UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANIMAL WELFARE INSTITUTE, et al.,	)	
Plaintiffs,	)	
v.	)	**Case No: 03-2006 (EGS)**
FELD ENTERTAINMENT, INC.,	)	
Defendant.	)	

DEFENDANT FELD ENTERTAINMENT INC.'S
OBJECTIONS TO APPOINTMENT OF SPECIAL MASTER AND
RECOMMENDATIONS FOR DUTIES AND AUTHORITY OF SPECIAL MASTER

INTRODUCTION

On April 19, 2013, the Court notified the parties of its intention to "appoint Magistrate Judge John M. Facciola as a Special Master pursuant to Federal Rule of Civil Procedure 53 and Local Civil Rule 72.1(b)(3), to determine the amount of attorneys' fees to be awarded in this case, including, if applicable, the Humane Society of the United States' liability for fees." Minute Order (04-19-13). The Court also directed the parties to notify the Court of any objections to the appointment and to make any recommendations for the scope of the Special Master's duties and authority. *Id.*

Defendant Feld Entertainment, Inc. ("FEI") has no objection Magistrate Judge Facciola personally; he is a highly experienced and respected jurist and member of this Court. However, given the unique circumstances, protracted history and current posture of this case, FEI objects to the concept itself of appointing a Special Master to determine the amount of attorneys' fees that FEI is entitled to recover.

This litigation is unprecedented. It has lasted nearly thirteen years, required exhaustive discovery and motions practice, a six-and-one-half-week bench trial and two appeals to the Circuit before the case ended in 2012 for the very same reason that it ended the first time in 2001 – no Article III standing on the part of any plaintiff. As the Court has determined, "the lawsuit was, from the beginning, frivolous and vexatious" which, in turn, mandates that "FEI should recover the attorneys' fees it incurred when it was forced to defend itself in this litigation." Mem. Op. (ECF No. 620) (03-29-13) ("03-29-13 Mem. Op.") at 27, 3. After all of this litigation and FEI's right to reimbursement having been established – an unprecedented ruling in and of itself under the Endangered Species Act – determining the amount of that reimbursement should not be allowed to become "a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). But that is what plaintiffs have made clear they intend to do with their request for discovery and other dilatory tactics. Adding a second layer of judicial review with a Special Master would, FEI respectfully submits, play into and reward this transparent tactic of delay. And the serious concern that FEI has about such delay is heightened by plaintiffs' recent allusions to potential "bankruptcy." Plaintiffs should not be allowed to escape the consequences of their frivolous litigation strategy by, in effect, running out the clock, spending their money on litigating attorneys' fees and then going bankrupt.

Therefore, FEI hereby provides notification of its objections to the appointment of a Special Master pursuant to Fed. R. Civ. P. 53 and Local Civil Rule 72.1(b)(3). In the alternative, as directed by the Minute Order, FEI also provides herewith its "recommendations for the scope of Magistrate Judge Facciola's duties and authority as Special Master."

A. OBJECTIONS TO APPOINTMENT OF SPECIAL MASTER

1. This Court Has Broader, First-Hand Experience

FEI respectfully submits that because the Court directly oversaw the vast majority of discovery, pre-trial proceedings, trial of this matter, and the entitlement phase of the attorneys' fees application, it has a broader understanding of this litigation and is in the best position to efficiently determine the appropriate amount of the attorneys' fees award.

The primary reason that an attorneys' fee award is reviewed only for an abuse of discretion on appeal is because a trial court judge who presides over the litigation is "uniquely qualified" to make determinations concerning the reasonableness of the award. *See Copeland v. Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980) (*en banc*) (attorneys' fee award amount reviewable for abuse of discretion because "it is better to have [the] discretion [to award fees] exercised by the court which has been ***most intimately connected with the case***") (internal quotation omitted) (emphasis added); *id.* ("the District Court Judge was intimately familiar with the barrage of pleadings, memoranda, and documents filed, and he ***observed the proficiency of counsel in court***") (emphasis added); *id.* ("***inspection of the cold record cannot substitute for [the trial court's] first-hand scrutiny***") (emphasis added); *Covington v. Dist. of Columbia*, 57 F.3d 1101, 1110 (D.C. Cir. 1995) (the "limited standard of review is 'appropriate in view of the district court's ***superior understanding of the litigation*** … .'") (quoting *Hensley*, 461 U.S. at 437) (emphasis added). *See also Blum v. Stenson*, 465 U.S. 886, 899 (1984) ("The District Court, ***having tried the case***, was in the best position to conclude that 'the quality of the representation was high.'") (emphasis added); *Nat'l Ass'n of Concerned Veterans v. Sec'y of Defense*, 675 F.2d 1319, 1329 (D.C. Cir. 1982) (the "District Court is uniquely qualified to assess the quality of counsel's performance … .").

