UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 07- 1532 (EGS/JMF)**
	:	
ANIMAL WELFARE INSTITUTE, et al.:		
	:	
Defendants.	:	
	:	

NOTICE OF MEET AND CONFER AND
PROPOSED RULE 16(B)(3) DISCOVERY ORDER

Pursuant to Magistrate Judge Facciola's 5/9/2013 Order (Docket No. 151), counsel for Plaintiff and Defendants (collectively "the parties") have met and conferred about remaining discovery issues and hereby submit a proposed order specifying those areas of discovery on which the parties have agreed.

The parties were not able to agree on certain remaining discovery subjects. For those areas of disagreement, the positions of Plaintiff and Defendants are listed below by topic, largely as they were set forth in the parties' respective Discovery Plans.

1. Production Format for Paper and Electronic Documents.

Feld Entertainment ("FEI"), Fund for Animals ("FFA"), Humane Society of the United States (HSUS), and Animal Welfare Institute ("AWI") have agreed on a protocol for the production of paper and electronic documents. That protocol is included in the attached proposed order.

Born Free USA ("Born Free"), Tom Rider, Wildlife Advocacy Project ("WAP"), Meyer Glitzenstein & Crystal ("MGC"), Katherine Meyer, Eric Glitzenstein, Howard Crystal,[1] Kimberly Ockene, and Jonathan Lovvorn have objected to the protocol for the production of paper and electronic documents. These Defendants believe that the extensive cost and burden of discovery in this matter may make it impracticable for them to comply in the absence of a cost-shifting provision, as discussed in more detail, *infra*. These Defendants propose production of documents in un-indexed, PDF format only or by providing documents for inspection. Such parties not providing an index also may not comply with the metadata requirements proposed in the electronic production protocol.

2. Alternative to Electronic Production: Adobe Format or by Inspection

Certain of the defendants disagree with the paper and electronic production protocol and have proposed either making documents available for inspection only or converting paper and/or electronic documents to Adobe PDF files.

Plaintiff's Position: Plaintiff believes that the most efficient form of production is by electronic means, in accordance with the protocol included in the attached Proposed Order. If parties are going to make documents available for inspection, it should be limited to paper documents that do not exist in electronic form. Plaintiff objects to the production of paper documents electronically as multipage Adobe PDF files to the extent such a production fails to delineate the beginning and end of each document or otherwise makes a document less useful, due to reduced searchability or otherwise. *See* Pl. Am. Discovery Plan (9/10/12) at 12-13.

[1] Mr. Crystal contends that he was dismissed as an individual defendant and thus should not be included in the order. FEI maintains that Mr. Crystal is a defendant to Counts II, III, IV and V of its First Amended Complaint. *See* ECF No. 90 at 44, 72 & 87 (dismissing Crystal under 18 U.S.C. § 1962(c) (Count I), and champerty (Count VII)). FEI also maintains that he in the case as a general partner of MGC. *See* ECF No. 90 at 44. Furthermore, Mr. Crystal answered the First Amended Complaint, and has continued to submit motions and other filings in this case as a party notwithstanding his purported "dismissal." *See* ECF Nos. 97, 105 and 118.

Plaintiff also objects to the production of electronic documents in Adobe PDF files as this makes the documents less useful to the requesting party (e.g. searchability; lack of document delineation; absence of metadata). Plaintiff objects to certain of the defendants' request to make an un-indexed production which exempts them from producing metadata, which could be critical in this case. For example, metadata could be very important with respect to Tom Rider's false answer to Interrogatory No. 24, which was central with respect to the Court's 12-30-09 Opinion and served as a basis for sanctioning counsel.

Plaintiff does not believe that any of these Defendants has established a basis for exempting themselves from the protocol that the other parties have agreed to. These defendants have not quantified the number of documents, volume of electronic data and the costs of producing such material. These defendants, therefore, should be subject the protocol absent a proper showing at a future date that they cannot reasonably comply with it.

Defendants' Position:

Given the wide scope of electronic discovery likely to be sought by Plaintiff in a case of this magnitude, Defendants Born Free, Tom Rider, WAP, MGC, Katherine Meyer, Eric Glitzenstein, Kimberly Ockene, and Jonathan Lovvorn believe that the cost of electronic discovery is potentially prohibitive of their abilities to comply with the ESI protocol in the absence of the cost-shifting of this expense to the Plaintiff, a topic which can only be briefed once the full scope and contours of the requested discovery are known. They instead believe that production of documents in un-indexed, PDF format only or alternatively making documents available for inspection, which Plaintiff may itself then review, scan, and copy in a searchable format is appropriate in this case in light of the aforementioned costs and burdens. Moreover, these documents are in a format that is sufficiently useful to Plaintiff.

