UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' DISCOVERY PLAN PURSUANT TO FED. R. CIV. P. 26(f)(3) AND REQUEST FOR STATUS CONFERENCE WITH THE COURT

Pursuant to Fed. R. Civ. P. 26(f), Defendants, by and through their respective counsel, submit the following report of their planning meeting with Plaintiff's counsel and discovery plan. In that regard, counsel for all of the parties participated in a Rule 26(f) conference on December 17, 2010. Defendants have made a good faith effort to confer regarding an initial discovery plan setting forth those matters required by Rule 26(f), and it is apparent that the parties have a fundamentally different view as to discovery going forward, which is why Defendants are filing a separate report.[1]

Moreover, the appropriate scope of any discovery, even limited discovery while defendants' motions to dismiss are pending, has changed significantly in light of Plaintiff's initial 26(a) disclosures and particularly its express limitation of its asserted damages to the attorneys' fees and costs in defending the Endangered Species Act ("ESA") litigation – *i.e.*, a

[1] Counsel for Defendants met with FEI's counsel and did address, as required under Rule 26(f), the topics to be included in this report. In addition, the significant new development regarding Plaintiff's confirmation that its damages are limited to attorneys' fees reinforces Defendants' position, and Defendants take this opportunity to apprise the Court regarding why discovery should be deferred. If the Court believes that it is more appropriate to file a formal motion, Defendants will do so.

matter which this Court has specifically stayed pending resolution of the cross-appeals in that case. Accordingly, Defendants submit their own Discovery Plan in accordance with the Court's December 9, 2010 Limited Scheduling Order (DE 56) and Rule 26(f)(3), and attempt to respond to certain of Plaintiff's requests as set forth in its proposed Discovery Plan.[2]

Under these circumstances, Defendants also respectfully request that the Court schedule a status hearing to address the parties' widely divergent views on the nature of the "limited" discovery that should occur while Defendants' legal arguments for dismissing this entire litigation are pending. While Defendants set forth their position regarding what they believe to be most legally appropriate and equitable, particularly in view of Plaintiff's limitation of damages, Defendants are of course fully complying with all obligations and deadlines imposed by the Limited Discovery Order (and any other order) until and unless modified by the Court.

A. Proposed Changes In The Timing, Form Or Requirements For Disclosures Under Rule 26(a).

Pursuant to this Court's Limited Scheduling Order, the parties served on January 28, 2011 initial disclosures pursuant to Rule 26(a)(1).

B. The Subjects On Which Discovery May Be Needed, When Discovery Should Be Completed, And Whether Discovery Should Be Conducted In Phases Or Be Limited To Or Focused On Particular Issues.

Pursuant to this Court's December 9, 2010 Order, only "limited" written discovery was authorized "prior to resolution of defendants' motions to dismiss" (interrogatories, requests for production of documents and requests for admissions) and must be "commenc[ed]" by February 25, 2011.

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[2] In this filing, plaintiff's proposed Discovery Plan, which was provided to defense counsel in draft form on February 9, 2011, will be cited as "PDP at ___." Defendants anticipate that plaintiff's final submission will incorporate much, if not all, of the contents of the draft.

Defendants adhere to their position at the October 15, 2010 status conference, which was initially adopted by the Court, that all discovery should be deferred pending the Court's resolution of Defendants' Motions to Dismiss, which were filed on December 3, 2010, and are presently pending before the Court.

A significant new development further counsels in favor of holding off on discovery at this time: FEI's Initial Disclosures expressly limit FEI's purported "damages" to only FEI's attorneys' fees and costs in defending the ESA case. *See* FEI's Initial Disclosures at p. 30 (a copy of which is attached). In light of this extremely salient fact - which confirms the significant limitation of the damages and claims asserted in FEI's 129-page Amended Complaint - it is Defendants' position that their motion to dismiss should be granted because, among the other reasons detailed in their memorandum, under controlling Circuit precedent, FEI simply cannot demonstrate a "pattern" of racketeering as required under RICO where the only "damages" they assert are fees and costs related to one lawsuit, especially when FEI is *separately* pursuing its fees and costs in that very lawsuit. *See* Defendants' Joint Motion to Dismiss, Memorandum at pp. 44-49. At the very least, given this important development and the Supreme Court's directive that a request for attorneys' fees should "not become a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) – let alone a RICO case – Defendants respectfully urge that they should not be subjected to invasive, costly discovery before the Court has even considered whether FEI may employ a sprawling, multi-party RICO action predicated on the very same fees and costs that FEI is pursuing in the related litigation.

