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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

-----X  
FELD ENTERTAINMENT, INC., Docket No. CA 07-1532  
Plaintiff,  
v. Washington, D.C.  
**March 8, 2011**  
12:35 p.m.

AMERICAN SOCIETY FOR THE  
PREVENTION OF CRUELTY TO  
ANIMALS, ET AL,  
Defendant.  
-----X

**STATUS HEARING**  
*BEFORE THE HONORABLE EMMET G. SULLIVAN*  
*UNITED STATES DISTRICT JUDGE*

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1 P-R-O-C-E-E-D-I-N-G-S

2 (12:35 P.M.; OPEN COURT.)

3 THE DEPUTY CLERK: Please remain seated and come to  
4 order. Civil Action 07-1532, Feld Entertainment, Inc. versus  
5 American Society for the Prevention of Cruelty to Animals, et  
6 al. Would counsel please identify yourselves for the record.

7 MR. SIMPSON: Good afternoon, Your Honor. John  
8 Simpson for the Plaintiff.

9 MS. PARDO: Good afternoon, Your Honor. Michelle  
10 Pardo for Plaintiff.

11 THE COURT: All right. Counsel.

12 MR. NEAL: Good afternoon, Your Honor. Steve Neal  
13 on behalf of Defendant Animal Welfare Institute.

14 MR. BRAGA: Good afternoon, Your Honor. Stephen  
15 Braga on behalf of Wildlife Advocacy Project and Tom Rider.

16 THE COURT: All right.

17 MS. STEEL: And good afternoon, Your Honor. I'm  
18 Laura Steel. I'm here on behalf of the law firm defendants  
19 and lawyer defendants, and I believe, as Your Honor knows,  
20 Eric Glitzenstein, he's here both as a named Defendant and as  
21 counsel in the ESA.

22 THE COURT: All right. Good afternoon.

23 MR. DICKIESON: Good afternoon, Your Honor. David  
24 Dickieson with the law firm of Schertler & Onorato  
25 representing Born Free, U.S.A.

1 THE COURT: All right. Counsel.

2 MR. NES: Your Honor, Brad Nes with Morgan, Lewis &  
3 Bockius for the Humane Society.

4 MR. TOMLINSON: Good afternoon, Your Honor. Peter  
5 Tomlinson from Patterson Belknap Webb & Tyler on behalf of the  
6 ASPCA.

7 THE COURT: All right. Counsel.

8 MR. CLARKE: Good afternoon. Harry Clarke of  
9 Patterson Belknap Webb & Tyler representing ASPCA.

10 THE COURT: All right. Counsel.

11 All right. Thank you for your respective  
12 submissions. I read everything and considered everything, and  
13 not -- I don't want to give you an opportunity to rehash  
14 everything because I've already read and considered  
15 everything, but if there's something else that you omitted  
16 from your respective pleadings about discovery, either the  
17 need to go forward now or the need not to go forward now, I'll  
18 give you a few minutes, but I've considered everything you've  
19 provided me with, but if you have any few additional thoughts,  
20 let me know.

21 MR. NEAL: Yes, Your Honor, if I may. Again, my  
22 name is Steve Neal, and I represent AWI. I will not go  
23 through everything we said in our papers, but I do want to  
24 highlight a few points.

25 THE COURT: I don't need you to highlight what you

1 wrote. Is there something else, something new that you didn't  
2 put in there? I mean, I read everything, I considered  
3 everything, so you made your best pitch, but if there's  
4 something else that, you know, every now and then, I know,  
5 especially me, I'll say, gee, I didn't say this or I didn't  
6 say that. If there's something that falls under that category  
7 of "I didn't," then tell me.

8 MR. NEAL: Well, I think we -- the papers are pretty  
9 complete on the issue of a stay. I would just like to  
10 highlight the fact that, you know, there has been a change in  
11 circumstances since you last considered this issue, and that  
12 change is that the only relief sought now by the Plaintiff in  
13 the RICO action is the attorneys' fees and costs incurred in  
14 the ESA action. That is the exact same basis for the petition  
15 for attorneys' fees. So now you have two different claims  
16 seeking the exact same relief.

17 You quite appropriately stayed pending resolution of  
18 the fee petition, pending resolution of the cross appeals.  
19 Those appeals will be fully briefed June 13<sup>th</sup>, which is just  
20 a few months away. It seems like the identical reasoning  
21 should be applied to the RICO case since the identical relief  
22 is sought.

23 That would be entirely consistent with your prior  
24 ruling and entirely consistent with *Hensley v. Eckerhart* where  
25 the Supreme Court especially directed that a request for

1 attorney fees should not become a second major litigation,  
2 which is exactly what has happened here.

3 So the Defendants in this case seek two different  
4 forms of a stay, either one of which could be appropriate.  
5 The first is --

6 THE COURT: Well, when the Supreme Court said that,  
7 though, that was in connection with an action for attorneys'  
8 fees. That wasn't in connection with the RICO action, though,  
9 was it?

10 MR. NEAL: That's correct. And this is a RICO  
11 action solely for attorneys' fees, which is very unusual;  
12 having handled a bunch of RICO cases, I've never seen that.

13 What the Defendants seek in this case is a stay of  
14 the RICO action pending resolution of the appeal. If you're  
15 not prepared to go that far today, then the Defendants seek a  
16 stay of discovery and other motions practice pending  
17 resolution of the motions to dismiss. Those motions to  
18 dismiss have been filed, and they'll be ripe for resolution as  
19 of April 1<sup>st</sup>, three weeks from -- less than -- almost three  
20 weeks from today.

