UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT FELD ENTERTAINMENT, INC.'S PETITION FOR ATTORNEYS' AND EXPERT WITNESS FEES

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GLOSSARY OF TERMS

Term	Explanation
__-__-09 a.m. or p.m. at ___.	A citation to the transcript of the trial in the present case which was conducted in February and March, 2009. Thus, for example, "3-18-09 a.m. at 14:24-15:24" indicates a citation to the March 18, 2009 day of trial, morning session, at page 14, line 24 through page 15, line 24.
API	Born Free USA United with Animal Protection Institute, plaintiff herein.
ASPCA	American Society for the Prevention of Cruelty to Animals, former plaintiff herein.
AWI	Animal Welfare Institute, plaintiff herein.
BC	Declaration of expert Barry Cohen, Partner, Crowell & Moring, LLP, filed with FEI's instant petition for attorneys' and expert witness fees. "BC at 1" means the declaration of Barry Cohen at page 1.
CA	Declaration of Christopher A. Abel, Partner, Wilcox & Savage, P.C. and formerly a partner at Troutman Sanders, LLP, filed with FEI's instant petition for attorneys' and expert witness fees. "CA, ¶ 1" means the declaration of Christopher A. Abel at paragraph 1. "CA, Ex. 1" means Exhibit 1 to the declaration of Christopher A. Abel.
COL	A Conclusion of Law set forth in the Court's December 30, 2009 Memorandum Opinion (ECF 559), reported at *ASPCA v. Feld Ent. Inc.*, 677 F. Supp. 2d 55 (D.D.C. 2009), *aff'd,* 659 F.3d 12 (D.C. Cir. 2011).
Crystal	Howard M. Crystal, former counsel of record for plaintiffs in the instant case.
DX	A trial exhibit of the defendant, admitted into evidence, in the instant case. "DX 1 at 5" means defendant's trial exhibit 1 at .pdf page 5.
ECF	A docket entry in the instant case when it was pending under Civil Action No. 03-2006-EGS (D.D.C.). "ECF 1 at 5" means docket entry number one (1) in Civ. No. 03-2006, at .pdf page 5.
No. 00-1641 ECF	A docket entry in the instant case when it was pending under Civil Action No. 00-1641-EGS (D.D.C.), from July 11, 2000 to September 26, 2003. "No. 00-1641, ECF 1 at 5" means docket entry number one (1) in Civ. No. 00-1641, at .pdf page 5.

Term	**Explanation**
EG	Declaration of Eugene Gulland, Partner, Covington & Burling LLP, filed with FEI's instant petition for attorneys' and expert witness fees. "EG, ¶ 1" means the declaration of Eugene Gulland at paragraph 1. "EG, Ex. 1" means Exhibit 1 to the declaration of Eugene Gulland.
ESA	Endangered Species Act, 16 U.S.C. § 1531 *et seq.*
ESA Case	The litigation styled, *American Society for the Prevention of Cruelty to Animals, et al. v. Feld Entertainment, Inc.*, Civil Action Nos. 00-1641-EGS & 03-2006-EGS (D.D.C.).
FEI	Feld Entertainment, Inc., defendant herein.
FFA	The Fund for Animals, Inc., plaintiff herein.
FOF	A Finding of Fact set forth in the Court's December 30, 2009 Memorandum Opinion (ECF 559), reported at *ASPCA v. Feld Ent. Inc.*, 677 F. Supp. 2d 55 (D.D.C. 2009), *aff'd,* 659 F.3d 12 (D.C. Cir. 2011).
Glitzenstein	Eric R. Glitzenstein, former counsel of record for plaintiffs in the instant case.
HSUS	The Humane Society of the United States.
Meyer	Katherine A. Meyer, former counsel of record for plaintiffs in the instant case.
MGC	Meyer, Glitzenstein & Crystal, former counsel of record for plaintiffs in the instant case.
ML	Declaration of Marc Langlois, Partner, Hughes, Hubbard & Reed LLP, filed with FEI's instant petition for attorneys' and expert witness fees. "ML, ¶ 1" means the declaration of Marc Langlois at paragraph 1. "ML, Ex. 1" means Exhibit 1 to the declaration of Marc Langlois.
PAWS	Performing Animal Welfare Society, an original plaintiff in the instant case under Civil Action No. 00-1641-EGS (D.D.C.).
Plaintiffs	Collective reference to all plaintiffs in the ESA Action.
PWC	A will call trial exhibit of plaintiffs in the instant case. "PWC 1 at 5" means plaintiffs' trial exhibit 1 at .pdf page 5.
Rider	Tom Rider, plaintiff herein.

Term	**Explanation**
JM	Declaration of expert John Millian, Partner, Gibson, Dunn & Crutcher, LLP, filed with FEI's instant petition for attorneys' and expert witness fees. "JM, ¶ 1" means the declaration of John Millian at paragraph 1.
JS	Declaration of John M. Simpson, Partner, Fulbright & Jaworski LLP, filed with FEI's instant petition for attorneys' and expert witness fees. "JS, ¶ 1" means the declaration of John M. Simpson at paragraph 1. "JS, Ex. 1" means Exhibit 1 to the declaration of John M. Simpson.
WAP	Wildlife Advocacy Project, a purported 501(c)(3) organization controlled by former counsel of record, Meyer and Glitzenstein. *See* ECF 620 at 10.

The Court held that "this case was groundless and unreasonable from its inception, and, therefore, that FEI should recover the attorneys' fees it incurred when it was forced to defend itself," ECF 620 at 3; and, pursuant to 28 U.S.C. § 1927, Meyer and her law firm, MGC, are jointly and severally liable for the fees FEI incurred "in litigating the portion of its Motion to Compel which sought information about Tom Rider's financial relationship with animal rights advocates." *Id.* at 4. Pursuant to the Court's Orders (ECF 629 & 631), FEI submits its petition requesting an award of **$25,462,264.26** against plaintiffs and **$133,712.60** against Meyer and MGC.

INTRODUCTION

This case is "extraordinary." ECF 620 at 2 & 3. Filed more than thirteen (13) years ago, litigation of this ESA citizen suit (the "ESA Case") involved multiple questions of first impression, in the context of a complicated regulatory scheme. The novelty of the issues raised, and the resulting lack of legal or factual precedent, made this case a challenging, difficult and time intensive matter to defend. Among other things, this was the first case seeking to apply the ESA "taking" provision to a captive endangered species, including animals in captivity before the ESA was enacted. It also was the first time that a federal court recognized that an alleged personal or emotional attachment to a particular animal could give rise to an "aesthetic injury" claim sufficient to proceed with attempting to establish Article III standing. This was the first case involving the regulatory intersection between the ESA and the Animal Welfare Act as to exotic animals presented for exhibition. And, this is the first time that a prevailing defendant has ever been awarded fees under the ESA. *See* JS, ¶ 169.

Aside from the novelty of the issues, the overwhelming zeal and fervor with which plaintiffs and their counsel litigated this case made it unique. The case was ideologically driven. For plaintiffs, their counsel, and even the "experts" they called at trial, this was "cause"

litigation.[1] The ESA Case was about more than just this civil action – it was but one piece of plaintiffs' broader crusade against the use of animals in entertainment. FOF 87. Plaintiffs categorically oppose ***any*** exhibition of elephants in a circus, and used the "groundbreaking" nature of the case to publicize their views about circuses. Pet., Ex. 3; JS, ¶ 166. They also used it to raise money. FOF 39; JS, ¶ 167. Throughout discovery, plaintiffs vigorously pursued the production of any and all material that had any connection to FEI's elephants (regardless of whether it was relevant to their "taking" claim), and then claimed it was their First Amendment "right" to use that material outside of the litigation, by posting it on their websites and disseminating it to the media and others. *Id.* ¶ 173. Indeed, the organizational plaintiffs and counsel claimed they were paying the lead plaintiff, Rider, ***to publicize the case***. FOF 48. Counsel even testified that the distinction between Rider's "public education campaign" and the case was "meaningless." FOF 51. For plaintiffs and their counsel, the "taking" claim was but one of multiple purposes that this case served for them.

For FEI, this case represented the highest "stakes" that a company could face in a lawsuit. JS, ¶¶ 163-65. FEI (or its predecessor entities) has produced and presented a live circus show, under "Ringling Bros." or a similar name, exhibiting Asian elephants since 1872. Plaintiffs sought forfeiture of FEI's Asian elephants and/or to enjoin two husbandry practices that FEI uses in managing its elephants, the guide and tethers. Both forfeiture and an injunction would have

[1] *See* Pet., Ex. 4 (Meyer argued, on behalf of, *inter alia*, plaintiffs herein API and AWI, and the Elephant Sanctuary, then run by plaintiffs' "expert" Carol Buckley, that ***"given the choice plaintiffs would rather see the [African] elephants [from Swaziland] dead than in a zoo"***) (emphasis added); 2-04-09 p.m. at 81-82 (Poole: "I mean, I just, I just – I don't understand why in this day and age with all we know about these animals that we have to treat them like this. This is the United States of America, we don't have to do this to these animals. The Court: What would be another way of treating these animals? Poole: Not having them in circuses. Not having them perform. Not having – abusing animals for our entertainment. I think it's wrong."); 2-23-09 p.m. (part I) at 27 (Buckley: "I believe that it compromises elephants to have them on display in the traditional way that elephants are displayed, which is to have the elephants performing, wearing costumes, doing tricks for people. The whole purpose of an elephant performing tricks is to entertain the public.") & *id.* at 33 (Buckley: "[I]t is extremely detrimental for elephants to be living in captivity."). *See also* JS, ¶ 166.

resulted in the same outcome: the removal of FEI's Asian elephants from its traveling performances, which is what plaintiffs ultimately wanted. *Id.* ¶ 163; Pet., Ex. 3 ("API and fellow plaintiffs are asking the court to prohibit Ringling's use of Asian elephants ... ."). The Asian elephant is the symbol of the "Greatest Show on Earth," and without the Asian elephants, the Ringling Bros. Circus would not be the Ringling Bros. Circus. Given that the only way plaintiffs proposed resolving the lawsuit was the removal of FEI's elephants from the circus, there was ***no*** means for the case to be resolved through settlement. JS, ¶ 166. FEI narrowed the case by motion, but summary judgment was denied as to the seven (7) pre-Act elephants that Rider claimed he was attached to. *Id.* ¶ 120. The stage for trial was set. ECF 620 at 35 ("Rider's standing hinged on his credibility, which ***only a trial*** could resolve.") (emphasis added).

But what makes the case so "extraordinary" is not just that it was novel, complex, ideologically driven and important to the parties. The case is "extraordinary" because it was, "from the beginning, frivolous and vexatious." ECF 620 at 27. *See also id.* at 3 ("this case was groundless and unreasonable from its inception"). ***Years of discovery and a trial showed that none of the plaintiffs ever had any standing to be in court.*** Rider was a paid plaintiff and fact witness who was "pulverized" on cross-examination and found to be utterly incredible. FOF 1. Rider was "hired." ECF 620 at 3. Rider was paid so that the case, and plaintiffs' "purposes" for it, could continue. FOF 52. Beyond the remarkable – and inescapable – fact that Rider was paid, Rider then "lied" about the payments. ECF 620 at 10-11. ***Counsel was sanctioned*** for helping Rider make an "affirmatively false" statement under oath about the payments that she and her own law firm made to him. *Id.* at 8. Moreover, the organizational plaintiffs' claims "fared no better than Rider's." *Id.* at 15. Three plaintiffs abandoned all claims for relief ***at trial***. *Id.* And, API's standing allegations were found to be completely "baseless." *Id.* FEI is aware of no other

ESA citizen suit like this one, where a case went all the way through trial where it was determined that ***none*** of the plaintiffs ever had standing. JS, ¶ 169.

