UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR CLARIFICATION AND/OR MODIFICATION OF THE COURT'S AUGUST 8, 2013 DISCOVERY ORDER

FEI's opposition confirms that there is a clerical mistake in the Court's August 8, 2013 Discovery Order that needs correction. FEI, however, will not concede that the mistake is the obvious omission of the phrase "from January 1, 2010 to the present" on page 4 of the Order. Instead, FEI contends that the mistake is an "apparent typographical error in the Order" in which the Court noted that "Defendants agree" when – as FEI now argues – the Order should have stated that "Defendants oppose." (ECF 174 at 6.) That is, FEI now attempts to manufacture a disagreement between the parties that the Court somehow resolved in its favor. FEI's new position contradicts the express representations made by both parties in their joint submission.

On May 24, 2013, the Parties filed a joint Notice of Meet and Confer. (ECF 152.) In that filing, FEI proposed that its counsel should only have to log privileged documents created or received "prior to January 1, 2010" with "limitation[s] as to subject matter. . . ." (*Id*. at 4.) Defendants agreed. (*Id*. at 5.) The Court, noting this agreement in its August 8, 2013 Order, required "[t]he parties shall meet and confer to identify a list of categories appropriate for logging." (ECF 156 at 4.) Despite the parties' agreement in the joint submission, however, FEI now refuses to meet and confer with respect to documents created or received by one of its law

firms – Fulbright – relying solely on an apparently inadvertent omission of the phrase "from January 1, 2010 to the present" on page four of the Court's Order.

First, FEI contends that Defendants waived the ability to request that this Court correct the clerical mistake on page four of the Court's Order. (ECF 174 at 3-6.) As a matter of law, this claim has no merit. Defendants' Motion to Clarify is made under Rule 60(a). A motion to correct such a mistake can be brought under Rule 60(a) at any time. *See* Fed. R. Civ. P. 60(a) (noting "the court may correct a clerical mistake or a mistake arising from oversight ***whenever*** one is found in a judgment, order, or other part of the record" (emphasis added)). Rather than confront this fact, FEI spends four pages citing wholly irrelevant authority under Rule 72(a). As Defendants noted in their Motion, however, Rule 72 is inapplicable because Defendants do not "object" to the Court's Order that the parties meet and confer. (ECF 172 at 4-5.) Nor are Defendants asking the Court to "reconsider" its ruling. Defendants simply request that the Court clarify its Order to bring it in line with the agreement of the parties in their joint submission, as noted correctly by the Court in its August 8, 2013 Order. (ECF 156 at 3) ("Defendants agree.").[1]

Second, FEI asserts that there is no basis for "disturbing" the "result" reached by this Court. (ECF 174 at 11-18.) None of the reasons proffered, however, supports FEI's opposition. For example, FEI cites two treatises for the unremarkable and inapplicable proposition that a

[1] Likewise, FEI's citation to *Trans-Pacific Policing Agreement v. U.S. Customs Serv.*, 2002 U.S. Dist. LEXIS 27672 (D.D.C. Apr. 24, 2002), does not support FEI's argument. In *Trans-Pacific*, the district court simply noted that "the relevant test for the applicability of Rule 60(a) is whether the change affects substantial rights of the parties and is therefore beyond the scope of Rule 60(a) **or is instead a clerical error, a copying or computational mistake, which is correctable under the Rule**." *Id*. at *4 (emphasis added). Here, the clarification that Defendants seek is clerical, not substantive. Defendants simply request the Court correct an inadvertent omission in the Court's Order. The change would not impact any of FEI's substantive rights and is therefore entirely appropriate as a Rule 60(a) motion. *See* Fed. R. Civ. P. 60(a). Defendant's request is fully consistent with the purpose of Rule 60(a), which is "to make an order reflect the actual intentions of the Court, plus necessary implications." *Bond v. U.S. Dep't of Justice*, 286 F.R.D. 16, 22 (D.D.C. 2012) (citing *Jones & Guerrero Co. v. Sealift Pacific*, 650 F.2d 1072, 1074 (9th Cir. 1981)); *see also Agro Dutch Indus. Ltd. v. United States*, 589 F.3d 1187, 1192 (Fed. Cir. 2009) ("Courts enjoy broad discretion to correct clerical errors in previously issued orders in order to conform the record to the intentions of the court and the parties.").

party should not have to create a document-by-document privilege log for the materials received or created by counsel ***after*** the filing of a lawsuit. (ECF 174 at 7.) Specifically, FEI cites to J.M. Facciola & J.M Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 Fed. Courts L. Rev. 19, 45 (2009), noting that an example of a document that need not be logged "may be the correspondence between the client and litigation [counsel] regarding . . . ***the instant lawsuit***." (ECF 174 at 7 (emphasis added).) Likewise, FEI quotes the Sedona Conference Cooperation Proclamation: Resources for the Judiciary, Part IV, The Stages of Litigation From A Judicial Perspective, 12.3.5 (The Privilege Log) (Oct. 2012), noting that parties should work "to identify presumptively-privileged documents that may be segregated and excluded from production based on some agreed methodology, for example, communications with outside counsel ***after the filing of a complaint or answer***." (ECF 174 at 7-8 (emphasis added).)