21 It is well settled in this court that, particularly  
22 RICO cases, but other kinds of cases as well, are often stayed  
23 pending resolution of a dispositive motion.

24 THE COURT: Is this a jury triable case or nonjury?

25 MR. NEAL: Jury trial. The *Travis* opinion, the

1 *Anderson* opinion, both from this court on page 6 of our brief,  
2 the *Maynard* opinion, they stayed pending -- stayed discovery  
3 pending resolution of a motion to address jurisdictional  
4 issues. Same theory.

5           These cases are entirely consistent with the Supreme  
6 Court's rulings in *Iqbal Twombly*, which says that legal  
7 deficiencies in a case should be considered early on while the  
8 expense is low, the burden is low. Nowhere is that more clear  
9 than a RICO case. You see how these things spin out of  
10 control.

11           I would ask you to again look at, if you haven't  
12 already, the *Limestone Development Corporation* case in the  
13 Seventh Circuit, and that's where Judge Posner made it  
14 absolutely clear that burdensome discovery in a RICO case  
15 during a pending motion to dismiss is improper.

16           We cited another case, the *Coss* case for the  
17 identical proposition.

18           THE COURT: I've considered all your -- so there's  
19 nothing -- you rest on your pleadings then essentially. I  
20 mean, there's nothing new.

21           MR. NEAL: Well, one thing I want to point out that  
22 is not in our papers. When assessing to issue a stay,  
23 obviously you have to consider prejudice to the Plaintiff. In  
24 this case --

25           THE COURT: I mean, you know, the Defendants did ask

1 me to stay this RICO case while the underlying suit against  
2 the Circus was pending. That was -- that was at Defendants'  
3 request when Defendants were Plaintiffs, and I did, I granted  
4 that. So why isn't it time for the case to go forward?

5 MR. NEAL: Well, again, I think -- well, first of  
6 all, there's case law on point, I think. Another point is, we  
7 have filed an omnibus motion to dismiss which makes many  
8 arguments as to why this case should be dismissed with  
9 prejudice now, any one of which is dispositive.

10 We only have to win one. Whether it's a pattern  
11 argument, here you have a single victim, a single scheme to  
12 file a lawsuit with a single remedy, attorneys' fees. That is  
13 not a pattern of racketeering.

14 Enterprise. They can't establish that the  
15 enterprise is distinct from the RICO persons. They can't do  
16 it. Their own amended complaint makes that clear.

17 The compulsory counterclaim rule. If you agree with  
18 us, that this was a compulsory counterclaim, the case is over  
19 forever. There are other reasons as well, any one of which  
20 makes the case go away.

21 But just for a moment, let me direct you to their  
22 discovery plan, because it demonstrates --

23 THE COURT: I've read their plan. All right. And  
24 you've told me about the one additional factor, so -- and I'm  
25 going to thank you. I considered everything you had.

1           And you were speaking for all of your clients, I  
2 mean, all of your -- for everyone --

3           MR. NEAL: On this particular issue, I am speaking  
4 on behalf of the Defendants.

5           THE COURT: All right. Anyone else? Just anything  
6 new. I've read all your pleadings. Anything new?

7           MR. DICKIESON: Your Honor, I have the honor of  
8 being the newest attorney in the case representing Born Free  
9 and just brought into the case, and one of the things that --

10          THE COURT: I would welcome you, but I'm not sure.

11          (LAUGHTER.)

12          MR. DICKIESON: Well, and that's the point, is that  
13 what I have seen is when we got the Defendants' discovery plan  
14 in the initial disclosures, it said we will turn over the  
15 calculation of damages.

16          So I contacted opposing counsel, and I said I'd like  
17 to either get a copy or come by and inspect that, and that was  
18 over a month ago. And the response I got is, well, we're not  
19 going to turn that over yet. We want a protective order.

20          And what I found is that they're not -- even that  
21 stuff that they say they're going to turn over, they're not  
22 turning over, and I was a little confused by this. And I went  
23 back and read the Court's decision granting the memorandum  
24 opinion of November 7<sup>th</sup>, 2007 where it says (reading) The  
25 Court's interest and judicial economy and efficiency is served

1 by the imposition of a temporary stay at this time, and the  
2 reason is the parties have demonstrated an inability or  
3 unwillingness to cooperate on even the most insignificant  
4 issues. The Court is not optimistic that allowing a second  
5 lawsuit to go forward between the same parties would result in  
6 anything less cumbersome, protracted or vitriolic than the  
7 first.

8 So what I'm facing here representing --

9 THE COURT: That sounds like something I signed my  
10 name to.

11 (LAUGHTER.)

12 MR. DICKIESON: What I'm facing here is representing  
13 a nonprofit entity that has no insurance coverage for this  
14 case, is facing enormous discovery burdens and everything is  
15 going to be contested to the nth degree. Even the material  
16 that they say we're going to provide, they haven't filed a  
17 protective order which they said they were going to do. We're  
18 going to have to file a motion to compel, and this is  
19 something that Rule 26(a)(1) says you must produce  
20 immediately, and that's -- that's my new perspective on the  
21 case that my client can't afford the discovery disputes and  
22 the cost that's going to be involved in this.