Alternatively, in light of the fact that FEI's sole asserted damages are its attorneys' fees and costs incurred in the ESA case, at minimum discovery in this case should be stayed pending the Court of Appeals' ruling on the pending cross-appeals in the ESA case. Indeed, this Court

has already stayed FEI's claim for attorneys' fees and costs in connection with the ESA case pending resolution of the pending appeals, because those appeals may have a direct bearing on whether, and how much, attorneys' fees and costs should be awarded.

Accordingly, it makes no sense, and is contrary to the Court's determination to stay the fee and cost issue, to allow FEI to pursue discovery regarding its claim for fees and costs under the guise of pursuing a massive RICO case. While Defendants strongly believe that the Court should dismiss this retaliatory, punitive action for the compelling legal reasons set forth in their pending dispositive motion, at bare minimum, in light of FEI's Initial Disclosures, the Court's decision to hold FEI's attorneys' fees and costs claim in abeyance pending the appeal means that the Court should also stay discovery on FEI's claim for attorneys' fees and costs pursuant to RICO and the other grounds asserted in this case. Simply put, if equity and judicial economy favor staying a resolution of FEI's request for attorneys' fees and costs in the ESA action – as the Court has already found – the same factors also surely favor staying wide-ranging discovery underlying what amounts to a collateral request for fees and costs.

Indeed, given the nature of FEI's Amended Complaint, discovery 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. The Court has already indicated that deposition discovery will be held in abeyance at this time, and Defendants believe that all further discovery should await the Court's consideration of the motion to dismiss, which raises overarching legal reasons (including statute of limitations and other jurisdictional barriers) as to why FEI's claims are clearly defective as a matter of law, particularly given FEI's express limitation of its "damages" to its attorneys' fees and costs.

Indeed, Plaintiff's recently filed Discovery Plan only underscores how far-reaching and burdensome discovery will be. In that regard, FEI submits a vast Discovery Plan setting forth 37 subjects on which discovery should be taken, which on its face is overbroad, intrusive, impermissible and invades multiple privileges such as First Amendment, attorney-client and work product protections. Most of the proposed discovery subject categories are so broad as to be unconscionable and highlight that this case is really about silencing FEI's perceived critics - for example, FEI demands unrestricted discovery (going back to 1998) into the Defendants' "media strategy" (PDP at p. 3), "Defendants' grant practices and procedures and recordkeeping/auditing," (PDP at p. 2), the "creation, maintenance and/or [alteration] of Defendants' websites" (PDP at p. 3), any and all litigation any defendant "contemplated, proposed and/or anticipated filing" since 1998 (PDP at p. 4), all "previous drafts and versions of selected discovery responses in the ESA action (PDP at p. 5), any "forensic analysis of certain of defendants' or its custodian's computers, hardware, portable hard drives, or other portable media," to name just a few. Plaintiff compounds its abusive discovery tactics by demanding discovery regarding the "organization, structure and formation" of the law firm of Meyer Glitzenstein & Crystal (PDP at p. 4) – which has litigated public-interest cases since 1993 -- along with its partnership tax returns and the individual, personal tax returns for two of its partners, Katherine Meyer and Eric Glitzenstein going back for 10 years (PDP at p. 4). Plainly, as FEI's discovery plan confirms, the purpose of this case is to punish, harass, and bankrupt FEI's perceived adversaries – a common practice by this particular corporation – especially since FEI has alternative vehicles for seeking the only concrete "damages" it has asserted.

