IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANIMAL WELFARE INSTITUTE, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:03-cv-2006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.,	)	
Defendant.	)	
FELD ENTERTAINMENT, INC.,	)	
Plaintiff,	)	
v.	)	**Case No. 1:07-cv-1532 (EGS/JMF)**
ANIMAL WELFARE INSTITUTE, *et al.*,	)	
Defendants.	)	

OPPOSITION TO FELD ENTERTAINMENT, INC.'S OBJECTION TO JANUARY 23, 2014 ORDER

The Animal Welfare Institute, The Fund for Animals, Inc., and Born Free USA (collectively, the "Nonprofit Litigants"), by and through their undersigned counsel, respectfully submit this Opposition to Feld Entertainment, Inc.'s ("Feld") Objection (the "Objection") to the January 23, 2014 Order (the "Order"), which was filed as ECF 691 in Civil Action No. 03-2006 (D.D.C.) (EGS/JMF) (the "ESA Action") and ECF 195 in Civil Action No. 07-1532 (D.D.C.) (EGS/JMF) (the "RICO Action"). In support of the Opposition, the Nonprofit Litigants state as follows:

INTRODUCTION

In the Order and in line with controlling D.C. Circuit authority, Judge Facciola properly

held that Feld cannot seek reimbursement of attorney's fees for redacted time entries where Feld continues to assert the attorney-client privilege and/or work product doctrine. Order at 3-4. In its Objection, Feld erroneously argues that the Order should be overturned because Feld: (1) believes it is proper to redact the names of potential witnesses (Objection at 2, 5-8); (2) contends Judge Facciola acted inappropriately in applying this Circuit's line of cases requiring waiver of the attorney-client privilege and work product doctrine when seeking fees (*id*. at 4-8); (3) contends that the number of time entries involved is *"de minimis"* (*id*. at 2-3, 6-7); and (4) wrongly believes that damages under the RICO statute and under various torts do not have to meet the same level of reasonableness required in an attorney fee context, specifically disagreeing with Judge Facciola's holding that "the fees award in the ESA case necessarily becomes the quantum of damages in the RICO case" (*id*. at 5-6, 8).

As described below and the underlying motion papers submitted by the Nonprofit Litigants (which are incorporated herein by reference), each of Feld's contentions is without merit and contrary to the controlling law in this Circuit. Indeed, the fact that Feld is seeking over a hundred thousand dollars for which it is claiming attorney-client privilege is astonishing given the very clear law on implied wavier. It is Feld's burden to prove the reasonableness of its fees, and it is impossible to know whether these particular entries are reasonable without knowing whom they involve. In response, Feld has ignored established law and has sought a new legal standard based upon "issue injection," notwithstanding the fact that Feld put the privilege at issue by seeking reimbursement of its fees. In addition, a hundred thousand dollars is not an insignificant amount to the Nonprofit Litigants, and Feld has amassed an enormous fee request by grouping together such requests.[1] Finally, Judge Facciola, as Special Master in the ESA

[1] This figure is based upon Feld's *ad hoc* method of apportioning block billed entries. This *ad hoc* methodology has not been considered by Judge Facciola to date. Therefore, the amount

Action and as the Magistrate overseeing the day-to-day management of the RICO Action, properly held that a combined approach for both actions was necessary and warranted at least with respect to damages. His ruling that the fees in the ESA Action will be the quantum of damages in the RICO Action is an implicit acknowledgement that the cases are inextricably linked and should not be treated otherwise.

For the reasons stated herein, the Objection should be overruled in its entirety.

STANDARD OF REVIEW

Although not entirely clear, it appears that the District Court could reverse the Special Master's ruling as to findings of fact if found to be clearly erroneous. *Summers v. Howard Univ.*, CIV.A. 98-2692 (AK), 2006 WL 751316, at *3 (D.D.C. Mar. 20, 2006); Fed. R. Civ. P. 53.[2] The District Court evaluates the Special Master's ruling as to conclusions of law under a *de novo* standard. *Id.*; *In re Vitamins Antitrust Litig.*, 198 F.R.D. 296, 297 (D.D.C. 2000). "The burden of demonstrating error falls upon the objecting party." *Summers*, 2006 WL 751316, at *3.

The standard of review of the Magistrate Judge's ruling is similar. The District Court may reverse the Magistrate Judge's ruling on a non-dispositive matter only if found to be clearly erroneous or contrary to law. *A.B. by Holmes-Ramsey v. D.C.*, CV 10-1283 (ABJ), 2014 WL

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of these entries could be more.