23 THE COURT: All right, Counsel. Thank you. Anyone  
24 else? Anything new?

25 All right. Counsel, anything new?

1 MR. SIMPSON: I think we -- we'll stand on our  
2 papers, Judge.

3 THE COURT: All right.

4 MR. SIMPSON: But just to respond to --

5 THE COURT: Let me ask you something. Let me ask  
6 you something. I stayed this case over objection years ago  
7 because it came -- with all the reasons I articulated in that  
8 opinion, it came in the eleventh hour and whatever, there was  
9 going to be need for more discovery, the other case had been  
10 pending for years, it was high time to bring some finality to  
11 that case and I ruled never reaching the merits.

12 But, you know, suppose I'm wrong? I granted  
13 judgment for the Defendant in the underlying case based on  
14 standing grounds, never having reached the merits. Suppose  
15 I'm wrong, the circuit disagrees with the Court?

16 Then what the Court has to do at that point is to  
17 focus on the merits and render a decision on the merits, which  
18 would be the same place the Court was two years ago when the  
19 Court stayed proceedings to enable the Court to resolve the  
20 case on the merits. So why shouldn't I just wait and see what  
21 the circuit does with respect to the issues before the  
22 circuit? I could be wrong.

23 MR. SIMPSON: That's certainly one way to proceed,  
24 Your Honor. You have the discretion to do it, but I would  
25 submit at this point, after we've been through a trial that

1 lasted six-and-a-half weeks, after my client's been through  
2 nine years of litigation with these individuals and these  
3 entities, it is time to move this case forward.

4 THE COURT: Right. No one's made this argument. No  
5 one's made the argument, though, that I should wait because --  
6 I mean, I could be wrong on standing, but if I'm wrong on  
7 standing, you know, it's not as if the lawsuit is over. It's  
8 just that we pick up where we ended back in February of  
9 whatever year it was, and then the Court has to determine then  
10 the merits, which was the reason for the stay in the first  
11 place to enable the Court to resolve the merits as a nonjury  
12 matter, and it just strikes me as why -- you know, why not  
13 just stay everything until then? I don't know. You don't  
14 have a date for argument. Pleadings will be --

15 MR. SIMPSON: We don't have a date for argument, but  
16 I think -- I would just like to, as Judge Penn pointed out in  
17 that *People with Aids* case that we cited, you can't just come  
18 in and say, "We need a stay because we're going to win our  
19 motion to dismiss, or it's burdensome to do discovery," and  
20 not supported, which is the problem here.

21 They're going to win their appeal? I don't think  
22 so. Your Honor made more than 100 findings of fact. They  
23 didn't challenge any of them, any of them. They waived them.  
24 They waived that argument. So I don't know how that case is  
25 coming back.

1           They've got a legal argument with respect to the  
2 organization, but I don't think it's appropriate for us to sit  
3 here and debate what the D.C. Circuit is going to do with  
4 that.

5           We need to move this case forward, because the  
6 problem is, we're talking about conduct that started in the  
7 1999/2000 timeframe.

8           THE COURT: Does this case depend upon the outcome  
9 of the first case, though?

10          MR. SIMPSON: No, it does not in any way. It does  
11 not in any way, and I would like Your Honor to study the  
12 *Malley-Duff* case, which we cite in the paper that we filed  
13 last Friday, the Third Circuit case that actually went to the  
14 Supreme Court and established the proposition that there's a  
15 four year statute of limitation in the RICO case.

16          But what's interesting in that case is the RICO  
17 plaintiff was a defendant in an antitrust case that was  
18 brought against them and they lost. They lost the case. But  
19 they still had a RICO claim against the plaintiff in that case  
20 because of the plaintiff's misconduct in the first case based  
21 on obstruction of justice, destruction of evidence and other  
22 predicate acts, and they made the same argument in that case  
23 that they're making here.

24          Well, this stuff, you could have gotten relief for  
25 this stuff in the other case. You should have filed a motion

1 for sanctions in the first case. And the Third Circuit  
2 specifically rejected that argument on the ground that if  
3 Congress intended that, Congress would have said it.

4 If Congress intended that your only remedy for  
5 conduct in an ESA case that constitutes bad faith litigation  
6 or conduct that otherwise satisfies the exception of the  
7 American rule, that's your exclusive remedy is to seek  
8 attorney's fees, Congress would have said that. Congress  
9 wouldn't have passed RICO.

10 But RICO has an independent basis. There's an  
11 independent remedy, and the Third Circuit ruled that the  
12 plaintiff was entitled to proceed with the RICO case  
13 notwithstanding the fact that they could have sought sanctions  
14 in the first case.

15 They haven't cited a single case to Your Honor that  
16 supports what they're saying. Not one. Where's the authority  
17 that says my client has to exhaust an attorney's fee petition  
18 in the ESA matter before we proceed with a RICO case? There's  
19 no such authority. None.

20 They haven't cited a single case where a court ever  
21 stayed discovery in a RICO case pending the outcome of a  
22 motion to dismiss. They didn't cite authority for that. We  
23 should proceed.

24 I don't know whether Tom Rider is even alive. This  
25 conduct started in 2000, if not earlier. It's 2011. You wait

1 another year, people die, their memories fade, evidence  
2 disappears. We already know, from the contempt hearing, that  
3 the Fund for Animals didn't start even thinking about saving  
4 documents in 2000 -- until 2005, that the ASPCA threw away the  
5 credit card receipts for their payments to Rider, had to go  
6 get them from American Express.

7           So, notwithstanding the fact that Your Honor ordered  
8 these Defendants in November of '07 to save evidence, they  
9 didn't do that before. So there is prejudice to my client if  
10 we don't proceed here. And the problem with this whole --  
11 with this whole approach is, they've totally blown off --  
12 that's the only way to put it -- blown off the discovery plan.