In that regard, Plaintiff's Discovery Plan places no limitation on the production of electronically stored information or privileged materials and contemplates the taking of a

minimum of 80 depositions (with the possibility of additional fact depositions), with party representatives subject to depositions of 14 hours. FEI even goes so far as to propose a significant expansion of the number of interrogatories allowed under Rule 33, a proposed revision that only benefits Plaintiff - FEI self-servingly proposes that all 13 defendants be limited to a collective 85 interrogatories, while Plaintiff would be entitled to receive 325 interrogatory responses (answers to 13 sets of 20 common interrogatories, plus 65 additional interrogatories). Plaintiff's all-encompassing and highly intrusive discovery demands only serve to highlight the inappropriateness of allowing massive discovery to proceed while Defendants' dispositive motion is pending and in view of the fact that the Court has already stayed the attorneys' fees and cost claim that undergirds this case.

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.").[3]

[3] 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

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 are clearly implicated here. As FEI confirmed at the October 15 status hearing and as its proposed discovery plan underscores, if this case proceeds, discovery in this case will inevitably be far-reaching, contentious, and massively expensive for all concerned. In addition, Defendants' pending Motion to Dismiss raises overarching legal grounds for why the entire case should not proceed. If the Court ultimately agrees with any of those arguments, then any 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.

Here, FEI has already obtained extensive discovery, including not only the initial disclosures that have now been exchanged in this case, but also the documents and depositions in connection with the underlying ESA case on the very issues FEI is seeking to explore here.

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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 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) (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).

Indeed, in the course of finding that it would be "sinful" to allow still more discovery concerning Tom Rider's funding in the ESA case, Magistrate Judge Facciola referred to abundant discovery and the dozens of discovery motions already devoted to that issue in the ESA case.[4] ESA Case, Order of Aug. 5, 2008 (DE 326), at 6. Accordingly, in lieu of the extensive discovery presently contemplated by FEI, if the Court is unwilling to hold all further discovery in abeyance – which Defendants respectfully maintain would be most consistent with pertinent legal precedents and FEI's assertion of attorneys' fees and litigation costs as its only damages – the Court should, consistent with its previous decision that only "limited" and "some discovery" would be allowed at this juncture, at least continue to narrowly limit such discovery in the manner previously authorized by the Court's December 9, 2010 Order, until the Court has an opportunity to consider the Motion to Dismiss, which Defendants believe will dispose of the entire case.

This case presents classic reasons why discovery should await resolution of the pending motion to dismiss. Even if any of FEI's claims survive the dispositive motion phase, which is highly unlikely especially in view of FEI's limitation of its "damages" to the same fees and costs it is seeking in the ESA litigation, the Court will be in a better position at that juncture to decide the appropriate scope and extent of discovery that might be warranted, including the subjects for

[4] It also bears noting that when FEI sought to inject this RICO claim into the ESA suit it represented that "much of what would be necessary for the counterclaim has already been sought, if not produced fully," and that "further discovery on the RICO claims could be pointed and efficient." *See* Case No. 03-2006, FEI's Motion to Amend Answer (DN 121) (Feb. 28, 2007) at 10. This representation is fundamentally irreconcilable with the monstrously far-reaching discovery identified in FEI's proposed Discovery Plan. Moreover, this Court has previously and explicitly rejected FEI's representations that discovery on a RICO claim would be limited. *See* Case No. 03-2006, Mem. Op. (DN 176) (Aug. 23, 2007) at 8 (explaining that allowing the RICO counterclaim into the ESA suit proceed would "'unleash a Hydra that would require from the court nothing short of a herculean effort in time and attention to even maintain a semblance of control over it'" (quoting *Koch v. Koch Industries, Inc.*, 127 F.R.D. 206, 212 (D. Kan. 1989)).

discovery and the number of depositions, depending upon which claims, if any, are allowed to proceed and against which parties.

That notwithstanding, if the Court decides to allow discovery to proceed, Defendants believe that the following is a list of subjects on which discovery may be needed based on Plaintiff's 129 page Complaint:

1. The truth of the allegations raised in the underlying ESA litigation, including FEI's mistreatment of elephants and other animals, abusive techniques used by FEI, FEI's training and chaining practices, the physical and medical condition of FEI's elephants, the incidence of Tuberculosis ("TB") in FEI animals, and conditions at FEI's facilities, including the CEC;

2. Inspections of FEI facilities to test the veracity of FEI's assertions in its Amended Complaint that FEI does not mistreat the animals in its care, and that Defendants are defrauding their members and others by asserting such mistreatment;

3. FEI's knowledge of Tom Rider's employment circumstances in 2000 and 2001;

4. FEI's longstanding knowledge of Tom Rider's public advocacy, funding and funding sources;

5. Complaints of animal mistreatment against FEI;

6. Investigation of FEI by the government, including USDA investigations, and FEI's conduct with regard to such investigations;

7. FEI's knowledge of Tom Rider's relationship with the FEI elephants;

8. Relationships between FEI workers and elephants;

9. Tom Rider's public advocacy efforts;

10. Payments and provision of other things of value by FEI and its counsel to various witnesses who testified in the ESA litigation, including tax documents and tax returns, including but not limited to FEI's payments and provision of other things of value to Dennis Schmitt, Ted Friend, Daniel Raffo, and Michael Keele;

11. FEI's media strategy after 2000, including its misrepresentations to the public and government officials concerning its treatment of Asian elephants and other animals;

12. All lawsuits filed by or against FEI from 2000 to the present, including but not limited to FEI's involvement in other RICO actions;

13. Organization and structure of FEI;

14. FEI's public relations and advertising practices;

15. FEI's relationships with fact and expert witnesses used in the ESA litigation;

16. FEI's conduct in failing to disclose records concerning the elephants and other information in the ESA case, including but not limited to FEI's failure to timely produce thousands of pages of veterinary records required by Court order, and the destruction and/or "loss" of evidence requested and compelled in ESA case, including but not limited to the destruction of videotapes of FEI elephants on trains;

17. FEI's tactics used against former and current employees to keep the public from finding out about the mistreatment of animals and other FEI practices;

18. FEI's failure to accept production of Mr. Rider's financial information subject to a confidentiality agreement;

19. FEI and its counsel's handling of evidence, including but not limited to Fulbright and Jaworski's claim that it lost specific FEI documents subject to an outstanding Court order;

20. FEI's preservation of documents including document retention and destruction policies;

21. FEI's financial information, including profit and loss statements, tax returns, ticket sales, etc.;

22. FEI's attorneys' fees and costs, including third party discovery to the law firms of Covington & Burling and Fulbright & Jaworski, L.L.P.;

23. Campaigns by FEI against those who object to mistreatment of animals;

24. FEI's false and misleading statements to public regarding treatment of animals;

25. FEI's efforts to quash public opposition and news stories about its mistreatment of animals;

26. FEI efforts to quash public dissemination of information that is critical of FEI;

27. FEI surveillance and other tactics used against those who are critical of FEI;

28. FEI efforts to suppress demonstrations and news coverage and FEI response to media coverage;

29. FEI efforts to counter Mr. Rider's and others' public advocacy;

30. FEI's efforts to quash legislative initiatives;

31. Circumstances surrounding the settlement of *Performing Animal Welfare Society et al. v. Feld Entertainment, Inc., et al.*, No. S-00-1259-GEB-DAD (E.D. Ca.);

32. Motivation and credibility of Archele Hundley, Robert Tom and Margaret Tom and falsity of allegations re MGC involvement regarding these witnesses in *ASPCA v. FEI*;

33. FEI's decision-making process in determining who to name as defendants in this action;

34. FEI's bad faith in bringing and pursuing this lawsuit, including but not limited to FEI's use of this case to stifle and deter criticism, and to impair and destroy the relationships among the Defendants.

With respect to production of documents, Defendants agree that it is not necessary to re-produce to parties who were plaintiffs or their attorneys in the ESA case documents previously produced in the underlying ESA case but will identify by Bates number and/or ESA trial exhibit number (PDP at fn. 2). However, Defendants submit that Plaintiff's proposed production plan for paper documents (PDP at pp. 6-7), which involves a multi-step process for scanning and production of documents, is unnecessary and serves to unduly increase the costs of discovery.

C. Any Issues About Disclosure Or Discovery Of Electronically Stored Information, Including The Form Or Forms In Which It Should Be Produced.