The litigation involved more than five (5) years of extensive discovery and motions practice; nearly 300 substantive filings; more than forty (40) substantive Court orders; and, nearly 700 docket entries; more than thirty (30) subpoenas; forty-six (46) depositions, including twelve (12) experts; seventy-seven (77) hearings, including a trial lasting more than six (6) weeks, during which the Court heard evidence from more than thirty (30) witnesses and admitted close to 400 exhibits (ECF 484); more than 1,500 pages of post-trial filings (ECF 533-36 & 538-41); and two (2) appeals. *See* JS, ¶ 162; JS, Exs. 26 & 27. *Cf.* JS, Ex. 10, Braga Decl. ¶ 6 ("There are very few cases that last twelve years from start-to-finish in the District Court, and that involve the protracted effort evidenced by this record."). The length, complexity, intensity and expense of the ESA Case surpasses even that of *McKesson v. Iran*, 2013 U.S. Dist. LEXIS 43266 (D.D.C. Mar. 27, 2013) (Leon, J.) and *Miller v. Holzmann*, 575 F. Supp. 2d 2 (D.D.C. 2008) (Lamberth, J.), where multi-million dollar fee awards issued. To FEI's knowledge this is the largest lodestar request made in this district. The circumstances fully justify the amount sought.

Plaintiffs cannot escape liability for a substantial fee award. ***Plaintiffs*** filed this case, and then "prolonged" and "deliberately delayed" the litigation of it. ECF 620 at 27 & 33-34.[2] There is no "public interest" and/or "non-profit" exception for plaintiffs to hide behind. Nor would a

[2] *Cf. Riverside v. Rivera*, 477 U.S. 561, 580 n.11 (1986) ("Those who elect a militant defense in the face of a statute allowing attorney's fees if they are defeated must take into account the time and effort they extract from their opponents. It was ... [defendants'] right to contest every aspect of this claim, but they cannot now disclaim the consequences of their actions."); *Springs v. Thomas*, 709 F. Supp. 253, 255-56 (D.D.C. 1989) ("[T]he defendant has vigorously contested plaintiff's claims at every stage. Having done so, the EEOC cannot now complain that the fee award should be reduced because the case could have been tried with fewer hours and resources expended."); *Singer v. Shannon & Luchs Co.*, 670 F. Supp. 1024, 1032 (D.D.C. 1987) (attorneys' fees were "caused by plaintiffs own obstructive behavior in pursuing every device to prevent the foreclosure from taking place").

fee award result in financial ruin for any of the plaintiff organizations. All of them have assets in the millions of dollars and can well afford to pay.[3] Ordering plaintiffs to pay the full lodestar amount will not have a "chilling" effect on legitimate lawsuits brought by bona fide plaintiffs with real injuries. To the contrary, it will deter these repeat litigants (ECF 620 at 32-33) from filing another frivolous and vexatious case and make clear that the rules of justice apply to all litigants. No defendant, and no federal court, should have to spend more than thirteen (13) years intensely working on a case that never should have been filed. *See Roadway Express v. Piper*, 447 U.S. 752, 762 (1980) (awarding fees to prevailing defendants "advances the congressional purpose to encourage suits by victims of discrimination while deterring frivolous litigation").

The only question for the Court is: what is a "reasonable" fee award in the context of an "extraordinary" case like this one?[4] FEI's petition, which provides evidence of its counsel's hourly rates and attaches the detailed, contemporaneous time records maintained by its counsel, demonstrates that a "reasonable" fee is an award of **$25,462,264.26** against plaintiffs and **$133,712.60** against Meyer and MGC.

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[3] Even though plaintiffs are an individual and a group of "non-profit" organizations, and defendant is a privately held corporation, there was no resource imbalance. Judge Sullivan observed that the parties invested "limitless resources ... to the prosecution and defense of this case." Pet., Ex. 2 (06/11/08 Hearing Tr. at 21). An "army of attorneys" represented both sides. *Id.* (03/23/10 Hearing Tr. at 15). Plaintiffs were represented by extremely competent counsel. *See* ECF 599-30 (Glitzenstein: "I have litigated many Endangered Species Act ("ESA") cases in federal courts around the country, and I am often asked to speak at conferences, seminars, and law school classes concerning ESA enforcement, litigation, and related topics."); Pet., Ex. 5 (*Wild Equity,* Drury Decl. ¶ 26) (Glitzenstein is considered to be "among the very best ESA litigators in the country"); *id.* (*Wild Equity*, Glitzenstein Decl. ¶¶ 5) (listing the ESA and wildlife protection cases Glitzenstein has successfully litigated) (ESA Case not listed) & 7 (Glitzenstein invited to write a chapter in an ABA book on the ESA); *id.* (*Wild Equity*, Crystal Decl. ¶ 4) (MGC has "extensive experience in environmental and administrative litigation in general, and Endangered Species Act (ESA) litigation in particular") (listing ESA cases where Crystal was counsel) (ESA Case not listed); *id.* (*Queen Anne's Conservation*, Crystal Decl. ¶ 4) ("Glitzenstein is one of the nation's leading experts in open government litigation. ... [H]e is also an expert on NEPA policy and litigation.").

[4] *Cf. Copeland v. Marshall,* 641 F.2d 880, 884 (D.C. Cir. 1980) ("We think the very intricacy of the litigation – which was a product, in part, of the government's vigorous and long-continued resistance to the claim assert against it – is highly relevant to the reasonableness of the fee award."); JS, Ex. 10, Braga Supp. Decl. at 8 ("***Context is everything***, and the context of this matter is a ***complex and bitterly fought*** $100 million case concerning an international conspiracy to commit bid-rigging and fraud which was set for discovery and trial on an aggressive expedited schedule.") (emphases added).

FACTUAL BACKGROUND

Plaintiffs' conduct – Rider's false and changing standing allegations; the coordinated effort to pay Rider and then conceal the payments, including through multiple false statements by both plaintiffs and their counsel; the zealous pursuit of discovery material and the use of it outside of the case; the repeated attempts to expand the scope of the case; and the ultimate abandonment of parties and claims – made litigation of this case protracted and arduous. This discussion only highlights some of the vexatious aspects of plaintiffs' litigation tactics and the efforts necessary to successfully defend FEI. The factual narratives in the attached declarations are incorporated herein by reference.[5]

The Complaint and the Circuit's Remand. This case began in July 2000, when Rider and several animal rights organizations filed suit under the ESA, alleging that FEI was "taking" the Asian elephants it owned.[6] Plaintiffs sought injunctive and declaratory relief, forfeiture of FEI's elephants, and attorneys' fees and costs. No. 00-1641, DE 1. The case was anchored by Rider's allegations of aesthetic and emotional injury, based on what he allegedly saw and heard while employed as a barn man on FEI's Blue Unit, and his desire to visit and work with the elephants again. *Id.* ¶¶ 30-35. The organizational plaintiffs alleged an independent basis for standing, claiming informational and resource injuries. *See id.* ¶¶ 11, 16, 21. Covington performed a factual and legal analysis of plaintiffs' complaint, and moved to dismiss in September 2000. EG, ¶ 4. Judge Sullivan granted FEI's motion, No. 00-1641, ECF 20, but

[5] The factual background of the ESA Case is far too complex and voluminous to completely describe in this petition. A complete discussion of the factual background of the case, as well as the hourly rates and hours recorded by FEI's counsel, is set forth in the declarations of Messrs. Simpson, Gulland, Abel and Langlois. FEI is filing nearly 70 exhibits supporting its request for fees, which are identified in its Master Exhibit Index. Each exhibit is cited in this brief or the declarations of FEI's counsel.

[6] Other plaintiffs included PAWS, two PAWS associates (Pat Derby and Ed Stewart) and Glenn Ewell. Ewell, a former FEI employee, was dropped as a plaintiff by the First Amended Complaint. No. 00-1641, ECF 7. PAWS, Derby and Stewart voluntarily dismissed their claims. No. 00-1641, ECF 14. API joined the case in 2006. ECF 60.

following plaintiffs' appeal, the case was reinstated "solely" on the basis of Rider's standing allegations. FOF 53. The Circuit held that:

> Rider would [] like to visit the elephants, but is unwilling to do so because he would suffer 'aesthetic and emotional injury' from seeing the animals unless they are placed in a different setting or are no longer mistreated.
> ...
> Based upon [Rider's] desire to visit the elephants (which we must assume might include attending a performance of the circus), his experience with the elephants, his alleged ability to recognize the effects of mistreatment, and what an injunction would accomplish, Rider's allegations are sufficient to withstand a motion to dismiss for lack of standing

ASPCA v. Ringling Bros. ("ASPCA I"), 317 F.3d 334, 335 & 336 (D.C. Cir. 2003).[7]

None of Rider's standing allegations, which were relied upon and assumed true by the Circuit, was ever proved (and some were in fact "knowingly false"),[8] and his request for injunctive relief was abandoned at trial.[9] Exhaustive discovery and a lengthy trial demonstrated that Rider had a "'motive to falsify' the entire basis for his standing," ECF 620 at 29, and that both Rider and API's allegations were devoid of any legal or factual support: "After eleven years, including two appeals, protracted, contentious, and expensive discovery, and a six week trial, the plaintiffs were unable to produce any credible evidence that any of them had standing to

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[7] From July 2000 to March 2003, during the briefing on FEI's motion to dismiss before the district and appellate courts, FEI was represented by a core team of five (5) attorneys (augmented by two (2) additional attorneys during the appeal). EG, ¶¶ 4 & 8.

[8] Some of Rider's allegations not only were "not truthful," FOF 60, but also were "false at the time they were made." ECF 620 at 47-48; *see also id.* at 11 ("At the time the Complaint was filed in 2000 and the Amended Complaint 2001, the ***plaintiffs and their counsel knew that Rider was not, as he alleged, 'refraining from' seeing the animals*** in order to avoid suffering injury. ... ***The D.C. Circuit relied on [Rider's] false claims*** of a 'refraining from' injury in 2003 in reversing this Court's 2001 dismissal on standing grounds. ... Rider's claims that he would like to visit and/or work with the elephants again and would attempt to do so if the elephants were relocated '***were false***.'") (emphases added); *id.* at 34 ("the original allegations that [Rider] was injured by 'refraining from' seeing them were ***demonstrably false***") (emphasis added); *id.* at 45 ("[T]o the extent counsel relied on a 'refraining from' standing injury for Rider from 2000 to 2003, ***this theory was knowingly false.***") (emphasis added).

[9] After the case was remanded in March 2003, FEI filed a supplemental memorandum in support of its motion to dismiss, No. 00-1641, ECF 31, and a motion for judgment on the pleadings. No. 00-1641, ECF 38. Both of these motions were denied. No. 00-1641, ECF 35 & 56. For procedural reasons associated with plaintiffs' 60-day notice letter, No. 00-1641 was consolidated with No. 03-2006 and dismissed without prejudice to the prosecution of No. 03-2006. No. 00-1641, ECF 48 & 56. Thereafter, the litigation proceeded under No. 03-2006. *See* EG, ¶ 5.

pursue their claims." *Id.* at 2-3. *See also 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.") & 27 ("There was no legal or factual basis on which to find Rider or API had standing to bring this case.").[10]

Fact Discovery. Discovery commenced following the Circuit's remand. Discovery was "protracted, contentious, and expensive." ECF 620 at 2. *See also id.* at 5-6 (the ESA Case was tried after "bitter and protracted discovery battles and extensive motions practice"); ECF 559 at 5 n.5 ("To say that this case has involved highly litigious, complex, and protracted discovery and motions practice is to profoundly understate the history of this case."); ECF 239 at 1 (discovery was "complicated and demanding"). An eight (8) lawyer Fulbright team handled most of discovery, JS, ¶¶ 11-12, and from the time Fulbright entered the case until the close of discovery in January 2008, counsel recorded **19,157.25** hours of time, valued at **$6,274,978.45**. JS, Ex. 22.

FEI Produced More Than 80,000 Documents. From May 2006 to January 2008, Fulbright made twenty-eight (28) separate document productions, totaling more than 50,000 documents.[11] The productions consumed significant attorney and paralegal time. The productions were time intensive because (1) the productions primarily were made in paper and (2) unlike many of the documents at issue in many other cases, FEI's productions involved

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[10] *See also* ECF 620 at 34-35 ("'Some frivolous cases ***impose large costs on defendants*** when they require counsel to wade through ***voluminous records or review many cases.***' ... ***This is the case here***, where Rider's standing hinged on his credibility, which only a trial could resolve. That the case lasted as long as it did 'was attributable not to the closeness of the questions,' but to plaintiffs' willingness to make standing claims which are 'easy to allege and hard to disprove, and therefore ... require substantial discovery and litigation, even when they are groundless from the outset.") (emphases added).

