

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

FELD ENTERTAINMENT, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 07-1532 (EGS/JMF)
)	
ANIMAL WELFARE INSTITUTE, <i>et al.</i>)	
)	
Defendants.)	

**DEFENDANTS’ MOTION FOR CLARIFICATION AND/OR MODIFICATION
OF THE COURT’S AUGUST 8, 2013 DISCOVERY ORDER**

Defendants respectfully move this Court under Federal Rule of Civil Procedure 60(a) for clarification and/or modification of the Court’s August 8, 2013 Discovery Order. (ECF 156.)

Counsel for Plaintiff and Defendants met on September 5, 2013, in an attempt to identify a list of categories appropriate for logging pursuant to this Court’s August 8, 2013 Order. (*See* ECF No. 156 at 3-4.) Counsel for Defendants understood that this meet and confer would address not only the categories appropriate for logging by Defendants and their counsel prior to January 1, 2010, but also the categories appropriate for logging by Plaintiff and its counsel, including privileged material created or received by Fulbright & Jaworski, LLP (“Fulbright”), *prior to* January 1, 2010.

During our meeting, however, counsel for Plaintiff asserted that this Court’s August 8, 2013 Order does not require Plaintiff to meet and confer with Defendants regarding the identification of categories of privileged material created or received by Fulbright at *any time* because Fulbright is not obligated to log *any* documents. Defendants disagree with Plaintiff’s interpretation of this Court’s Order.

The source of this dispute appears to be seven missing words in the Court's August 8, 2013 Order. In the following description of the documents that Defendants' counsel need not log, the Court included the phrase "from January 1, 2010 to the present;" in its reciprocal description of the documents that Plaintiff's counsel need not log, the phrase "from January 1, 2010 to the present" does not appear (ECF 156 at 3-4) (emphasis added):

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 for defendant in Civil Action No. 03-2006-EGS (D.D.C.), their associated attorneys and support staff, including paralegal and secretarial personnel.	Plaintiff proposes that the law firm of Fulbright & Jaworski, LLP should be included in this exception. [#152] at 4.	Defendants agree. [#152] at 5.	Approved.

Defendants believe that this omission was inadvertent, particularly in light of the background to the Court's Order and the other provisions of the August 8, 2013 Order. On May 9, 2013, this Court ordered the Parties to meet and confer regarding certain discovery issues and to submit a proposed order specifying those areas of discovery on which the Parties agreed. (ECF No. 151.) On May 24, 2013, the Parties filed a Notice of Meet and Confer and Proposed Rule 16(B)(3) Discovery Order, indicating that they had met and conferred about the remaining discovery issues and specifying the Parties' areas of agreement. (ECF No. 152.) In that Notice, Plaintiff represented to this Court with respect to privileged documents that need not be logged:

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*. . . .

(*Id.* at 4-5 (emphasis added).) Defendants responded as follows:

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.

(*Id.* at 5 (emphasis added).)

Consistent with Plaintiff's representations and Defendants' expectations, this Court's August 8, 2013 Order required the Parties to meet and confer to identify a list of categories appropriate for logging that were created or received prior to January 1, 2010, relating to the ESA case. (ECF No. 156 at 3-4.) Significantly, this Court noted that "*Plaintiff proposed* that there be *subject matter limitations* on the logging of documents created or received *prior to* January 1, 2010." (ECF No. 156 at 4 (citing 152 at 4-5) (emphasis added).)

Nonetheless, Plaintiff has seized on the absence of the words “from January 1, 2010 to the present” as support (indeed, their sole support) for the wholly-unjustified position that this Court’s Order does not require Plaintiff to log *any materials* created or received by Fulbright *prior to* January 1, 2010, relating to the ESA case. Defendants disagree with Plaintiff’s reading of the Order. Defendants believe that the fair and correct reading of the Order is that Fulbright need not log privileged material it created or received *after* January 1, 2010. Defendants agreed to such an approach, as the Court noted in the Order. Defendants never agreed that Fulbright would be exempt from logging all privileged documents *prior to* January 1, 2010. Rather, the whole point of meeting and conferring was to try to agree upon the “subject matter limitations” that Fulbright proposed were necessary in order for Fulbright to log documents created or received “prior to January 1, 2010.” (*See* ECF No. 152 (quoting Plaintiff).)