13           The federal rule was amended under Rule 26 to make  
14 it clear that certain areas need to be discussed, particularly  
15 in a complicated case at the outset, because an ounce of  
16 prevention is worth a pound of cure. If you don't sit down  
17 and have a meaningful discussion and have a meaningful  
18 agreement Court supervised on the scope of discovery, on what  
19 modification should go to the number of interrogatories and  
20 admission requests, on how you're going to produce electronic  
21 discovery, on what you're going to do with privilege issues  
22 such as crime fraud in this case or what the log's going to  
23 look like or what you're going to do with confidentiality  
24 issues, then all that becomes a big train wreck, all that  
25 becomes the subject of motions practice down the road for

1 whichever judicial official is responsible, either the trial  
2 judge or the magistrate judge.

3 And we tried to sit down and go through these  
4 various subjects with the other side. Their response is we're  
5 not doing any discovery, we're going to win, you're going to  
6 lose, and we're not going to do any discovery. And even if we  
7 do any, it's not going -- we're not going to do any electronic  
8 discovery.

9 We tried, in our discovery plan, to study what the  
10 magistrate judges, particularly the magistrate judges in this  
11 District have said in their opinions and in their various  
12 presentations about what they want to see in these modern  
13 discovery plans, and we know what they're looking for. We  
14 tried to address these issues, and they blew that off.

15 And I would just make one point about what counsel  
16 for Born Free said. We said we will produce these documents  
17 that support the calculation of our damages, but Rule 26(a)(1)  
18 specifically says material produced is going to be produced in  
19 accordance with the standards of Rule 34. And under Rule 34,  
20 a party does not waive privilege, No. 1, nor does it waive the  
21 ability to seek confidential treatment for documents otherwise  
22 that should be treated confidentially.

23 Now, the problem I've got, before we proceed here  
24 without a discovery plan and without discussing the concept of  
25 a confidentiality order, is my client's discovery documents

1 get produced and then the next day they're on a billboard in  
2 Boston, Massachusetts, because that's what happened in the  
3 other case.

4           Actually it didn't make it onto the billboard, but  
5 there was an attempt to put it up, the famous pools of blood  
6 memorandum. I don't want to go through that here, and I think  
7 if you're talking about contentiousness, the best way to end a  
8 contentiousness in something like that is to do exactly what  
9 the Magistrate Judge Facciola did when you handed off the ESA  
10 discovery issues to him in September of '07. He wasn't on the  
11 watch more than I think two weeks when he issued a blanket  
12 order that said everything from this point forward is going to  
13 be produced under confidentiality, it's not going to be shared  
14 with anybody outside this case, and that facilitated discovery  
15 because it cut down the disputes, and that's what we suggest  
16 ought to happen here.

17           Maybe with a slight modification, it doesn't  
18 necessarily have to be blanket, each party gets to designate,  
19 but if I have to -- if I have to concern myself with whether  
20 every single document that I produce is going to be on the  
21 internet, given to the evening news or plastered on a  
22 billboard, then there's going to be fights over it. There  
23 will be fights over it.

24           So that's one of the things that we think ought to  
25 be the subject of a discovery plan.

1           So, Your Honor, I think -- my guess -- I don't know  
2 whether I'm getting into what you want to hear or not, but our  
3 view on this is you should deny the stay, but if -- it's  
4 within your discretion to go either way. We don't dispute  
5 that. You should deny the stay, we should proceed because  
6 it's not going to go away. You know, pretending like it's not  
7 here, it's not going to go away.

8           I think that this is a case that probably does need  
9 a magistrate judge to supervise discovery, and I think that  
10 what you should do is enter an order that puts all these  
11 various discovery requests that were served last week, or the  
12 25<sup>th</sup>, on hold in terms of deadlines until that discovery  
13 plan is done, because right now, they just --

14           THE COURT: Go ahead.

15           MR. SIMPSON: They just file all this -- they just  
16 serve all this stuff without any, you know -- just I guess to  
17 take advantage of the fact that they all have 25  
18 interrogatories, so now we have hundreds of requests, hundreds  
19 of requests for admissions, hundreds of interrogatories out  
20 there, which, you know, if they're appropriate, I'll answer  
21 them. I don't have any problem answering them. I'm going to  
22 need more time.

23           I'll answer them, but some of these things are just  
24 outrageous in terms of what they ask for. They want to  
25 know -- they want to take discovery on how my client treats

1 not just elephants, which I don't think has anything to do  
2 with this case, but every animal, all animals.

3 So somehow, and I haven't found authority, but  
4 somehow how my client treats Percy the Porcupine is a defense  
5 to a RICO claim because Percy the Porcupine, at least at one  
6 point, was on the Blue Unit, he's an animal. So I don't know  
7 if my client mistreated Percy the Porcupine, how that gets him  
8 out of bribing a witness, but that's the kind of stuff we're  
9 dealing with. That needs to be cut down, and that's why you  
10 need a discovery plan to cut through that and narrow this case  
11 to what it's actually all about.

12 THE COURT: All right. Are there porcupines in  
13 circuses?

14 MR. SIMPSON: It was on the Blue Unit at the time we  
15 tried this case, Your Honor.

16 MR. NEAL: May I briefly address?

17 THE COURT: Briefly, yeah.

18 MR. NEAL: We started arguing a motion to stay and  
19 ended up dealing with a protective order.

20 First of all, I think there's a real irony here that  
21 a Plaintiff files an absolutely salacious and frivolous RICO  
22 action and then wants you to stay all the discovery that would  
23 disprove those allegations. They want a protective order for  
24 all their damages information. Quite unusual.