[11] The parties briefed protective order issues in fall 2003. From 2004-2006, Covington engaged in affirmative and defensive discovery as well as the development of fact and case strategy, including the selection of fact and expert witnesses. During this same time period, substantial litigation occurred on the production of elephant veterinary records. EG, ¶ 6. In spring 2006, FEI's representation transitioned from Covington to Fulbright. JS, ¶¶ 5 & 114; EG, ¶ 6. To narrow the areas of disagreement, the work performed by Covington and Fulbright on the veterinary records issue and the work associated with the transition from Covington to Fulbright has been excluded in its entirety from FEI's fee petition. JS, ¶¶ 225 & 229-239; JS, Exs. 17 & 18; EG, ¶¶ 66 & 69-70; EG, Ex. 7 & 8. *See infra* at 40-42.

voluminous videotape footage (in a variety of different formats), photographs, and x-rays. JS, ¶ 115. In 2006 and 2007, the core Fulbright team was augmented with three principal associates who assisted with document review and production. *See id.* ¶ 12.

Significant attorney time also was spent responding to numerous highly detailed, single-spaced discovery "deficiency" letters from plaintiffs' counsel. JS, ¶¶ 116 & 174. The letters frequently demanded, in short order and on pain of motions to compel, the production of materials that plaintiffs speculated existed, but, in reality did not, and/or or were far afield from their "taking" claims. On June 14, 2007, plaintiffs sent a fifteen (15) page letter raising over sixty (60) purported "deficiencies" in FEI's production. Pet., Ex. 6 (6/14/07 ltr). Some of these issues had been raised, addressed and resolved in prior correspondence. *See, e.g., id.* (06/29/07 ltr at 5). Others were patently frivolous. Plaintiffs demanded documents concerning the elephant Jumbo, an African elephant owned by P.T. Barnum more than 100 years ago; "elephants" that did not exist; videotapes and photographs that plaintiffs speculated existed, but which FEI repeatedly explained did not exist; material about Rider which plaintiffs also speculated existed, but which FEI explained did not exist; and USDA investigations that never occurred. *Id.* (6/29/07 ltr at 4-7; 11/16/07 ltr at 3). Plaintiffs later moved to compel the Rider material, and the Court flatly rejected plaintiffs' "it must exist because we think it does" approach to discovery. ECF 330 at 6 ("Plaintiffs' speculation of what the Circus might have done, in the teeth of the denial by defendants' counsel that it has, hardly merits any additional judicial action."). Plaintiffs' June 14, 2007 letter ultimately resulted in ***77 total pages of correspondence***. *See* Pet., Ex. 6. FEI expended an extraordinary amount of time re-reviewing its productions and responding to plaintiffs' initial and follow-up letters on an item-by-item basis.

Another example concerns FEI's response to plaintiffs' interrogatory requesting the identity of individuals who "worked with the elephants in any capacity" since 1994. Plaintiffs insisted on FEI's disclosure of the identities of any and all persons who remotely had any contact with the elephants, even though FEI repeatedly informed plaintiffs that the request was grossly overbroad. *See, e.g.,* Pet., Ex. 7 (1/18/08 ltr demanding the disclosure of all "barn men, staff who worked in props or wardrobe, dancers, and floor crew, provided that they had some responsibility with respect to the elephants"). FEI thought the issue was resolved after providing plaintiffs with the identities and contact information for more than 400 employees who "worked with" the elephants. *See id.* (06/09/04, 03/09/05 & 01/31/07 Interrog. Resp.). But plaintiffs continued to insist that FEI's response was incomplete in another demand letter just days before the close of discovery. *Id.* (01/23/08 ltr). To avoid a motion to compel, FEI produced the volume of information plaintiffs requested: the names and contact information of over 1,000 current and former employees who "worked with" the elephants. *Id.* (01/30/08 Interrog. Resp.). Then, plaintiffs protested that FEI's response was so voluminous that it "did not put [them] on notice as to which particular individuals [FEI] might rely on to support its case," ECF 343 at 19, which was completely circular since FEI had never listed the vast majority of these people as witnesses. *See also* Pet., Ex. 2 (10/24/08 Hearing Tr. at 23-29) (denying ECF 343). Further, the dispute took another turn when plaintiffs unsuccessfully attempted to compel the same information under the guise of demanding the production of FEI's "performance reports." ECF 265 at 6; ECF 263 at 8-9 n.5; ECF 330 at 3-4. This dispute aptly illustrates of the harassment and "heads I win, tails you lose" approach of plaintiffs in discovery.

In aggregate, from March 2006 to March 2008, the parties exchanged more than 35 letters, totaling more than 140 single-spaced pages, concerning purported "deficiencies" in FEI's

production.[12] JS, ¶ 116. The letters demonstrate the zeal with which plaintiffs pursued discovery material, and are part of the reason discovery was as expensive as it was.

Scope of Discovery and Plaintiffs' Changing Claims. Plaintiffs' zealous pursuit of discovery material also translated to the scope of discovery itself: plaintiffs strenuously advocated for, and were granted, a wide scope of discovery. JS, ¶¶ 114, & 174-75. As the litigation progressed, FEI attempted to streamline the case twice. After summary judgment narrowed the case to the seven (7) Blue Unit elephants that Rider claimed he was attached to and the Court rejected plaintiffs' attempt to add new Red Unit plaintiffs to the case, FEI requested that discovery be limited to the seven (7) Rider elephants. But, the Court denied FEI's request and plaintiffs were permitted to continue to take discovery concerning all fifty-four (54) of FEI's elephants. Further, FEI again attempted to limit the scope of evidence to be presented at trial to the seven (7) Rider elephants, and exclude plaintiffs' novel theory of Red Unit "pattern and practice" evidence. Plaintiffs successfully opposed that motion, and presented a significant volume of Red Unit evidence at trial. Had discovery or trial been limited as FEI twice requested, FEI would have expended significantly less time defending the case. Instead, FEI had to be prepared to defend the treatment of all fifty-four (54) of its elephants, to cross-examine plaintiffs' Red Unit witnesses at trial (including Lanette Williams, Archele Hundley, Robert Tom and Margaret Tom), and to call its own Red Unit witnesses (*e.g.*, Carrie Coleman). *Id.* ¶¶ 176 & 178. FEI also had to initiate and litigate a lawsuit against PETA to, *inter alia*, obtain key videotape and documentary evidence used at trial to impeach Red Unit witnesses Archele Hundley, Robert Tom, and Margaret Tom, all of whom were affiliated with PETA. 2-5-09 a.m. at 82-85; 2-5-09 p.m. at 5-11, 18-19, 24-28, 93-94, 100-01, 123-24. That lawsuit, was, in itself, demanding, and resulted in more than 50 docket entries. JS, ¶ 129 & JS, Ex. 29; CA ¶¶ 1-24.

[12] These figures exclude all correspondence concerning plaintiffs' motion to enforce the Court's 09/29/05 Order.

Further complicating the litigation was that the identity of the plaintiffs, their claims, and their requests for relief were a moving target. Indeed, in finding the case vexatious, Judge Sullivan emphasized that Rider changed his standing theory in 2003, after the case was remanded by the Circuit. ECF 620 at 7, 27 & 34. Further, through their voluminous expert reports, plaintiffs expanded their claims beyond the issues identified in their 60-day notice letters and pleadings. JS, ¶ 175. Plaintiffs' case, initially about the use of the guide and tethers, and weaning of the baby elephants, became a case about the elephant "toenail cracks," "learned helplessness" and tuberculosis, among other things. *Id.* ¶¶ 125 & 175. FEI had to respond to these expanded claims. Further, plaintiffs dropped their request for forfeiture in June 2008, after preparation for trial had begun, *id.* ¶ 182, and dropped their weaning claim in their pre-trial statement. *Id.* ¶ 180. Plaintiffs ASPCA, AWI and FFA unsuccessfully attempted to exclude themselves as trial witnesses, and then dramatically abandoned any claim to relief during closing argument. *Id.* ¶ 179. *See also* ECF 620 at 15, 16, 27 & 34. Rider and API, the only remaining plaintiffs, abandoned their claim to immediate injunctive relief at final argument. *Id.* at 13, 15, 27, 28 & 34. Had plaintiffs pleaded and litigated an ESA citizen suit (1) brought only by Rider and API; (2) seeking only a declaratory judgment; and (3) using only Blue Unit evidence, FEI would not have incurred and now be seeking the amount of fees it is today. *See id.* at 34 (plaintiffs "force[d] FEI and the court to spend time and resources litigating against organizational plaintiffs and requests for relief which plaintiffs abandoned during the trial"). Indeed, if Rider had not lied about his "aesthetic injury," the case would have ended in 2001 when Judge Sullivan threw it out the first time.

Plaintiffs and Counsel Failed to Disclose the Payments. Plaintiffs initially failed to disclose the Rider payments in discovery "by both omissions and affirmatively false statements,"

FOF 59; JS, ¶¶ 120 & 172. Plaintiffs' obfuscation delayed the litigation.[13] FEI's efforts to discover the payment information, and piece together how the payments undermined Rider's credibility, were time intensive, complicated, and required dogged determination due to the fact that plaintiffs and their counsel were engaged in a coordinated effort to conceal. JS, ¶ 172. Payment discovery was made more difficult because of counsel's direct involvement in the payments. This was not a case where the clients were providing counsel with incomplete information, and counsel signed false and misleading discovery responses in good faith. ***Plaintiffs and their counsel worked together first to pay Rider and then to hide the payments from FEI and the Court***. Significant time was expended subpoenaing third parties; reviewing plaintiffs' productions and identifying deficiencies therein; briefing multiple motions to compel; and identifying falsehoods and/or inconsistencies in representations about Rider's "media" work. *Id.* ¶¶ 117, 120, 122, 172.

Both plaintiffs and counsel made false and misleading statements regarding the amount and source of the payments, and their disclosure of them. In correspondence with FEI and in filings with the Court, Ms. Meyer repeatedly insisted that plaintiffs were "extremely forthcoming" about the payments and had produced everything.[14] Plaintiffs' September 2007

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[13] *See* ECF 620 at 8 ("Rider, the organizational plaintiffs, and plaintiffs' counsel sought to conceal the nature, extent and purpose of the payments from FEI during the litigation, including through an affirmatively false interrogatory response signed by Rider and prepared by Ms. Meyer, the same attorney who was paying him."); *id.* at 10-11 ("Rider lied about the payments. ... The organizational plaintiffs also concealed the payments from FEI, in whole or in part by providing misleading or incomplete information to FEI until after the Court granted FEI's motion to compel ... ."); *id.* at 27 ("Plaintiffs prolonged the litigation by ... attempting to conceal the nature of Rider's funding."); *id.* at 33-34 ("They deliberately delayed the proceedings by (1) providing false or incomplete information about the financial arrangements between Rider and the other plaintiffs for years ... ."); *id.* at 43 ("[P]laintiffs and their counsel sought to conceal, at least in part, the payments from FEI[.]").