[2] Fed. R. Civ. P. 53(f) provides that a Special Master's ruling as to both findings of fact and conclusions of law is reviewed under a *de novo* standard. However, a healthy strain of law in the D.C. Circuit notes that a Special Master's ruling as to findings of fact is reviewed under a clearly erroneous standard. *See Summers v. Howard Univ.*, CIV.A. 98-2692 (AK), 2006 WL 751316, at *3 (D.D.C. Mar. 20, 2006) ("A Special Master's findings of fact in a non-jury action are to be accepted unless they are clearly erroneous."); *In re Vitamins Antitrust Litig.*, 198 F.R.D. 296, 297 (D.D.C. 2000) ("Findings of fact in a Special Master's report are reviewed for clear error, while conclusions of law are reviewed *de novo*."). The revisor's notes to Rule 53 indicate that "[c]lear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request." Fed. R. Civ. P. 53. Regardless of the standard, Feld's Objection should be overruled.

346058, at *3 (D.D.C. Jan. 31, 2014); *New Life Evangelistic Ctr., Inc. v. Sebelius*, 847 F. Supp. 2d 50, 52-53 (D.D.C. 2012); Fed. R. Civ. P. 72(a); LCvR 72.2. The clearly erroneous standard applies to factual findings and discretionary decisions while the contrary to law standard permits *de novo* review of legal conclusions. *Am. Ctr. for Civil Justice v. Ambush*, 794 F. Supp. 2d 123, 129 (D.D.C. 2011). The District Court should reverse the Magistrate's ruling only where the Court "is left with the definite and firm conviction that a mistake has been committed." *A.B. by Holmes-Ramsey*, 2014 WL 346058, at *3.

ARGUMENT

1. Feld's Decision To File A Fee Petition Results In A Waiver Of Any Claimed Privileges

Judge Facciola's ruling that "entries that support a petition for attorney's fees may not contain redactions based on privilege" is well supported by applicable D.C. Circuit case law. Order at 3. Indeed, it is well settled in this and other Circuits that if a party seeks attorneys' fees, it must produce "the billing statements itemizing those fees in its entirety." *See Ideal Electronic Sec. Co., Inc. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143, 152 (D.C. Cir. 1997) (finding the reasonableness of billing statements could not be determined from the production of redacted billing statements and therefore the party seeking attorney's fees must produce "the billing statements itemizing those fees in its entirety, notwithstanding its claim that portions of the billing statements are privileged"); *Feld v. Fireman's Fund Ins. Co.*, 12-1789, 2013 WL 3340372, *8 (D.D.C. July 3, 2013) (citing *Ideal*, 129 F.3d at 152) (finding that ***Feld*** must produce attorney time sheets, itemized entries, and backup documentation associated with the invoices); *Robertson v. Cartinhour*, 883 F. Supp. 2d 121, 131 (D.D.C. 2012) (citing *Ideal*, 129 F.3d at 151) (finding that counsel must produce unredacted bills for those fees for which he is requesting compensation); *TIG Ins. Co. v. Fireman's Ins. Co. of Wash., D.C.*, 718 F.2d 90, 96

(D.D.C. 2010) (ordering plaintiff to respond to discovery requests for billing documentation regarding the attorney's fees requested).[3]

As Judge Facciola recognized, since Feld is seeking compensation for allegedly privileged time entries, Feld has waived the attorney-client privilege and attorney work-product doctrine and should be ordered to produce these entries in their entirety. Order at 3; *Ideal*, 129 F.3d at 151 (under the common law doctrine of implied waiver, the attorney-client privilege is waived when the client places otherwise privileged matters in controversy); *Feld*, 2013 WL 3340372 at *8 (finding ***Feld*** waived the attorney-client privilege and work product doctrine as to the invoices itemizing the fees and expenses incurred, all supporting documentation, and "any other communications going to the reasonableness of the amount of the [fees and expenses]" when Feld sought indemnification of his attorney's fees); *Berliner Corcoran & Rowe LLP v. Orian*, 662 F. Supp. 2d 130, 135 (D.D.C. 2009) ("[C]lients are deemed to waive the privilege when they place privileged information at issue through some affirmative act for their own benefit."); *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir.1982) (a party asserting attorney-client privilege "cannot be allowed, after disclosing as much as he pleases, to withhold the remainder"). In these entries, Feld allegedly has allegedly redacted the identities of potential witnesses and persons discussing settlement. Objection at 7. However, the law is clear that there

