UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.,

Plaintiff,

v. **Civil Action No. 07-1532 (EGS/JMF)**

ANIMAL WELFARE INSTITUTE, *et al.*,

Defendants.

ORDER

On May 9, 2013, I determined that 46 topics were relevant and appropriate areas for discovery. See Order [#151] at 1-7. I further directed the parties to meet and confer pursuant to Rule 26(f)(3) of the Federal Rules of Civil Procedure, and to file a proposed order pertaining to all remaining discovery issues, in accordance with Rule 16(b)(3) of the Federal Rules of Civil Procedure. Id. at 7. The parties have now done so and the issue is ripe for resolution.

While the parties were able to agree on certain areas of discovery, they were unable to resolve disagreements as to the following areas, the majority of which the Court will now resolve:

1. Production Format for Paper and Electronic Documents

The following organizations have agreed to a protocol for the production of both paper and electronic documents: 1) Feld Entertainment ("FEI"); 2) Fund for Animals ("FFA"); 3) the Humane Society of the United States ("HSUS"), and 4) the Animal Welfare Institute ("AWI"). Notice of Meet and Confer and Proposed Rule 16(B) (3) Discovery Order [#152] at 1. As to those parties, the proposed protocol is approved.

The following defendants have not reached an agreement with plaintiff:

Plaintiff's Position	Defendants' Position(s)	Court's Resolution
	The following organizations and individuals argue that the cost of complying with the above-referenced protocol would be prohibitively expensive and burdensome: 1) Born Free USA ("Born Free"); 2) Tom Rider; 3) the Wildlife Advocacy Project ("WAP"); 4) Meyer Glitzenstein & Crystal ("MGC"); 5) Katherine Meyer; 6) Eric Glitzenstein; 7) Howard Crystal; 8) Kimberly Ockene; and 9) Jonathan Lovvorn. [#152] at 2. Instead, they propose to either produce documents in an un-indexed, PDF format, or to allow the documents to be inspected. Id.	The protocol agreed to by FEI, Fund for Animals, the Humane Society of the United States and the Animal Welfare Institute will apply to all parties.

The recalcitrance of certain defendants to agree to the protocol agreed by the others is troubling.

First, I am hard pressed to understand how the goals of efficiency and expedition are served by having two forms of production. Second, the assertion by these defendants that their manner of producing paper documents and electronically stored information is less costly than the protocol to which the other defendants have agreed is unproved and unprovable on this record. They have to admit that their own form of production will be costly and there is any showing (besides their lawyers' suppositions) that it will be any more or less costly than the manner of production to which the other defendants have agreed. There will therefore be only one protocol of production for all parties. The dissenting defendants are, of course, free to move for a

protective order once the specific demands are made, but I caution them and all parties that I will insist upon a specific, detailed showing of what the anticipated costs of complying with a certain demand will be, with an equally specific showing of why one manner of production is more costly than another. The latter showing will have to be supported by affidavits and declarations by persons who have the knowledge, skill, and experience to make estimates of costs.

2. Documents That Need Not Be Logged

Description of Documents	Plaintiff's Position	Defendants' Position(s)	Court's Resolution
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 various law firms.	Plaintiff proposes that the following law firms should be included in the exception: 1) Wilson, Elser, Moskowitz, Edelman & Dicker, LLP; 2) Ropes & Gray, LLP, Morgan Lewis & Bockius, LLP; 3) Patterson Belknap Webb & Tyler, LLP; 4) Shertler & Onorato, LLP; 5) Zuckerman Spaeder, LLP; 6) Clifford Chance; 7) Wilmer Cutler Pickering Hale & Dorr, LLP; 8) Stephen Braga, DiMuro Ginsburg, PC; 9) Latham & Watkins; and 10) Kaiser Law Firm, PLCC. [#152] at 4.	Defendants agree. [#152] at 5.	Approved.
Privileged material created or received by counsel of record for Plaintiff in this matter and	Plaintiff proposes that the law firm of Fulbright & Jaworski, LLP should be included in this	Defendants agree. [#152] at 5.	Approved.

for defendant in Civil Action No. 03-2006-EGS (D.D.C.), their associated attorneys and support staff, including paralegal and secretarial personnel	exception. [#152] at 4.		
Other documents	Plaintiff proposes that there be subject matter limitations on the logging of documents created or received prior to January 1, 2010 (documents relating to the ESA case). [#152] at 4-5.	Defendants agree. [#152] at 5.	The parties shall meet and confer to identify a list of categories appropriate for logging. If they cannot agree at this point in time, the issue will be resolved by the Court, if need be, after specific requests for production have been made.

