or scanned and then pay the reasonable costs for said copying or scanning.

Paper Documents

When the parties produce hard copy (paper) documents, the paper will be scanned and produced electronically as Group IV single page TIFF images, 300 DPI, named the same as their

Bates number (Acrobat PDF scans will comply with this requirement). To the extent an image is illegible or difficult to read, a party propounding the request (Requesting Party) may ask to see the original document. Each TIFF should be endorsed with a unique document identifier (*i.e.*, Bates Label).

Area of Disagreement: Defendants agree to the criteria above, except that Defendants believe a party should be permitted to scan paper documents and produce them electronically as multipage Adobe PDF files where that format is more cost effective for the party (*i.e.* the party will be making only a relatively small production and the party's resources are limited). Plaintiff objects to this narrowing, particularly where the volume of documents to be produced in such format is unknown, because such a format will require Plaintiff to incur additional processing costs unnecessarily.

Machine generated OCR created from scanned images of hard copy documents will be provided at a document level. There will be one text file per document, named the same as the Beginning Bates number (Document ID) of the document. The OCR text file for a document will reside in the same location (file directory) as the images for that document. The text file associated with any redacted document will exclude redacted text.

If a document is more than one page, to the extent possible, the unitization of the document and any attachments or affixed notes should be maintained as it existed when collected by the producing party. Parties may unitize their documents using either physical unitization (*i.e.*, based on physical binding or organizational elements present with the original paper documents like staples, clips and binder inserts) or logical unitization (*i.e.*, a manual review of the paper to determine what logically constitutes a document like page numbers or headers). If

unitization cannot be maintained, the original unitization should be documented in the data load file or otherwise electronically tracked.

Unstructured ESI (e.g. e-mail, Word, Excel, PowerPoint)

Unstructured ESI also will be produced as Group IV single page TIFF images, 300 DPI, named the same as their Bates number, except as noted below. Each TIFF should be endorsed with a unique document identifier (*i.e.*, Bates Label). Excel files and PowerPoints will be produced in native format, named the same as their Beginning Bates number and with their confidentiality designation, with placeholder TIFF images endorsed substantially as follows: “this file produced natively,” the applicable Bates number, and any other applicable endorsements, and their MDHash value. Native files shall be produced with related searchable text and metadata (to the extent it exists). The parties will discuss reasonable, discrete requests for production in native format on a document by document or category by category basis.

Area of Disagreement: Plaintiff believes that native documents should also be produced with a flag indicating that they have been produced natively. Defendants disagree because that is a redundant step and whether a document is produced in native format is inherent in the structure of the production format.

Extracted text taken from native files will be provided at a document level. There will be one text file per document, named the same as the beginning Bates number (Document ID) of the document. The extracted text file for a document will reside in the same location (file directory) as the images for that document. The text file associated with any redacted document will exclude redacted text (*i.e.* the Producing Party can OCR the redacted image of the unstructured ESI and replace the original extracted text).

To the extent a custodial document has hidden comments, speaker notes, or columns or other embedded data, the parties agree this data should be legible and produced in such a way as to understand its context and not block other text or data.

Metadata

The following fields will be provided for all custodial documents (paper and electronic) in the production: Begin Bates, End Bates, Begin/End Attachment, Parent/Child ID, Document Type (Paper, Email, Attachment or E-document), Custodian, Redacted and Confidentiality (see below). The following metadata fields associated with emails, attachments and non-email custodial ESI will be exchanged to the extent that they exist and are reasonably accessible and processed: Subject / Re: Line (Email), File Name (Non-Email), Sent Date (Email), Received Date (Email), Created Date (All Electronic File Types), Modified Date (All Electronic File Types), Author (All Electronic File Types), Recipient (Email), Copyee (Email), BCC (Email), Importance (Email); File Extension (Attachment or E-document) and Nativelink. Metadata will be provided in a flat file (.txt or .dat) using standard Concordance delimiters. Each line will begin with the fields Beg Bates and End Bates. A chart listing the pertinent metadata and the chosen formats is attached as Exhibit "A". If metadata are not produced because they do not exist or because they are not reasonably accessible, then the producing party shall identify it as such within their production.