Also, the individual defendants, who have relatively limited materials to produce, believe it would be unfair to impose on them document production protocols that effectively require that they engage outside contractors to complete a limited document production, and that excluding them from the document protocol agreed to by other defendants, all of whom were organizational defendants, would have at most a minimal impact on plaintiff.

3. Privilege Documents That Need Not Be Logged

The Parties disagree on the categories of privileged documents that need not be logged.

Plaintiff's Position: Plaintiff proposes that 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.

Plaintiff does not believe that its counsel should have to individually log, index or produce, without limitation as to subject matter, documents created or received prior to January 1, 2010, as this would encompass the entirety of the ESA Case which is irrelevant, overbroad

and exceedingly burdensome. Plaintiff does not believe that the meet and confer process described by defendants below would be productive until specific requests for production of documents have been served.

Defendants' Position: Defendants propose 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.

Defendants believe that Plaintiffs' counsel should have to log certain categories of documents created or received prior to January 1, 2010. Plaintiff appears to agree, objecting only to a requirement that it log all documents created or received prior to January 1, 2010 "without limitation as to subject matter." Defendants similarly object to having to produce or log documents without limitations as to subject matter. The parties should meet and confer to develop the categories or subject matters of documents appropriate for logging.

4. Privilege Log Specifications

The Parties disagree about certain of the privilege log specifications, specifically regarding the logging of email strings and the specificity of document descriptions.

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: Defendants propose that 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).

5. Number of Fact Witness Depositions

The Parties disagree about the number of fact witness depositions.

Plaintiff's Position: Due to the complexity of the case and large number of potential witnesses, including those listed in Defendants' Initial Disclosures, 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. The 12 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. In no event should the Defendants be collectively entitled to more fact depositions than Plaintiff, due to the nature and extent of Plaintiff's claims and the fact that Defendants have listed more witnesses on their Initial Disclosures.

The presumptive limit of 10 depositions is already exceeded by the fact that there are twelve defendants, all of whom need to be deposed. Moreover, there are three former parties to the ESA case that would be subject to deposition as well (PAWS, Glenn Ewell, and ASPCA), and none of this takes into account the multiple employees of current and former defendants, some of whom are not employed by them (*e.g.*, Lisa Weisberg, Ed Sayers, Nicole Paquette and others). Additionally, part of the RICO allegations in this case concern the use of the ESA case

to raise money and therefore to victimize the donating public. Multiple depositions, therefore, will be required to pursue that theory as well.

Defendants' Position: Defendants believe that, at a minimum, they collectively need one and a half times the number of depositions allotted to Plaintiff. Moreover, Defendants believe that the Court ought to place reasonable limitations on the number and duration of all depositions in this case, as described below. The allotment of deposition time must account for the fact that there are 11 times as many Defendants as there are Plaintiffs in this case. Accordingly, Defendants ought to be entitled to take a proportionally greater number of depositions in order for each Defendant to have an opportunity to develop his, her, or its own defense individually. Given the nature of Plaintiff's allegations, which, among other things, accuse Defendants of concerted wrongdoing with co-Defendants, mounting an adequate defense is likely to require Defendants to take discovery from each other as well as from third parties and Plaintiff. Thus, it is likely that many of the individuals and entities that Plaintiff seeks to depose – including those Plaintiff refers to above – will also need to be deposed by one or more of the Defendants. Moreover, there are also likely to be many witnesses whom the Defendants will need to depose, such as present and former employees of Plaintiff, from whom Plaintiff will not need discovery.

Thus, if Plaintiff is entitled to take its requested 40 fact depositions, Defendants collectively should be entitled to take at least 60 fact depositions. This number would be equal to approximately five depositions per Defendant. However, Defendants believe that Plaintiff's request for 40 depositions is excessive and will result in unnecessary burden and cost for all parties, and most especially for the Defendants here, who are non-profit organizations and public interest lawyers and one unaffiliated individual. Instead, as proposed in their September 2012 Discovery Plan [DE 118 at 25], Defendants propose that Plaintiff be allotted 25 depositions and

Defendants collectively be allotted 40 depositions. Should a party need more depositions than this amount (which vastly exceeds the amount called for in the Federal Rules), he, she, or it can seek permission from the court to do so.

