UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC. **Plaintiff,** v. AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, *et al.*, **Defendants.**	**Civ. No. 07-1532 (EGS)**

DEFENDANTS' JOINT DISCOVERY PLAN
PURSUANT TO FED. R. CIV. P. 26(f)(3)

Pursuant to Fed. R. Civ. P. 26(f), Defendants, by and through their respective counsel, jointly submit the following report and discovery plan. Counsel for all of the parties participated in Rule 26(f) Conferences on December 17, 2010 and August 21, 2012. Despite their good faith effort to confer regarding an initial discovery plan setting forth those matters required by Rule 26(f), it is apparent that the parties have fundamentally different views as to the scope of discovery going forward and thus must file separate proposed plans. Additionally, because the parties differ significantly as to the proper contours of discovery in this dispute, the parties have agreed to preface their proposed plans with brief preambles (limited to five pages) setting forth their overall perspectives on the proper contours of discovery in this case. These preambles are merely introductory and are not intended to supplant or supplement any briefing and argument necessary before the Court can determine these contour issues.

PREAMBLE

1. First Amendment Issues. The alleged "pattern of racketeering" that allowed FEI's RICO claim to survive a motion to dismiss raises serious First Amendment issues, because it depends on FEI's ability to prove that the organizational defendants defrauded their own contributors and members at a 2005 fundraiser. *See* Doc. 90 (Motion to Dismiss Ruling) at 32 (explaining that FEI has alleged that defendants engaged in "unlawful fundraising activity" and that this is integral to FEI's assertion of a RICO pattern). FEI has made clear its intention to conduct an invasive fishing expedition into the identities of contributors so FEI can burden these contributors with third-party discovery regarding their specific reasons for contributing to the organizations. *See* Doc. 105-4 (FEI discovery requests).[1] Such an inquiry necessarily infringes core First Amendment associational rights of nonprofit organizations and their supporters and imposes significant burdens on the very individuals that FEI claims as its supposed co-victims, subjecting them to subpoenas, depositions, and the need for legal counsel. FEI's proposed inquiry would create a chilling effect on the organizations' communications with their supporters and imposes substantial barriers to membership in, or support of, a nonprofit organization, in derogation of core First Amendment rights. If FEI insists on pursuing this discovery, Defendants anticipate that the Court will need to resolve these First Amendment issues early in the discovery process.

2. Treatment of Elephants. FEI's case directly puts at issue the truth of representations made by the Defendants regarding FEI's mistreatment of the Asian elephants in its possession and the credibility and good faith of the Defendants who made such statements.

[1] For instance, FEI's discovery requests seek the following: "All documents that refer, reflect, or relate to any solicitation of or request for donations, contributions, payments or financial support of any kind, regardless of label or characterization, concerning the ESA Action, the presentation of elephants in circuses, Tom Rider, Defendants, and/or WAP, by the ESA Action plaintiffs, MGC and/or WAP" (Document Request #19); and "All documents that refer, reflect, or relate to donations (whether financial or in kind) that were designated or otherwise earmarked by the donor, for use in connection with the ESA Action." (Document Request #21).

See, e.g., FAC ¶ 9 (denying that the ESA case had anything to do with "stopping elephant 'abuse'"); *id.* ¶¶ 184-91 (asserting that Tom Rider's assertions of elephant mistreatment were "false" and that the organizational plaintiffs paid him to provide "false" testimony of elephant mistreatment). Similarly, in support of its tenuous "pattern" argument, FEI alleges that the organizational defendants defrauded their own members and supporters via a July 2005 fundraiser invitation which was "false and/or misleading" because its "various claims that FEI mistreats its Asian elephants are untrue." FAC ¶ 180; *see generally id.* ¶¶ 179-183. The invitation states that there "are numerous eye-witness accounts and other evidence of the mistreatment of the elephants, including the deaths of several baby elephants"; that the elephants in FEI's possession "are beaten and chained for most of their lives"; and that there is "video footage of mistreatment of elephants at the Ringling Bros. Circus." Doc. 105-2.