Indeed, courts in this district regularly rely upon their oversight and first-hand knowledge of the underlying litigation when determining the reasonableness of a fee award amount. *See, e.g.*, *Heller v. Dist. of Columbia*, 832 F. Supp. 2d 32, 59 (D.D.C. 2011) (Sullivan, J.) (no enhancement to lodestar amount warranted based upon presiding judge's observation and finding that "the lawyering on both sides was excellent"); *Blackman v. Dist. of Columbia*, 677 F. Supp. 2d 169, 179-180 (D.D.C. 2010) (Friedman, J.) (rejecting argument that fee petition should be reduced for vagueness because "***when reviewed by an individual with knowledge of the case*** … virtually all of the entries provide sufficient information to determine what work was performed and why it was relevant to the case") (emphasis added), *aff'd*, 633 F.3d 1088 (D.C. Cir. 2011); *Ellipso, Inc. v. Mann*, 594 F. Supp. 2d 40, 46 (D.D.C. 2009) (Lamberth, J.) (determining that defendants' attorneys' fees were reasonable, in part based on the Court's observance of "***the attorneys' performances in pleadings and during trial"***) (emphasis added); *Miller v. Holzmann*, 575 F. Supp. 2d 2, 16 (D.D.C. 2008) (Lamberth, J.) (" … [T]his Court is well-suited to judge the quality of counsel's representation, both in the courtroom and in written submissions. By this Court's assessment, relator's counsel – particularly the more junior trial team members – acquitted themselves admirably. ***Their zealous, polished, and astute advocacy justifies, and is reflected in, their established billing rates***.") (emphasis added); *Wilcox v. Sisson*, 2006 U.S. Dist. LEXIS 33404, at *16 (D.D.C. May 25, 2006) (Collyer, J.) ("***Given its familiarity with the numerous motions, briefs, arguments, discovery disputes, and the bench trial itself***, the Court readily finds that [the attorney] performed in an exemplary manner equal to lawyers many years his senior.") (emphasis added), *aff'd*, 2008 U.S. App. LEXIS 7733 (D.C. Cir. Aug. 28, 2008).

For the same reasons, the Court, and not a Special Master, should determine the amount of fees to be awarded here. The litigation of this case was complex and protracted, and its

ultimate outcome hinged on events that took place at a bench trial over which the Court presided for more than six weeks. There is no substitute for this Court's first-hand knowledge of this case, which the Court has overseen for the vast majority of the nearly ***thirteen years*** it has been pending.[1] It is not only "intimately familiar" with the pleadings and motions practice – it tried the case and entered findings of fact and conclusions of law, ***which were expressly based on its observations***. Mem. Op. (ECF No. 559) (12-30-09) ("12-30-09 Mem. Op."), COL 19. Indeed, the Court's observations of this litigation, and the rationale behind its 12-30-09 Memorandum Opinion, led it to ultimately find that the "lawsuit was, from the beginning, frivolous and vexatious" – which is the reason fees are being awarded. 03-29-13 Mem. Op., at 27; *see id.* at 6 ("The Court carefully considered the testimony of approximately thirty witnesses and hundreds of exhibits in an effort to find any evidence that any of the plaintiffs had standing to pursue their claims. There was none."); *id.* at 15 ("all but one of the organizational plaintiffs abandoned all claims to relief during the trial") (original emphasis); *id.* at 27 ("Plaintiffs prolonged the litigation by raising new theories of standing during the case, and worse, by attempting to conceal the nature and extent of Rider's funding."); *id.* at 28 ("This outcome of this case, however, did not rest solely on a credibility determination."); *id.* at 29 ("Moreover, the credibility determination the Court did make was far more damning than a routine judgment call resolving different versions of the facts. The Court found Rider was 'pulverized' on cross-examination and afforded his testimony 'no weight' as to any of the material allegations in the

[1] The Court oversaw almost all of the discovery in this matter. Magistrate Judge Facciola oversaw a limited set of issues concerning plaintiffs' motion to compel during the 2005-2006 timeframe (*see* ECF No. 50 (09-26-05)); oversaw discovery from August 23, 2007 until the January 30, 2008 discovery cut-off; and, presided over the evidentiary hearing held in the spring of 2008. *See* Minute Entries (02-26, 03-06 & 05-30-08). That concluded his involvement with the case, as he has observed. *See* Ex. 1, 04-03-13 Hearing Tr. at 6:16-18 ("Remember, I leave this case when discovery has ended in the other case, and Judge Sullivan goes to trial. That's all I have any responsibility for.").

complaint … ."); *id.* at 31 ("As the lawsuit continued, the problems with Rider's claims of personal and emotional attachment to the elephants became more obvious."); *id.* at 35 ("… Rider's standing hinged on his credibility, which only a trial could resolve.").

A Special Master who did not preside over the complex pre-trial proceedings, including multiple motions *in limine*, the actual trial and the comprehensive post-trial proceedings, including two separate final arguments, is not situated similarly with the presiding District Judge. A Special Master would not have the first-hand observations of Rider's complete "pulverization;" the unpersuasive testimony of the AWI, FFA/HSUS and WAP witnesses; and AWI's and FFA's dramatic abandonment of their claims at final argument – and would not be in the same position as this Court to determine the reasonableness of FEI's fees, no matter how thoroughly he or she studies the papers. Nor could a Special Master make the type of assessments concerning the performance of counsel, and the reasonableness of counsel's fees, that were made by the courts in *Blackman*, *Ellipso*, *Miller*, and *Wilcox* and by this Court in *Heller*. As the Circuit observed in the *en banc* decision in *Copeland*, "the very intricacy of the litigation – which was a product, in part of the [losing party's] vigorous and long-continued resistance to the claim asserted against it – ***is highly relevant to the reasonableness of the fee award***." 641 F.2d at 884 (emphasis added). Furthermore, "inspection of the cold record" by the Special Master "cannot substitute for [the] first-hand scrutiny" that the District Judge already has with respect to the major events in the case. *Id*. at 901. These observations are particularly applicable here given the Court's finding, after extensive briefing, that this case was, *inter alia*, "groundless and unreasonable from its inception." 03-29-13 Mem. Op., at 3. The District Judge who found the case to be "from the beginning, frivolous and vexatious," and who found "overwhelming evidence that the plaintiffs satisfy the vexatiousness standard," *id*. at 27, does not