25 There's a process that has to be followed. If they

1 want a protective order, they can file a motion, we'll oppose  
2 it, and the Court can ultimately rule. You can take their  
3 protective order, our protective order or the Court can come  
4 up with its own.

5           The blanket protective order issued by Judge  
6 Facciola, respectfully, is in direct violation of Rule 26.  
7 Rule 26 provides that only certain kinds of information be  
8 subject to a protective order, and it's the burden on the  
9 moving party to demonstrate for each document that is to be  
10 protected.

11           And so, if we go forward in this case, we are going  
12 to have to deal with the existing protective order that's in  
13 place.

14           As to prejudice. Back to the motion to stay  
15 briefly. Counsel has given some examples of why he believes  
16 the Plaintiff is prejudiced. In this case, Your Honor, just  
17 looking at their discovery plan, there's 37 categories of  
18 information they want discovery on. They want -- they  
19 envision taking at least 80 depositions. They have five pages  
20 just going through a protocol for electronic discovery. They  
21 say they want to take our computers and do forensic analysis.  
22 The initial disclosures in this case goes on for 23 pages with  
23 all the individuals they want to call at trial.

24           This discovery will be enormously cumbersome and  
25 enormously expensive, and that doesn't even address all the

1 many motions that are before the Court, whether it's on crime  
2 fraud or whether it's on various privilege issues on the part  
3 of the Defendants in this case.

4           There will be enormous prejudice to the Defendants  
5 in this case, or any one of six or seven different omnibus  
6 arguments can make the whole case go ahead.

7           THE COURT: All right. I'll take a five-minute  
8 recess.

9           THE DEPUTY CLERK: This honorable court now stands  
10 in a short recess.

11           (A BRIEF RECESS WAS TAKEN.)

12           THE DEPUTY CLERK: Please remain seated and come to  
13 order.

14           THE COURT: All right. Anyone else?

15           MR. BRAGA: Yes, Your Honor, just briefly. Stephen  
16 Braga on behalf of Defendant Wildlife Advocacy Project and Tom  
17 Rider who is alive.

18           There is a question that you asked Mr. Simpson, does  
19 this case, the RICO case, depend on the result on appeal. He  
20 said no. Of course it does. Of course it does. As Your  
21 Honor's questions indicated, it's up there on a standing  
22 theory.

23           The core of the RICO complaint is that the  
24 Defendants created a fictitious theory of standing to justify  
25 suing the circus for over ten years and inflicting monetary

1 pain on them. If the D.C. Circuit says there is standing and  
2 it comes back and Your Honor has to rule on the merits, you  
3 might rule on the merits for the Plaintiffs in the ESA case.  
4 Are there then going to be attorneys' fees awarded against the  
5 prevailing party? Of course not.

6 The shape of this RICO case will change, might go  
7 away entirely, certainly will morph depending upon what the  
8 D.C. Circuit does. Mr. Simpson also said that no findings of  
9 fact by Your Honor were controverted on appeal. There are  
10 some findings of fact that have been addressed in the briefs.  
11 I'm not involved in the appeal, but I understand that to be  
12 the case.

13 The second point that Mr. Simpson made that I would  
14 like to address is he said, Your Honor, there is no authority  
15 that the other side has cited for why the RICO claim should  
16 await these other remedies, attorneys' fees in the ESA case,  
17 that there's another forum. And in Footnote 25 of  
18 Mr. Simpson's opposition, he actually cites one of our cases,  
19 and it's a case by the Second Circuit called *In Re: Merrill*  
20 *Lynch Limited Partnership Litigation* where the Second Circuit  
21 says, endorsed by Mr. Simpson in this footnote for other  
22 purposes, quote, When contractual or other legal remedies  
23 remain which hold out a real possibility that the injury may  
24 be eliminated or significantly reduced, then the RICO claim is  
25 not ripe until those remedies are exhausted and the damages

1 are clear.

2 That's our situation with the appeal pending, Your  
3 Honor. We would ask for a stay.

4 THE COURT: All right. Thank you.

5 Mr. Simpson, let me ask you this, though. I keep  
6 going back to this. I mean, the case in the Court of Appeals  
7 has not been expedited, correct?

8 MR. SIMPSON: Excuse me?

9 THE COURT: The case in the circuit has not been  
10 expedited and there's probably no reason to.

11 MR. SIMPSON: It's on the normal track.

12 THE COURT: Right. So what happens? So we go  
13 forward with this case. I mean, hypothetically, if the motion  
14 to dismiss is denied, we go forward with discovery, jury  
15 trial, I don't know, let's say the fall of '12 and the case is  
16 still pending in the circuit. Jury trial, you prevail, the  
17 jury has heard all sorts of evidence about attorneys' fees,  
18 because that is a measure of damages that you would argue in  
19 the RICO case before the jury, correct?

20 MR. SIMPSON: Yes.

21 THE COURT: And then the Circuit reverses and you're  
22 no longer a prevailing party. Then what happens to all that  
23 work? What happens to that jury verdict? What happens?

24 MR. SIMPSON: Well, if that were to happen --

25 THE COURT: Don't tell me you cross that bridge when

1 we get to it.

2 MR. SIMPSON: It's also possible that some court in  
3 the interim could declare RICO unconstitutional. I mean, but  
4 these are not things likely to happen. I mean, let's be  
5 realistic here.