Plaintiff's Position: Metadata shall not be considered "not reasonably accessible" if it has become "not reasonably accessible" since the party had a duty to preserve the metadata.

Defendant's Position: Due to the expense and burden of discovery in this case, it may not be feasible for some defendants to provide an indexed electronic production. Parties not providing an index may not comply with the metadata requirements listed above.

Additional Specifications for All Custodial Documents (Paper and Unstructured ESI)

a. Load Files

For all produced paper and unstructured ESI, a standard Opticon image load file indicating document boundaries and location of images will accompany the images. The fields should include Bates ID, CD Name, Path\TIFF Name, DocBreak and Document.

When producing a multi-page document, images for the document should not span multiple directories. In addition, parties responding to a request (Producing Parties) should not include more than 1,000 images in a single directory unless a document is more than 1,000 pages.

b. Black and White

Generally speaking, Custodial Documents can be produced in black and white. However, if an original document contains color and is incomprehensible without color, the party producing the document should, upon request, produce the document in color to assist the party requesting the document in understanding the document. The Parties expect that there will be few instances in which such requests will be necessary and such requests should not unreasonably be denied by the Producing Party. Production of color images will be in JPEG format.

c. Bates Labeling

For each Custodial Document, produced as TIFF images, the Producing Party should electronically “burn” a legible, unique Bates number onto each page at a location that does not obliterate, conceal or interfere with any information from the source document. For Custodial Documents produced in native format, the Bates number shall be included in the file name of the produced document. Each Producing Party should use unique Bates Labels to identify its images

and documents. A Bates Label should begin with at least three alphabetical characters and followed by at least seven numbers (e.g. ABC0000001 or ACME00000023 or JUPITER0000004).

d. Redactions

For Custodial Documents, if the Producing Party is redacting information from a page, the Producing Party should electronically “burn” the word “Redacted” onto the page at or reasonably near the location of the redaction(s). If the Producing Party redacts a document, it may withhold from the document’s Load File only the metadata directly associated with the redaction and shall designate the document as redacted in the produced metadata. The reason for privilege redaction(s) of each privilege-logged record must be disclosed in the appropriate privilege log. The parties requests guidance from the Court as to how redactions for reasons other than privilege should be handled because the ability to redact without objective, enforceable standards can be the subject of abuse.

e. TIFF Filename Convention

The file name for each TIFF image should correspond to the Bates Label for that Image (e.g. ABC0000009 would be ABC0000009.tif).

f. Attachments

To the extent any Custodial Document has a relationship to another Custodial Document (such as an attachment to e-mail, exhibit to a memo, embedded file, or an appendix to a report), that relationship should be preserved and produced using the Begin Attach and End Attach fields in the Load File discussed above.

g. Embedded Data

Unless produced in native format, for documents produced as TIFFs, objects embedded in other files (e.g. a spreadsheet within a PowerPoint or Word document) will be extracted as a separate document and treated like attachments to the document.

h. Organization of Production⁶

To the extent a Producing Party organizes its production of Custodial Documents as it is kept in the ordinary course of business (rather than by document request), Producing Party should scan and produce folders, redwells, binder-covers and other organizational structure. Such materials should be produced as independent documents and be produced before the documents that were contained in these elements to the extent reasonably accomplishable by the above-addressed unitization. (e.g. the file folder should have a Bates Label immediately before the documents contained in the file folder). The Producing Party will provide the name of the custodian who had possession of the document when it was collected to the extent that it can be reasonably determined at the time of collection. A custodian can include an employee or person's name, a shared space on an electronic data store (e.g. departmental share), or an archive storage.

i. Confidentiality

If the Producing Party is producing a Custodial Document subject to a claim that it is protected from disclosure under any protective order or confidentiality agreement, or any agreement entered into or Order issued in this matter, the Producing Party should electronically "burn" the word "CONFIDENTIAL INFORMATION" onto each page of the document, or otherwise designate the confidential status in a manner in compliance with the applicable

⁶ The "Organization of Production" section applies only to documents produced in the instant matter and does not apply to prior productions of documents made in the ESA Action.

protective order or agreement. The Producing Party should also include in the flat file (.txt or .dat) a designation that the document is protected and the level of protection, as required by any protective order or agreement.