6. Interrogatories

The Parties disagree about limitations on interrogatories.

Plaintiff's Position: 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).[2] 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. This will avoid the chaotic situation that occurred earlier in the case when there were no limits on interrogatories. Defendants proceeded as they now suggest should happen and FEI was served with 221 interrogatories, many of which overlapped. Defendants have yet to explain why each and every one of them needs 20 interrogatories.

Defendants' Position: Defendants believe that the Federal and Local Rules should control with respect to interrogatories in this case, and no changes to the limitations on interrogatories in those rules are warranted. Plaintiff filed a 129-page, 354-paragraph, First Amended Complaint wherein it falsely alleges that Defendants engaged in, *inter alia*, racketeering, conspiracy, bribery, illegal gratuity payments, obstruction of justice, mail fraud,

[2] Plaintiff made this calculation when ASPCA was still a party. However, FEI is willing to abide by its original proposal.

wire fraud, and money laundering. Plaintiff's position on interrogatories, if adopted, would hamstring Defendants' ability to illustrate falsity of these allegations by severely limiting Defendants' ability to serve sufficient interrogatories in accordance with the Federal Rules. Each Defendant is entitled to adequately test Plaintiff's allegations against each of them, on an individualized basis, which would be impossible given the inequitable allocation of interrogatories proposed by Plaintiff.

7. Requests for Admission

The Parties disagree about limitations on requests for admission.

Plaintiff's Position: In order to maximize their utility and efficiency and to prevent abuse, with the exception of requests for admission that seek to authenticate a document, Plaintiff proposes that all requests for admission shall be served after the completion of written fact discovery. Absent this modification, Plaintiff proposes that Plaintiff shall serve no more than 50 admission requests and Defendants, collectively, shall serve no more than 50 admission requests. This will avoid the chaotic situation that occurred earlier in the case when there were no limits on admissions. Defendants proceeded as they now suggest should happen and FEI was served with 430 admissions, many of which were argumentative or otherwise improper.

Defendants' Position: Defendants believe that the Federal and Local Rules should control with respect to requests for admission in this case, and no change to those rules is warranted.

8. Protective and Confidentiality Order(s)

Plaintiff's Position: Consistent with *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (parties have no First Amendment right to disseminate, in advance of trial, information gained through the pre-trial discovery process), Plaintiff believes that the Court should enter a Protective

and Confidentiality Order and submits that the Order entered by Magistrate Judge Facciola in the ESA Action (03-2006) on 9/25/2007 is an appropriate model. That protective order applied to all discovery taken in the case from that point forward, through the discovery cut-off. That protective order limited disclosure of discovery material to the parties in the lawsuit and their counsel, and facilitated the orderly progress of discovery. Such an approach would avoid Court involvement in multiple motions for protective orders. Further, such an approach would permit the parties to use whatever they find in discovery for proper purposes (i.e., litigating this case) but would, at the same time, avoid what happened in the ESA case (i.e., discovery material finding its way into the media). Defendants' suggestion that there should be a meet and confer on a protective order is curious given that the parties have already attempted this. Plaintiff does not believe the current filing is the appropriate vehicle for litigating whether the allegations in the First Amended Complaint are "false," but would note that the press releases referenced by Defendants and most of the media attention have been the result of the public reaction to rulings by the Court in this case and the ESA case.

Defendants' Position(s): Defendants do not believe that the protective order entered by Magistrate Judge Facciola in September 2007 in the ESA Action, which governed some, but not all, of the discovery in that case, is the appropriate model for this case for multiple reasons. In this case, Plaintiff has publicly filed a lengthy complaint wherein Plaintiff falsely alleges that Defendants engaged in a vast number of illegal acts (including racketeering, conspiracy, bribery, fraud, and money laundering. These allegations have been the subject of multiple news articles and also press releases by Plaintiff. Plaintiff now seeks entry of a blanket protective order that would result in the public not learning about the falsity of these allegations and Plaintiff's own

wrongdoing. Plaintiff should not be permitted to publicly make false allegations and then hide their falsity from the public through a blanket protective order.

Defendants further believe entry of a protective order is premature at the present time. Instead, Defendants propose that the parties should meet and confer in accordance with Rule 26(c) regarding the contours of an appropriate protective order in this case. Defendants do not believe that an adequate meet and confer process has yet occurred with regards to the proper scope of a protective order in this case.

9. Timing of Written Discovery and Responses

The parties agree that document requests and interrogatories should be substantially submitted during the first 90 days of fact discovery. The parties also agree that any additional document requests and interrogatories may be served no later than 30 days before the close of fact discovery.