To defend themselves against FEI's claims, Defendants will need to pursue discovery of materials reasonably likely to lead to admissible evidence on the truthfulness of the statements in their fundraising invitation and on FEI's treatment of its elephants. Further corroborating evidence concerning elephant mistreatment that Defendants may obtain through discovery – not only the specific forms of mistreatment litigated in the ESA case (including information requested in discovery in that case but not produced), but also other forms of mistreatment, such as the treatment of young elephants – is relevant to FEI's allegations that Mr. Rider's testimony concerning these matters was not truthful and that Defendants knew that Mr. Rider's accounts on these topics were not truthful. Should FEI refuse to provide Defendants with responses to discovery on these topics, the Court will also need to resolve this issue.

3. <u>FEI's Knowledge of Mr. Rider's Activities</u>. What FEI knew about Mr. Rider's advocacy for the elephants and how Mr. Rider was being funded – and when FEI acquired such

information – goes to the heart of the statute of limitations defense that the Court has already indicated may be dispositive as to some or all of the Defendants. *See* Doc. 90 at 28-29. As explained *infra*, Defendants believe that the statute of limitations issues could be resolved first. Additionally, FEI's understanding of Mr. Rider's public advocacy campaign and FEI's evaluations of Mr. Rider and his effectiveness as an advocate for the elephants are relevant to, and may contradict, FEI's assertions regarding Defendants' motives for funding Mr. Rider. Again, should FEI refuse to provide this discovery, early Court intervention will be necessary.

4. FEI's Conduct of its Defense in the ESA Action. FEI acknowledges that the only damages it alleges in this case are its attorneys' fees and other litigation costs in the ESA litigation, purportedly in excess of $20 million. Even were FEI successful in proving a RICO violation, it would still need to prove the amount of these damages and that they were proximately caused by the alleged predicate offenses. Accordingly, Defendants will need to obtain discovery into the nature of FEI's alleged damages. This will include the reasons for which certain fees and costs were incurred and the extent to which such fees flowed from FEI's good-faith defense of the ESA action as opposed to the pursuit of other objectives. Part of this discovery will involve, for example, investigating the extent to which FEI itself may be responsible for substantial legal fees because FEI or its counsel delayed or protracted the proceedings or otherwise contributed directly and unnecessarily to the length and complexity of the ESA litigation. *See, e.g.*, Doc. 176 in No. 03-2006 (wherein the Court explains that FEI's "failure to timely produce thousands of pages of veterinary records" was responsible for the delays in the discovery schedule).

FEI's litigation conduct also bears on whether Defendants' alleged conduct is sufficient to support FEI's causes of action. FEI broadly pleads its causes of action in an attempt to reach

Defendants' alleged misconduct. However, to the extent that FEI's own conduct in the ESA Action would also violate the standards of conduct that FEI itself proposes regarding the actions of the ESA plaintiffs (such as FEI's assertions that Defendants' litigation conduct obstructed justice or was otherwise improper), Defendants should be allowed discovery into FEI's conduct to refute the proffered standards.

For example, the circumstances surrounding FEI's repeated failures to comply with Court Orders to divulge the elephants' medical records, and the purported loss by FEI's counsel of specific documents that FEI was ordered to produce for *in camera* review, *see* Doc. 332 in No. 03-2006, at 3, may undercut FEI's contention that alleged discovery discrepancies by the ESA plaintiffs constituted "obstruction of justice" or other misconduct. Similarly, FEI's extensive payments to witnesses – *e.g.*, providing $700,000 in grants to Dennis Schmitt (who served as both a fact and expert witness), *see* ESA Trial Tr. (3/13/09 am), at 68-77, and rehiring Daniel Raffo with a substantial salary increase, *see* Tr. (3/4/09 am) at 55-56 – may undercut FEI's allegations and/or reflect on the standard that FEI is applying in arguing that funding provided to Mr. Rider constituted an illegal gratuity. If FEI refuses to provide information in response to Defendants' discovery requests regarding this topic, this would also require Court intervention to resolve.