2. Structured Data (e.g. databases)

If data from structured data systems (e.g. databases) is responsive to particular requests and will otherwise be produced, the parties agree that the responding party will notify the requesting party of its intended production format prior to the actual production and the parties will discuss in good faith the most reasonable production format for the particular information. Where possible, relevant and responsive information from databases will be either produced in standard (a/k/a canned) reports or as pipe-delimited ASCII format with the first row including data field headings/names.

3. Forensic Analysis.

Plaintiff's Position: Plaintiff believes that forensic analysis of certain of Defendants' or its custodians' computers, hardware, portable hard drives, or other portable media may be necessary to recover documents. Plaintiff submits that the parties should confer and submit to the Court a protocol for inspection, review, analysis and cost-sharing for such tasks.

Defendants' Position: Defendants believe that Plaintiff's proposed forensic analysis of Defendants' or its custodians' computers, hardware, portable hard drives, or other portable media to recover documents is inappropriate, unnecessary, and unwarranted.

4. Global De-Duplication. Parties may use global de-duplication across custodians from within their unique possession, custody or control to remove exact duplicates (based on MD5 or SHA-1 hash values at the family level) so long as the suppression of documents from review tracks where the duplicates were residing so that it can be produced if warranted.

5. Selection Criteria and Computer Assisted Review.

Plaintiff's Position: Plaintiff has suggested that the parties meet and confer and cooperate in developing and calibrating search terms and programmatic culling processes.

Defendants' Position: Defendants agree that selection criteria and computer assisted review will be necessary in this case for both Plaintiff and Defendants. Defendants agree that the parties may need to meet and confer on this issue in the future. However, Defendants do not believe that coordination with Plaintiff is appropriate, necessary or warranted at this time.

6. Additional Discovery Protocols. The parties have not yet addressed every aspect of a discovery protocol and therefore after the subjects on which discovery may be needed are clarified by the Court, the parties agree to continue their dialogue and develop additional protocol that may assist in narrowing the scope of subsequent discovery, if any, and/or reducing its cost or burden.

D. Claims of Privilege / Protection.

1. Waiver issues. Both Plaintiff and Defendants are likely to raise privilege and waiver issues as to the other.

Plaintiff's Position: Plaintiff has indicated that this case will require the Court to analyze whether certain of Defendants' privileges and/or protections have been waived or no longer apply, including but not limited to the crime/fraud exception to the attorney-client privilege and/or work product protection; waiver flowing from a good faith or opinion of counsel defense; claims of protection made pursuant to "media strategy" or the First Amendment to the United States Constitution; and the claim for damages asserted by MGC in its abuse of process counterclaim that places directly in issue its client relationships (to the extent it survives the motion to dismiss).

Defendants' Position: Defendants believe that this case will require the Court to analyze whether Plaintiff has waived, or otherwise may not be able to avail itself of, certain privileges and/or protections, including but not limited to Plaintiff's waiver or loss of its attorney-client privilege and work product protection because Plaintiff has placed its legal fees at issue as its alleged damages. Defendants will make those arguments to the Court as appropriate. Plaintiff disputes that Plaintiff's privileges and/or protections have been waived or no longer apply.

2. Privilege Documents That Need Not Be Logged.⁷

Notwithstanding the competing positions highlighted below, the parties agree that they will confer at a later time to determine whether any other categories of privileged documents can be excluded from the logging requirement. For example, to the extent it would be required to log every attorney-client communication in the ESA litigation, this may impose excessive burdens, and hence the parties should explore avenues for identifying the universe of relevant documents and asserting privilege that do not require such a burdensome and expensive exercise.

Plaintiff's Position: The following privileged documents and electronically stored information ("privileged material") need not be logged, indexed or produced: (a) privileged material created or received by counsel and their associated attorneys and support staff, including paralegal and secretarial personnel, from January 1, 2010 to the present, from the following law firms only: Wilson, Elser, Moskowitz, Edelman & Dicker LLP, Ropes & Gray LLP, Morgan Lewis & Bockius, LLP, Patterson Belknap Webb & Tyler, LLP, Shertler & Onorato, LLP, Zuckerman Spaeder LLP, Clifford Chance, Wilmer Cutler Pickering Hale & Dorr, LLP, Stephen

⁷ Defendants previously indicated that they wanted additional counsel, who are not counsel of record in this matter, to also be exempt from logging privileged communications with Defendants. At the August 21, 2012 meet and confer, Plaintiff's counsel indicated that they did not object to extending this exemption to additional law firms, provided that they are all disclosed in this paragraph.