[3] *See also Equitable Prod. Co. v. Elk Run Coal Co., Inc.*, 2:08-CV-00076, 2008 WL 5263735, *6 (S.D.W. Va. Oct. 3, 2008) (citing *Ideal*, 129 F.3d at 151) (requiring plaintiff to disclose unredacted attorney invoices as a party may not attempt to recover damages for a particular type of loss and then refuse to produce the evidence of that alleged loss for thorough examination and testing by the opposing party); *Pillsbury Winthrop Shaw Pittman LLP v. Brown Sims, P.C.*, 4:09-mc-365, 2010 WL 56045, *8 (S.D. Tex. Jan 6, 2010) (ordering plaintiff to produce unredacted billing statements for any attorney's fees for which it wishes to be reimbursed); *Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Sharp Plumbing*, 2:09-cv-00783, 2012 WL 2502748, *4 (D. Nev. June 27, 2012) (ordering the production of unredacted records relating to a claim for attorney's fees including, retainer agreements, billing invoices, correspondence relating to attorney's fees and legal expenses, and payment records).

is an implied waiver of the attorney-client privilege and attorney-work product doctrine where, as here, a party seeks to recover its attorneys' fees and the Nonprofit Litigants and the Court have a right to review the reasonableness of these time entries based on the identities of these purported "potential fact or expert witnesses." As such, Judge Facciola properly ruled that Feld had the option to produce the withheld information or to elect not to seek compensation for the redacted time entries.

Indeed, Feld and its counsel know that they were required to produce bills in their entirety and further know they cannot claim privilege with respect to these entries and expect to be compensated for this time. Recently, Judge Bates made this absolutely clear to Feld and its present counsel in *Feld v. Fireman's Fund Insurance Company,* 2013 WL 3340372. In that case, Mr. Feld had prevailed in a lawsuit against his sister and sought indemnification of his attorneys' fees and costs from an insurance carrier. *Feld*, 2013 WL 3340372 at *1, *3. The carrier sought Feld's bills/invoices and related underlying documentation in discovery. *Id.* at *4. Feld refused to produce these materials and asserted that they were privileged. *Id.* at *6. Following *Ideal* and *Berliner*, Judge Bates ruled that Feld must produce its bills/invoices in their entirety, timesheets, and any backup documentation pertinent to the invoices. *Id.* at *8. Judge Bates further ruled that Feld had waived the attorney-client and work-product privileges with respect to these materials and any communications related to the reasonableness of the amount of fees, stating, "the reasonableness of any portion of the total amount [of fees] claimed can only be determined by examining the entirety of the billing records pertaining to Feld's defense in the Underlying Action." *Id*

Feld's "issue injection" argument (Objection at 5-6) is a red herring. *Ideal*, the seminal case on implied waiver in the D.C. Circuit, stands for the proposition that ***whenever*** attorneys'

fees are put at issue, any privileges are waived. 129 F.3d at 152. Feld contrives its "issue injection" analysis in an attempt to avoid the simple mandate of *Ideal* – if the attorneys' fees are at issue, privileges are waived – a mandate this Court has followed outside of any purported "issue injection" case law. *See Robertson*, 883 F. Supp. 2d at 131 ("The Court, however, does agree that counsel must produce unredacted bills for those fees for which he is requesting compensation") (citing *Ideal Elec. Sec.*, 129 F.3d at 151). Other courts also have held that the attorney-client and work product privileges are waived under normal prevailing party statutes ***not*** involving "issue injection." *See, e.g., Nationwide Payment Solutions, LLC v. Plunkett*, 831 F. Supp. 2d 337 (D. Me. 2011); *Stern v. Does*, 2011 WL 997230 (C.D. Cal. Feb. 10, 2011). *Plunkett* found that the prevailing party seeking fees "can be said to have impliedly waived any applicable privilege or protection, at least as to its opponent and as to the invoices themselves." 831 F. Supp. 2d at 338-39. Furthermore, in *Stern*, a party who sought attorney fees for frivolous claims under a prevailing party clause in the Copyright Act of 1976 was found to have waived privileges preventing disclosure of relevant materials. 2011 WL 997230, at *13-14. The court reasoned that "by filing the instant lawsuit, Plaintiff waived any work product claim in the listserv post because he should have known that its disclosure would be necessary." *Id.* at *16.

The cases Feld cites in the Objection (at 6-7) do not allow it to side-step *Ideal*. *Miller*, for example, did not involve a question of waiver, but rather an argument by the fee petition opponents that the petitioner's contemporaneous time entries had been inadequately recorded because they failed to identify certain witnesses. *See* 575 F. Supp. 2d at 34, n.58. Judge Lamberth credited the petitioner's explanation that the lack of identification had been a deliberate choice based on privilege concerns, rather than lack of timekeeper diligence. *Id*.[4]

[4] Feld's citations to out-of-Circuit authority cannot override the binding authority cited by the Non-Profit Litigants. Such citations are inapposite. Objection at 7 (citing *Fish v. Watkins*,

Moreover, Feld's attorneys' fees clearly are at issue. As *Ideal* mandates, Feld's claims of privilege have been waived.