5. <u>Scope of Discovery Regarding Mr. Rider's Funding</u>. FEI has already received extensive discovery on Mr. Rider's funding, based on years of discovery concerning this topic in the ESA litigation. As both the Court and Judge Facciola observed, FEI was "relentless" in its pursuit of information concerning Mr. Rider's funding in the ESA case. Doc. 176 in No. 03-2006, at 8; *see also* Doc. 326 at 6 (explanation by Judge Facciola that much of the discovery in the ESA case pertained to Mr. Rider's funding, that it was the subject of an extensive evidentiary

hearing, and that it would be "sinful" to allow for still more discovery on that matter). FEI has previously represented that in view of the abundant information that it has already received concerning the sources and amounts of Mr. Rider's funding, the discovery needed to pursue its RICO claim could be "pointed and efficient." Doc. 176 in No. 03-2006, at 6. Nonetheless, FEI now seeks to conduct burdensome and costly electronic and other discovery, including inappropriately invading attorney-client communications and work-product materials. Should FEI insist on these materials, Defendants also anticipate early litigation over these matters.

6. Claims of Purported Issue Preclusion. FEI has advised that it will seek to foreclose discovery on key issues by asserting that the Court's opinion in the ESA litigation precludes litigation of those issues in this case. For a number of reasons – including, but not limited to, a lack of identity of issues between the two cases, the presence of new parties in this case, and the prejudice to Defendants that would arise from being unable to litigate issues that were not fully and fairly litigated in the ESA case – issue preclusion is inappropriate. Accordingly, Defendants will challenge any attempt by FEI to escape relevant discovery on preclusion grounds and will fully brief the matter when it is raised by FEI.

DISCUSSION REGARDING RULE 26(f)(3)

A. Proposed Changes In The Timing, Form Or Requirements For Disclosures Under Rule 26(a)

Pursuant to this Court's Limited Scheduling Order, Defendants served their initial disclosures pursuant to Rule 26(a)(1) on January 28, 2011. FEI's initial disclosures, however, were incomplete: FEI did not produce the legal bills and other supporting documents required as part of its Rule 26(a) disclosures regarding damages. Defendants respectfully request that the Court set a deadline in the near term for Plaintiff to produce such documents.

Defendants understand that FEI may seek a broad protective order covering these disclosures and other discovery materials. Defendants believe that such a protective order is inappropriate and that any request to protect specific documents or disclosures should comply with the normal standards of Rule 26(c). Defendants will address this fully if and when FEI moves for such a protective order.

B. The Subjects On Which Discovery May Be Needed, When Discovery Should Be Completed, And Whether Discovery Should Be Conducted In Phases Or Be Limited To Or Focused On Particular Issues

Pursuant to this Court's December 9, 2010 Order, "limited" written discovery has been served by parties. Such discovery was stayed pending resolution of Defendants' Motions to Dismiss and is currently being held in abeyance.

1. Phasing of Discovery

Given the nature of FEI's Amended Complaint, Defendants anticipate extensive discovery by both FEI and the thirteen separate Defendants, which will involve disputes over attorney-client, work product, First Amendment, and other privilege issues. In the interest of judicial economy and efficiency, and for the benefit of all parties, the Court should consider phasing discovery so as to simplify and streamline the litigation. For example, the Court suggested in its ruling on the Motion to Dismiss that a number of the Defendants may have a valid statute of limitations defense as to the RICO claims. DE 90 at 28-29. Defendants contemplate filing motions for summary judgment on statute of limitations grounds as soon as practicable. Were the Court to authorize an initial targeted and limited discovery concerning the limitations issue, followed promptly by related summary judgment briefing, the scope of the case, and necessary merits discovery would, at a minimum, narrow the case considerably.

2. Likely Topics on Which Discovery May Be Needed

Defendants propose the following list of likely subjects on which they will need discovery based on FEI's Complaint and Defendants' Answers:

1. FEI's knowledge of Tom Rider's employment circumstances in 2000 and 2001, and when FEI acquired such knowledge;

2. FEI's knowledge of Tom Rider's public advocacy, funding and funding sources, and when it acquired such knowledge;

3. The truth of the allegations raised in the underlying ESA litigation, including FEI's mistreatment of elephants and other animals, abusive techniques used by FEI, FEI's training and chaining practices, the physical and medical condition of FEI's elephants, the incidence of Tuberculosis ("TB") in FEI animals, and conditions at FEI's facilities, including the CEC;

4. The truth of the allegations relating to the contents of the invitation to the July 2005 fundraiser, including FEI's claim that the invitation to the fundraiser was "false and/or misleading" because of the "the invitation's various claims that FEI mistreats its Asian elephants are untrue";