Braga, DiMuro Ginsburg, PC, Latham & Watkins, Kaiser Law Firm PLLC; and (b) privileged material created or received by counsel of record for Plaintiff in this matter and for defendant in Civil Action No. 03-2006-EGS (D.D.C.), their associated attorneys and support staff, including paralegal and secretarial personnel, from Fulbright & Jaworski L.L.P. Under subparts (a) and (b), whether logged or not, all privileged material should be preserved in the event of a dispute.

Defendant's Position: The parties agree that the following privileged documents and electronically stored information ("privileged material") need not be logged, indexed or produced: privileged material created by or at the direction of, or received by attorneys and support staff, including paralegal and secretarial personnel, from January 1, 2010 to the present, from the following law firms only: Wilson, Elser, Moskowitz, Edelman & Dicker LLP, Ropes & Gray LLP, Morgan Lewis & Bockius, LLP, Patterson Belknap Webb & Tyler, LLP, Shertler & Onorato, LLP, Zuckerman Spaeder LLP, Clifford Chance, Wilmer Cutler Pickering Hale & Dorr, LLP, Stephen Braga, DiMuro Ginsburg, PC, Latham & Watkins, Kaiser Law Firm PLLC, and Fulbright & Jaworski LLP.

3. Privilege Log Specifications.

The parties agree that privilege logs will be produced as an Excel spreadsheet. Documents withheld from production that a party believes are covered by an attorney-client privilege and/or work product protection, which do not fall into the categories specifically excluded above, should be logged on a privilege log on a document-by-document basis, except as identified below. The following information should be provided (as applicable) in the privilege log for each document: (1) Document identification number; (2) document type; (3) attachments; (4) date; (5) author; (6) recipient(s); (7) copyee(s); (8) privilege or protection claimed; and (9) description of the document including information sufficient to establish the

elements of each asserted privilege. In order for the description of the document to be sufficient so that the requesting party can assess the nature and claim of the privilege and privilege disputes can be focused on particular documents so that the parties and the Court are not wasting time and effort on unnecessary documents, the description needs to be detailed enough so that the issue in the case or matter can be identified.

Plaintiff's Position: For those documents that contain a series of e-mail communications in a single document ("email string"), it shall be sufficient to log the "string" without separate logging of each included communication, but reference to the document as an "email string" should be made in the document description field of the log and all participants in the conversation shall be identified by type (e.g. from, to, bcc, cc) and it shall be noted if there are any e-mails that do not include a lawyer or other person covered by a privilege. Email strings that are not privileged in their entirety should be redacted, the redaction labeled to reflect the nature of the privilege; the document logged; and the non-privileged portions produced. All counsel or their employees (or direct reports for in-house counsel) shall be identified as such in the privilege log, such as in a chart or "key". Further, for each individual listed on the log, the party shall identify the party or company for which (s)he works.

Plaintiff believes the following examples provide useful guidance regarding the description of documents in the privilege log. For example, the description "Communication regarding FEI case" or "E-mail discussing ASPCA matter," would not be sufficiently detailed if the email or communication discussed payments to Tom Rider. At a minimum, the document needs to be described as: "Communication regarding payments to Tom Rider." The parties believe that further meet and confers and the help of the Court is necessary to determine the sub-topics that need to be identified particularly in the privilege log.

Defendants' Position: Documents should be logged on a privilege log on the document-by-document basis described above, or in a manner otherwise in compliance with Rule 26(b)(5)(A). For those documents that contain a series of e-mail communications in a single document ("email string"), it shall be sufficient to log the "string" without separate logging of each included communication, but reference to the document as an "email string" should be made in the document description field of the log. For those communications possessing attachments over which email strings that are not privileged in their entirety should be redacted, the redaction labeled to reflect the nature of the privilege; the document logged; and the non-privileged portions produced. To the extent not addressed above, all documents listed in the privilege log shall be described, and communicants, authors, or recipients identified, to the extent required by Rule 26(b)(5).

