UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 07- 1532 (EGS)**
	:	
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY ANIMALS, et al.	:	
	:	
Defendants.	:	
	:	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' EMERGENCY MOTION FOR LEAVE TO FILE MOTION TO DISMISS IN EXCESS OF PAGE LIMIT

Plaintiff Feld Entertainment, Inc. ("FEI") hereby opposes Defendants' Emergency Motion for Leave to File Motion to Dismiss in Excess of Page Limit ("Def. Mtn.") (11-19-10) (Docket Entry ("DE") No. 47) and states as follows:

In their second "emergency" motion in two weeks, defendants now want to file an excessive 85-page brief and an undetermined number of 10-page "supplemental" briefs in connection with their forthcoming motion to dismiss. Defendants devote most of their motion arguing for something the Court has already ordered: consolidated briefing on the motion to dismiss. Minute Order (10-20-10) ("defendants are encouraged to submit joint memoranda, to the extent feasible, to avoid duplicative briefing"). FEI agrees that such a streamlined approach is the best way to proceed.

Moreover, FEI has no objection to a reasonable extension of the page limits, but what is sought here is excessive. This case has been pending for more than three years, and defendants have had the First Amended Complaint since February 2010. DE 25. Therefore, defendants have had more than ample time to prepare their response. However, even with all of the time

available, defendants still cannot commit to how many "supplemental briefs" there actually will be or who will be filing them, which is the primary reason FEI did not consent to the motion. *See* Def. Mtn. at 1-3 ("certain" defendants will do supplemental submissions; "some" defendants "may wish to submit supplemental briefs"; 85 pages "plus a likely additional maximum of 40 pages").[1]

Defendants' motion inappropriately shifts the burden of doing their own work to the Court. The motion should be denied. Defendants should be limited to one joint brief of 75 pages. If the necessary editing cannot occur within the existing schedule, then more time can be allowed. Neither the Court nor FEI should be required to wade through papers that can, and should be, made more concise and that defendants cannot even say with certainty how long will actually be. Defendants' offer to agree to a corresponding amount of pages for FEI to file in response only compounds the issue.

Defendants' forthcoming motion is to dismiss based on the pleadings alone, not for summary judgment. It is still the law that the facts alleged in the plaintiff's complaint must be taken as true on a motion under Fed. R. Civ. P. 12(b)(6). *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009); *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). Furthermore, unlike perhaps any other case ever filed under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, in this case, the major facts alleged in the plaintiff's complaint have already been found to be true by a federal district court after a 6 ½ week trial. As a mere example, among the hundreds of findings made, this Court found that:

> Mr. Rider is essentially a paid plaintiff and fact witness who is not credible, and therefore [the Court] affords no weight to his

[1] The implication that plaintiff's counsel gave the requested extension short shrift is inaccurate. As the actual email exchange demonstrates, counsel for plaintiff asked how many "supplemental" briefs there would be and did not get a straight answer. Ex. 1 hereto. Even now, defendants do not commit to a definite number of "supplemental" briefs.

> testimony regarding the matters discussed herein, i.e., the allegations related to his standing to sue. ...
>
> [T]he primary purpose of the funding provided by the organizational plaintiffs was to secure and maintain Mr. Rider's participation in this lawsuit, not legitimate reimbursement for bona fide media expenses. This determination is based on (i) the manner in which the payments to Mr. Rider were structured, accounted for and characterized by the organizational plaintiffs, MGC and WAP; (ii) the fact that they were not disclosed initially in discovery, by both omission and affirmatively false statements; and (iii) the fact that Mr. Rider never even filed tax returns until he was confronted about it in this very case.

ASPCA v. Feld Entertainment, Inc., 677 F. Supp. 2d 55, 67, 83 (D.D.C. 2009), *appeal pending*, Nos. 10-7007 & 10-7021 (D.C. Cir.). If defendants really have controlling authority that says that these facts do not – ***as a matter of law*** – "plausibly" (*Iqbal*, 129 S.Ct. at 1937) show the operation of an enterprise through a pattern of racketeering (*i.e.*, bribery, illegal gratuity payments, obstruction of justice, mail fraud, wire fraud and money laundering), or do not – ***as a matter of law*** – "plausibly" constitute a tort or illegal conspiracy, then defendants should be able to make that point in considerably less than 85 pages.

Nor is it the case that defendants each have a right to file their own 45-page brief and thereby inundate the Court with "500 pages of briefing." Def. Mtn. at 2. The Court made it clear during the October 15, 2010 hearing in this case that no such thing would happen: "I want to be fair about that, but I don't need ... two or three briefs saying the same thing either." Tr. of Hearing at 7 (10-15-10). Furthermore, the Court invited counsel for the parties to consider the procedures adopted in the "polar bear" case with respect to the number and length of briefs. *Id.* *See In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, Misc. Action No. 08-764 (EGS); MDL Docket No. 1993 (D.D.C.). That litigation demonstrates, by sharp contrast, that what defendants seek here is excessive. *Polar Bear* was a multi-districted

consolidation of 11 separate lawsuits, involving more than 75 separately represented parties, with widely divergent interests, challenging agency action based upon an administrative record of more than one hundred thousand pages. Misc. Action No. 08-764 (Docket Sheet). Even in that case, when motions for summary judgment were filed, the parties were held to briefs that were, in several of the case groupings, actually shorter than what defendants seek here. *Id.*, Fourth Joint Status Report 3-5, 7 (8-14-09) (DE 114); Order (8-29-09) (DE 115). A case like the present one, in which a single plaintiff sues 13 defendants in a complaint with seven counts, five of which are common to all defendants,[2] does not require what defendants seek.

Defendants' motion should be denied.

Dated: November 22 2010

Respectfully submitted,

/s/

John M. Simpson (D.C. Bar #256412)
jsimpson@fulbright.com
Richard C. Smith (D.C. Bar #498177)
rcsmith@fulbright.com
Michelle C. Pardo (D.C. Bar #456004)
mpardo@fulbright.com
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-0200
Facsimile: (202) 662-4643
Counsel for Plaintiff Feld Entertainment, Inc.

[2] Defendants' assertion that the First Amended Complaint "contains twelve (12) separately enumerated causes of action," Def Mtn. at 1, is wrong. The First Amended Complaint (DE 25) states seven, separately described counts: Count I (violation of RICO by conducting the affairs of an enterprise through a pattern of racketeering activity), *id.* at p. 102; Count II (conspiracy to violate RICO), *id.* at p. 110; Count III (violation of the Virginia Conspiracy Act through a conspiracy to harm a business), *id.* at p.113; Count IV (abuse of process), *id.* at p. 114; Count V (malicious prosecution), *id.* at p. 120; Count VI (maintenance), *id.* at p. 123; Count VII (champerty), *id.* at p. 125.