[14] *See, e.g.*, ECF 127-11 at 3 ("[P]laintiffs have always been ***extremely forthcoming*** about the fact that they were providing funding for this purpose, and the amount of funding they have provided ***directly to Mr. Rider and to the Wildlife Advocacy Project*** for this purpose – i.e., they have answered all of the discovery requests and provided deposition testimony on this matter, and have provided defendants with all documents that reflect this information.") (emphases added); ECF 127-5 at 8-9 ("[A]ll of the plaintiff organizations have been ***extremely forthcoming*** about funds that they have contributed ***to either Tom Rider or the Wildlife Advocacy Project*** for media .... Accordingly,

and August 2008 Court-ordered productions (ECF 178 & 325) demonstrated that these statements were not true. While all of the payment information was initially requested in 2004, nearly 1,000 pages were withheld by plaintiffs and WAP until after the Court's 08/23/07 Order issued. FOF 57. Counsel was sanctioned for preparing Mr. Rider's "affirmatively false" interrogatory response that withheld critical payment information. ECF 620 at 8.[15] AWI and FFA likewise "did not disclose their payments to Rider through MGC and WAP even when specifically asked" at deposition. FOF 57.[16]

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to the extent that defendants are complaining they have been denied such information, this is simply not true.") (emphases added) & 11 ("[A]ll of the plaintiff organizations have been ***extremely forthcoming*** about the funds that they have contributed ***to either Tom Rider or the Wildlife Advocacy Project***[.]") (emphases added); ECF 132 at 15 ("[P]laintiffs have been ***extremely forthcoming*** with this Court about the fact that they are providing grants ***either to the Wildlife Advocacy Project ("WAP") or to Mr. Rider directly*** to allow him to travel around the country to educate the public about the elephants' condition ... . [T]he plaintiff organizations have answered every question posed to them about how they have contributed to ***WAP and/or Mr. Rider's media and public education efforts***, ...") (emphases added); ECF 138 at 15 ("[P]laintiffs have freely admitted that Mr. Rider is funded by the organizational plaintiffs and other animal advocates, and indeed have provided many pages of documents reflecting this fact. That should be enough for defendants' asserted purposes ... ."); ECF 141-1 at 3 n.1 ("The other plaintiffs have also already identified all of the funding ***that they have provided to Mr. Rider***.") & 4 ("[T]he only financial information that has ever been outstanding with respect to defendants' discovery is any information concerning funding or other 'items' Mr. Rider may have received from any additional groups or individuals[.]") (emphasis added); ECF 156 at 4-5 ("[D]efendants already have the only information to which they are arguably entitled concerning the funding issue – i.e., the actual amounts of funding that the groups have donated for Mr. Rider's media and educational campaign ... ***[T]here is no information remaining to compel on this matter that would not simply duplicate information already provided*** ... .") (emphasis added). **All of these statements were false and were made before the Court-ordered production of additional payment information by plaintiffs and WAP, consisting of 44 revised interrogatory answers; 6 declarations; and nearly 1,000 pages of additional documents**.

[15] The organizational plaintiffs and counsel also played a cat-and-mouse game with their interrogatory responses, disclosing Rider payments only after FEI learned about them from other sources. For example, AWI updated its interrogatory responses to reflect payments that it made to WAP in February 2004 – which should have been disclosed in its June 2004 interrogatory responses – only after FEI (1) received documents concerning this payment in response to its subpoena to WAP and (2) pointed this out in correspondence. *Compare* ECF 477-3 (DX 19) at 6-8 *with id.* at 13-15. *See also* ECF 127-5, at 8 ("with this letter, AWI is providing documents concerning a contribution it made to the Wildlife Advocacy Project in February 2004"). AWI's interrogatory responses were signed by Meyer, who knew about AWI's February 2004 payment to WAP because she, together with Glitzenstein, "controlled" WAP. ECF 620 at 10. She also solicited "tax deductible" contributions from AWI to WAP, for the purpose of funding Rider's advocacy efforts regarding elephants and the lawsuit. FOF 38.

[16] When FFA stated under oath that it had paid Mr. Rider on only "one occasion," ECF 168-17, at 3-4, the lawyer defending FFA's deposition, Meyer (JS, Ex. 26), knew that statement was false. By the time of FFA's deposition, FFA already had made numerous payments to Rider through ***Meyer's law firm***. ECF 459-6 (DX 61) at 34-57.

The MGC payments to Rider are a prime example of counsel's involvement in the effort to conceal. Meyer misleadingly implied, in court filings and correspondence, that the organizational plaintiffs had produced all information concerning their Rider payments: she stated that plaintiffs produced all documents concerning the funding they had provided "directly to Mr. Rider and to the Wildlife Advocacy Project." *See supra* n.14. Conspicuously, Meyer made absolutely no mention of the payments which the organizational plaintiffs had, by that point in time, already made to Rider through ***her own law firm***. *See* ECF 459-6 (DX 61). Indeed, Meyer falsely represented to FEI that there were no non-privileged portions of MGC invoices showing payments to Rider. ECF 127-7, at 6 ("[P]laintiffs have no 'non-privileged portions of invoices from [our] firm that reflect monies filtered through it for payments to Mr. Rider.'"). In reality, (1) nearly 60 pages of MGC legal bills showing Rider payments (dated 2001-2003) and (2) an IRS Form 1099 issued by MGC to Rider (dated 2001) existed; these documents were only produced pursuant to Court order. ECF No. 459-6 (DX 61); ECF 458-8 (DX 55).[17] *See also* JS, ¶¶ 120, 122 & 172.

Plaintiffs' and counsel's misrepresentations about the nature of Rider's "media" campaign were tedious to unravel because plaintiffs and counsel structured and documented the payments in a way that made them appear legitimate. ECF 620 at 10 ("The funds paid to Rider appeared to be paid in such a way as to avoid ready detection.").[18] They falsely claimed that Rider was receiving "grants" to "traverse the country in a used Volkswagen Van – usually just

[17] The fact the counsel paid Rider and was directly involved in the concealment of the payments was relied upon several times in the Court's 12/30/09 and 03/29/13 opinions. Indeed, this is why counsel was sanctioned. FOF 33, 35, 50, 56; ECF 620 at 3, 8, 10, 11, 12, 42. *See also* JS, ¶ 171.

[18] *Cf.* JS, Ex. 10, Braga Decl. ¶ 6 ("It is always difficult to discover and prove fraud, especially when it is hidden through Swiss bank accounts and companies located in foreign jurisdictions. It is also always difficult to discover and to prove a conspiracy, which by its very nature is secretive.").

ahead of the circus – to speak to the news media and public … ." ECF 163 at 13.[19] Apparently supporting this story, WAP produced a payment ledger and cover letters indicating that Rider was doing "media" work in cities that matched FEI's tour schedule. FOF 45. But an analysis of Rider's receipts (most of which were obtained by subpoenaing WAP) and the FedEx mailing slips enclosing WAP's letters and payments (obtained by subpoenaing MGC), showed that this was a charade: most of Rider's "media" work was actually performed at his daughter's home or at a campground in Florida. FOF 49. *See also* ECF 620 at 10 ("Rider did not actually follow the circus[.]"). Glitzenstein testified at deposition that WAP cover letters were a post-hoc attempt to make the payments look legitimate: WAP began sending cover letters with Rider's payments only after FEI subpoenaed WAP. FOF 45-46. A detailed review of Rider's receipts showed that they did not match the amount of "grant" money he received, and that Rider used the money for items such as entertainment expenses. FOF 43-44. The documents also showed that even plaintiffs did not consider the payments "grants." Rider's tax returns (produced as a result of FEI's motion to compel Rider), indicated that he was performing a "service" and the payments were income or wages (not "grants"). FOF 55. The Form 1099 issued to Rider by MGC (produced as a result of FEI's motion to compel Rider), classified the payments as "compensation." *Id.* If FEI had not filed its motion to compel against the organizational plaintiffs and Rider; subpoenaed WAP for the cover letters, ledger and receipts; conducted a Rule 30(b)(6) deposition of WAP (which WAP unsuccessfully attempted to squash, ECF 237);

[19] *See also* Pet. Ex. 2 (09/16/05 Hearing Tr. at 29-30) (Meyer: "And what we have on the other side, Your Honor, we have Tom Rider, a plaintiff in this case, ***he's going around the country*** in his own van, he gets ***grant money*** from ***some of the clients and some other organization***s to speak out and say what really happened when he worked there.") (emphases added).

and, subpoenaed MGC for the FedEx mailing slips, the falsity of the "grants" for Rider's "traveling" "media" campaign story would not have come to light.[20]

To discover the payment material used by Judge Sullivan to determine that Rider had no credibility, FEI issued six (6) third-party subpoenas and filed four (4) motions to compel (ECF 85, 126, 149, 192), all of which were granted in major part.[21] JS, ¶¶ 117, 120, 172; JS, Ex. 27. These efforts would not have been required had Rider and the organizational plaintiffs provided true and complete responses to FEI's discovery requests.

Summary of Fact Discovery Efforts. From the time the case was remanded by the Circuit (March 2003) until the close of fact discovery (January 2008):

- The parties made more than 130 substantive filings. JS, Ex. 27. The Court banned the parties from making filings without Court permission, two separate times. Minute Order (08/11/07); Minute Order (10/23/07).

- The Court entered more than 20 substantive orders. JS, Ex. 27.

- The parties issued more than thirty (30) third-party subpoenas for testimony and documents. JS, Ex. 27.

- Twenty-nine (29) depositions were taken. JS, Ex. 26.

- The Court held more than twenty (20) separate hearings and/or status conferences. JS, Ex. 27.[22]

Evidentiary Hearing and Expert Discovery. An evidentiary hearing, the briefing on nine (9) discovery motions (seven (7) of which were filed by plaintiffs), and expert discovery took

[20] The fact that Rider did not actually follow the circus, as plaintiffs and counsel claimed, played a key role in the Court's 12/30/09 and 03/29/13 opinions, as did the characterization of the payments as "grants." FOF 45-50, 52, 57 & 59; ECF 620 at 10 & 31. *See also* JS, ¶ 170.

[21] Part and parcel of FEI's motion to compel Rider to produce the payment information was FEI's opposition to Rider's unsuccessful motion for a protective order. *See* ECF 141 & 178.

[22] In total, the parties filed nearly 300 substantive documents; the Court issued forty-four (44) substantive orders; forty-six (46) depositions were taken; and the Court held 77 separate hearings, status conference, and/or days of trial. JS, Exs. 26 & 27.

place from February to May 2008. *See* JS, ¶¶ 123-29. During this time period, counsel recorded **3,051.50 hours**, valued at **$1,364,790.78**. JS, Ex. 22.

FEI moved to enforce the Court orders requiring plaintiffs, WAP and HSUS to produce additional payment material. The Court convened a hearing that took place over three (3) days. Even though a contempt sanction did not issue, FEI's motions were granted in part and material that had been withheld was ordered produced. ECF 325. This material was admitted at trial without objection, and relied upon in the Court's 12/30/09 opinion. ECF 460-11 (DX 209); FOF 36. Indeed, much of the work necessary to prepare for the evidentiary hearing coincided with what ultimately became relevant at trial. *See* JS, ¶ 123.

Expert discovery was, in itself, complicated. There were thirteen (13) testifying experts at trial. Plaintiffs submitted eight (8) reports totaling more than 400 pages of text. One report was exceedingly voluminous: Philip Ensley's report (Pet., Ex. 8) was 290 pages, contained more than 650 citations to discovery documents and had a 164-page single-spaced appendix citing the equivalent of ***twelve (12) boxes of documents***. Pet. Ex. 9; JS, ¶¶ 125-26. Responding to this was time consuming, because the reports: required the review of hundreds of citations to discovery documents; expanded the issues beyond those described in the 60-day notice letters and pleaded in the complaint; and, raised significant *Daubert* issues that had never been evaluated by a court before. *Id.* ¶¶ 126 & 169. FEI produced five (5) expert reports, and designated a sixth expert. *Id.* ¶¶ 127. Expert depositions took place during a consolidated time frame: the parties took ten (10) expert depositions over a three month period. *Id.* ¶¶ 132 & 136. One partner and three other professionals were added to the Fulbright team to assist with experts. *Id.* ¶ 13.

Pre-Trial Proceedings. Plaintiffs unexpectedly filed a "preliminary" injunction motion in May 2008, which was withdrawn when the Court scheduled the case for trial in October 2008.

JS, ¶¶ 130-31 & 179. Ultimately, plaintiffs sought a continuance and trial was rescheduled for February 2009. *Id.* ¶ 137. From June 2008 through January 2009, counsel recorded **11,018.29 hours**, valued at **$4,994,844.43**. JS, Ex. 22. From August 2008 through the end of trial, Fulbright's core team included five (5) attorneys. JS, ¶ 14.