6 This case got decided in this court on two standing  
7 theories, one of which was totally dependent on the  
8 credibility of a single witness that Your Honor found totally  
9 incredible, totally incredible, and the only evidence that was  
10 offered on that individual's standing, Mr. Rider, was  
11 Mr. Rider's testimony. There is no other evidence in the case  
12 about his standing to sue, period.

13 So when his testimony is rejected in toto for lack  
14 of credibility, that's the end of Tom Rider. Tom Rider is not  
15 coming back. There is no case I've -- I'm aware of in the  
16 history of the D.C. Circuit in which they have ever reversed a  
17 trial judge for determining that a witness is not credible, a  
18 witness who testified live.

19 THE COURT: What about the organizational standing?

20 MR. SIMPSON: All right. So, Rider is gone, Rider  
21 is history. The organization that we're talking about here is  
22 one, API. ASPCA, FFA and AWI abandoned this lawsuit in the  
23 middle of trial. They abandoned this lawsuit. They filed a  
24 motion for Your Honor to exclude them as witnesses, it was  
25 denied. They put on no evidence whatsoever of their standing

1 to sue. And when it came to the final argument and you  
2 specifically asked counsel for the Plaintiffs what relief they  
3 wanted, they want no relief. Why should they still be in the  
4 case? You ask them that. They just want to be in the  
5 caption? Yes. Do they want relief? No.

6 And while they're, quote, parties to this appeal,  
7 they've made -- those organizations have made no argument in  
8 the D.C. Circuit in their initial brief, none, about why Your  
9 Honor's decision about them was erroneous. The only appellant  
10 making any argument in the D.C. Circuit on organizational  
11 standing is API.

12 API entered this lawsuit on March 16<sup>th</sup>, 2006, six  
13 years into this case, after Rider had been paid close to a  
14 \$100,000. They entered this case in March of 2006 under the  
15 same theories that Your Honor rejected in 2001.

16 Now, I don't think that's coming back. But even if  
17 that does come back, it doesn't explain the damages that were  
18 inflicted on my client between July 11, 2000 when they brought  
19 the original case with Rider and March 16<sup>th</sup>, 2006 when API  
20 entered the lawsuit. That's still a problem.

21 That still is a period of time when they were paying  
22 him to be a Plaintiff in the case, when he was the only  
23 Plaintiff in the case, yet Your Honor concluded had standing  
24 because all during that timeframe, your ruling in June of '01  
25 that the organizations had no standing remained in effect.

1 The only reason this lawsuit existed between June of '01 and  
2 March 16<sup>th</sup> of '06, at a minimum, was Tom Rider.

3 So, even if that part comes back, we still have a  
4 RICO claim. It's not worth what it is now, obviously, but we  
5 still have one. There's absolutely no question about that,  
6 and that's why we need to proceed instead of speculating about  
7 whether the D.C. Circuit is going to be the first case in  
8 American history to reverse a judge on a credibility  
9 determination.

10 THE COURT: All right.

11 MS. STEEL: Your Honor.

12 THE COURT: Yes, Counsel.

13 MS. STEEL: Yes, Your Honor. Thank you. Laura  
14 Steel on behalf of the lawyer defendants. Your Honor's  
15 question is right on target, that not only were there issues  
16 raised and that are on appeal now about Tom Rider's standing,  
17 but also the organizational Plaintiff's standing. Your Honor  
18 is absolutely right. Those issues were preserved. They are  
19 being litigated on appeal.

20 And in fact the position that the ESA Plaintiffs  
21 have taken in this -- in the ESA lawsuit and on appeal is that  
22 all of the organizational Plaintiffs were asserting the same  
23 interest as API and that the only -- that they were only  
24 presenting evidence below as to one, for the Court's  
25 convenience because the interests were all the same. That is

1 a live issue that is on appeal.

2           If that comes back and is reversed by the D.C.  
3 Circuit, not -- I don't know how Mr. Simpson can be so  
4 clairvoyant that no, there's no way that the Circuit -- the  
5 D.C. Circuit isn't going to reverse a standing ruling, but it  
6 has an absolutely huge bearing on the configuration of this  
7 case, whether or not Tom Rider had standing, it goes to the  
8 heart of the allegations, ethical allegations, legal  
9 allegations that are made against all of the Defendants that  
10 they put Tom Rider up knowing that he had no standing. If  
11 that comes back, this whole case is gone.

12           If the organizational Plaintiffs are determined to  
13 have standing, well then the RICO case goes away because all  
14 of a sudden FEI does not have, cannot prove proximate cause in  
15 the bringing -- in the incurring of their legal expenses in  
16 the underlying case because there was an independent basis to  
17 proceed.

18           I think, and I certainly can talk about some of the  
19 discovery issues that are raised here, Your Honor...

20           THE COURT: No, they've been addressed by both  
21 sides.

22           MS. STEEL: I think that has been addressed.

23           THE COURT: All right. Great. Thank you. All  
24 right. Anyone else?

25           You know, as you know, I've gone back and forth on

1 this whether to permit discovery or limited discovery to go  
2 forward while the motion to dismiss is pending. On the one  
3 hand, this Court's practice is, which are not unlike other  
4 courts, is to resolve 12(b)(6) motions prior to discovery  
5 going forward.

6 On the other hand, this case has a tortured history,  
7 and for a host of reasons which are familiar to the parties  
8 and the attorneys, new attorneys as well, if not yet, soon,  
9 and those reasons don't need to be recited here. They've been  
10 alluded to by the parties in pleadings by the attorneys.