5. Complaints of animal mistreatment against FEI;

6. Investigation of FEI by the government, including USDA investigations, and FEI's conduct with regard to such investigations;

7. FEI's tactics used against former and current employees to keep the public from finding out about the mistreatment of animals and other FEI practices;

8. Public relations, media or legal campaigns by FEI against those who object to mistreatment of animals;

9. FEI's statements to the public regarding treatment of animals;

10. FEI's efforts to quash public opposition, news stories, or legislative initiatives concerning FEI's mistreatment of animals, including FEI's efforts to suppress demonstrations and news coverage thereof;

11. FEI's media strategy after 2000, including its misrepresentations to the public and government officials concerning its treatment of Asian elephants and other animals;

12. FEI efforts to quash public dissemination of information that is critical of FEI;

13. FEI surveillance and other tactics used against those who are critical of FEI;

14. Circumstances surrounding the settlement of *Performing Animal Welfare Society et al. v. Feld Entertainment, Inc., et al.*, No. S-00-1259-GEB-DAD (E.D. Ca.);

15. Organization and structure of FEI;

16. FEI's financial information, including profit and loss statements, tax returns, ticket sales, etc.;

17. Tom Rider's interactions and relationship with the FEI elephants;

18. Relationships between other current or former FEI workers and FEI elephants;

19. Tom Rider's public advocacy, education, and media efforts;

20. FEI's motivations for bringing and pursuing this lawsuit;

21. All lawsuits filed by or against FEI from 2000 to the present, including but not limited to FEI's involvement in other RICO actions;

22. FEI's attorneys' fees and costs, including third party discovery to the law firms of Covington & Burling and Fulbright & Jaworski, L.L.P.;

23. FEI's relationships with fact and expert witnesses used in the ESA litigation;

24. Payments and provision of other things of value by FEI and its counsel to various witnesses who testified in the ESA litigation, including tax documents and tax returns, including but not limited to FEI's payments and provision of other things of value to Dennis Schmitt, Ted Friend, Daniel Raffo, and Michael Keele;

25. FEI's knowledge regarding the motivation and credibility of Archele Hundley, Robert Tom and Margaret Tom and the basis of FEI's allegations regarding MGC's involvement with these witnesses in the ESA litigation;

26. FEI's preservation of documents including document retention and destruction policies;

27. FEI and its counsel's handling of evidence in the ESA Action, including but not limited to Fulbright & Jaworski's claim that it lost specific FEI documents subject to an outstanding Court order;

28. FEI's conduct of its defense in the ESA Action, including its failure to disclose records concerning the elephants and other information in the ESA case, including but not limited to FEI's failure to timely produce thousands of pages of veterinary records required by Court order, and the destruction and/or "loss" of evidence requested and compelled in ESA case, including but not limited to the destruction of videotapes of FEI elephants on trains; and

29. FEI's failure to accept production of Mr. Rider's financial information subject to a confidentiality agreement.

3. When Discovery Should Be Completed

Defendants believe that it is impracticable to select a precise date by which merits discovery should be completed until certain issues as to the scope and contours of such discovery are resolved in their appropriate context – including whether it is advisable to focus discovery initially on the statute of limitations issue, the resolution of which may greatly simplify the rest of the case. Nevertheless, Defendants favor and are committed to completing all discovery as soon as practicable.

4. Production of Documents Already Produced

With respect to production of documents, Defendants agree that it is not necessary to re-produce to parties who were plaintiffs or their attorneys in the ESA case documents previously produced in the underlying ESA case but will identify such documents by Bates number and/or ESA trial exhibit number.

C. <u>Issues Regarding Electronically Stored Information ("ESI")</u>

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,[2] there

[2] **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

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 "Defendants' Position" are set forth herein.

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 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 inspection, the requesting party shall identify the

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.

documents that it wants to be copied or scanned and then pay the reasonable costs for said copying or scanning.

a. 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.

b. 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 because this method, among other things, facilitates the authentication of natively produced documents, but 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.

c. 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.

Defendants' 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.

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

i. 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.

ii. 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.

iii. 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).

iv. 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 request 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.

v. 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).

vi. 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.

vii. 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.

viii. Organization of Production[3]

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.

ix. 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

[3] 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

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 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.