The identities of the redacted witnesses bear on the reasonableness of its attorneys' fees. As an initial matter, the decision to interview certain individuals over others would certainly be relevant in determining the "nature and extent of the work done" as well as the "appropriate hours expended." For example, to answer Feld's hypothetical raised before Judge Facciola, the decision to interview a Mr. X, a person with a very tangential relationship to the case, or Mr. Y, a highly relevant expert, would certainly help determine the reasonableness of the hours charged and the work performed. Surely, repetitive, at length, interviews of a person tangentially or not related to the case would be less reasonable, and therefore, relevant in determining the "nature and extent of the work done" as well as the "appropriate hours expended."

The identity of the interviewees establishes their relationship to the case and would help the Court determine if any of the time spent on them was excessive, which is clearly relevant to the reasonableness of fees. *LaPrade v. Kidder Peabody & Co., Inc.*, 146 F.3d 899, 906 (D.C. Cir. 1998); *McKesson Corp.*, 935 F. Supp. 2d at 44 ("[A] fee applicant should exercise good billing judgment and exclude from its fee application any 'hours that are excessive, redundant, or otherwise unnecessary.'") (citing *Miller*, 575 F. Supp. 2 d at 21); *see also Tiara Condominium Ass'n, Inc. v. Marsh USA, Inc.*, 697 F. Supp. 2d 1349, 1362 (S.D. Fla. 2010); *Rozell v. Ross-Holst*, 576 F. Supp. 2d 527, 541 (S.D.N.Y. 2008) (reducing fees where plaintiff's counsel spent excessive time on certain tasks); *Solomon v. Allied Interstate*, LLC, No. 12 Civ. 7940, 2013 WL 5629640 (S.D.N.Y. Oct. 7, 2013) ("'[E]xcessive internal emails' has been grounds to reduce attorneys' fees.") (quoting *Ryan v. Allied Interstate, Inc.*, 882 F.Supp.2d 628, 637 (S.D.N.Y.

2006 U.S. Dist. LEXIS 6769 (D. Ariz. Feb. 17, 2006), *Prudential Ins. Co. of Am. v. Coca-Cola Enter., Inc.*, 1993 U.S. Dist. LEXIS 9993 (S.D.N.Y. July 21, 1993)).

2012)). Without knowing the identity of the witnesses interviewed, it is impossible for the Nonprofit Litigants and the Court to appraise their relationship to the case and any possibility that the interviews represent excessive billable time.

The substantial hours Feld's counsel spent interviewing potential witnesses and discussing settlement are anything but *de minimis*, and consequently, makes Feld's reliance on *Miller v. Holzmann*, 575 F. Supp. 2d 2 (D.D.C. 2008) misplaced. *See* 575 F. Supp. 2d at 34, n.58 ("the problematic labels appear ***so infrequently*** that their impact on the Court's ability to subject the records to meaningful review is negligible.") (emphasis added). Even accepting Feld's characterization that the redacted entries account for $113,762.49, this would hardly be a *de minimis* amount to the Nonprofit Litigants. Indeed, in *Robertson*, the entire amount of sanctions requested only totaled $158,954.28, yet the Court ordered that the unredacted bills be turned over. 883 F. Supp. 2d at 131. Moreover, Feld's argument that the redacted entries should be paid because they are a small percentage of the total entries over the course of years of litigation is without merit. Objection at 2, 6-7. These entries represent a significant amount of money to the Nonprofit Litigants and Feld's Fee Petition is so overblown in part because it has layer upon layer of improper fees.[5]

For these reasons and the reasons stated in the Order, Judge Facciola properly held that Feld had to either provide the redacted information or not seek compensation for the redacted and privileged entries. As such, the Objection should be overruled.

[5] In addition, because Feld utilized block billing, there is no way to determine which portions of the block billing entries were occupied by tasks with redacted witnesses. However, what is clear is that tasks with redacted entries for Covington involved approximately 500 total hours of entries and 500 hours is a far cry from *de minimis*. Without explaining how much time Feld ascribed to tasks with redacted witnesses in block entries as large as 13 hours, Feld leaves the Nonprofit Litigants and the Court unable to evaluate the reasonableness of its calculation of the privileged entries.

2. Whether Feld's Damages Are Based In RICO Or Tort Is Irrelevant

It is undisputed that the only damages sought by Feld in the RICO Case are the "attorney fees, expenses, and costs incurred in defending itself in the ESA Action." D.E. 166 at 6 in RICO Action Docket (citing Feld's Initial Disclosures). It is also the case that Rule of Professional Responsibility 1.5 requires that ***all*** attorneys' fees and costs be reasonable. With this background, Judge Facciola properly held that "the fees award in the ESA case necessarily becomes the quantum of damages in the RICO case. While I appreciate that there may be other damages demanded in the RICO case, the bedrock of the damaged demand in that case is necessarily the attorney's fees awarded in the RICO case." Order at 2. This is a commonsense and pragmatic holding that is in accordance with the Rules of Professional Conduct and D.C. Circuit precedent and it is an implicit acknowledgement that the RICO damages are inexplicitly tied to Feld's Fee Petition.

Notwithstanding, and without any legal support, Feld attempts to distinguish the *Ideal* line of cases cited above by arguing that they do not apply where, as here, Feld is seeking its attorneys' fees and expenses as tort and RICO damages (Objection at 4-5), which Feld wrongly contends must be decided by a jury without regard to their reasonableness. D.E. 166 at 6 in RICO Action Docket 4, 19-21. Feld is once again mistaken. The fact finder – whether it is a jury or a judge – is not required to accept at face value Feld's damages. It is Feld's burden to prove to the fact finder the reasonableness of its damages, and the Nonprofit Litigants are entitled to the documents and information needed to challenge Feld's alleged damages for attorneys' fees and costs, which only can be determined from the bills/invoices in their entirety.

The fact that Feld's claims are based in tort or upon the RICO statute is irrelevant. For example, the Second Restatement of Torts on damages states that in cases involving wrongful

civil proceedings the plaintiff is entitled to recover "the expense that he has ***reasonably incurred*** in defending himself against the proceedings." § 681 Damages, Restatement (Second) of Torts (1977) (emphasis added). Likewise, model jury instructions for the RICO statute typically require that "you must evaluate each claim of damages ***and the proof submitted in support of each claim*** separately and you should award damages only for those claims that you find have been established by a preponderance of the evidence." Modern Fed. Jury Instructions, Inst. 84-10 (emphasis added). As such, Feld must demonstrate to the fact finder that its attorney's fees and costs were reasonable, which can only be assessed by reviewing the bills/invoices in their entirety. If this were not the case, Feld and its counsel could engage in improper billing, inflated rates, unnecessary tasks, and the like, and the Nonprofit Litigants and the Court would have no way to challenge these practices.

Ultimately, Feld's RICO Action is no different than any other that seeks attorneys' fees and costs. It is Feld's burden to prove the reasonableness of its damages – in this case, solely Feld's legal fees and costs. As the above authority from this and other Circuits make clear, that can only be accomplished by an examination of Feld's legal bills/invoices in their entirety.

With respect to Feld's arguments concerning an *in camera* inspection instead of the required disclosure, it would serve no purpose. Objection at 6. Assuming the RICO Action is not dismissed beforehand, the fact finder will ultimately decide Feld's damages and determine if they are reasonable. That fact finder is entitled to examine the actual legal bills/invoices at issue, and the Nonprofit Litigants are entitled to use the bills/invoices to demonstrate to the fact finder why the alleged damages are not what Feld contends they should be.

Finally, notwithstanding the clear authority in the *Ideal* line of case, in its Objection, Feld argues that by seeking its attorneys' fees and expenses as its only damages it has not waived the

privilege because it is the alleged victim of "frivolous and vexatious litigation" and "criminal RICO and intentionally tortious conduct." Objection at 5. This contention is meritless. First, the *Ideal* line of cases is not limited to certain causes of action – it applies to all cases where a party seeks attorneys' fees and costs. Second, Feld has yet to prove that any of the baseless allegations made in its Amended Complaint are actually true such that the Court should disregard the above governing authority – at present, all that is before the Court is unproven allegations made in the First Amended Complaint. Put simply, Feld must follow the law like everyone else.

In accordance with the law in this Circuit, Feld is required to produce the bills/invoices that support its damages claim in their entirety. As such, Judge Facciola's ruling that Feld was required to either produce the withheld information or not seek attorney's fees for the privileged entries was not in error.

CONCLUSION

For the foregoing reasons, the Nonprofit Litigants respectfully request that the Court overrule Feld's Objection in its entirety.

Date: February 18, 2014

Respectfully submitted,
ANIMAL WELFARE INSTITUTE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 18th day of February, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

/s/
Stephen L. Neal, Jr.