Preparing the case for the original trial date demanded an excruciating amount of work in an extremely short time period. The Court's pretrial order issued at the end of July 2008, and set tight deadlines for filing pretrial statements and responses; pretrial briefs; motions *in limine* and oppositions (four (4) such motions were filed); proposed findings of fact and conclusions of law; objections to exhibits; deposition designations and counter designations; and *Daubert* objections. All of this occurred while expert discovery and the evidentiary hearing were still ongoing. JS, ¶¶ 130-139. *See also* JS, Ex. 23 (fees exceeded $700,000 per month from August–September 2008, and were nearly $1,000,000 in October 2008).[23]

Plaintiffs' pretrial statement listed (14) will call witnesses, thirteen (13) may call witnesses, deposition designations for fifteen (15) witnesses, 161 will call exhibits, and 72 may call exhibits.[24] Plaintiffs' pretrial statement made FEI's trial preparation difficult because it did not comply with Local Rule 16(b)(5)'s requirements that (1) a witness's proposed testimony be described and (2) the projected amount of time that a witness will testify be identified. JS, ¶ 134. *Cf.* ECF 392 (plaintiffs' amended pre-trial statement, which complied with LCvR 16.5(b)(5)). Further, certain of plaintiffs' proposed exhibits were so voluminous that they were nearly impossible to object to on a page-by-page basis. For example, plaintiffs' Will Call

[23] Indeed, **39.66 percent** of the total number of hours billed by Fulbright were billed during the busiest period in the litigation, from June 2008 to September 2009. JS, Ex. 25.

[24] FEI prepared to cross-examine all of plaintiffs' witnesses at trial, even though one of plaintiffs' may call witnesses (expert Ajay Desai) was dropped before trial (ECF 392-2, at 14), and only two (2) of plaintiffs' thirteen (13) original may call witnesses actually testified. JS, ¶ 134.

Exhibit 1 contained all of the documents reviewed by expert Philip Ensley, which was approximately ***twelve (12) boxes*** of documents. JS, ¶ 134. *See also* ECF 357-1 at 2. Plaintiffs also listed a large quantity of video exhibits,[25] some of which contained ***hours*** of unrelated video "compilations" that were heavily edited and run together in non-chronological order and that duplicated material on other exhibits.[26] This required significantly more time to review and object to the "compilations," including the time necessary to piece together the chronological order of the "clips," than if each piece of raw, unedited footage had been marked individually as an exhibit. JS, ¶ 134. Adding to the volume of work, just days before trial, plaintiffs asked FEI to stipulate to the admission of, *inter alia*, incomplete USDA investigation files and certain of the video compilations, which they claimed were business records and/or were "authenticated" by declarations. While in a typical case the parties may be able to make such stipulations, here it was made impossible by plaintiffs' attempt to admit incomplete and unreliable documents and videotapes, without any witness available for cross-examination. JS, ¶ 181.[27]

In September 2008, during the height of trial preparation, the Eastern District of Virginia ordered PETA to comply with FEI's third-party subpoena. JS, ¶ 138; CA ¶ 13. PETA made a ***substantial*** volume of videotapes available for inspection, that had to be reviewed and analyzed

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[25] Plaintiffs' pretrial statement listed 30 will call video exhibits. ECF 341 at 25-27 (PWC 121-150). Plaintiffs could not reasonably have expected to play all of this video at trial, because doing so would have taken up well over a full day of trial time. *See* ECF 357-1 at 23 (PWC 121, ***more than five hours***); *id.* at 24 (PWC 122, ***43 minutes***; PWC 123, ***more than one hour***); *id.* at 27 (PWC 129, ***49 minutes***); *id.* at 28 (PWC 132, ***39 minutes***; PWC 133, ***more than two hours***) & *id.* at 30 (PWC 140, ***55 minutes***).

[26] *See also* ECF 341 at 25-27 (plaintiffs' will call video "compilation" exhibits: PWC 123, 132-33, 135-137, 139-140, 146); 2-9-09 p.m. (part II) at 36-49 (plaintiffs' witness Cuviello testifying that his video "clips" on PWC 132 were not in chronological order and were taken on different days). The footage on PWC 121, for example, duplicated the footage contained on four other will call exhibits (PWC 123, 128, 129 & 132). ECF 357-1 at 23.

[27] For example, plaintiffs claimed that ten (10) of their video "compilations" were authenticated by the declarations of eight (8) individuals, many of whom were aligned with animal rights activist organizations. *See* 2-09-09 p.m. (part II) at 76-78 (Cuviello started an organization with a website titled "ringlingabusesanimals.com" and donated money to "numerous" animal rights organizations). This unnecessarily added to FEI's pre-trial preparation time: only two (2) of the eight (8) declarants actually showed up at trial. JS, ¶ 181.

by local counsel and Fulbright in a compressed time period so that the material could to be used at trial, then scheduled for October. But, at the final pretrial conference, the Court denied plaintiffs' motion *in limine* to exclude eighteen (18) of FEI's witnesses. Plaintiffs sought a continuance so they could depose an additional five (5) fact witnesses, and trial was rescheduled for February 2009. JS, ¶¶ 137-38.

Trial. The case was tried from February 4, 2009 through March 18, 2009, on twenty-three (23) separate days. JS, ¶ 140. From January 11, 2009 (about three (3) weeks before trial) through March 18, 2009 (the date of closing argument) – a period of nearly 10 weeks – the core Fulbright team worked almost every day at a rate of eight (8) to sixteen (16) hours per day, averaging twelve (12) hours per day, with some work days exceeding eighteen (18) hours. *Id.* ¶ 142. *See also* JS, Ex. 23 (fees exceeded $800,000 per month in January 2009 and $1,000,000 per month in February-March 2009). Thirty (30) witnesses testified live, and the testimony of twelve (12) witnesses was presented by deposition. Nearly 400 exhibits were admitted into evidence. Twelve (12) substantive briefs were filed. JS, ¶ 140. Both FEI and plaintiffs had five lawyers at counsel table during most of the trial. *Id.* ¶ 21; JS, Ex. 27. During this time period, **4,369.00 hours** were recorded, at a value of **$2,219,860.51.** JS, Ex. 22.

Post-Trial Proceedings. After the trial concluded, the Court ordered the parties to submit post-trial proposed findings of fact and conclusions of law. JS, ¶¶ 143 & 182. The parties post-trial filings exceeded ***1,500 pages***. ECF 533-36 & 538-41. The filings were lengthy given the voluminous trial record. In contrast to a jury trial, a bench trial enabled the Court to defer ruling on all objections to evidence. For example, the Court deferred ruling on any *Daubert* issues and the weight of plaintiffs' Red Unit "pattern and practice" evidence until after trial. JS, ¶¶ 143-44. As a result, FEI had to be prepared to respond to all of plaintiffs' expert and Red Unit evidence,

and address the admissibility of such evidence in its post-trial filings. *Id.* ¶ 182. *See also* 2-4-09 a.m. at 72-73 ("I'm going to provisionally listen to a lot of evidence, some of which may be excluded in the final analysis … ."). Further, the Court admitted a significant number of paper exhibits without any witness testimony (*e.g.*, USDA records). Thus, the record was replete with evidence that was not the subject of witness testimony, but which FEI had to respond to. As to Rider and API's standing to sue, Judge Sullivan ultimately adopted, with modification, FEI's proposed findings of fact and conclusions of law. JS, ¶ 143-44; *compare* ECF 535 *with* ECF 559. From March 19, 2009, when the trial ended, to December 30, 2009, when the Court's judgment issued, **3,224.50 hours** were recorded, at a value of **$1,649,388.87.** JS, Ex. 22. *See also* JS, Ex. 23 (fees exceeded $500,000 per month in April-May 2009). In addition to the core team, two non-partner attorneys also assisted with the post-trial filings. JS, ¶ 142.

2010 Proceedings. In 2010, plaintiffs noticed their appeal and FEI noticed a cross-appeal; FEI submitted its bill of costs; and the parties attempted to resolve this case and the related RICO action through mediation. The mediation was protracted and required substantial effort, but it ended with no resolution. JS, ¶¶ 148-50. From January 2010 to October 2010, **1,359.75 hours** were recorded, at a value of **$783,981.25.** JS, Ex. 22.

Second Appeal. After mediation, the Circuit reactivated the appeals. Plaintiffs were represented by six (6) lawyers, including renowned Supreme Court practitioner Carter Phillips. JS, ¶ 151. FEI's core team was augmented by two appellate lawyers. *Id.* ¶ 16. Following oral argument, the Circuit affirmed the trial court's judgment. Plaintiffs' petition for panel rehearing was denied. *Id.* ¶¶ 152-53. From November 2010 to January 11, 2012, **1,380.60 hours** were recorded, at a value of **$830,675.00.** JS, Ex. 22.

Attorneys' Fees Entitlement, ASPCA Settlement, and Taxing of Costs. Following the Circuit's remand, the parties briefed FEI's entitlement to attorneys' fees. The briefing was complex and totaled more than 1,000 pages. This is the first case awarding attorneys' fees to a prevailing defendant in an ESA citizen suit, and substantial legal research and factual development was necessary for the briefing. JS, ¶¶ 154-55. *See also* JS, Ex. 23 (fees exceeded $200,000 per month in February-March and June 2012). In late 2012, FEI negotiated a settlement of this case and the related RICO action with ASPCA for, among other things, a $9.3 million lump-sum cash payment to FEI. JS, ¶ 156. In February 2013, the Clerk taxed FEI's costs. While payment of the taxed costs should have been a routine matter, plaintiffs initially refused to pay, which resulted in additional work for FEI. *Id.* ¶ 157. A core team of four (4) lawyers handled this work. *Id.* ¶ 17. From January 12, 2012 to March 31, 2013, **2,477.20 hours** were recorded, at a value of **$1,285,875.00.** JS, Ex. 22.

ARGUMENT

The court has discretion to determine the "reasonable" amount of attorneys' fees to be awarded in this case. *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983). The "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 433. "A strong presumption exists that the product of these two variables – the 'lodestar figure' – represents a 'reasonable fee.'" *Miller v. Holzmann*, 575 F. Supp. 2d 2, 11 (D.D.C. 2008) (Lamberth, J.).[28]

I. COUNSEL'S RATES ARE REASONABLE

A. Counsel's Billing Rates Are Presumptively Reasonable

[28] *See also Blum v. Stenson,* 465 U.S. 886, 897 (1984) (the lodestar "normally provides a 'reasonable' attorney's fee'"); *McKesson Corp. v. Iran*, 2013 U.S. Dist. LEXIS 43266, at *9 (D.D.C. Mar. 27, 2013) (Leon, J.) (the lodestar is "*presumed* to represent a reasonable fee"); *Heller v. Dist. of Columbia*, 832 F. Supp. 2d 32, 37 (D.D.C. 2011) (Sullivan, J.) ("[t]here is a 'strong presumption' that the lodestar figure represents a reasonable attorney's fee").

The rates charged by FEI's counsel are "reasonable" and should be used to calculate the lodestar. "The Supreme Court has endorsed a market-based approach to calculating attorneys' fees." *McKesson*, 2013 U.S. Dist. LEXIS 43266, at *11. *See also Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) ("[W]e have consistently looked to the marketplace as our guide to what is 'reasonable.'"). The Circuit has held that "'an attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" *Miller*, 575 F. Supp. 2d at 11-12 (quoting *Kattan by Thomas v. Dist. of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993)).[29] Courts in this district have repeatedly held that where, as here, the case involves "two private litigants ... 'the best measure of [the rates] the market will allow are the rates actually charged.'" *McKesson*, 2013 U.S. Dist. LEXIS 43266, at *15 (quoting *Yazdani v. Access ATM*, 474 F. Supp. 2d 134, 138 (D.D.C. 2007) (Facciola, J.)).[30] The Circuit has expressly stated that fee litigation should not become a ratemaking proceeding when fixed market rates already exist:

> [W]hen fixed market rates already exist there is no good reason to tolerate the substantial costs of turning every attorneys fee case into a major ratemaking proceeding. *In almost every case, the firms' established billing rates will provide fair compensation.* The established rates represent the opportunity cost of what the firm turned away in order to take the litigant; they represent the lawyers' own assessment of the value of their time.

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[29] *See also* JS, Ex. 10, Braga Decl. ¶ 6 ("[The] direct connection between a traditional law firm's setting of its standard hourly rates and the prevailing market rate in its legal community is why the courts have repeatedly recognized that private counsel's standard billing rates are highly relevant to – and ordinarily the best evidence of – the prevailing market value rate for the attorney's services.").