have the "learning curve" that a Special Master who had limited involvement in the case inevitably will have. Accordingly, because the Court has a "superior understanding" of this complex case, having presided over the trial and having already determined the plaintiffs' liability for attorneys' fees, *Covington,* 57 F.3d at 1110, the Court sits in the best position to set the fee amount. FEI therefore objects to the referral of the determination of the fee award amount to a Special Master.

2. Referral to a Special Master Will Further Delay this Protracted Litigation, Thereby Prejudicing FEI

The Circuit has held that "the interests of justice will be served by awarding the prevailing party his fees as promptly as possible." *Concerned Veterans,* 675 F.2d at 1330. Referral of this case to a Special Master will not serve the interest of justice because it will not result in "prompt" payment of fees to FEI. It will add an additional (and unnecessary) layer of judicial review and will only delay FEI's receipt of its fees – fees which the Court has determined FEI is entitled to recover and which FEI has been forced to continue paying since this case was filed in July 2000, even though it was "groundless and unreasonable from its inception." 03-29-13 Mem. Op., at 3. Inevitably, the Special's Master's determination will be appealed to the District Court and then to the Circuit. Plaintiffs have made plain that their *modus operandi* is to delay FEI's recovery of its fees as long as possible (for example, plaintiffs intend to drag out the fee litigation by conducting discovery on FEI's fee submission and its settlement with ASPCA. *See* Joint Status Report (ECF No. 621) (4-15-13) ("Joint Status Report"), at 3-5 & 5 n.10). It is not a leap in logic to conclude that plaintiffs will use referral as yet another way to put off their inevitable payment to FEI.

Given the fact that the Court has already referred the related RICO case, Civil No. 07-1532-EGS-JMF (D.D.C.), to Magistrate Judge Facciola under Local Civil Rules 72.1 through

72.3 for "full case management," *id.*, Minute Order (04-23-13), adding the duties of Special Master in this case could also cause delay in the resolution of the attorneys' fee issue by assigning too many tasks to a single judicial officer. Therefore, even if utilization of a Special Master were appropriate with respect to the determination of the amount of attorneys' fees, the interests of justice would be better served by enlisting the services of one of the other Magistrate Judges or a private practitioner to handle that issue. In light of the highly disputed nature of both the RICO case and the remainder of this case, it may well be impracticable for a single judicial officer to preside over both. Therefore, if the Court believes that a Special Master is necessary for the final resolution of the attorneys' fee issue, FEI proposes that Magistrate Judge Facciola's full case management assignment to the RICO case be left intact and a third party be appointed as Special Master herein. A non-judicial appointee should be compensated at plaintiffs' expense. *See* Fed. R. Civ. P. 53(g).

3. It is Imperative that Further Delay be Avoided in Light of Plaintiffs' Statements That They Could Go "Bankrupt" if They Have to Pay What They Owe, Thereby Impairing FEI's Ability to Recover on an Award

Plaintiffs recently have represented that they may be unable to satisfy the amount of attorneys' fees awarded to FEI. Joint Status Report, at 2 ("Paying fees in this amount (or even a substantial fraction thereof) ***would likely bankrupt these entities***.") (emphasis added); *id*. at 4 ("the magnitude of the fee request is life-threatening to the Parties from whom the fees are sought"). Plaintiffs do not say which of them supposedly stands on the brink of purported insolvency. There is no cited evidence or other basis to believe that this representation is accurate as to any of them, including Tom Rider, who has managed to find four separate lawyers to represent him in this and the RICO case. Notice of Appearance (Kaiser) (ECF No. 595) (06-7-12); No. 07-1532-EGS/JMF, Notices of Appearance (Braga & Reed) (ECF Nos. 27 & 145) (3-

19-10) & (4-19-13); Motion to Appear Pro Hac Vice (Foley) (ECF No. 146) (04-22-13). Plaintiffs' representation of potential "bankruptcy" contradicts the organizational plaintiffs' 2011 tax filings, which indicate that collectively, they have over $25 million in net assets:[2]

Organizational Plaintiff	Net Assets	Unrestricted Net Assets
AWI	$13,538,396	$13,039,831
FFA	$9,202,088	0
Born Free	$2,499,026	$1,919,542
Total	$25,239,510	$14,959,373
HSUS	$183,215,830	$134,776,460
Total with HSUS	$208,455,340	$149,735,833

The reference to potential "bankruptcy" and the like also stands in sharp contrast to representations that the Humane Society of the United States ("HSUS") has made in this case about the solvency of its own wholly controlled "affiliate," the Fund for Animals ("FFA"). *See* HSUS Reply in Support of Mot. to Strike (ECF No. 604) (07-9-12), at 4-5 n.4 (rejecting the notion that FFA might be "judgment proof" because "FFA's most recently published Form 990, which is publically available, shows FFA as having approximately $8 million of net assets for the 2010 tax year. (HSUS Reply Ex. A.)".). Indeed, while FFA and the other plaintiffs suggest an inability to pay the attorneys' fees they are liable for, they apparently have the resources to litigate this issue to the bitter end as their filings make clear they intend to do. In fact, FFA's 2011 IRS Form 990 identified Zuckerman Spaeder LLP as one of FFA's "five highest

[2] The relevant pages of AWI, FFA, Born Free and HSUS's IRS Forms 990 are attached hereto as Exhibit 2.

compensated independent contractors that received more than $100,000 from the organization" in 2011. *See* Ex. 2, at 8 (reporting $327,359 in legal fees paid, more than was paid for "animal feed").