4. Return of inadvertently, unintentionally, or mistakenly produced privileged documents.

The parties agree that if information subject to a claim of attorney-client privilege or work product immunity or any other privilege or immunity is inadvertently, unintentionally, or mistakenly produced in this litigation (07-1532-EGS), such production shall in no way prejudice or otherwise constitute a waiver of, or estoppels as to, any claim of privilege or work-product immunity for the document or any other document covering the same or a similar subject matter under applicable law, including Federal Rule of Evidence 502. The parties agree that (1) a statement by a party that a production was inadvertent, unintentional, or mistaken shall be dispositive; (2) they are all taking reasonable steps to prevent disclosure of privileged material; and (3) that a party took prompt steps to rectify the inadvertent, unintentional, or mistaken production if they notify the recipient within (14) calendar days of learning of the inadvertent production. If a Producing Party has inadvertently, unintentionally or mistakenly produced

Information subject to a claim of immunity or privilege, and if the Producing Party makes a written request for the return of such Information, the Information for which a claim of inadvertent, unintentional, or mistaken production is made (including any analyses, memoranda, derivative works, or notes which were generated based upon such Information), as well as all copies, shall be either sequestered, destroyed or returned within five (5) business days regardless of whether the Receiving Party disputes the claim of privilege. The Producing Party will provide sufficient information to the Receiving Party regarding the asserted privilege(s), in the form of a privilege log. If the Receiving Party disputes the Producing Party's assertion of privilege, the Receiving Party may move the Court for an order compelling production of the material but such motion shall not assert the fact or circumstance of an inadvertent, unintentional, or mistaken production as a grounds for entering such an order. Subject to the Court's direction, resolution of the issue may include the Court's review of the potentially privileged information *in camera*. Notwithstanding this agreement, no party will be prevented from seeking any further protection or relief provided by any statute, law, or Rules or Orders of a Court. Likewise, no party will be prevented from moving the Court for an order compelling the production of documents for which a party asserts the privilege has been waived, is inapplicable or no longer applies in each case solely due to a reason other than an inadvertent, unintentional, or mistaken production.

Pursuant to Fed. R. Civ. P. 26 (f)(3)(D), and in a manner giving effect to Fed. R. Evid. 502 (d)-(f), the parties request that the protocol for return of inadvertently, unintentionally or mistakenly produced privileged documents, stated herein, be incorporated into an order of the Court.

E. Limitations on Discovery. There were no areas of agreement among the parties on discovery limits. Because of the complexity of the case and the potential number of witnesses,

Plaintiff believes that the presumptive limits on discovery as stated in the Federal Rules of Civil Procedure should be modified as stated. Therefore, Plaintiff submits that the limitations on discovery should be as follows:

1. Depositions. Due to the complexity of the case and potential number of witnesses, Plaintiff believes that the presumptive limit on 10 depositions as stated in the Federal Rules of Civil Procedure is insufficient and should not apply. Plaintiff submits the following limits on depositions: Plaintiff shall be entitled to take 40 fact depositions. Defendants collectively shall be entitled to take 40 fact depositions. If any party believes that additional depositions are necessary, the parties should meet and assess whether additional fact depositions are necessary and reasonable. Each deposition other than that of a party shall be limited to one day of 7 hours unless extended by agreement of the parties or order of the Court. Any party (other than the deposing party) desiring to ask questions shall cross-notice the deposition. In the instance where a deposition of a non-party is cross-noticed, the party noticing the deposition will be limited to 6 hours of examination and cross-noticing parties shall be limited collectively to 1 hour of examination. If one or more cross-noticing parties require more time, they may take time in excess of 1 hour, but the deposition will then count against those cross-noticing parties' deposition count. In no event will a deposition of a non-party exceed 12 hours without either (1) agreement by all parties and the witness; or (2) order of the Court.