[30] *See also Save our Cumberland Mountains, Inc. v. Hodel,* 857 F.2d 1516, 1520-24 (D.C. Cir. 1988); *Nat'l Assoc. of Concerned Veterans v. Sec'y of Defense*, 675 F.2d 1391, 1326 (D.C. Cir. 1982); *Wilcox v. Sisson,* 2006 U.S. Dist. LEXIS 22404, at *8 (D.D.C. May 25, 2006) (Collyer, J.); *Adolph Coors Co. v. Truck Ins. Exchange*, 383 F. Supp. 2d 93, 98 (D.D.C. 2005) (Facciola, J.); *Cobell v. Norton,* 231 F. Supp. 2d 295, 302-03 (D.D.C. 2002) (Lamberth, J.) (quoting *Griffin v. Wash. Convention Ctr.*, 172 F. Supp. 2d 193, 197 (D.D.C. 2001) (Facciola, J.)); *Martini v. Fed. Nat'l Mortgage Ass'n,* 977 F. Supp. 482, 485 (D.D.C. 1997) (Kessler, J.); *Covington v. Dist. of Columbia*, 839 F. Supp. 894, 896 (D.D.C. 1993) (Lamberth, J.), *aff'd*, 57 F.3d 1101 (D.C. Cir. 1995); *Allen v. Utley*, 129 F.R.D. 1, 7-8 (D.D.C. 1990) (Richey, J.); *Lebron v. WMATA*, 665 F. Supp. 923, 925 (D.D.C. 1987) (Harris, J.).

Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 24 (D.C. Cir. 1984) (emphasis in original).

An attorney's billing rate is considered "reasonable," where a fee applicant demonstrates: (1) the attorneys' billing practices; (2) the attorneys' skill, experience, and reputation; and (3) the prevailing market rates in the relevant community. *Covington v. Dist. of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995). *See also Blum*, 465 U.S. at 896 n. 11 ("[T]he burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."). Where evidence of the *Covington* elements is established, counsel's billing rates are afforded a presumption of reasonableness.[31]

1. Counsel's Billing Practices Are Demonstrated by the Declarations

Counsel's billing practices are established by their declarations. FEI's counsel have stated, under oath, how the rates billed and collected for work on the ESA Case were determined, and how time was recorded. JS, ¶¶ 198-207; EG ¶¶ 44-49. *Cf. McKesson*, 2013 U.S. Dist. LEXIS 43266, at *13. Fulbright billed FEI at discounted rates. Fulbright generally charged FEI at rates equal to a one (1) year lag in the firm's standard hourly rates (*i.e.*, the "matter" rate). In other words, work performed in 2013 in the ESA Case was valued at last year's (2012) standard hourly rates. JS, ¶¶ 202. This "matter" rate for the ESA Case resulted in substantial discounts to FEI off of the Fulbright standard rates. *Id.* ¶ 203. Further, Fulbright often gave FEI additional discounts off of the "matter" rate when the firm billed the file (*i.e.*, the "billed" rate). *Id.* ¶¶ 201 & 203. *See also id.*, ¶ 204 (in ESA Case, average overall discount off of standard rate is **11.16 percent** and average overall discount off of matter rates is **3.93 percent**) & *id.* ¶¶ 205-

[31] *See McKesson*, 2013 U.S. Dist. LEXIS 43266, at *17 (finding that Iran failed to rebut the presumption that the standard billing rates Morgan Lewis and Winston & Strawn charged McKesson were reasonable); *Miller*, 575 F. Supp. 2d at 13 (affording Wilmer Hale's established billing rates a presumption of reasonableness); *Woodland v. Viacom*, 255 F.R.D. 278, 281 (D.D.C. 2008) (Facciola, J.) (finding that the plaintiffs failed to rebut the presumption that the rates Morgan Lewis actually charged to its clients were reasonable).

07 (example of standard, matter and billed rates); JS, Ex. 6 (spreadsheet showing standard hourly rates; matter rates; and billed rate for Fulbright time keepers); JS, Ex. 7 (for each Fulbright invoice, showing the number of hours billed and value of those hours at standard rates; matter rates; and billed rates).[32]

2. Counsel's Skill, Experience and Reputation Are Demonstrated by the Declarations

The skill, experience and reputation of FEI's counsel merits their hourly rates. From the time Fulbright entered the case to the present, FEI's litigation team has been led by John Simpson, a seasoned litigator with more than thirty-five (35) years of experience. Mr. Simpson was responsible for developing the overall litigation strategy, staffing and supervising the work of all of the Fulbright lawyers on the case, communicating all strategic and tactical decisions to the client and writing or reviewing every filing made by Fulbright in the ESA Case. JS, ¶¶ 30-32. The other core Fulbright team members and the Covington, Troutman and Hughes Hubbard attorneys likewise had strong academic credentials and work experience. *See generally id.* ¶¶ 33-111 & JS, Ex. 28; EG, ¶¶ 11-44 & EG, Ex. 3; CA, ¶ 25; ML ¶ 3. There is no question that the lawyers who successfully defended FEI in the ESA Case have exceptional credentials. BC, at 7-8; JM, ¶¶ 41 & 49.

3. Counsel's Rates Are Aligned with the Prevailing Market Rates of Other Large Washington, DC Firms Conducting Complex, Federal Litigation

The following evidence establishes that counsel's rates are aligned with the rates charged by other large Washington firms litigating complex, federal cases:[33] the Peer Monitor survey;

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[32] Covington applied various discounts against attorney and non-attorney professional time. Beginning in November 2004, Covington and FEI agreed that FEI should receive a five (5) percent discount on all hourly rates. EG, ¶¶ 51 & 57.

[33] The relevant market for "complicated and demanding" litigation, ECF 239 at 1, such as the ESA Case is other complex, federal litigation. *See Covington*, 57 F.3d at 1111-112 (affirming district court's determination that relevant market for § 1983 litigation is complex federal litigation; rejecting argument that relevant market should be

recent D.D.C. fee awards to other large Washington firms; and, the expert declarations of two litigation partners in the Washington offices of other large firms, John Millian, Gibson, Dunn & Crutcher LLP and Barry Cohen, Crowell & Moring LLP. [34]

a. Peer Monitor Survey

Fulbright sets standard hourly rates for all time keepers based on, *inter alia*, job classification; class years; geographic location; practice area; and economic and competitive factors in the legal marketplace. When setting standard hourly rates, the firm considers: (1) recovering the costs of running the business and thereby generating a profit; and (2) remaining competitive in the marketplace for legal services. The latter factor is assessed by market information including rate surveys. JS, ¶ 199. From 2000-2013, one data source available to Fulbright in setting rates for its Washington office was a survey prepared by Peer Monitor.[35] Peer Monitor collects standard hourly rate, agreed rate, billed rate and collected rate information from participating firms.[36] JS, Ex. 8, Branden Decl., ¶ 4. Peer Monitor reports these rates by

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defined narrowly to include only plaintiffs' lawyers in civil rights, employment or discrimination actions); *Miller*, 575 F. Supp. 2d at 14-15 (relevant market for False Claims Act case was complex, federal litigation); *Ricks v. Barnes*, 2007 U.S. Dist. LEXIS 22410, at *12-16 (D.D.C. Mar. 28, 2007) (Robinson, J.) (rejecting argument that the plaintiff should have recovered rates customary in § 1983 litigation, not complex federal litigation). *Cf.* JS, Ex 10, Braga Supp. Decl. ¶ 3 ("[A]s in the typical piece of complex federal civil litigation, both the Federal Rules of Civil Procedure and the Federal Rules of Evidence controlled the proceedings. And both discovery and trial went ahead under the well-established means of proceeding forward in this courthouse in complex civil cases. In reality, there is no principled, or meaningful, distinction between the litigation of this False Claims Act case and complex federal civil litigation generally. Perhaps the best proof of this is in the pudding, Relator's counsel – who are admittedly not exclusive False Claims Act specialists – won the case, with their general complex federal litigation skills.").

[34] *See, e.g., Miller*, 575 F. Supp. 2d at 12-14 (two expert affidavits and survey data from the *National Law Journal*); *McKesson*, 2013 U.S. Dist. LEXIS 43266, at *14-17 (billing rate survey data prepared by the *National Law Journal*, *Of Counsel*, and PricewaterhouseCoopers LLP); *Wilcox*, 2006 U.S. Dist. LEXIS 33404, at *12-17 (billing rate survey data prepared by the *National Law Journal* and Helder Associates).

[35] Peer Monitor is a dynamic, live benchmarking program that collects various financial information from participating law firms and provides access to that information to participating law firms. Ninety-seven (97) of the top 200 Am Law firms with offices in the United States participate in Peer Monitor. From December 1, 2005 through March 31, 2013, Fulbright was a Peer Monitor participating firm. JS, Ex. 8, Branden Decl., ¶ 3.

[36] The "standard" hourly rate is the firm's published rate. The "agreed" rate is the rate a client agrees to pay for a particular matter, which reflects some discount off of the "standard" hourly rate. The "billed" rate is the rate actually billed by the firm to the client. Typically, this reflects an additional discount off of the "agreed" rate for a

three measures: 25th percentile; median; and 75th percentile. *Id.* ¶ 7. A comparison of the rates Fulbright charged to FEI in the ESA Case and the Peer Monitor survey data (JS, Ex. 8)[37] shows that Fulbright's rates were reasonable. For example, a review of the collected rates for Fulbright's core time keepers shows that, with only a few exceptions, those time keeper's billed rates fell in between the median and 75th percentile of the surveyed firms. *See id.* Indeed, for certain core time keepers, Fulbright's collected rate was even lower than the median. *See, e.g., id.* at 11-18 (Joiner's collected rate, 2005-2010 & Petteway's collected rate, 2006-10 & 2011-13).[38]

b. Other D.D.C. Fee Awards

Courts in this district have held that the rates charged by large, Washington firms are reasonable. *See Wilcox*, 2006 U.S. Dist. LEXIS 33404, at *8 ('The market generally accepts higher rates from attorneys at firms with more than 100 lawyers than from those at smaller firms – presumably because of their greater resources and investments … .").[39] In high stakes, bet the

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particular matter. The "collected" rate is the rate actually paid by the client and collected by the firm. JS, ¶ 211.

[37] In 2008, Fulbright requested Peer Monitor rate data with respect to the litigation practice in its Washington office. Fulbright included eight (8) firms in the survey which it considered to be its peers and/or relevant comparators.

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JS, Ex. 8, Branden Decl., ¶ 8. For purposes of FEI's instant fee petition, the firm requested a copy of a Peer Monitor report, showing the standard rate, agreed, rate, billed rate and collected rate information, for the firms in the 2008 Washington Peer Group, for the years 2005 through 2013, *id.* ¶ 9, a copy of which is attached hereto as JS, Ex. 8.

[38] Covington sets hourly rates for partners based on a variety of factors, including seniority, area of specialization, record of success, reputation and client demand. The firm reviews its standard hourly rates annually based on, *inter alia*, the firm's assessment of the market value of the legal services provided. Market value is assessed through the use of public information about legal fees charged by other large firms, market survey information, and feedback from clients. EG, ¶¶ 58-59. Covington's rates in the ESA Case are reasonable and well in line with the rates charged by leading Washington firms, as is demonstrated by data from the *National Law Journal* and Peer Monitor. *Id.* ¶¶ 60-64; EG, Ex. 4; EG, Ex. 16.

