

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

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

CONSENT MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Pursuant to Fed. R. Civ. P. 15(a)(2) and the Court’s scheduling order (ECF 187 & Minute Order, 12-27-2013), Plaintiff Feld Entertainment, Inc. (“FEI”) hereby requests leave to file a Second Amended Complaint. A copy of the Second Amended Complaint is attached hereto as Exhibit 1. A redline version of the Second Amended Complaint, showing the additions and deletions made to the First Amended Complaint (ECF 25), is attached hereto as Exhibit 2.

FEI does not believe that leave of Court (and thus the instant Motion) is necessary to amend its complaint, given that (1) the parties consented to the filing of amendments to the pleadings by today, February 28, 2014 (*see* ECF 187), and (2) FEI previously amended its complaint, without a Rule 15 motion, pursuant to a similar scheduling order (Minute Order, 1-15-2010). However, out of an abundance of caution, FEI is hereby seeking leave of Court. In support of its Motion, FEI hereby states as follows:

1. The Second Amended Complaint does not add new parties or new causes of action. The Second Amended Complaint makes additions and deletions to FEI’s prior pleading, the First Amended Complaint (ECF 25), and takes into account legal and factual developments

since February 16, 2010 when the First Amended Complaint was filed¹; conforms the pleading to the representations that FEI has made about what is or is not in issue; and adds further factual detail to the existing claims, some of which has been learned since February 16, 2010. In particular, the Second Amended Complaint comes forward with allegations in response to defendants' repeated argument that FEI's donor fraud allegations are legally deficient. FEI's amended donor fraud allegations are based on the Court's 12-30-09 and 3-29-13 Memorandum Opinions in the ESA Action (No. 03-2006, ECF 559 & ECF 620), documents produced by defendants in the ESA Action and defendants' own websites.

2. The filing of the Second Amended Complaint will not result in any delay in the litigation of this matter. Discovery has recently commenced. The parties currently are engaging in meet and confer discussions regarding document requests. None of the parties have made any substantial production of documents, nor have any of them served (let alone answered) interrogatories. Fact discovery is set to close in August 2014 and dispositive motions are due to be filed in December 2014. *See* ECF 187.

3. "Leave to amend should ordinarily be freely granted to afford a plaintiff 'an opportunity to test his claim on the merits.'" *Gaubert v. Fed. Home Loan Bank Bd.*, 863 F.2d 59, 69 (D.C. Cir. 1988) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). *See also* Fed. R. Civ. P. 15(a)(2) ("The Court should freely give leave when justice so requires."). Leave to amend may be denied in cases of, *inter alia*, undue delay, bad faith, undue prejudice or futility of amendment. *Foman*, 371 U.S. at 182. None of these issues is present here. There is no undue delay, bad faith, or prejudice to defendants given that FEI is seeking leave in accordance with the

¹ Deletions from the First Amended Complaint, as reflected in the Second Amended Complaint, to take into account the Court's decision on defendants' motions to dismiss are without prejudice to FEI's rights to seek appellate review, at the appropriate time, of that portion of the Court's dismissal order that dismissed certain of FEI's claims.

parties' agreed upon scheduling order, discovery is still in its early stages, and the amendments are based on (1) recent legal and factual developments and (2) documents and/or material that defendants' themselves generated. Moreover, FEI is not adding new parties or causes of action, making the futility of amendment prong irrelevant. Where, as here, "an amendment would do no more than clarify legal theories or make technical corrections,' leave is often granted." *Ellis v. Georgetown Univ. Hosp.*, 631 F. Supp. 2d 71, 79 (D.D.C. 2009) (quoting *Harrison v. Rubin*, 174 F.3d 249, 253 (D.C. Cir. 1999)).

Pursuant to LCvR 7(m), counsel for FEI consulted with counsel for defendants concerning the relief sought by this Motion. Defendants consent as to the procedural step of making the amended pleading, without prejudice to any defendant's right to challenge any of FEI's amendments on their merits.

Accordingly, for the reasons set forth above, FEI respectfully requests that its Motion be granted. A proposed form of order is submitted herewith.

Dated: February 28, 2014

Respectfully submitted,

/s/ John M. Simpson

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