3. Privilege Log Specifications

Description of Documents	Plaintiff's Position	Defendants' Position(s)	Court's Resolution
E-mail strings	Plaintiff contends that each separate communication within the string need not be logged separately, but that all participants in the string be identified and their affiliations provided in an accompanying key. With respect to privileged portions of the string, plaintiff contends that those portions be redacted in the normal course and the reason for the redaction identified.	Defendants appear to agree with the added caveat that all e-mail strings be identified as such and that the log otherwise comply with Fed. R. Civ. P. 26(b)(5). [#152] at 6-7.	The following information shall be provided as to e-mail strings: 1) date of most recent e-mail in string; 2) author(s); 3) recipient(s); 4) description (including whether it is part of a string); 5) identification of claimed privilege; and 6) whether the document was redacted and released or withheld completely. The claim of privilege will be the detailed

	[#152] at 5-6.		showing required by Fed. R. Civ. P. 26(b)(5), *i.e.* the claim of privilege shall "describe the nature of the document . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." An entry in the log that does not meet this requirement will cause a forfeiture of the privilege claimed.

4. Number of Fact Witness Depositions

Plaintiff's Position	Defendants' Position(s)	Court's Resolution
Plaintiff argues that the 10 deposition limit specified in the Federal Rules is insufficient given the complexity of the case and the number of potential witnesses. [#152] at 7. Plaintiff proposes that it be entitled to take 40 fact witness depositions and that defendants, collectively, be entitled to take 40 as well, with the option for any party to take additional depositions, if deemed necessary and reasonable. Id.	Defendants argue that if plaintiff is allowed to take 40 fact depositions, defendants should collectively be allowed to take 60 depositions, to account for the fact that there are eleven times as many defendants as plaintiffs in this case. [#152] at 8. Alternatively, defendants propose that plaintiff be allowed to take 25 fact depositions and that defendants be allowed to take 40, with the possibility that any party could seek permission to take additional depositions if necessary. Id. at 8-9.	Plaintiff will be allowed to take 40 fact depositions and defendants, collectively, will be allowed to take 60. Any party may seek permission to take additional depositions and requests will be considered on a case by case basis.

5. Interrogatories

Plaintiff's Position	Defendants' Position(s)	Court's Resolution
Plaintiff argues that defendants should collectively be limited to no more than 20 interrogatories against plaintiff with each defendant being allowed an additional 5 interrogatories against plaintiff, for a total of 85 interrogatories. [#152] at 9. Plaintiff further proposes that it be allowed 85 interrogatories as well (20 common interrogatories to be served on all defendants and an additional 65 interrogatories to be served as plaintiff wishes). Id.	Defendants argue that each defendant should be allowed 20 interrogatories. [#152] at 9-10.	Plaintiff will be allowed to propound 85 interrogatories (20 common and an additional 65 to be propounded as plaintiff wishes) and each defendant will be allowed to propound 20 interrogatories.

6. Requests for Admission

Plaintiff's Position	Defendants' Position(s)	Court's Resolution
Plaintiff proposes that, with the exception of requests that seek to authenticate a document, requests for admission be served after the completion of written fact discovery. [#152] at 10. Plaintiff further proposes that plaintiff be allowed no more than 50 admission requests and that defendants collectively be allowed no more than 50 requests. Id.	Defendants argue that the Federal and Local Rules should control. [#152] at 10.	Plaintiff shall be allowed 50 requests for admission and defendants shall each be allowed 20 requests for admission. Unless good cause is shown, the requests for admission will be served after fact discovery is closed.

7. Protective and Confidentiality Order(s)

Plaintiff's Position	Defendants' Position(s)	Court's Resolution
Plaintiff proposes that the Court enter a protective order similar to the one entered in the ESA Action (03-2006) on September 25, 2007. [#152] at 10-11.	Defendants argue that a protective order is premature at this time and that defendants should not be precluded from publicizing information that	The Court will consider issuing such an order. Plaintiff shall propose such an order within 10 days of this Order, accompanied by a

Plaintiff further proposes that the order apply until the discovery deadline. Id. at 11.	tends to disprove plaintiff's claims. [#152] at 11-12.	memorandum of points and authorities supporting its entry. Defendant may oppose the application 14 days thereafter and plaintiff may reply 7 days later.