Defendants' 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.

Plaintiffs believe 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 ASCPA 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. 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) 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. <u>What Changes Should Be Made In The Limitations On Discovery Imposed Under These Rules Or By Local Rule, And What Other Limitations Should Be Imposed</u>

1. Interrogatories, Requests for Production of Documents, and Requests for Admission

Defendants believe that there should be no changes made in the limitations on discovery under the Federal Rules or Local Rules with respect to interrogatories, requests for production of documents, and requests for admissions under Fed. R. Civ. P. 33, 34, and 36.

2. Number of Depositions

Due to the number of Defendants that FEI has sued, and the need for each Defendant to have an opportunity to develop his, her, or its own defense, Defendants do not believe that the presumptive limits in the Federal Rules should apply in this case. For the same reason, FEI's proposal that FEI be entitled to the same number of depositions as the Defendants collectively is inequitable. The various Defendants have separate and different factual and legal issues, and each Defendant is entitled to pursue individualized discovery to mount its defense. Discovery will extend to multiple persons and entities, including parties, individuals within a party's control, and third parties, and in certain instances, Defendants and Plaintiff will be seeking discovery from the same person or entity.

Accordingly, Defendants propose that FEI be permitted to take one deposition of each of the 13 Defendants and no more than 12 other depositions, for a total of 25 depositions. Defendants propose that Defendants collectively be permitted to take one deposition of FEI and no more than 39 other depositions (which is equal to the relatively modest number of 3 depositions per defendant), for a total of 40 depositions.

3. Other Proposed Deposition Parameters

If any party believes that additional depositions are necessary, the parties agree to meet and assess whether additional fact depositions are necessary and reasonable. If the parties cannot reach an agreement, a party may seek leave of court to obtain further depositions upon a showing of good cause.

a. Party Depositions

Defendants propose that the Fed. R. Civ. P. 30(b)(6) deposition of FEI shall be limited to 2 days, consisting of 12 hours reserved for Defendants' questioning and 2 hours reserved for

FEI's rebuttal questioning. Defendants shall divide their allotted time among themselves by agreement.

Defendants propose that a Fed. R. Civ. P. 30(b)(6) or individual deposition of any Defendant be limited in duration as follows: each such deposition shall be limited to 2 days total (or 14 hours total), consisting of 6 hours reserved for FEI's questioning, 6 hours reserved for questioning by other Defendants, and 2 hours reserved for rebuttal questioning by the party being deposed.

b. Other Depositions

Absent leave of Court for good cause shown, an individual or organization shall be deposed no more than once by FEI and once by the Defendants, collectively, in connection with this case. If an individual or organization is noticed for deposition by both FEI and Defendants, the parties shall coordinate to ensure that, absent unavoidable scheduling conflicts or similarly compelling grounds, the depositions will occur on consecutive days. The designation of a person to testify on behalf of a corporation or other organization noticed for deposition pursuant to Fed. R. Civ. P. 30(b)(6) will not prejudice the rights of any party to separately notice that person for deposition in his or her individual capacity.

Unless extended by agreement of the parties and deponent, or by an order of Court, each deposition of a non-party fact witness shall be limited to 1 day of 7 hours of deposition testimony, which shall include 1 hour of deposition time for Defendants, collectively, if FEI noticed the deposition, or for FEI if one of the Defendants noticed the deposition.

F. <u>Any Other Orders That The Court Should Issue Under Rule 26(C) Or Under Rule 16(B) And (C)</u>

As discussed above at the end of Section A, Defendants believe that the Court will need to address the issue of whether a broad protective order should be entered into in this case.

Defendants believe that such a protective order is not appropriate and that the normal standards of Rule 26(c) should instead apply.

Defendants also believe that it would serve the interests of judicial efficiency to modify and/or lift the several protective orders that were entered or agreed to in the ESA Action in order: (i) to permit those Defendants who were not parties to the ESA Action access to all ESA Action documents; and (ii) to enable the parties to use documents from the ESA Action in this case without requiring that future filings be done under seal.

Date: September 10, 2012 Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of September 2012, copies of the foregoing Defendants' Joint Discovery Plan Pursuant to F.R.C.P. 26(f)(3) was served via ECF on all counsel of record including the following opposing counsel:

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