

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

FELD ENTERTAINMENT, INC.

Plaintiff,

v.

**AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY
ANIMALS, et al.**

Defendants.

Case No. 07- 1532 (EGS)

DEFENDANTS' PROPOSED DISCOVERY PLAN

Although defendants adhere to the position they espoused at the October 15, 2010 status conference, and initially adopted by the Court, that any discovery should be deferred pending the Court's consideration of the motion to dismiss defendants will file in two weeks, in keeping with the Court's subsequent order that it will allow "some discovery" to proceed prior to a ruling on the motion, defendants will first set forth their proposal as to how any discovery that proceeds should be limited, and then present a brief summary of their views on the legal precedents and principles that they believe should govern the Court's determination on this matter.

Proposed Discovery Plan

Pursuant to the Court's Minute Orders of November 2 and 5, 2010, the parties submit the following agreed pre-trial discovery schedule:

- December 1, 2010.** Entry of appearance by all counsel for all parties.
- December 3, 2010.** Deadline for Defendants' responses to First Amended Complaint.
- December 17, 2010.** On or before this date, the parties shall conduct the conference required by Fed. R. Civ. P. 26(f)(1)-(2).

January 28, 2011.	Exchange of Initial Disclosures pursuant to Fed. R. Civ. P. 26(a)(1) and LCivR 26.2(a), except to the extent that such documents have already been produced during discovery, hearings and/or trial in <i>ASPCA v. Feld Enter. Inc.</i> , No. 03-cv-2006 (D.D.C.).
February 11, 2011.	The parties shall submit a written report to the Court, outlining the proposed plan for initial discovery pursuant to Fed. R. Civ. P. 26(f)(3).
February 25, 2011.	Commencement of written discovery (interrogatories, document production requests, inspection requests, admissions requests and requests to third parties).
March 4, 2011.	Deadline for Plaintiff's opposition to defendants' motion(s) to dismiss.
April 1, 2011.	Deadline for Defendants' replies in support of motion(s) to dismiss.
Mid-April, 2011.	Conference with court regarding discovery plan submitted by the parties.
Within 30 days of the Court's decision on Defendants' Motion to Dismiss.	Parties shall meet and confer as necessary regarding the schedule for the remainder of pretrial proceedings.
Within 60 days of the Court's decision on Defendants' Motion to Dismiss.	Conference with the Court to discuss schedule for remainder of pretrial proceedings.

Dates for additional events and conferences with the Court shall be established at a later time by further order of the Court.

Legal Rationale for Restricting Discovery

Given the sprawling nature of FEI's complaint, even initial disclosures and written discovery propounded by both sides (including 13 separate defendants) will inevitably prove extremely burdensome and costly, and will engender myriad disputes over attorney-client, First Amendment, and other privilege issues. Any other discovery, and particularly depositions, should await the Court's consideration of the motion to dismiss, which will raise overarching

legal grounds for dismissal (including statute of limitations and other jurisdictional barriers stemming the Court's prior holding that the same RICO claim was filed too late, and was "improperly motivated," *American Soc'y for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, 244 F.R.D. 49, 51-52 (D.D.C. 2007)).

It is "well settled that discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending." *Chavous v. District of Columbia Financial Responsibility and Management Assistance Authority*, 201 F.R.D. 1, 2 (D.D.C. 2001) (quoting *Anderson v. United States Attorneys Office*, 1992 WL 159186, at * 1 (D.D.C. June 19, 1992)). Further, where, as here, jurisdictional defenses are being raised to one or more claims, it is especially appropriate to restrict discovery. *See, e.g., Maynard v. Colorado Supreme Court Office of Attorney Regulation Counsel*, 2010 WL 231555, at * 2 (D. Colo. Jan. 13, 2010) ("[N]either [the Court's] nor the parties' time is well-served by being involved in possible discovery motions and other incidents of discovery when, as here, a dispositive motion involving a jurisdictional defense is pending.").

These principles apply to routine litigation, but have particular pertinence in a case such as this one, in light of recent Supreme Court rulings specifically addressing the standards that should be satisfied before extremely time-consuming, burdensome, and expensive discovery proceeds in complex multi-party litigation and/or cases raising important threshold jurisdictional issues. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (potential legal deficiencies in a massive case should be considered and "exposed at the point of minimum expenditure of time and money by the parties and the court"); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009). The upshot of these Supreme Court rulings is not only that district courts now have greater latitude to dismiss or significantly narrow cases on Rule 12(b)(6) grounds, but that,

especially in cases that will inevitably entail extensive, protracted, and contentious discovery over claims and/or counterclaims – as this case surely will – courts should generally evaluate the adequacy of pleadings *before* allowing such discovery to proceed.

As several lower courts have recognized, this principle is especially applicable to massive RICO cases like this one, and hence “burdensome discovery in RICO cases during the pendency of a motion to dismiss is inappropriate.” *Coss v. Playtex Prod., LLC*, 2009 WL 1455358, *2 (N.D. Ill. 2009); *see also Limestone Development Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 803 (7th Cir. 2008) (the Supreme Court’s concern with “expensive pretrial discovery” is as “applicable to a RICO case, which resembles an antitrust case in point of complexity”); *Nicholas v. Mahoney*, 608 F. Supp. 2d 526, 636 (S.D.N.Y. 2009) (“The concerns about the impact of civil antitrust litigation that were articulated by the Supreme Court in *Twombly* . . . are equally, if not more so, applicable to civil RICO claims.”); *PMC, Inc. v. Ferro Corp.*, 131 F.R.D. 184, 187 (C.D. Cal. 1990).

All of the factors alluded to in *Twombly*, *Iqbal*, and their progeny for deferring burdensome discovery until the Court has an opportunity to consider Defendants’ grounds for dismissal of the Amended Complaint filed by Feld Entertainment, Inc. (“FEI”) are implicated here. As FEI confirmed at the October 15 status hearing and as its proposed discovery plan (which does not propose limiting discovery in *any* fashion whatsoever) underscores, if this case proceeds, discovery in this case will inevitably be far-reaching, contentious, and massively expensive for all concerned. In addition, defendants’ motion to dismiss, which will be filed on December 3, 2010, will raise several overarching legal grounds for why the entire case should not proceed. If the Court ultimately agrees with any of those arguments, then extensive discovery visited on the non-profit animal protection organizations and their public-interest

counsel in the meantime will merely have had the effect of harassing defendants and making them spend their limited resources, *i.e.*, exactly what the Supreme Court has indicated should *not* happen when legal arguments for dismissing a huge, complex case have yet to be resolved by a district court.

Accordingly, in lieu off the extensive, protracted discovery contemplated by FEI, which is simply not consistent with the Court's indication that it would allow only "some discovery" during pendency of the motion to dismiss, the Court should *at most* authorize written discovery in the manner proposed above during the time that the Court is resolving the motion to dismiss.¹

¹ Defendants believe that, once they have filed their motion to dismiss, the specific legal arguments raised in that motion may help inform the Court's considered views as to whether, and on what terms, discovery should be authorized in view of the legal principles and precedents summarized above. Accordingly, defendants may renew their request that the Court stay some or all discovery when there is a pending motion to dismiss.

Dated: November 19, 2010

Respectfully submitted,

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