But, assuming that the insinuations of "bankruptcy" are legitimate and are not empty rhetoric,[3] since plaintiffs raised the issue, the Court should do something about it. Fed. R. Civ. P. 53(a)(3) expressly requires that, in appointing a special master, "the court … must protect against unreasonable expense or ***delay***." (Emphasis added). Since plaintiffs imply that they might not ultimately be able to pay when the time comes, FEI should be afforded some security while the amount of its award is being determined (and appealed). *See* LCvR 65.1.1. Plaintiffs' liability has already been adjudicated, so whatever delay results from a determination of the amount of that liability should not be permitted to prejudice FEI's ultimate ability to recover. To protect that right of recovery in the interim while the determination of amount is being made and appealed, plaintiffs should be required to post a bond or similarly satisfactory form of security as approved by the Court. *See id*.

Courts have inherent authority to require litigants to post a bond "where there is reason to believe that the prevailing party will find it difficult to collect its costs when the litigation ends." *Gay v. Chandra*, 682 F.3d 590, 594 (7th Cir. 2012) (quotation omitted); *see also In re American President Lines, Inc.*, 779 F.2d 714, 717-18 (D.C. Cir. 1985) (district court has authority to order cost bonds). This is the case even when no statute or rule specifically authorizes such an order.

[3] Plaintiffs' recent threat of insolvency and the dramatic shift in FFA's net "unrestricted" assets as reported in 2010 and 2011 Form 990s (from over $7 million in unrestricted assets in 2010 to "0" in 2011, *see* Ex. 2 at 9 (2011 unrestricted net assets) & 13 (2010 unrestricted net assets)), further raise concerns about asset disposition. *See* D.C. CODE § 28-3104(b) (Transfers fraudulent as to present and future creditors) (listing factors that give rise to "actual intent to hinder, delay or defraud" a creditor, including: "[b]efore the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit"; "[t]he transfer was of substantially all the debtor's assets; and "[t]he debtor removed or concealed assets").

Gay, 682 F.3d at 594. Rather, the Court's "authority to award costs to a prevailing party implies a power to require the posting of a bond reasonably calculated to cover those costs … ." *Id.*

Similarly, the Court here has ruled that FEI is entitled to recover attorneys' fees under section 11(g)(4) of the Endangered Species Act, pursuant to which a court "***may award costs of litigation (including reasonable attorney*** and expert witness ***fees***) to any party, whenever the court determines such award is appropriate." 16 U.S.C. § 1540(g)(4) (emphasis added). Accordingly, the Court has the authority to require the plaintiffs to post a bond to cover the anticipated amount. Other courts have found that when attorneys' fees fall within the applicable definition of "costs," parties may be required to post bonds to cover the amount of attorneys' fees. *See, e.g., Adsani v. Miller*, 139 F.3d 67 (2d Cir. 1998) (affirming order requiring plaintiff to post appeal bond for undetermined amount of appellate attorneys' fees because under the Copyright Act attorneys' fees are considered part of the costs); *Watson v. E.S. Sutton, Inc.*, 2006 U.S. Dist. LEXIS 88415, at *3-5 (S.D.N.Y. Dec. 6, 2006) (requiring party to post a bond to cover attorneys' fees where party made statements on the record that it might become bankrupt and finding that the "costs" contemplated by Fed. R. App. P. 7 include attorneys' fees when the statute governing the underlying cause of action defines costs to include fees); *RLS Assocs., LLC v. United Bank of Kuwait PLC*, 464 F. Supp. 2d 206, 209 (S.D.N.Y. 2006) (parties required to post bond to cover cost of undetermined amount attorneys' fees because according to applicable English law, attorneys' fees are considered part of the costs); *see also Int'l Floor Crafts, Inc. v. Adams*, 656 F. Supp. 2d 240, 242 (D. Mass 2009) (in RICO case, requiring defendant to post bond for costs, including attorneys' fees, because appeal bore "indicia of frivolousness").[4] And,

[4] While *Watson* and *RLS* refer to a local Southern District of New York rule that explicitly allows the district court to order a party to file a bond or additional security for costs, other courts have determined that district courts have such inherent authority without an explicit rule, *see, e.g., Gay, supra.*

it is clear that plaintiffs – public charities – are subject to the same security requirements as other litigants. *Cf. Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 457 (7th Cir. 2010) (rejecting the argument that "nonprofit entities, at least those devoted to public goods of great social value, such as protection of the environment, should be exempt from having to post injunction bonds").

3. Referral Limited to Determining the "Value of Services" Rendered

Should the Court decide to make any referral to a Special Master, FEI objects to the referral of any matters other than the amount of attorneys' fees to be awarded, *i.e.*, the "value of services" rendered. Fed. R. Civ. P. 54(d)(2)(D) ("the court may refer issues concerning the ***value of services*** to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1)") (emphasis added); *see also Welch v. Bd. of Dirs. of Wildwood Golf Club*, 904 F. Supp. 438, 441 (W.D. Pa. 1995) (referring "issues relating to the value of services rendered" to a special master pursuant to Fed. R. Civ. P. 53).[5] FEI objects to the referral of any other ancillary issues to the Special Master, such as plaintiffs' purported inability to pay, the organizational plaintiffs' "special" status and/or immunity from fees because they are purported "public interest" organizations, and the other "equitable factors" that plaintiffs apparently plan on raising. *See* Joint Status Report, at 5 ("Each [plaintiff] may need to speak to separate circumstances, financial status, and other equitable factors that militate in favor of mitigation of any fee award."). None

[5] The Court cannot refer the amount of fees to a magistrate judge, acting as a magistrate under Fed. R. Civ. P. 72(b), because the Court already has decided the first part of the issue by finding that the plaintiffs are liable for fees. *Cf.* WRIGHT, MILLER & COOPER § 2680 ("Additionally, the court is given authority to refer issues regarding the amount of fees in a particular case to a special master, ***or to refer the entire fee motion to a magistrate judge as if it were a dispositive pretrial matter***.") (emphasis added); MOORE'S FED. PRACTICE § 54.157[4] ("***If both the right to a fee and the amount of the fee are unresolved***, the district court may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were dispositive motion pretrial matter.") (emphasis added). In any event, the applicable standard of review under Rules 53 and 72(b) is the same – de novo review. *See* Fed. R. Civ. P. 53(f)(3), 53(f)(4) & 72(b)(3).

of this has anything to do with the "value of the services" under Fed. R. Civ. P. 54(d)(2)(D), and it should be excluded explicitly from the reference.

FEI further objects to the referral of the amount of sanctions against Ms. Meyer and the law firm Meyer, Glitzenstein & Crystal ("MGC") to the Special Master, because claims for fees as sanctions pursuant to 28 U.S.C. § 1927 cannot be referred to a Special Master under Rule 54. *See* Fed. R. Civ. P. 54(d)(2)(E) ("Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927."). The amount of the sanction to be entered against Ms. Meyer and MGC must be determined by the District Court.

Moreover, FEI has discovered that the Order sanctioning Ms. Meyer and MGC contains an apparent typographical error. *See* 03-29-13 Mem. Op., at 42. The motion to compel that FEI was required to file as a result of Tom Rider's false interrogatory answer on the payments (the basis for the Court's sanction) was ECF No. 126 (Motion to Compel Discovery from Plaintiff Tom Rider and for Sanctions, Including Dismissal), not ECF No. 101 (Motion to Compel Testimony of Plaintiff Tom Eugene Rider and for Costs and Fees). ECF No. 126 was the second motion to compel against Mr. Rider that the Court granted on August 23, 2007. *See* Order (ECF No. 178) (8-23-07), at 3. FEI will shortly file a motion with the Court seeking this correction.

B. RECOMMENDATIONS FOR THE SCOPE OF THE SPECIAL MASTER'S DUTIES AND AUTHORITY OF THE SPECIAL MASTER

FEI's recommendations for the scope of the Special Master's duties and the authority of the Special Master are set forth in its proposed referral order. *See* Proposed Order submitted herewith. "Rule 53(b)(2) requires precise designation of the master's duties and authority." *See* Fed. R. Civ. P. 53, advisory committee notes, 2003 amendments. FEI's proposed referral order will advance this litigation by requiring a firm briefing schedule; the filing of consolidated briefs;

limited, controlled discovery; and, explicit exclusion of extraneous and irrelevant issues from the proceeding. The specific bases for FEI's recommendations are as follows:

1. Scope. The scope of the Special Master's duties should be specifically limited to deciding the matters set forth in the Court's 03-29-13 Order and the Court's 04-19-13 Minute Order. *See* Fed. R. Civ. P. 53, advisory committee notes, 2003 amendments ("topics for any reports or recommendations" should be "clear[ly] delineat[ed]"). Accordingly, FEI proposes that the Special Master be ordered to consider and rule upon the following matters:

- The amount of attorneys' fees (*i.e.*, the "value of services") to be awarded in this case against all plaintiffs, jointly and severally, pursuant to the Court's 03-29-13 Order and Memorandum Opinion (ECF Nos. 619 & 620) (holding that the case was "groundless and unreasonable from its inception" and that "FEI should recover the attorneys' fees it incurred when it was forced to defend itself in this litigation" pursuant to 16 U.S.C. § 1540(g)(4)). This includes the amount of "fees on fees" to which FEI is entitled for litigating its request for fees and sanctions, up to the date of the filing of FEI's initial submission.[6] *See Sierra Club v. EPA*, 769 F.2d 796, 811 (D.C. Cir. 1985) ("The hours reasonably expended on such a petition are compensable."); *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1298 (11th Cir. 2010) ("a district court may include costs arising from the sanctions proceedings in the sanctions award").

- The determination of amount shall proceed under the standards prescribed by controlling precedent from the Supreme Court and in this Circuit. The Special Master should not indulge plaintiffs' effort to convert the determination of

[6] If appropriate, FEI shall file a supplemental fee petition upon the conclusion of the fee litigation covering the additional fees it incurs from the time it files its initial fee submission going forward.

amount into a line-by-line, issue-by-issue or pleading-by-pleading review of the case. Only specifically documented objections need be considered and a "nit-picking" review of FEI's submission is to be avoided. *Concerned Veterans*, 675 F.2d at 1338 (Tamm, J., concurring) ("Neither broadly based, ill-aimed attacks, nor nit-picking claims … should be countenanced."); *Donnell v. United States*, 682 F.2d 240, 250 (D.C. Cir. 1982) (district court "cannot inquire into the reasonableness of every action taken and every hour spent by counsel"); *Alfonso v. Dist. of Columbia*, 464 F. Supp. 2d 1, 6 (D.D.C. 2006) (since plaintiffs' fee submission "met their burden," "the court declines the defendants' invitation to 'conduct a minute evaluation of each phase or category of counsel's work.'") (quoting *Copeland*, 641 F.2d at 903); *Miller*, 575 F. Supp. 2d at 22 n.33 ("the Court will evaluate *only* those time entries which defendants have specifically challenged") (citing *Donnell*).

- The Special Master should be specifically directed not to permit the litigation of the amount of the fees that plaintiffs owe to devolve into (1) a collateral attack on the Court's determination that plaintiffs are liable for fees for vexatious, frivolous and groundless litigation; (2) a second trial on the claims that FEI was "taking" its elephants in violation of the ESA; or (3) an attempt, under the guise of arguing the "reasonableness" of FEI's fee application, to get the Special Master to decide matters that are cognizable only in the RICO case. The Court has already determined that such assertions or gambits "miss[] the point entirely; no matter how strong the merits of a case may be, plaintiffs are not insulated from scrutiny

under *Christiansburg* if they have no right to be in court." 03-29-13 Mem. Op., at 30.

- The amount of attorneys' fees (*i.e.*, the "value of services") for which plaintiffs' counsel Katherine Meyer and MGC are jointly and severally liable, pursuant to the Court's 03-29-13 Order and Memorandum Opinion (ECF Nos. 619 & 620) (sanctioning Ms. Meyer and MGC pursuant to 28 U.S.C. § 1927). The determination of amount shall proceed under the standards prescribed by controlling precedent from the Supreme Court and in this Circuit, and the Special Master should receive the same advisory here with respect to the ancillary attacks that plaintiffs can be expected to launch as set forth above with the determination of the attorneys' fees owed by the plaintiffs.

- The liability of the Humane Society of the United States ("HSUS") for FEI's attorneys' fees. *See* 03-29-13 Mem. Op., at 49 (denying FEI's request to hold HSUS jointly and severally liable for its attorneys' fees without prejudice "to refile at an appropriate time and in an appropriate procedural posture").

- The set-off, if any, to be applied to FEI's attorneys' fees award as a result of its settlement with former plaintiff American Society for the Prevention of Cruelty to Animals ("ASPCA").

2. Notice. The Court gave the parties notice and an opportunity to be heard before appointing the Special Master. *See* Minute Order (04-19-13). FEI proposes that the referral order make clear that the Court makes any referral over the objection of FEI. *See* Fed. R. Civ. P. 53(b)(1).

3. Duties. FEI proposes that the Special Master's duties should be specifically limited to the following:

- *Prior Orders.* The Special Master should be directed to familiarize herself or himself with the following Orders, which are vital to understanding the nature of this litigation and set forth the factual and legal bases for FEI's entitlement to attorneys' fees and sanctions against counsel: (1) the Court's 12-30-09 Order and Memorandum Opinion (ECF Nos. 558 & 559) (entering judgment for FEI) and (2) the Court's 03-29-13 Order and Memorandum Opinion (ECF Nos. 619 & 620) (holding that FEI is entitled to attorneys' fees and sanctioning counsel).

- *Report.* The Special Master should be ordered to review the briefing on the amount of the attorneys' fees award and HSUS's liability, the schedule for which is set forth *infra*; determine whether further briefing and/or submissions are required; hear argument, if necessary; and prepare and file a written report deciding the issues set forth in the "Scope" section, *supra*.

- *Discovery.* FEI objects to ***any*** discovery on the fee issue. The Special Master should be given the authority to (1) determine whether any discovery should be permitted and (2) place all discovery under a protective order, if necessary. FEI's proposed discovery procedures are set forth below in paragraph 5.

4. Briefing Schedule. FEI proposes the following briefing schedule. FEI further proposes that all filings conform with page number limitations set forth in Local Civil Rule 7(e).

- FEI's fee submission and opening brief/motion regarding HSUS's liability shall be due no later no later than **120 days** after the entry of the order appointing the Special Master.

- Plaintiffs, Ms. Meyer and MGC shall file a consolidated response/opposition, **90 days** after FEI's submission. HSUS shall file its opposition **90 days** after FEI's opening brief/motion.
- FEI's replies to the consolidated response/opposition and HSUS's opposition shall be due **45 days** after those documents are filed.
- The established briefing schedule should not be amended absent a showing of good cause by the party seeking additional time. The good cause requirement should apply with equal force to any party seeking additional time as a result of fee discovery (*see* paragraph 5).

5. Fee Discovery. There should be no discovery, as of right, concerning FEI's fee request. *Hensley*, 461 U.S. at 437 ("A request for attorneys' fees should not result in a second major litigation."); *Springs v. Thomas*, 709 F. Supp. 253, 254-55 (D.D.C. 1989) (discovery unnecessary where fees documented in affidavits and contemporaneous time records). However, to the extent any discovery is determined by the Special Master to be necessary, it should be extremely limited and conducted in accordance with the standards set forth in *Concerned Veterans*, *supra*. Moreover, should plaintiffs be allowed discovery, it should be mutual, *cf. New York v. Microsoft Corp.*, 2003 U.S. Dist. LEXIS 8713, at *9 (D.D.C. May 12, 2003), and at their expense. *Sierra Club*, 769 F.2d at 811.

To conserve the Special Master's resources, prevent further delay and prevent this case from devolving into a "purely vindictive contest over fees," *Concerned Veterans*, 675 F.2d at 1330, FEI proposes that the Special Master be ordered to oversee discovery according to the following procedures:

- *Timeframe*. As plaintiffs have acknowledged, any discussion regarding whether discovery concerning FEI's fee submission is necessary, and if so, the appropriate scope of that discovery, is premature until FEI has filed its submission. *See* Joint Status Report, at 4 ("Plaintiffs do not know the discovery they need and will not know this until they have had an opportunity to review the substance and adequacy of Feld's fee petition and supporting materials."); *id.* at 5 (indicating the plaintiffs intend to take "some limited discovery, now hard to forecast until we have seen Feld's materials"). Accordingly, there should be no discovery, by any party, until FEI files its fee submission.

- *Motions*. After the filing of FEI's initial attorneys' fees submission, any party seeking discovery should be required file a motion first with the Special Master. *Concerned Veterans*, 675 F.2d at 1338 (Tamm, J., concurring) ("the opposing party must file with the district court a formal request for discovery"); *cf. Brown v. Pro Football*, 839 F. Supp. 905, 912 (D.D.C. 1993) (Lamberth, J.) ("Because both parties have sought to compel discovery without first obtaining court permission to conduct discovery, both motions to compel will be denied."). The proposed discovery requests, and, if applicable, deposition questions, should be attached as an exhibit to the motion. Motions "must state the specific issues on which discovery is needed, point to the particular aspects of the fee application raising the issues, and contain a precise statement of what the discovery is expected to produce." *Concerned Veterans*, 675 F.2d at 1338 (Tamm, J., concurring); *see also id.* at 1329 ("unfocused requests to initiate [fee] discovery without indicating its nature or extent serve no purpose"). Motions should be limited to ten (10) pages. The parties should be relieved of their Local Civil Rule 7(m) obligation to meet and confer.

- *Oppositions.* FEI proposes that the party against whom discovery is sought shall have the opportunity to file an opposition, not to exceed ten (10) pages. FEI proposes that oppositions be due no later than seven (7) days after the motion requesting discovery.
- *Replies.* FEI proposes that reply briefs shall not exceed five (5) pages, and shall be due no later than five (5) days after the filing of the opposition.
- *Orders.* FEI proposes that the Special Master rule on discovery motions within 48 hours or as soon as practicable. Orders by the Special Master shall be reduced to writing and filed via ECF. FEI further proposes that any discovery permitted shall be limited to the specific requests approved and ordered by the Special Master, and that the Special Master's discovery orders be reviewable for abuse of discretion. *See* Fed. R. Civ. P. 53(f)(5).
- *Protective Order.* Given the contested nature of the discovery that plaintiffs likely seek, FEI proposes that, if the Special Master determines that any discovery is to be allowed, the Special Master be authorized to place all such discovery under a protective order and order that the material discovered be used only for the purposes of this case. Such an order was issued by Magistrate Judge Facciola in the instant case, and it greatly facilitated the completion of discovery. *See* Order (ECF No. 195) (09-25-07), at 4. To the extent that any information produced in discovery actually is relevant to the ultimate determination of the amount of fees by the Court, the decision can be made at that point whether to make the information part of the public record.

6. HSUS Discovery. FEI proposes that there be no discovery regarding HSUS's liability until the Special Master makes an initial ruling as to whether HSUS became a party to this case pursuant to Rule 25 on the basis of the Asset Acquisition Agreement (in evidence as

DX 68) (the "Agreement"). FEI's position is that HSUS became a successor-in-interest to FFA's liabilities, including its liability for fees in this case, by operation of the Agreement, thus automatically making it a party to this case pursuant to Rule 25. FEI's position is that this issue can be determined within the four corners of the Agreement itself, without any discovery. Thus, if the Special Master determines that HSUS is liable based on the Agreement, no discovery against HSUS on this issue will be necessary. However, there are other bases upon which HSUS could be liable for attorneys' fees as a party in this case under Rule 25, including, for example, that its combination with FFA was a *de facto* merger. *See* FEI's Opp. to HSUS Mot. to Strike (ECF No. 603) (06-27-12), at 11-16. The facts necessary for those arguments, however, have not yet been fully developed and would require discovery. Accordingly, FEI proposes that the Special Master allow discovery regarding HSUS's liability only if he makes an initial ruling that HSUS is not liable based on the Agreement alone. If HSUS discovery is necessary, it should proceed pursuant to a separate schedule set by the Special Master.

7. *Ex Parte* Communications (Fed. R. Civ. P. 53(b)(2)(B)). FEI proposes that the Special Master be permitted to communicate *ex parte* with the Court on matters of procedure only. *See* Fed. R. Civ. P. 53, advisory committee notes, 2003 amendments ("Ordinarily the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings."). FEI further proposes that the Special Master may not communicate *ex parte* with the parties. *See id.* ("In most settings … ex parte communications with the parties should be discouraged or prohibited.").

8. Master's Record (Fed. R. Civ. P. 53(b)(2)(C), 53(d) & 53(e)). FEI proposes that the record include the parties' filings and exhibits thereto; discovery motions, oppositions and replies and exhibits thereto; any order issued by the Special Master; the Special Master's

written report; and the parties' objections to, or motions to adopt or modify, the Special Master's written report. FEI further proposes that all documents shall be filed electronically via ECF in Civ. No. 03-2006, and that the Special Master shall not be required to preserve any other documents or records regarding his activities. *See* Fed. R. Civ. P. 53, advisory committee notes, 2003 amendments ("Subdivision (b)(2)(C) provides that the appointment order must state the nature of the materials to be preserved and filed as the record of the master's activities, and (b)(2)(D) requires that the order state the method of filing the record.").

9. Master's Authority (Fed. R. Civ. P. 53(c)). FEI proposes that the Special Master shall have all of the rights, powers and duties provided in Fed. R. Civ. P. 53(c) and may adopt such procedures as are not inconsistent with the Rule or with this or other Orders of the Court. *See* Fed. R. Civ. P. 53(c).

10. Master's Orders and Report (Fed. R. Civ. P. 53(d) & 53(e)). FEI proposes that the Special Master shall reduce any order to writing. FEI further proposes that the Special Master prepare and file a written report containing findings of fact and conclusions of law concerning the matters set forth in paragraph 1, "Scope." The Special Master "should provide all portions of the record preserved under Rule 53(b)(2)(C) that the master deems relevant to the report." Fed. R. Civ. P. 53, advisory committee notes, 2003 amendments. The Special Master's orders and report should be filed via ECF in Civ. No. 03-2006. FEI proposes that filing via ECF shall satisfy the Master's duty to serve his orders on the parties and report on the Court and the parties. *See* Fed. R. Civ. P. 53(d) & 53(e).

11. Opportunity for a Hearing; Action by the Court (Fed. R. Civ. P. 53(f)(1)). FEI proposes that in acting on an order, report, or recommendation of the Special Master, the Court shall afford the parties an opportunity to present their positions, pursuant to paragraph 12

below. *See* Fed. R. Civ. P. 53(f)(1). Further, FEI proposes that, in its discretion, the Court may request further briefing, receive evidence, and may adopt or affirm; modify; wholly or partly reject or reverse; resubmit to the Special Master with instructions; or may issue any further orders it deems appropriate. *See id.*

12. Time to Object or Move to Modify (Fed. R. Civ. P. 53(f)(2)). FEI proposes that a party be permitted to file objections to – or a motion to adopt or modify – the Master's order, report, or recommendations no later than 45 days after a copy is filed on the ECF system. FEI proposes an extension of the time period from 21 days (the default time period set in Fed. R. Civ. P. 53(f)(2)) to 45 days given the complexity of this matter.

13. Reviewing Factual Findings and Legal Conclusions (Fed. R. Civ. P. 53(f)(3) & (f)(4)). FEI proposes that all objections to findings of fact and conclusions of law made or recommended by the Special Master be reviewed de novo by the Court. *See* Fed. R. Civ. P. 53(f)(3) & (f)(4); *see also Summers v. Howard Univ.*, 374 F.3d 1188, 1195 n. 6 (D.C. Cir. 2004) ("[I]n 2003, Rule 53 was amended to provide de novo review of a special master's factfindings by the district court."). FEI specifically ***does not stipulate*** to a different standard of review.

14. Reviewing Procedural Matters (Fed. R. Civ. P. 53(f)(5)). FEI proposes that the Special Master's procedural rulings, including rulings on discovery motions, be reviewable for abuse of discretion. *See* Fed. R. Civ. P. 53(f)(5).

15. Civ. No. 07-1532 (the "RICO Action"). FEI proposes that the order expressly state that referral of this matter to the Special Master shall in no way delay or impact the litigation of Civil Action No. 07-1532. As FEI stated in the Joint Status Report, the ESA and RICO Actions were placed upon separate litigation tracks ***at plaintiffs' request***. *See* Joint Status Report, at 8. Plaintiffs should not be permitted to further delay litigation of the RICO Action,

which has been pending since August 2007, or to delay further the resolution of the attorneys' fee issue in this case, by now requesting that the cases be consolidated. *See id.* at 4. Further, the standard for awarding attorneys' fees in this case (which will be done by the Court) and for assessing damages in the RICO case (which will be done by a jury), are entirely different. The respective allowable scopes of discovery are likewise different. The game of "ping pong" that plaintiffs have played (*i.e.*, urging that events in one case await the outcome of events in the other case with the resulting delay of both cases) should cease.

16. Amendment (Fed. R. Civ. P. 53(b)(4)). FEI proposes that the Court be permitted to amend the referral order at any time, after notice to the parties and an opportunity to be heard. *See* Fed. R. Civ. P. 53(b)(4). A party seeking an amendment be required to file an appropriate motion with the Court.

Dated: April 26, 2013

Respectfully submitted,

/s/ John M. Simpson

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