[39] *See, e.g., Berke v. Fed. Bureau of Prisons,* 2013 U.S. Dist. LEXIS 60526, at *16-17 (D.D.C. April 29, 2013) (Huvelle, J.) (Ballard Spahr's standard billing rates); *McKesson*, 2013 U.S. Dist. LEXIS 43266, at *16-18 (Morgan Lewis and Winston & Strawn's standard billing rates); *Pleitez v. Carney*, 594 F. Supp. 2d 47, 53 (D.D.C. 2009) (Bates, J.) (Vinson & Elkins's discounted rates); *Miller v. Bill Harbert Int'l Constr., Inc.*, 601 F. Supp. 45, 49-50

company cases such as this one, courts have awarded rates reflecting "'mega-law firm'-quality representation." *Miller*, 575 F. Supp. 2d at 16. *See also In re North (Schultz Fee Application)*, 8 F.3d 847, 852 (D.C. Cir., Spec. Div., 1993) ("[A] cabinet official facing the possibility of serious charges and the destruction of a longstanding reputation for devoted public service will reasonably retain 'attorneys of the highest competence in their practice areas with commensurate hourly rates.'"). Indeed, courts in this district have repeatedly found that the billing rates of large Washington firms such as Fulbright and Covington were reasonable even where they were higher than *Laffey* matrix rates.[40] While *Laffey* rates may be considered as evidence that a firm's billing rates align with prevailing rates in the community, *Covington*, 57 F.3d at 1109, "simple reference to the *Laffey* matrix cannot defeat the presumption of reasonableness accorded [a fee petitioner's] requested rates." *Miller*, 575 F. Supp. 2d at 15.[41]

A comparison of Fulbright's rates to the rates proffered and awarded in cases litigated during the same time period as the ESA Case – *Miller* (Wilmer Hale); *McKesson* (Morgan Lewis); and *Woodland* (Morgan Lewis) – demonstrates that Fulbright's ESA Case matter rates

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(D.D.C. 2009) (Lamberth, J.) (Wilmer Hale's standard rates); *Miller*, 575 F. Supp. 2d at 16 (Wilmer Hale's established billing scale); *Woodland,* 255 F.R.D. at 281 (Morgan Lewis's discounted rates); *Ricks*, 2007 U.S. Dist. LEXIS 22410, at *11-16 (Goodwin Procter's customary billing rates); *Wilcox,* 2006 U.S. Dist. LEXIS 33404, at *16-17 (Williams & Connolly's standard rates); *Adolph Coors Co.*, 383 F. Supp. 2d at 98 (Dickstein Shapiro's regular billing rates).

[40] *See, e.g., McKesson*, 2013 U.S. Dist. LEXIS 43266, at *14-18 (rejecting argument that *Laffey* matrix rates should apply and finding standard billing rates of Morgan Lewis and Winston & Strawn reasonable); *Miller*, 575 F. Supp. 2d at 15-16 (finding rates charged by Wilmer Hale reasonable despite 38 percent variance with *Laffey* matrix); *Woodland*, 255 F.R.D. at 281 (finding Morgan Lewis's rates reasonable even though the *Laffey* matrix rates were "unquestionably lower"); *Adolph Coors Co.*, 383 F. Supp. 2d at 98 ("The defendant's assertion that the court has some power to reduce what Dickstein, Shapiro actually charges its client to the *Laffey* rate ... is unsupported by law, logic, or economics.").

[41] *See also id.* at 16 ("Neither [Congress] nor the courts have ever 'propose[d] ... that all attorneys be remunerated at the same rate, regardless of their competence, experience, and marketability.'") (quoting *Save Our Cumberland Mountains, Inc.*, 857 F.2d at 1522 n.4); *Adolph Coors Co.*, 383 F. Supp. 2d at 98 ("[I]t does not follow that the rate Dickstein, Shapiro charges its clients should not be allowed as the market rate because the United States Attorney has advised the bar that it will not oppose fees sought that are equal to or lesser than the *Laffey* rate.").

are reasonable. *See* JS, ¶¶ 215-21; JS, Exs. 11-14. For example, the 2007 and 2008 Wilmer Hale hourly rates proffered in *Miller* were, across the board, higher than the ESA Case matter rates for comparably experienced attorneys, during the same time period. JS, Ex. 11. Judge Lamberth held that Wilmer Hale's established billing scale was reasonable. 575 F. Supp. 2d at 17. The same analysis holds true for *McKesson* and *Woodland.* In both cases, the courts held that the hourly rates of Morgan Lewis were reasonable. *McKesson,* 2013 U.S. Dist. LEXIS 43266, at *16-18; *Woodland*, 255 F.R.D. at 281. Morgan Lewis's rates are higher than those charged by comparable Fulbright attorneys, during the same time period. JS, Exs. 12 & 13.[42]

c. Expert Opinions of Millian and Cohen

Experts Millian and Cohen have opined that FEI's counsel's rates were reasonable. JM, ¶¶ 72-79; BC, at 8-9 & 23-25. Counsel's rates were ***actually paid*** by Feld, which is, as Millian noted, the "best evidence of 'market' billing rates." JM ¶ 76; BC, at 8. Further, Millian and Cohen, based on a review of the Peer Monitor and *National Law Journal* data, also noted that counsel's rates were aligned with (and, in the case of Fulbright, "often at the low end of") the rates of other comparable Washington firms. JM, ¶¶ 73-74; BC, at 9 & 24-25. Indeed, Millian stated that "the rates charged and collected by Covington and by Fulbright ... do not exceed the rates charged and collected by Gibson Dunn during the same time periods." JM, ¶ 75. *Compare id.* ¶ 3 (Millian, class of 1983, 2013 rate, $985/hr) *and* BC, at 1 & 3 (Cohen, class of 1970, 2013 rate, $845/hr) *with* JS, Ex. 6 (Simpson, class of 1978, 2013 ESA billed rate, $825/hr).

[42] The reasonableness of Fulbright's ESA Case billed rates is underscored by the fact that they are comparable to the rates sought by Glitzenstein and Crystal in a recent ESA case in the Northern District of California. *See* Pet., Ex. 5 (*Wild Equity*, MGC Fee Pet. at 23 & *Wild Equity*, Crystal Decl. ¶ 15) (seeking $750/hr for Glitzenstein (class of 1981) and $700/hr for Crystal (class of 1993)). *Cf.* JS, Ex. 6 (2013 ESA billed rate for Simpson (class of 1978) is $825/hr and Pardo (class of 1997) is $645/hr).

B. Current Rates Should be Awarded for Current Timekeepers

Current rates should be used to calculate the lodestar. "[A]n adjustment for delay in payment is ... an appropriate factor in the determination of what constitutes a reasonable attorney's fee." *Jenkins*, 491 U.S. at 284. That is because "[c]ompensation received years after services are rendered is less valuable than the same dollar amount received promptly." *West v. Potter*, 717 F.3d 1030, 1031 (D.C. Cir. 2013). *See also Miller*, 575 F. Supp. 2d at 20 ("one dollar received today is more valuable than it would be if received five years from now for two reasons—first, because it will buy more now than it will after five years of price inflation, and second, because of the interest that can be earned from it in the interim"). Courts may compensate for delay in payment by basing the lodestar amount on current, as opposed to historical rates (*i.e.*, the rate applicable at the time the services were rendered).[43] *Jenkins,* 491 U.S. at 282-83. The Circuit has endorsed the award of current rates to calculate the lodestar to "counterbalance" the delay in payment and "simply the task of the district court." *Murray,* 741 F.2d at 1433. *See also Miller*, 575 F. Supp. 2d at 19 ("accounting for delay by applying current rates across the board boasts distinct, practical advantages"). The court has discretion to award current rates where, as here, "the legal services were provided over a multiple-year period and

[43] The calculation of the lodestar using current rates is separate and apart from any "enhancement" to the lodestar figure itself for delay. *See, e.g., Murray v. Weinberger*, 741 F.2d 1423, 1433 (D.C. Cir. 1984) ("[I]f the district court determined that the reasonable hourly rate incorporated into the lodestar did not reflect an increment for the expected delay in payment, it may properly consider whether recalculation of the lodestar utilizing current market rates instead of historic rates, is appropriate. If the delay factor is reflected in the lodestar figure itself, an additional enhancement for delay would not be appropriate in this case."); *Copeland v. Marshall,* 641 F.2d 880, 893 n.23 (D.C. Cir. 1980) ("[I]f the 'lodestar' itself is based on present hourly rates, rather than the lesser rates applicable to the time period in which the services were rendered, the harm resulting from delay in payment may be largely reduced or eliminated."); *Smith v. Rohrer*, 954 F. Supp. 359, 365 n. 3 (D.D.C. 1997) (Green, J.) ("Since the Court will base the award on current rates, no enhancement for delay will be added to the lodestar."). For example, the courts in *Heller* and *Miller* used current rates to set the reasonable rate, which was then used to calculate the lodestar. *Heller*, 832 F. Supp. 2d at 60; *Miller*, 575 F. Supp. 2d at 18-21. Indeed, in *Heller*, Judge Sullivan specifically denied the plaintiff's request for an enhancement to the lodestar based on unanticipated delay ***because the lodestar already had been calculated using current rates***. *See* 832 F. Supp. 2d at 59-60. In *McKesson*, Judge Leon referred to the use of current rates as an "enhancement," but awarded current rates when setting the reasonable fee to calculate the lodestar; current rates were not used as an enhancement to the lodestar figure itself. 2013 U.S. Dist. LEXIS 43266, at *18-19.

when the use of the current rates does not result in a windfall for the attorneys." *Murray*, 741 F.2d at 1433.

This is precisely the type of case where current rates should be awarded: FEI has been paying legal fees for ***more than thirteen years***, defending itself in a "frivolous and vexatious" case that never should have been filed, and that was prolonged by plaintiffs' deliberate conduct. ECF 620 at 27 & 33-34. *Cf. West*, 717 F.3d at 1034 (appropriate factors to consider when determining whether to award an adjustment for delay include, but are not limited to (1) "unusually long" delay and (2) delay attributable to "dilatory or stalling conduct"'). Several recent decisions by courts in this district have used current rates to calculate the lodestar in complicated, multi-year cases such as this one. *See, e.g.*, *McKesson*, 2013 U.S. Dist. LEXIS 432266, at *5 & *18-19 (awarding 2012 standard billing rates; litigation spanned from 2000-2012); *Miller*, 575 F. Supp. 2d at 18-21 (awarding 2007 billing rates; litigation spanned from 1995-2007).[44] This is not a case where the services were rendered only one or two years ago.[45]

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[44] *See also Harvey v. Mohammed,* 2013 U.S. Dist. LEXIS 89615, at *9-11 (D.D.C June 26, 2013) (Lamberth, J.) (awarding current *Laffey* rates for work performed from the "early 2000s" forward); *Thomas v. Dist. of Columbia,* 2012 U.S. Dist. LEXIS 177987, at *39-41 (D.D.C. Dec. 17, 2012) (Howell, J.) (awarding 2012-13 *Laffey* rates for work performed in 2009-12); *Blackman v. Dist. of Columbia*, 677 F. Supp. 2d 169, 170 & 175 n.9 (D.D.C. 2010) (Friedman, J.), *aff'd* 633 F.3d 1088 (D.C. Cir. 2011) (awarding 2008-09 *Laffey* rates for work performed in 2006-08); *Petties v. Dist. of Columbia*, 2009 U.S. Dist. LEXIS 127505, at *5 & *13-15 (D.D.C. Oct. 20, 2009) (Friedman, J.) (awarding 2008 *Laffey* rates for work performed in 2005-07); *Muldrow v. Re-Direct, Inc.*, 397 F. Supp. 2d 1, 4 n.4 (D.D.C. 2005) (Huvelle, J.) (awarding 2005-06 *Laffey* rates "even though much of the litigation work took place several years ago"); *Does v. Dist. of Columbia*, 448 F. Supp. 2d 137, 141-42 (D.D.C. 2006) (Urbina, J.) (awarding 2005 *Laffey* rates for work performed beginning in 2001); *Pullins-Graham v. Dist. of Columbia*, 2003 U.S. Dist. LEXIS 25796, at *9 (D.D.C. July 31, 2003) (Kay, J.), *adopted* 2003 U.S. Dist. LEXIS 25793 (D.D.C. Sept. 9, 2003) (Kollar-Kotelly, J.) (awarding current rates where fees were awarded in 2001 and case was initiated in 1998); *McDowell v. Dist. of Columbia*, 2001 U.S. Dist. LEXIS 8114, at *11-12 (D.D.C. 2001) (Lamberth, J.) (awarding current rates where plaintiffs waited over two and a half years to receive their attorneys' fees); *Smith*, 954 F. Supp. at 364-65 (awarding defendants current rates where the bulk of the legal expenses were incurred from 1989-91, and the fee petition was filed 5-7 years thereafter).