8. Timing of Written Discovery and Responses

Plaintiff's Position	Defendants' Position(s)	Court's Resolution
Plaintiff argues that document requests and interrogatories should be substantially submitted during the first 90 days of discovery and in any event, no later than 30 days before the close of discovery. [#152] at 12.	Defendants argue that additional requests should be allowed after the initial 90 days but only if based on new information. [#152] at 12-13. Defendants also argue that all production should be substantially completed either 120 days after service of the request or 30 days after resolution of any objection, whichever is later. Id. at 13.	Pursuant to the parties' limited agreement, document requests and interrogatories should be submitted during the first 90 days of discovery and in event, no later than 30 days before the close of discovery. No other internal deadlines will be imposed.

9. Time Limits on Depositions

Deposition Type	Plaintiff's Position	Defendants' Position(s)	Court's Resolution
Non-party depositions	Plaintiff proposes the following: 1) non-party depositions shall be limited to 7 hours unless extended by agreement of the parties or Court order; 2) if any party being deposed wishes to ask questions for longer than 30 minutes, it shall cross-notice the deposition; 3) if a non-party is cross-noticed, the party seeking the deposition will be limited to 6 hours and cross-noticing	Defendants propose the following as to all depositions: 1) if only one side notices a deposition, it will be allowed 6x the questioning time allowed the non-noticing side; 2) if a deposition is noticed by both sides, each side will be allotted half of the total questioning time; 3) unless otherwise agreed to by the parties or ordered by the Court, party	A hearing will be held on this complicated issue. Plaintiff's counsel will take the responsibility of finding a date that is convenient for all counsel and then coordinating with my chambers to set a date for a hearing in September.

	parties shall be collectively limited to 6 hours; 4) non-party depositions will never exceed 12 hours unless the parties agree or the Court permits it; and 5) a cross-noticed deposition counts against both sides' deposition counts. [#152] at 13-14.	depositions shall be limited to 14 hours if noticed by only one side and 21 hours if noticed by both sides; 4) unless otherwise agreed to by the parties or ordered by the Court, depositions of non-party witnesses shall be limited to 7 hours; 5) for depositions noticed by both sides, each side shall have the same amount of time; and 6) for depositions noticed by one side, the noticing party shall have 6x the questioning time allowed the non-noticing side. [#152] at 15-16.	
Party depositions	Plaintiff proposes the following: 1) Depositions of parties shall be limited to 14 hours unless extended by agreement of the parties or Court order; 2) if any party being deposed wishes to ask questions for longer than one hour, it shall cross-notice the deposition and cross-noticing parties shall be limited collectively to 7 hours; 3) a cross-noticing party may take more time but the deposition will count against the cross-noticing party's deposition limits; 4) party depositions will never exceed 3 days	See above.	See above.

	unless the parties agree or the Court permits it; and 5) with respect to a party organization, this limit shall be a collective limit on the total hours of all Rule 30(b)(6) witnesses; 6) one hour of follow up questions by the deponent's counsel may be asked without separately cross-noticing a deposition but if the questioning exceeds one hour, a deposition must be cross-noticed; and 7) unless otherwise permitted by the Court, an individual or organization may only be deposed once in this case except that 30(b)(6) witnesses may be separately noticed in his or her individual capacity. [#152] at 13-15.		

In addition to the above resolution of disputed discovery issues, it is, hereby,

ORDERED that the parties' jointly submitted Proposed Order [#152-1] is **GRANTED.**

The Court appreciates that there has been a delay in the issuance of this Order due to the press of other business. If the deadlines to which the parties have agreed now require adjustment, the Court will certainly consider revising them upon the parties' joint application.

SO ORDERED.

Digitally signed by John M. Facciola
DN: c=US, st=DC, l=Washington, email=john_m._facciola@dcd.uscourts.gov, o=United States District Court for the District of Columbia, cn=John M. Facciola
Date: 2013.08.08 12:13:30 -04'00'

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE