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

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| **FELD ENTERTAINMENT, INC.** | : | |
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| **Plaintiff,** | : | |
| | : | |
| **v.** | : | **Case No. 07- 1532 (EGS)** |
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| **AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY ANIMALS, et al.** | : | |
| | : | |
| **Defendants.** | : | |
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**PLAINTIFF'S RESPONSE TO STAY ARGUMENTS IN DEFENDANTS' "DISCOVERY PLAN"**

As directed by the Court's Minute Order of February 25, 2011, plaintiff Feld Entertainment, Inc. ("FEI") hereby responds to the arguments by defendants as to why discovery should be stayed, contained in Defendants' Discovery Plan Pursuant Fed. R. Civ. P. 26(f)(3) and Request for Status Conference with the Court (2-11-11) (Docket Entry ("DE") 59) ("Def. Plan").

Defendants have opposed doing any discovery in this case from the outset, beginning with the 3-year stay that they obtained in 2007 pending the outcome of No. 03-2006 (the "ESA Case"), DE 22 & 23, and continuing through their recently filed "discovery plan," DE 59. According to defendants, they do not need to do any discovery because (1) they are going to win their motions to dismiss; (2) FEI's racketeering damages are best disposed of through an attorneys fee claim in the ESA Case; and (3) discovery is hard and costly, particularly for non-profits and their lawyers. These objections should be overruled. Discovery will not go away, and postponing the inevitable will only multiply the expense and complexity of dealing with such issues as the "crime-fraud" exception to the attorney-client privilege. A well-reasoned

discovery plan can set boundaries and keep the case on track. FEI attempted in good faith to do this, and requests the Court to consider and adopt FEI's proposed discovery plan.

Defendants bear the burden of showing good cause and establishing the need for a stay. *Clinton v. Jones*, 520 U.S. 681, 708 (1997); *State Farm Mut. Auto. Ins. Co. v. Accurate Medical, P.C.*, 2007 U.S. Dist. Lexis 74459 at *3 (E.D.N.Y. 2007); Fed. R. Civ. P. 26(c). Defendants have not met their burden. Defendants merely assert, without support, that they believe their motions to dismiss will be granted and that it allegedly would be burdensome for them to conduct discovery while their motions are pending. Def. Plan at 3-4. These naked assertions are insufficient to stay discovery pending resolution of a motion to dismiss:

> The party seeking to stay discovery has the burden of justification. ***However, defendant has failed to demonstrate beyond mere allegations that resources will be conserved by granting the stay. Further, defendant makes a bald assertion that its motion to dismiss will be granted. These are mere assertions that have not been substantiated by defendant.*** ... "[B]are assertions that discovery will be unduly burdensome or that it should be stayed pending dispositive motions that will probabl[y] b[e] sustained, are insufficient to justify the entry of an order staying discovery generally."

*People with Aids Health Group v. Burroughs Wellcome Co.*, 1991 U.S. Dist. Lexis 14389 at *2 (D.D.C. 1991) (emphasis added; denying stay; quoting *Continental Illinois Bank & Tr. Co. v. Caton*, 130 F.R.D. 145, 148 (D. Kan. 1990)). *See also Twin City Fire Ins. Co. v. Employers Ins. of Wausau*, 124 F.R.D. 652, 653 (D. Nev. 1989) (denying stay of discovery pending ruling on 12(b)(6) motion; such a motion "is not ordinarily a situation that in and of itself would warrant a stay of discovery;" movant "needs to make more than a mere conclusory statement that discovery would cause undue burden and expense. Some extraordinary justification must be shown").

Defendants have shown nothing "extraordinary" here, nor have they substantiated their claims of ***undue*** burden and expense. All discovery involves burden and expense, and the Court has already limited it for the moment to written discovery. Indeed, defendants contradict themselves in their own filing with the argument that "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." Def. Plan at 7. If accurate, then the discovery that remains to be done now cannot be as burdensome as defendants make it.[1] In addition, the evidence in this case is very likely to show that defendants did not save (or destroyed) documents relevant to the payments to Rider, further undermining the claim of undue burden. *See* First Amended Complaint of Feld Entertainment, Inc. ¶ 235 (2-16-10) (DE 25) ("FAC"). Furthermore, since there is no discovery plan and defendants have made no meaningful effort to provide the Court with a joint plan and, indeed, filed their own without ever showing it to FEI, *see* Plaintiff's Discovery Plan at 2 (2-11-11) (DE 60), defendants are in no position to be seeking a stay of discovery on the grounds of alleged burden. *See Beecham v. Socialist People's Libyan Arab Jamahiriya*, 245 F.R.D. 1, 3 (D.D.C. 2007) (denying motion to stay jurisdictional discovery pending decision on allegedly dispositive motion to enforce settlement agreements; "[g]iven that the parties have not yet formed a plan for jurisdictional discovery ... defendants' allegations that jurisdictional discovery will be intrusive are unfounded").

[1] This statement is also completely contrary to the sprawling written discovery that defendants served on February 25, 2011. Notwithstanding their argument that discovery should be stayed and their reluctance to negotiate discovery specifications consistent with Fed. R. Civ. P. 26 that would streamline and/or minimize discovery disputes, defendants collectively served on FEI **221** interrogatories, **809** requests for production of documents, **430** requests for admissions and **4** third party subpoenas, most of which seeks information related to the merits of the ESA Case.

Whether a stay of discovery pending decision on a potentially dispositive motion should be granted is "'committed to the sound discretion of the district court judge.'" *Id.* (quoting *White v. Fraternal Order of Police*, 909 F.2d 512, 517 (D.C. Cir. 1990)). Exercising that discretion requires a "'case-by-case analysis'" which depends upon a number of factors, including the type of motion. *United States v. Massey Coal Co.*, 2007 U.S. Dist. Lexis 77501 at *7-8 (S.D. W.Va. 2007) (citation omitted). Thus, a 12(b)(6) motion that simply challenges the sufficiency of the allegations in a plaintiff's complaint is not the type of "dispositive" motion that warrants a stay of discovery because "[a]ny existing pleading defects would be subject to correction." *Id.* at *8 (denying motion to stay discovery pending decision on defendants' motion to dismiss). *See also Coca Cola Bottling Co. of Lehigh Valley v. Grol*, 1993 U.S. Dist. Lexis 3734 at *8 (E.D. Pa. 1993) (denying stay pending 12(b)(6) motion to dismiss RICO claims "because even if [the motion to dismiss were] granted, Plaintiff may be able to amend the complaint"). Similarly, if a motion to dismiss goes outside the four corners of plaintiff's complaint or is actually, in effect, a motion for summary judgment, then a stay of discovery pending the outcome of such a motion is not appropriate. *See Blosser v. Gilbert*, 2008 U.S. Dist. Lexis 50095 at *3-4 (E.D. Mich. 2008) (motion to stay discovery denied because defendant's motion to dismiss "is necessarily a motion for summary judgment because he relies extensively on materials outside plaintiff's complaint"); *State Farm*, 2007 U.S. Dist. Lexis 74459 at * 5-6 (motion to stay discovery pending motion to dismiss RICO claims denied because defendants' statute of limitations argument "necessarily assumes facts that are beyond the pleadings and have yet to be developed").

Defendants' motion and supplemental motions all fall within these parameters. They all challenge the sufficiency of the allegations in the FAC. *See* DE 53 at 2-9 DE 54-1 at 42-82; DE

55 at 5-10. Therefore, given the liberality of pleading amendment mandated in this Circuit,[2] none of these motions is "dispositive" for purposes of a stay of discovery. Moreover, defendants' main motion to dismiss as well as the supplemental motion filed by HSUS both improperly go outside the four corners of the FAC and create issues of fact with respect to several subjects, including whether the claims in the FAC allegedly were compulsory counterclaims in the ESA Case, whether FEI's claims are barred by limitations, whether HSUS and FFA merged effective January 1, 2005, and whether HSUS paid money to bribe Rider. DE 54-1 at 22-28, DE 55 at 1-5. Given clear precedent that none of these fact-bound arguments can be resolved on a 12(b)(6) motion without converting it to summary judgment and giving the parties full access to the procedures provided by Fed. R. Civ. P. 56,[3] defendants' motions are not the appropriate basis upon which to grant a stay of discovery, as the authorities noted above demonstrate. That the FAC contains claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, makes no difference. *State Farm*, 2007 U.S. Dist. Lexis 74459 at *5-6 (denying motion to stay discovery pending motion to dismiss RICO claim); *Coca Cola*, 1993 U.S. Dist. Lexis 3734 at *8 (same).

Defendants are wrong when they claim a "significant new development" has arisen with FEI's disclosure that the damages it is seeking in the instant case are the attorneys fees and costs it was forced to bear in the ESA Case. Def. Plan at 2. Nothing about this is "significant," nor does it warrant a stay of discovery. Attorneys fees that a party incurs in having to defend a case

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[2] *E.g., Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (leave to amend "'almost always' allowed to cure deficiencies in pleading fraud"); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local # 639*, 883 F.2d 132, 145 (D.C. Cir. 1989) (granting leave to amend to remedy deficiencies in RICO allegations), *modified on other grounds*, 913 F.2d 948 (1990), *cert. denied*, 501 U.S. 1222 (1991).

[3] *E.g., Kim v. United States*, 2011 U.S. App. Lexis 2397 at *16-17 (D.C. Cir. 1-21-11); *Gordon v. Nat'l Youth Work Alliance*, 675 F.2d 356, 360 (D.C. Cir. 1982).

that is the product of racketeering activity are recoverable as damages under RICO.[4] Furthermore, that there may be routes to recovery of the same sum in addition to RICO is beside the point. FEI is entitled to pursue all avenues of relief. *Malley-Duff & Assoc., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341, 354-55 (3rd Cir. 1986) (attorneys fees incurred in defending a case affected by obstruction of justice were recoverable as damages in later RICO suit even though plaintiff could have sought sanctions in the earlier case; "[w]e must assume that by including obstruction of justice among the RICO predicate acts, Congress envisioned the statute being used, where all other requirements are met, to supplement remedies already available for such conduct"), *aff'd on other grounds*, 483 U.S. 143 (1987).[5]

Nor are defendants correct when they contend that the fact that FEI's damages are its ESA Case attorneys fees means that there is no pattern of racketeering activity. Def. Plan at 3. Among other things, the FAC alleges that defendants engaged in, or conspired to commit, more than 1300 related predicate acts of bribery/illegal gratuity payments,[6] obstruction of justice,[7] mail and wire fraud[8] and money-laundering[9] over a 9-year period, which either continues to this day or clearly threatens to recur.[10] These allegations readily establish a pattern.[11]

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[4] *Handeen v. Lemaire*, 112 F.3d 1339, 1354 (8th Cir. 1997); *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1167 (2nd Cir. 1993); *Bankers Tr. Co. v. Rhodes*, 859 F.2d 1096, 1105 (2nd Cir. 1988); *Burger v. Kuimelis*, 325 F. Supp. 2d 1026, 1035 (N.D. Cal. 2004).

[5] Defendants' citation to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), Def. Plan at 3, is irrelevant. FEI agrees that the attorneys fee phase of a fee-shifting case should not devolve into re-litigating the merits (which should be kept in mind when the ESA Case moves to the fee petition stage). However, this has nothing to do with whether a party can recover, as damages under RICO, attorneys fees incurred in defending a prior case predicated on racketeering activity. Nothing in *Hensley* addresses that point. Defendants' position also rings hollow in light of their position in the ESA Case that FEI is not entitled to recover any attorneys fees. *See* Nos. 03-2006 & 07-1532, Tr. of Hearing at 19 (3-23-10) (counsel for ESA Case plaintiffs).

[6] FAC ¶¶ 19-22, 27, 64-65, 72-80, 85-86, 90-97, 106, 125-26, 132-34, 137, 146-48, 158-61, 170, 172, 283.

[7] FAC ¶¶ 27, 30-32, 184-235, 283.

[8] FAC ¶¶ 25-26, 76-77, 98-129, 138-42, 150-54, 163-67, 174-77, 179-83, 283.

[9] FAC ¶¶ 24, 28-29, 24, 28-29, 76, 80, 130, 143, 155, 168, 178, 283.

[10] FAC ¶¶ 13-32, 245-72, 283.

None of the cases cited by defendants justifies a stay. *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1 (D.D.C. 2001), is not on point because both parties filed dispositive motions – the plaintiffs having filed a motion for summary judgment – so plaintiffs there were in no position to oppose a stay of discovery. *Id.* at 3. In *Maynard, v. Colorado Sup. Ct. Office of Atty. Regulation Counsel*, 2010 U.S. Dist. Lexis 7236 (D. Colo. 2010), the motion to dismiss was for lack of jurisdiction which, as indicated above, is different from a 12(b)(6) motion for purposes of a stay of discovery. In *Coss v. Playtex Prod., LLC*, 2009 U.S. Dist. Lexis 42933 (N.D. Ill. 2009), the court noted that "[a]lthough stays on discovery are sometimes appropriate, this court disfavors them because they bring resolution of the dispute to a standstill," *id.* at *4, and ***denied*** the motion for stay, ruling that limited discovery appropriate to that case should be conducted pending defendant's motion to dismiss, *id.* at *11-13. And in *PMC, Inc. v. Ferro Corp.*, 131 F.R.D. 184 (C.D. Cal. 1990), the only case cited by defendants addressing a stay in a RICO case, the court ***denied*** the defendant's motion to stay or delay discovery and simply limited the plaintiff's discovery to what the Court deemed appropriate for that particular RICO claim, *id.* at 188.[12]

The original defendants obtained a stay in 2007 arguing that, since FEI's damages "are the attorneys' fees FEI is incurring in the ESA Action," "it is evident that it is premature to even consider whether FEI's RICO violations are the 'but for' cause of its alleged damages." DE 5 at

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[11] *E.g., H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 250 (1989) (unspecified number of bribe payments over period of 6 years); *United States v. Wilson*, 605 F.3d 983, 1021 (D.C. Cir. 2010) (*per curiam*) (drug activity over period of 16 months was a pattern with open- and closed-end continuity); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1117-18 (D.C. Cir. 2009) (108 predicate acts of mail and wire fraud over several decades was a sufficient pattern); *United States v. Richardson*, 167 F.3d 621, 623, 625-26 (D.C. Cir. 1999) (pattern shown by 15 separate violent criminal incidents over 2.5 months); *United States v. Palfrey*, 499 F. Supp. 2d 34, 46 (D.D.C. 2007) (indictment sufficiently showed continuity with 14 prostitution–related predicate acts between 1998 and 2006); *Oceanic Expl. Co. v. ConocoPhillips, Inc.*, 2006 U.S. Dist. Lexis 72231 at *58-59 (D.D.C. 9-21-06) (continuous bribes of government officials over a decade was a pattern).

[12] Neither *Limestone Dev. Corp. v. Village of Lemont*, 520 F.3d 797 (7th Cir. 2008), nor *Nichols v. Mahoney*, 608 F. Supp. 2d 526 (S.D.N.Y. 2009), addresses the issue of a discovery stay pending a motion to dismiss a RICO claim.

19 (original emphasis). Thus, argued defendants, "it will not become clear whether Mr. Rider's testimony is the 'but for' cause of the ESA Action ***until the case is concluded***." *Id.* at 20 (emphasis added). Accepting defendants' representations, the Court noted since "FEI has no choice but to continue to defend the ESA suit regardless of the outcome of its RICO claim, FEI's damages ***are unascertainable at this point***." 523 F. Supp. 2d 1, 4 (D.D.C. 2007) (emphasis added). Now that FEI's damages are ascertainable, there is no basis for staying this case any further. Defendants have shown no burden or prejudice to them that proceeding with discovery would cause. But by same token, the extended postponement that defendants seek "takes no account whatever of the [plaintiff's] interest in bringing the case to trial." *Clinton*, 520 U.S. at 707. *See also Massey Coal*, 2007 U.S. Dist. Lexis 77501 at *9 ("all parties have an interest in a timely and final judgment, a concern best addressed by moving the case forward with as much dispatch as is reasonably possible under the circumstances") (footnote omitted).

## CONCLUSION

Defendants' request for a stay of discovery should be denied.

Dated: March 4, 2011

Respectfully submitted,

/s/

John M. Simpson (D.C. Bar #256412)
jsimpson@fulbright.com
Stephen M. McNabb (D.C. Bar #367102)
smcnabb@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.