Depositions of a party⁸ (either of an individual or of an organization pursuant to Fed. R. Civ. P. 30(b)(6)) shall be limited to two days totaling 14 hours unless extended by agreement of the parties or order of the Court. Any party (other than counsel for the deposed) desiring to ask questions shall cross-notice the deposition and cross-noticing parties shall be limited collectively

⁸ As used in this section, "party" means, as to an organization, the organization's 30(b)(6) witness(es) and as to an individual party that person him/herself.

to 2 hours of questions. In the event one or more cross-noticing parties require more time they may take more time, but the deposition will then count against those cross-noticing parties' deposition limits. In no event shall the deposition of a party exceed 3 days without (1) agreement by all parties; or (2) order of the Court. With respect to an organization, this limit shall be a collective limit on the total hours of all Fed. R. Civ. P. 30(b)(6) witnesses. Any follow-up or clarifying questions that such party deponent's own counsel may have may be asked without cross-noticing up to a maximum of one hour. Beyond that one hour, the rules for cross-noticing parties shall apply to the party deponent. Absent an order from the Court, an individual or organization shall only be deposed once in connection with this case, with the exception that an individual designated as a Fed. R. Civ. P. 30(b)(6) witness may separately be noticed for deposition in his or her individual capacity, and will be subject to the same time limits stated herein.

The parties shall use reasonable and best efforts to schedule depositions for mutually agreeable dates and times and, if possible, set a deposition schedule by agreement in advance. Depositions must be noticed a minimum of 14 days in advance of the deposition date. The parties may not use scheduling conflicts to unduly delay a deposition or interfere with the order of discovery. The parties agree that absent an agreement among counsel or court order, they will not schedule multiple depositions to occur on the same day. In the event of a scheduling conflict, the parties should use reasonable efforts to reach a mutually agreeable date. If the parties are unable to do so, the date of the deposition may proceed subject to the availability of the witness and the attorney noticing the deposition. Nothing in this order shall prevent a party from seeking a court order regarding depositions in the event that scheduling cannot be mutually agreed upon, and a motion seeking such order shall automatically postpone the deposition. The

parties agree that counsel may attend depositions by telephone or similar remote-access device, and the party or parties attending by telephone or similar remote-access device shall be responsible for setting up their own dial-in information or access in advance of the deposition for use during the same. A party foregoing participation in a properly noticed deposition may not depose that same individual or organization at a later date, except by agreement of the parties or order of the Court.

2. Interrogatories. Plaintiff believes the following limits on interrogatories should be imposed: Defendants shall collectively have the ability to serve no more than 20 interrogatories against Plaintiff. In addition, each Defendant may individually serve no more than an additional 5 interrogatories against Plaintiff, for a combined total of 85 interrogatories (20 collective and 65 individual). Plaintiff shall have the ability to serve no more than 85 interrogatories. Twenty (20) of those 85 interrogatories will be considered to be “common interrogatories” which each Defendant must answer, and this will only be counted as 20 interrogatories against Plaintiff’s total of 85. Plaintiff’s remaining 65 interrogatories may be divided among the Defendants as Plaintiff elects.

3. Requests for Admission. With the exception of requests for admission that seek to authenticate a document, all requests for admission shall be served after the completion of written fact discovery so as to maximize their utility and efficiency. Absent agreement of the parties or order of the Court Plaintiff shall serve no more than 325 admission requests and Defendants, collectively, shall serve no more than 325 admission requests.

4. Document Requests. Plaintiff believes that Fed. R. Civ. P. 34 shall govern requests for production of documents, with the following stated exceptions. For electronically stored information, the parties shall produce such information in accordance with the protocols

set forth herein (*see* Sections II(C) and II(D) and Exhibit A hereto). Should the production of any information previously produced in *ASPCA et al. v. Feld Entertainment, Inc.* (00-1641-EGS or 03-2006-EGS) be required, the producing party shall have the option of either re-producing the document again or providing a sufficient description of the previously produced document, either by Bates number or, in the event such documents were previously produced without a Bates number, by specific information that makes them readily identifiable, or by trial exhibit number or other identifiable docket number.

F. Other Matters.

Protective and Confidentiality Order(s). Plaintiff believes that the Court should enter a Protective and Confidentiality Order and will submit a proposed order if directed by the Court.

Dated: September 10, 2012

Respectfully submitted,

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