See Defendants' position set forth in Section B above. As explained, Defendants believe that discovery should be deferred pending the Court's consideration of and ruling upon the pending Motion to Dismiss; alternatively, given the Court's finding that FEI's claim for attorneys' fees and costs should be stayed pending the appeal in the ESA case, and the fact that the FEI has only asserted such fees and costs as damages in this case, any discovery in this case

should be stayed pending resolution of the appeal. At minimum, Defendants request that, in view of the Court's determination to allow only "limited discovery prior to resolution of Defendants' motions to dismiss," DE 56, no burdensome, expensive discovery be permitted of electronically stored information. Not only does the Court have authority to limit the scope of discovery even where there is no pending dispositive motion, it is permitted to enter any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. *See* Fed. R. Civ. P. 26(b)(1).

Moreover, particularly because FEI has sued not only several non-profit animal protection organizations, but also five of their attorneys and an entire law firm (Meyer, Glitzenstein & Crystal), discovery of electronically stored information is not reasonable because of undue burden and cost. Fed. R. Civ. P. 26(b)(2). Indeed, in light of the 10–year history of the underlying ESA case, requiring the lawyers and their public interest law firm to collect, review, produce, and assert privileges for all of the electronically stored information that FEI intends to request, will impose an enormous burden on their law practice, that should not be required while a motion to dismiss the entire case is pending before the Court. In view of the decade-long litigation history of the underlying ESA case - and considering the extensive discovery already conducted in that ESA case on the very topics that FEI seeks to revisit here - the burden and expense of electronic discovery far outweighs any potential benefit, particularly considering the extensive discovery that has already been adduced in the ESA case, the significant attorney-client privilege and work-product protection issues presented, and the Court's finding that FEI's claim for attorneys' fees and costs should be stayed pending resolution of the cross-appeals in the ESA case. In addition, once again, even if the Court should decide not to dismiss the entire

case, it will at least be in a far better position to determine whether electronic discovery should proceed and how it should be limited.

To the extent the Court considers allowing electronic discovery to proceed in this case prior to ruling on the pending Motions to Dismiss, Defendants request an opportunity to thoroughly review and consider Plaintiff's ESI proposal,[5] which was not presented to defense counsel until 2 days prior to the filing date for this report. Because of the complexity and sensitivity of ESI discovery – particularly in this case that implicates multiple privileges and protections – additional time is required to consider the issue and Defendants suggest that at minimum further briefing is warranted before the Court authorizes any electronic discovery while a motion to dismiss is pending.

D. Any Issues About Claims Of Privilege Or Of Protection As Trial-Preparation Materials.

See Defendants' position set forth in Section B above. As explained, Defendants believe that discovery should be deferred pending the court's consideration of and ruling upon the Defendants' pending Motion to Dismiss. At minimum, given FEI's limitation of its "damages" to attorneys' fees and litigation costs, and the Court's finding that FEI's fee and cost claim should be held in abeyance pending the cross-appeals, discovery in this collateral effort to pursue such fees and costs should also be stayed pending resolution of the appeal, particularly in view of the extensive privilege issues that will be raised should the case go forward.

Additionally, Rule 26 only permits discovery to be taken of ***non-privileged*** matters. *See* Fed. R. Civ. P. 26(b). Because FEI's present claims arise out of the prosecution of the underlying

[5] FEI's electronic discovery proposal consists of 5 pages of detailed rules for ESI (PDP at pp 6-11) and is a transparent effort by FEI to unnecessarily increase litigation and discovery costs, and thereby ensure that the ongoing important national charitable work and programs of the non-profit charities it has sued are frustrated and inhibited to the maximum extent possible.

ESA litigation (where its present Complaint names the non-profit animal protection organizations/plaintiffs and their public-interest counsel), most, if not all, of the documents and testimony from Defendants that have not previously been produced are protected by the First Amendment, attorney-client and/or joint/common interest privileges and the work product doctrine. Defendants have significant evidentiary and testimonial privileges, which protects them from having to partake in or respond to any discovery, or to provide testimony and therefore they should not be subject to the burdens of FEI's broad and burdensome discovery. Defendants anticipate significant motions regarding privileges and protections surrounding their actions and communications in connection with the underlying ESA litigation, which are privileged and/or protected by myriad privileges.