Plaintiff's Position: Plaintiff believes that Defendants' attempt to limit document requests is impractical, and would only generate additional disputes (i.e., whether information is or is not "new"). There is no basis in the Federal Rules for Defendants' approach. Defendants' approach assumes that the propounding party already knows what the information is and where it exists. Further, Plaintiff believes that it is impractical to impose a formula on the timing of the production of documents after the service of requests or the resolution of objections. Defendants' proposed timelines may be excessive in some instances, and insufficient in others. In addition, Defendants' approach contradicts the parties' agreement that written discovery requests may be served no later than 30 days before the close of fact discovery.

Defendants' Position: Defendants believe that additional document requests or interrogatories should only be allowed after the initial 90-day period to the extent such requests

or interrogatories are based on new information gathered during fact discovery and therefore could not have been anticipated at the beginning of fact discovery. Defendants believe that allowing for any other new discovery requests after then 90-day period will only serve to duplicate document gathering efforts, particularly electronic document collection and searching, which would be extremely costly and burdensome. Moreover, requiring both sides to make all their discovery requests in a timely fashion will simplify and streamline the discovery process as a whole.

Defendants believe that any production of documents responsive to a document request or interrogatory should be substantially completed on the later of (i) 120 days after service of the document request, or (ii) 30 days after the resolution of any applicable objection. Defendants believe that such common-sense limits on the time to respond to written discovery requests will simplify and streamline the discovery process as a whole, and permit all parties to move on to deposition discovery in a timely fashion.

10. Time Limits on Depositions

Plaintiff's Position: 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 to exceed 30 minutes 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 6 hours of examination. Parties desiring to conduct 30 minutes or less of examination of a non-party deponent do not need to cross-notice the deposition. 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. A cross-noticed deposition counts against both sides' deposition counts.

Depositions of a party[3] (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 of more than an hour shall cross-notice the deposition and cross-noticing parties shall be limited collectively to 7 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 Defendants' proposal (which would give each side only 3.5 hours of deposition time for non-parties and 10.5 hours for parties) virtually guarantees that, in a deposition important enough to be cross-noticed, there will be a motion for more time and a second session of the deposition, thus needlessly using up resources of the Court and the parties. Plaintiff's proposal

[3] 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.

for depositions set forth above avoids the unfair tactic of Defendants' noticing depositions simply to cut down the time that Plaintiff otherwise would have in the absence of such a cross-notice. The template Plaintiff proposes makes an advance determination that is reasonable (and realistic) as to the duration of a cross-noticed deposition. An advance determination like this also allows a deponent to make proper arrangements for travel and other logistics. In the case of a party, FEI should be able to take at least a 2-day deposition of every defendant and its proposal provides for this, even if the deposition is cross-noticed by another defendant.

Defendants' Position: If only one side notices a deposition, it will be allotted six times the questioning time compared to the non-noticing side. For instance, if a Defendant notices a deposition, and Plaintiff does not notice that same deponent, then for each deposition day, Defendants collectively shall have 6 hours of deposition time and Plaintiff shall have 1 hour of deposition time. If a deposition is noticed by both sides, each side will be allotted half of the total questioning time. Unless otherwise stipulated by the parties or ordered by the Court, a deposition of a party will last for no more than two days of fourteen hours of deposition time if only noticed by one side or three days of 21 hours or deposition time if noticed by both sides. Unless otherwise stipulated by the parties or ordered by the Court, a deposition of other nonparty witnesses will last for one day of seven hours.

Defendants believe that a fifty-fifty presumptive split of deposition time for depositions noticed by both sides is more than fair, given that Plaintiff is a single party, represented by a single law firm, whereas Defendants are 11 separate—and mostly separately-represented—entities and individuals. Similarly, a six-to-one time split for depositions noticed by only one side would provide the noticing side with ample questioning time, reserving only a small, reasonable period for questioning by the other side. Defendants believe that the presumptive

time limits proposed by Plaintiff are unfair, in that they will leave too little opportunity for the cross-noticing side to question, and unworkable, in that they assume that the Court will freely grant extensions of nonparty depositions. Defendants' position equitably allots questioning time whether or not the Court grants additional time for a particular deposition. Defendants believe that the decision to grant additional time for a particular deposition should be made on a case by case basis, upon a showing of need, consistent with the Federal and Local Rules.

Dated: May 24, 2013

Respectfully submitted,

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