These authorities indicate that counsel for all parties in the RICO action need not log any documents created or received ***after*** the Amended Complaint was filed ***in this action***. Defendants already agreed to this position. (ECF 152 at 5.) None of these authorities support FEI's ***new*** claim, which was not raised in the parties' joint submission, that all documents created or received by Fulbright at any time in the ESA Action, ***regardless*** of "subject matter limitation," need not be logged as well.[2]

[2] FEI's citations for the proposition that "courts frequently have refused to order the preparation of document-by-document privilege logs for the communications and work product of litigation counsel," ECF 174 at 8-9, are similarly inapposite. None of these cases address the propriety of ordering parties to meet and confer to identify appropriate subject matters for privilege logging – especially where, as here, the parties agreed to do so in a joint submission. *See Games2U, Inc. v. Game Truck Licensing, LLC*, 2013 U.S. Dist. LEXIS 114907, at *19 (D. Ariz. Aug. 9, 2013) (noting log not warranted in context of a subpoena because most information had already been disclosed); *Am. Broadcasting Co., Inc. v. Areo, Inc*., 2013 U.S. Dist. LEXIS 5316, at *8 (S.D.N.Y. Jan. 11, 2013) (noting document by document log for *every* document in counsel's files would be burdensome); *In re NCAA Student Name & Likeness Licensing Ltd*., 2012 U.S. Dist. LEXIS 84144, at *19 (M.D.N.C. June 18, 2012) (noting that compelling a nonparty to produce privilege log would be unduly burdensome); *Kirzhner v. Silverstein*, 2012 U.S. Dist. LEXIS 5144, at *5 (D. Colo. Jan. 17, 2012) (noting that preparation of log in response to subpoena on

The authorities cited in FEI's opposition (ECF 174 at 7-9) are also distinguishable because this is not a typical case in which trial counsel's activities are wholly irrelevant to the merits of the underlying dispute. For example, Fulbright's activities in the ESA Action are central to FEI's damages claim. FEI's sole claim for damages is the attorneys fees incurred in defending itself in the ESA Action. Accordingly, this Court has already ordered that "[t]he damages claimed by FEI in this case, [including] any claims for attorneys fees made by FEI in this action" and "FEI's attorneys' fees and costs, including third party discovery issued to the law firms of Covington & Burling and Fulbright & Jaworski, LLP" are relevant and appropriate areas of discovery. (ECF 151 ¶¶ 9, 36.).[3]

FEI next argues that creating a privilege log would be "an enormously burdensome and costly undertaking" because "lead counsel for FEI himself has more than 10,000 emails between and/or among himself, his client, or his colleagues about the ESA Case that contain or reflect attorney-client communications, opinion work product, fact work product or a combination of all three. . . ." (ECF 174 at 10.) This assertion does not demonstrate a lack of a mistake in the Court's Discovery Order. Rather, it is for precisely this reason, the purported burden on FEI and

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trial counsel would be unnecessary undertaking); *Sann v. Mastrain*, 2010 U.S. Dist. LEXIS 126168, at *3 (S.D. Ind. Nov. 29, 2010) (overlooking failure to provide log because documents at issue were contents of counsels' files); *1100 West, LLC v. Red Spot Paint & Varnish Co., Inc*., 2007 U.S. Dist. LEXIS 73621, at *4 (N.D. Ind. May 18, 2007) (quashing subpoena issued to a private investigator); *Durkin v. Shields*, 174 F.R.D. 475, 479 (S.D. Cal. 1997) (noting creation of document-by-document privilege log regarding instant case would be overly burdensome).

[3] There are also additional categories of discovery specifically enumerated by the Court that at least warrant logging by Fulbright and hence should be subject to the meet and confer obligation by the Court. For example, the Court specified as one such category "FEI's knowledge of Rider's 1) interactions and relationship with FEI's elephants, and 2) public advocacy, education, and media efforts." (ECF 151 at 6.) In the ESA Action, this Court held that such documents compiled by FEI's counsel were work-product materials for which the ESA Action plaintiffs did not have an overriding need, and hence the materials did not need to be produced or logged. (*See* ESA Action ECF 59.) But, as implicitly recognized in the May 9, 2013 Discovery Order, the knowledge of FEI (and its counsel) of Mr. Rider's activities ***during the ESA Action*** may be highly relevant to a number of issues that must be resolved in ***this*** case, including Defendants' statute of limitations defense and the abuse of process counterclaim that has been filed by one of the Defendants. In any event, it would make little sense for the Court to recognize that a particular category of information is indeed a "relevant and appropriate area[] for discovery," ECF No. 156 at 1, while simultaneously providing that *all* materials falling within that category need never even be *identified* in a log.

its counsel, that Defendants agreed in the first place to meet and confer to develop subject matters limitations for logging. (ECF 152 at 4-5.)