Defendants also object to Plaintiff's proposed limitations regarding the privilege log requirements (PDP at p. 12) for logging privileged material since several of the Defendants employ and retain additional counsel, who are not counsel of record in this litigation. Defendants also object to Plaintiff's proposal on privilege logs as overly burdensome and request the opportunity to further simplify such proposal should the Court determine that discovery proceed.

E. <u>What Changes Should Be Made In The Limitations On Discovery Imposed Under These Rules Or By Local Rule, And What Other Limitations Should Be Imposed.</u>

See Defendants' position set forth in Section B above. As explained, Defendants believe that discovery should be deferred pending the court's resolution of Defendants' pending Motion to Dismiss or, alternatively, until resolution of the pending appeal in the ESA case in light of FEI's limitation of its "damages" to attorneys' fees and costs and the Court's finding that FEI's fee and cost claim in the ESA case should be stayed pending the outcome of the cross-appeals.

To the extent that the Court decides to proceed with limited discovery, it is Defendants' position that there should be no changes made in the limitations on discovery under the Federal rules or local rules with respect to interrogatories, requests for production of documents and admissions under Fed. R. Civ. P. 33, 34 and 36.[6] Defendants do not believe that depositions are contemplated under the Court's limited discovery order --- a position with which Plaintiff appears to agree based upon representations by FEI's counsel at the December 17th 26(f) Conference. *See also* (PDP at n. 4)("While not specifically called for by the 12/9/10 Limited Scheduling Order, Plaintiff hereby submits its views on deposition discovery for the convenience of the court."). Defendants submit that any decision on depositions, including whether there is any basis for exceeding the presumptive limit in the federal rules, should await a ruling on the Motion to Dismiss, which may dispose of the entire case or alternatively at least narrow and refine the claims FEI may pursue. The Court's ruling on the dispositive motion will provide the necessary guidance with respect to which, if any, claims will proceed and on what basis, and hence how many depositions (if any) are appropriate. For these reasons, it is, at this time, premature to limit or expand the number of depositions beyond the presumptive limits under Fed. R. Civ. P. 30.[7]

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[6] Plaintiff's proposal on interrogatories is unfair and one-sided. (PDP at p. 16). FEI proposes that all the Defendants, collectively, be allowed to propound a cumulative 85 interrogatories. On the other hand, through plaintiff's proposal of 20 common interrogatories to be answered by each defendant, FEI would essentially be allowed 325 interrogatories (20 common questions against all 13 Defendants, and 65 extra interrogatories). This is simply excessive and unwarranted.

[7] As far as depositions, Plaintiff proposes that it should be entitled to conduct 40 depositions and all the Defendants collectively would get the same number, 40 depositions. (PDP at pp. 14-16). Any such proposal is unfair. First, FEI's proposal treats the diverse defense interests as monolithic, which they are not. Secondly, plaintiff states that "Any party seeking to depose a deponent noticed for deposition shall file a cross notice of deposition indicating the party's desire to attend the originally-scheduled deposition and participate in same." Under FEI's proposal, if two separate defendants sought to depose a third party witness whose deposition was

F. Any Other Orders That The Court Should Issue Under Rule 26(C) Or Under Rule 16(B) And (C).

See Defendants' position set forth in Section B above. As explained, Defendants believe that discovery should be deferred pending the Court's consideration of and ruling upon the Defendants' pending Motion to Dismiss. Defendants object to Plaintiff's request for a blanket protective order for all discovery materials but are willing to consider requests to designate as confidential certain matters on a case by case basis and in accordance with the applicable legal standards for doing so. Defendants do not believe that a blanket protective order is authorized by pertinent legal precedent and, moreover, do not believe that FEI should be permitted to make egregious allegations in its Amended Complaint – *e.g.*, that highly reputable animal protection charities are defrauding the public concerning FEI's treatment of Asian elephants – and then seek to litigate the validity of such accusations in secret. Accordingly, at a minimum Defendants request the opportunity to brief this matter further in light of the pertinent legal standards that apply to the imposition of protective orders in cases of this nature.

As noted, in light of recent developments, and the significantly divergent views of the parties with respect to proposed areas/appropriate subjects for discovery, Defendants respectfully suggest that the Court hold a status conference to address these matters.

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noticed by plaintiff, which would count towards 2 of Defendants' depositions, which is likewise unfair.

Date: February 11, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

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