11 The Court is extremely sensitive to Plaintiff's  
12 desire to proceed with its case; however, after -- after  
13 careful consideration and for the reasons that I will  
14 articulate, the Court has determined that discovery should be  
15 stayed pending resolution of Defendants' motion to dismiss,  
16 not the appeal, but resolution of the Defendants' motion to  
17 dismiss.

18 The purpose, as articulated in a number of cases,  
19 Federal Rule of Civil Procedure 12(b)(6), is to enable  
20 defendants to challenge the legal sufficiency of complaints  
21 without subjecting themselves to discovery. I mean, that's  
22 been universally held in a number of cases, the *Rutman Wine*  
23 *Company* case, the *Mann v. Brenner* case, the *Havaco of America,*  
24 *Limited versus Shell Oil Case,* the *Maljack, M-a-l-j-a-c-k,*  
25 *Productions* case from one of my colleagues.

1           Moreover, Federal Rule of Civil Procedure 26(c)  
2 provides that, and I quote, the Court may, for good cause,  
3 issue an order to protect a party or person from annoyance,  
4 embarrassment, oppression or undue burden or expense, end  
5 quote.

6           The Court is acutely aware that bare assertions that  
7 discovery will be unduly burdensome or that it should be  
8 stayed pending dispositive motions that will probably be  
9 sustained are insufficient to justify a stay of discovery.

10           However, the Court finds that after careful  
11 consideration of the arguments advanced by the parties, that  
12 discovery should be stayed in this case pending the outcome of  
13 the motion to dismiss. And I emphasize that motion will be  
14 resolved on a expedited -- well, I don't want to say  
15 "expedited" because it has a certain meaning within the  
16 context of our rules, but it will be decided soon, and I'll  
17 talk about that after I finish articulating the reasons for  
18 stay.

19           The Court reaches the conclusion for a stay for  
20 several reasons. First, the record reflects that a discovery  
21 deadline has not yet been set by the Court, thus at this early  
22 stage of the proceedings, it is unlikely that a stay of  
23 discovery will harm either of the parties.

24           Second, Defendants make an extremely compelling  
25 argument, a number of them, that discovery will be highly

1 burdensome. The First Amended Complaint alleges that  
2 everything that Defendants did was in furtherance of not only  
3 a scheme to illegally mount and continue a damaging and  
4 expensive lawsuit against it, but in furtherance of, and I  
5 quote, multiple schemes to permanently ban Asian elephants in  
6 circuses with the ultimate objective of banning Asian  
7 elephants in all forms of entertainment and captivity. That's  
8 from the amended complaint at paragraphs 3, 16, 279 and 282.

9 Accordingly, Feld seeks extremely broad discovery  
10 against Defendants, including, but not limited to all  
11 Defendants' handling of grants and related matters for tax  
12 purposes since 1998; the creation, maintenance and/or  
13 alteration of Defendants' websites since 1998; the  
14 identification of all litigation involving exotic animals  
15 which any Defendant filed or contemplated or proposed or  
16 anticipated filing since 1998; and all Wild Advocacy Project  
17 activities and records from its inception to the present.

18 And that's gleaned from the Plaintiff's discovery  
19 plan at pages 6 and 7.

20 As Feld points out, the Defendants similarly seek,  
21 quote, sprawling written discovery, end quote, against  
22 Plaintiff, including 221 interrogatories, 809 requests for  
23 production of documents, 430 requests for admissions, and four  
24 third-party subpoenas. And that's gleaned from Feld's  
25 response to Defendants' stay arguments at page 3, note 1.

1           Based on the highly complex issues at stake in this  
2 case as well as the parties' apparent inability to focus and  
3 limit discovery at this juncture, the Court is persuaded that  
4 discovery will be extraordinarily extensive and burdensome.

5           The Court's conclusion is unfortunately re-enforced  
6 by its experience with the parties over the past decade. The  
7 prior litigation on which this case is based, to an extent,  
8 was characterized by annoyance, embarrassment, oppression,  
9 undue burden and expenses for all concerned.

10           As Magistrate Judge Facciola pointed out in *ASPCA*  
11 *versus Feld*, and that's in Case No. 03-2006, discovery has  
12 gone on for nearly five years, and I'm quoting from his order,  
13 and the expenditure of the resources of the parties and of the  
14 Court to deal with the problems that have arisen is  
15 staggering. For example, this court has been forced to  
16 resolve 44 different motions pertaining to discovery.

17           And I note that in a recent RICO case decided by  
18 judge -- I think it was Judge Kessler, the tobacco case, I  
19 think there were between 45 and 50 opinions in that case that  
20 took nine months to try.

21           I cited -- I quoted from Judge Facciola's  
22 discovery -- strike that -- his order dated August the 5<sup>th</sup>,  
23 2008. This court similarly observed, and I quote from this  
24 court's order of August the 23<sup>rd</sup>, 2007, Docket No. 178, that  
25 all parties have needlessly prolonged and multiplied the

1 proceedings in this case because of their constant filing of  
2 excessively large motions, inability to resolve any disputes  
3 without assistance of the Court and overall poisoned  
4 relationship and hostile attitude toward each other.

5 Based on the broad scope of the parties' proposed  
6 discovery in this case as well as their past history as  
7 litigation adversaries, the Court concludes that a stay of  
8 discovery pursuant to Rule 26(c) is entirely justified in this  
9 case.