Tellingly, FEI's 18-page opposition completely ignores, much less confronts, the express representations that FEI made to this Court with respect to logging privileged documents:

> 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).) FEI even represented ***when*** a meet and confer regarding such "limitation[s] as to subject matter" related to Fulbright's documents should take place:

> 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.

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

Based on these representations, the Court ordered the parties' to meet and confer regarding the "subject matters" appropriate for logging. (ECF 156 at 4.) Unfortunately, as explained in the Motion, the Court inadvertently omitted the phrase "from January 1, 2010 to the present" with respect to Fulbright and now FEI and its counsel are trying to capitalize on that omission, refusing to meet and confer with Defendants even after the Defendants served their document requests.

Instead, FEI takes the curious position that it will meet and confer regarding appropriate subject matter limitations for all of the law firms that FEI itself utilized in the ESA Action ***except*** Fulbright. That is, FEI concedes that the Court's Order as currently written requires FEI to meet and confer regarding FEI's other four law firms in the ESA Action – *e.g*., Covington & Burling, Troutman Sanders, Hughes Hubbard & Reed and Jackson Kelly – because none of those firms is mentioned directly by name in the Order. (ECF 174 at 13.) FEI's tortured reading is nonsensical

on its face and finds no support in FEI's representations to the Court in the parties' joint submission. (*See* ECF 152 at 4-5.)[4] The only difference between Fulbright and FEI's other law firms in the ESA Action is that Fulbright is ***also*** FEI's counsel in the RICO action, which for purposes of logging is relevant only to the extent that documents were created or received "**from January 1, 2010 to the present**" – *i.e.*, the seven missing words in the Court's Order.

Moreover, FEI has already conceded 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. (ECF 172 at 5 n.1 (citing Ex. 2).) There is no reason client correspondence regarding billing in the ESA Action would be "appropriate for logging" with respect to Covington & Burling, Troutman Sanders, Hughes Hubbard & Reed and Jackson Kelly but not with respect to Fulbright.[5]

FEI also repeats the erroneous assertion that Defendants want FEI to log *every* document in the ESA Action. (ECF 174 at 14-15.) Again, this is simply not accurate. Defendants never indicated during the 09/05/13 meet-and-confer that every single document that was generated by FEI and/or its counsel in the ESA Case should be "subject to being logged." (*Id*. at 14.) As Defendants have now repeated multiple times – both in writing and during the 09/05/13 in-person meeting – Defendants simply want FEI to meet and confer in a good-faith effort to

[4] FEI concedes that "document-by-document logging" may be required for materials relating to the statute of limitations issue but contends that this burden should be reserved for Covington & Burling, including because only documents generated prior to February 16, 2006 – four years before the Amended Complaint was filed – could be relevant to the defense. (ECF 174 at 13 & n. 2.) That assertion is incorrect. While it is correct that FEI's *state of mind* prior to that date is crucial to the statute of limitations issue, documents generated by Fulbright in the ESA Action and/or exchanged with FEI after that date obviously may disclose information that has a direct bearing on FEI's understanding of Mr. Rider's activities before that date (*e.g.*, a 2007 document saying that "of course, based on our surveillance work, we've known all along how Rider's media campaign was being funded"). Accordingly, Fulbright's effort to draw a bright line between Covington's documents and its own in the ESA Action, at least insofar as logging is concerned, must also fail.

[5] There is no coherent reason offered as to why ESA Action materials generated by or exchanged with these other firms, and Covington in particular, would be "appropriate for logging" because they bear on the statute of limitations and/or other issues enumerated in the Court's discovery categories, but should be *excluded* from any logging obligation by *Fulbright* merely because FEI elected to retain that firm for the RICO Action.

identify and agree upon appropriate "subject matter limitations" with respect to the documents that should be logged prior to January 1, 2010, including but not limited to documents created or received by Fulbright. FEI refuses to do so.

Finally, FEI notes that Defendants "have yet to cite any authority" for the proposition that Defendants are entitled to production of documents created or received by FEI's counsel in the ESA Case. (ECF 174 at 16.) Defendants recently served their document requests on FEI and FEI has yet to provide its written responses and/or objections. Therefore, it is premature to address this issue at this time. Defendants' Motion to Clarify relates to a very simple and narrow issue involving the parties' responsibilities under the Court's August 8, 2013 Order to meet and confer regarding privilege logs.

* * * *

Accordingly, for the foregoing reasons and the reasons outlined in Defendants' Motion, 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.

Dated: October 4, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply was served via electronic filing this 4th day of October, 2013, to all counsel of record.

/s/ W. Brad Nes
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