At the conclusion of the Parties’ September 5, 2013 meet and confer, the Parties agreed to resume the meet and confer process on privilege logging after Defendants have served their operative document requests. The next day, on September 6, 2013, Defendants proposed that the Parties defer raising with the Court their differences about the pre-January 1, 2010 Fulbright documents until the overall meet and confer process regarding privilege logging is complete so that the Court might consider all privilege-logging issues at the same time. (*See* Ex. 1.)

Plaintiff rejected that approach without responding to any of the points made above. Instead, Plaintiff’s sole response was to characterize Defendants’ efforts to address an apparent ambiguity in the Courts’ Order as “objections” to that Order and to contend that such “objections” are untimely under Local Rule 72.2(b) because they were not raised within 14 days of the Order. (*See* Ex. 2.) Local Rule 72.2(b), however, is inapplicable here. Defendants do not object to any of the directives in the Court’s order. Rather, Defendants simply request that the

Court clarify its order under Federal Rule of Civil Procedure 60 to bring it in line with the agreement of the parties as noted in the Order. (*See* ECF 156 at 3 (noting “Defendants agree. Approve.”).) Defendants have brought this issue to the Court’s attention as soon as they learned of it from Plaintiff’s counsel. Under Rule 60(a), “[t]he court may correct a clerical mistake or a mistake arising from oversight or omission *whenever* one is found in a judgment, order, or other part of the record. The Court may do so on motion or on its own, with or without notice.” *See* Fed. R. Civ. P. 60(a) (emphasis added).¹

Accordingly, and for the foregoing reasons, Defendants respectfully request that the Court clarify its August 8, 2013 Order to bring it in line with the Parties’ May 24, 2013 agreement to meet and confer on subject matter limitations on the logging of privileged documents, including documents created or received by Fulbright prior to January 1, 2010. A proposed order is attached to this motion.²

¹ In the Parties’ meet and confer correspondence regarding this Motion, Plaintiff appears to concede that there are subject matters upon which privileged documents created or received by Fulbright prior to January 1, 2010 “may be appropriate for logging,” including correspondence between attorney and client regarding billing. (*See* Ex. 2.) Plaintiff’s characterization of Defendants’ position – that “*every* document in the ESA Case is a ‘damages’ document, therefore *every* privileged document in the ESA Case would need to be logged individually on a privilege log” (Ex. 2 (italics in original)) – is not accurate. Rather, Defendants simply maintain that all documents that relate to FEI’s damages claim are **relevant**. This Court has already ruled expressly that discovery of documents related to FEI’s massive, multimillion dollar damages claim is relevant. (*See* ECF 151 ¶¶ 9, 36.) However, to be clear, Defendants do not take the position that FEI should have to log *every* document in the ESA Case. Rather, Defendants wish to continue to meet and confer with Plaintiff in an attempt to identify appropriate “subject matter limitations” with respect to the documents that *should be logged* not only with respect to the damages alleged by Plaintiff but also the other areas of discovery identified as relevant by this Court.

² On September 11, 2013, in accordance with LCvR 7(m), counsel for Defendant HSUS spoke with counsel for Plaintiff FEI to further discuss the motion in a good-faith effort to determine whether there is opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement. Counsel for Plaintiff FEI stated that Plaintiff will oppose the relief sought in this motion.

Dated: September 11, 2013

Respectfully submitted,

/s/ W. Brad Nes

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[PROPOSED] ORDER

Having considered the Defendants’ Motion for Clarification and/or Modification of the Court’s August 8, 2013 Discovery Order, the Court being fully advised, and finding no prejudice to Plaintiff by allowing the proposed clarification,

it is hereby **ORDERED** that Defendants’ Motion is **GRANTED**, this ____ day of _____, 2013.

Hon. John M. Facciola
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion and (Proposed) Order was served via electronic filing this 11th day of September, 2013, to all counsel of record.

/s/ W. Brad Nes

W. Brad Nes