10 Finally, the Court notes that Defendants seek a stay  
11 of discovery only for a limited period of time, that is, until  
12 the motion to dismiss is decided. If not, I understand the  
13 additional requests until resolution of the appeal, but I'm  
14 not prepared to go that far at this time.

15 Nevertheless, the Court does find it appropriate to  
16 stay discovery until resolution of the motion to -- motion to  
17 dismiss.

18 Now, this is my plan for resolution of that motion.  
19 I plan to give you a hearing date in June, and I'm going to  
20 resolve that motion this summer, you know. I've learned early  
21 on not to tell you by a certain date because when that date  
22 comes and goes, then all we -- we don't have enough people to  
23 answer telephones about why there's no decision, so I'm not  
24 going to go that far and say by what date.

25 I will tell you that it will be resolved over the

1 course of the summer months. Now, I'm prepared to give you a  
2 date in June now or I can issue a minute order and then deal  
3 with all the conflicts that undoubtedly that there will be,  
4 but I don't want to wait until July, don't want to wait until  
5 August when people, you know, start going on vacation and  
6 start spending the money that they've already guaranteed to  
7 take a trip, and I don't want anyone's family or kids mad at  
8 me for any reason.

9 So, I think probably June is probably the better  
10 part of wisdom, and you know, I can give you a date now or  
11 just float it. I'll just give you a date now.

12 June 23<sup>rd</sup> at 10:00 o'clock for a hearing on the  
13 motion. There may be -- there used to be a time when everyone  
14 had calendars. Everyone has a Blackberry now. Is that a bad  
15 date for anyone?

16 MR. SIMPSON: It's fine with us, Your Honor.

17 MR. BRAGA: It's fine with me, Your Honor.

18 THE COURT: Let me just ask this: Does anybody have  
19 any problems with that date? Are there ten other attorneys  
20 who aren't here for this hearing? All right. Everyone here,  
21 June 23<sup>rd</sup> at 10:00 o'clock. All right. That's the motions  
22 date. Now, that's a date you can count on.

23 Now, but I'm not going to sit here and tell you I'm  
24 going to decide it by a certain date over the summer. We're  
25 going to decide it this summer, though, and that's the quid

1 pro quo, and I'll stay discovery pending resolution of the  
2 motion to dismiss.

3 I will tell you one thing, if this case does go  
4 forward, I can tell you I have no doubt about this whatsoever,  
5 I'll either enlist the aid of Judge Facciola, and I think,  
6 even under our revised rules for assignment of matters to  
7 magistrate judges where lawyers can no longer, you know, pick  
8 and choose magistrate judges, I think that there's probably  
9 some authority for reassigning this case to him for resolution  
10 of discovery disputes because of his unique familiarity with  
11 the attorneys and the issues in this case.

12 And in all likelihood, if the case goes forward, I  
13 will probably enlist his aid. That's assuming that he'll take  
14 my telephone call. He may not.

15 But you know, I'm not going to rule out the  
16 appointment of an outside master. I mean, there are a number  
17 of outstanding superior court judges who have recently  
18 retired, a number of them. But again, I'm mindful of the  
19 cost. I'm not necessarily interested in saddling the  
20 attorneys with costs, but I'm not going to overlook that  
21 talent out there.

22 Unfortunately, we've lost a lot of good judges from  
23 superior court recently and through retirement because they  
24 want to, I assume, embark on other ventures, so I'm not going  
25 to overlook that talent. But I'm mindful. I'm mindful of the

1 expense associated with that.

2 But that's -- that's the best I'm going to -- that's  
3 the best I can do for the parties today. I'll stay discovery  
4 today, but it's not an open-ended stay, and the promise that  
5 I'm making to you is that I'm going to resolve the motion to  
6 dismiss, up or down, one way or the other, before the -- I  
7 said during the summer months. I'll just leave it at that,  
8 the during the summer months. All right. Yes.

9 MR. BRAGA: Thank you, Your Honor.

10 MS. STEEL: Yes, Your Honor. There was one  
11 housekeeping matter, if Your Honor is issuing orders. The one  
12 thing I think counsel for both sides can agree on is an  
13 extension of the page limit for the defense to file their  
14 reply to 50 pages.

15 THE COURT: Yeah, I thought that was -- if that  
16 wasn't expressed, I certainly thought it was implied because I  
17 granted authority for Mr. Simpson to file.

18 MR. SIMPSON: Correct. No objection.

19 MS. STEEL: It was not in the proposed order, so we  
20 would just ask if Your Honor is issuing a minute order, if  
21 that could be included.

22 THE COURT: Sure, we'll do that. Sure. Absolutely.  
23 And it's due April the 1<sup>st</sup>, I believe; is that correct?

24 MS. STEEL: Yes, Your Honor.

25 THE COURT: All right. And that's still a firm

1 date. Okay.

2 All right. And that's all we have to talk about  
3 today. All right. It's good to see everyone. All right.  
4 And see you in June. All right. Thank you.

5 MR. NEAL: Thank you, Your Honor.

6 THE COURT: Have a nice day.

7 THE DEPUTY CLERK: This honorable court now stands  
8 in recess.

9 (PROCEEDINGS END AT 1:21 P.M.)

10 \*-\*-\*-\*

11 **CERTIFICATE OF REPORTER**

12 I, Catalina Kerr, certify that the foregoing is a  
13 correct transcript from the record of proceedings in the  
14 above-entitled matter.

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\_\_\_\_\_  
Catalina Kerr

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Date

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