[45] *Cf. Miller v. Bill Harbert Int'l Constr. Inc.*, 601 F. Supp. 2d 45, 49-50 (D.D.C. 2009) (Lamberth, J.) (denying request to apply 2008 rates to work performed in 2007 and 2008, because, *inter alia*, there was no substantial delay in payment); *Bolden v. J&R Inc.,* 135 F. Supp. 2d 177, 179 (D.D.C. 2001) (Kessler, J.) (denying request to apply 2001 rates to work performed in 1999 and 2000, because the case was not "protracted" and did not "span[] multiple years"); *Salazar v. Dist. of Columbia*, 123 F. Supp. 2d 8, 15 (D.D.C. 2000) (Kessler, J.) (denying request to apply 1999 rates to work performed in 1998, because the delay in payment was not "several years").

Courts in this district have awarded current rates where, as here, the fee petitioner regularly paid its counsel's bills. In *McKesson*, Judge Leon awarded current rates where McKesson "actually incurred and paid" attorneys' fees from 2000-2012. 2013 U.S. Dist. LEXIS 43266, at *6. Even though McKesson paid its counsel approximately $8 million in fees between 2000-2012, *id.* at *6 n. 2, Judge Leon awarded it approximately $10 million. *Id.* at *25-26. Judge Leon employed the same rationale used by courts awarding current rates in contingency cases: a fee award to a party today, at historic rates, does not compensate that party for the lost time value of the money paid for services years ago, resulting in harm. *See id.* at *19.[46]

FEI has taken a conservative approach to its request for current rates. With regard to Fulbright, FEI only is requesting current rates for time keepers who were partners or associates at the firm as of 2012, and therefore have a 2012 standard billing rate. As previously explained, the matter rate for the ESA Case is the previous year's standard hourly rate; for example, for 2013, a time keeper's matter rate for the ESA Case is that time keeper's standard hourly rate for 2012. JS, ¶ 202. Thus, FEI seeks current rates (which, for the ESA Case, would be the 2012 standard billing rates) for all Fulbright time keepers who were partners or associates at the firm of as 2012, and have set 2012 standard rates. *See* JS, Ex. 1. To narrow the areas of disagreement between the parties, FEI is not seeking current rates for time keepers who left the firm before 2012, and thus do not have a 2012 standard billing rate. JS, ¶¶ 250-55.[47] FEI also is seeking

[46] *See also* Pet., Ex. 10, *McKesson*, ECF 548, at 23 n. 2 ("[B]ecause Plaintiffs seek only the nominal amount of fees and expenses ***which they have actually paid over the years***, their request is somewhat less in real terms than the amount paid both because inflation has devalued the dollars they expended in the past and because of the loss of the time value of their money. ***Thus, payment of $1000 today will not fully recompense [McKesson] for a $1000 bill they paid many years ago***.") (emphases added).

[47] FEI's current rate request is significantly more conservative than the approach followed in *McKesson* and *Miller*, where the fee petitioners sought current rates for ***all*** time keepers for whom fees were claimed. *Cf. McKesson; supra; Miller, supra.* ***FEI only is seeking current rates for fifteen (15) out of the twenty-nine (29) Fulbright time keepers, and six (6) of the twenty-one (21) Covington timekeepers, for whom it is seeking fees.*** *See* JS, ¶¶ 250-55; JS, Ex. 1; EG, ¶¶ 80-84; EG, Ex. 5. *Cf. Miller*, 575 F. Supp. at 17 n.26 (approving of relator's proposal to compensate associates who left of the firm at the established billing rates of current Wilmer Hale associates who

current rates (2012 standard billing rates) for Fulbright time keepers who were partners or associates at the firm of as 2012 for the § 1927 sanction against Meyer and MGC. *Id.* ¶¶ 260-61; JS, Ex. 34. Similarly, with regard to Covington, FEI is seeking current rates for only for current Covington timekeepers. EG, ¶¶ 80-84; EG, Ex. 5.

II. THE NUMBER OF HOURS EXPENDED SUCCESSFULLY DEFENDING THIS "GROUNDLESS," "FRIVOLOUS AND VEXATIOUS" LAWSUIT ARE REASONABLE

FEI seeks fees for the reasonable number of hours necessary to successfully defend FEI in this groundless, frivolous and vexatious case. A party seeking fees "must submit evidence supporting the hours worked," *Heller*, 832 F. Supp. 2d at 49, *i.e.*, the "contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney." *Concerned Veterans*, 675 F.2d at 1327. A request for fees "should not result in a second major litigation." *Hensley*, 461 U.S. at 437. *See also Martini v. Fed. Nat'l Mortgage Ass'n*, 977 F. Supp. 482, 487 (D.D.C. 1997) (Kessler, J.) ("contests over fees should not be permitted to evolve into exhaustive trial-type proceedings") (quotation omitted). While a fee application should be "sufficiently detailed" to allow the court to make an "independent determination whether or not the hours claimed are justified," it "need not present the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney." *Concerned Veterans*, 675 F.2d at 1327 (quotation omitted).[48] Courts are not "green-eyeshade accountants" tasked with "auditing perfection." *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011). Nor should courts entertain "nit-picking" challenges to attorney time

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graduated law school in the same years). Such a conservative request eliminates any argument that FEI will receive a "windfall."

[48] *See also Hensley*, 461 U.S. at 437 n.12 (counsel are "not required to record in great detail how each minute of time was expended"); *Heller*, 832 F. Supp. 2d at 51 ("extremely detailed billing entries are not required in this Circuit"); *Novak*, 496 F. Supp. 2d at 158-59 ("it is the law of this Circuit that the requirement of submitting detailed records should not be applied in a Draconian manner").

records. *Concerned Veterans*, 675 F.2d at 1338 (Tamm, J., concurring). ***"It is neither practical nor desirable to expect the trial court judge to have reviewed each paper in this massive case file*** to decide, for example, whether a particular motion could have been done in 9.6 hours instead of 14.3 hours." *Copeland*, 641 F.2d at 903 (emphasis added). *See also McKenzie v. Kennickell,* 645 F. Supp. 437, 442 (D.D.C. 1986) (declining defendant's invitation to "undertake a line by line examination of the fee request and 'pleading by pleading' examination of the copious files in this case"). Rather, "[t]he essential goal in shifting fees (to either party) is to do rough justice . . . ." *Fox*, 131 S. Ct. at 2216.

Counsel's contemporaneous time records (JS, Exs. 31 & 32; EG, Ex. 1; CA, Ex. 2; ML, Ex. 2), demonstrate that the reasonable number of hours to be used to calculate the lodestar is: **41,126.66 hours** of work performed by Fulbright, JS, ¶¶ 255 & JS, Ex. 1; **5,913.83 hours** of work performed by Covington, EG, ¶ 84 & EG, Ex. 5; **1329.80 hours** of work performed by Troutman, CA, ¶ 32 & CA, Ex. 3; and 17.50 hours of work performed by Hughes Hubbard, ML, ¶ 5 & ML, Ex. 2. The reasonable number of hours counsel expended filing the motion to compel material concerning Rider's financial relationship with animal rights advocates (ECF 126) is **363.25 hours**. JS, ¶¶ 256-61; JS, Exs. 33-34. While FEI's counsel expended an "extraordinary amount of time," this was, as Judge Sullivan held, "an extraordinary" case. ECF 620 at 2 & 3; JS, Ex. 10, Braga Decl. ¶ 6. *See also* JM, ¶ 64 (number of hours is "what I would expect to see in a complex, 'bet the company'-type case that was exceedingly hard-fought over a substantial number of years").

A. The Number of Hours Is Reasonable

Counsel Successfully Defended FEI in This Vexatious Case. The number of hours expended by counsel in successfully defending FEI in this frivolous and vexatious case is reasonable. JM, ¶¶ 45, 66, 70 & 71; BC, at 20, 22-23 & 27. The ESA case was anything but the

"typical" § 1988 fee shifting case. JM, ¶ 62 ("Plaintiffs' position was pursued with extraordinary zeal and commitment, if not candor, by their counsel. ... ***[T]he demands of the case were enormous*** ... ."") (emphasis added); BC, at 4 ("The litigation record reveals that the plaintiffs were aggressive and even zealous in pursuit of their litigation goals .... The record also reflects s***everal instances of overly aggressive advocacy and/or unethical conduct*** ... .") (emphasis added). The sheer volume of work necessary to defend this case – as evidenced by the number of substantive filings and orders, docket entries, depositions and hearings, as well as the length of the trial and post-trial proceedings – is unprecedented. That volume of worked was dramatically increased due to (1) Rider's changing standing theories; (2) plaintiffs' and counsel's concealment of the payments, and the work entailed in exposing the true nature and extent of the Rider payments; and (3) plaintiffs' inexplicable abandonment of parties and requests for relief at trial, all of which complicated litigation of the case. ECF 620 at 27 & 33-34. BC, at 5 ("most of the defense activity was driven by and in response to aggressive litigation strategies and tactics pursued by the plaintiffs"); JM, ¶ 83 (FEI's "victory" "resulted only because of creative and tenacious legal work that including uncovering, obtaining and deploying the body of evidence that led to Mr. Rider being 'pulverized' on cross-examination"). FEI filed several successful motions that had a major bearing on the ultimate outcome of the case, JS, ¶ 120, and successfully defeated a significant number of motions filed by plaintiffs, including a Rule 11 motion. *See id.* ¶¶ 124 & 177. While FEI was not successful on every single motion or position it took throughout the litigation, it ultimately "won the war." FEI's successful effort should be treated as an "inclusive whole, rather than as atomized line-items."[49] Indeed, when petitioning for fees in

[49] *See Comm'r, INS v. Jean*, 496 U.S. 154, 161-62 (1990) ("While the parties' postures on individual matters may be more or less justified, ... fee-shifting statutes – favor[] treating a case as an inclusive whole, rather than as atomized line-items.") (quoted in *Conservation Force v. Salazar*, 2013 U.S. Dist. LEXIS 1819, at *44 (D.D.C. Jan. 7, 2013) (Bates, J.)); *Air Transp. Ass'n of Can. v. FAA*, 156 F.3d 1329, 1335 (D.C. Cir. 1998) ("'Rare, indeed, is the

another ESA case, former counsel for plaintiffs specifically noted that a ***"'fee award should not be reduced simply because the [petitioner] failed to prevail on every contention in the lawsuit.'"*** Pet., Ex. 5 (MGC Fee Pet. at 24) (quoting *Hensley*, 461 U.S. at 435) (emphasis added). *See also* JM, ¶ 19.

Billing. FEI's counsel maintained detailed, contemporaneous time records. JS, ¶ 183; JS, Exs. 31 & 32; EG, ¶ 45; EG, Ex. 1; CA, Ex. 2; ML, Ex. 2. With regard to Fulbright, from December 1, 2005 through April 30, 2010, time keepers recorded entries in fifteen (15) minute increments and aggregated the time spent working on all activities for the ESA Case on a given day (*i.e.*, block billing).[50] Both practices followed the firm's time keeping policies. *Id.* ¶ 183. From May 2010 through the present, block billing was discontinued, and each timekeeper has recorded each task performed on the ESA Case on a given day separately, with a separately stated amount of time for each task. Beginning in March 2011, the increment of time recorded changed from fifteen (15) minutes (0.25 hours) to six (6) minutes (0.10 hours). JS, ¶¶ 184-85.

Counsel's contemporaneous time entries are sufficiently detailed to allow the court to assess the reasonableness of the number of hours claimed.[51] *See Smith v. Dist. of Columbia*, 466

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litigant who doesn't lose some skirmishes on the way to winning the war,'" so a litigant "who is unsuccessful at a stage of litigation that was a necessary step to her ultimate victory is entitled to attorney's fees even for the unsuccessful stage."); *Heller*, 832 F. Supp. 2d at 55 (declining to deduct time for four unsuccessful procedural motions because "plaintiffs' counsel reasonably expended time on these motions during the course of litigation on which plaintiffs was ultimately successful"); *Miller*, 575 F. Supp. 2d at 31 n. 53 ("Parties often proceed under more than one legal theory, or seek to acquire supporting evidence from more than one source. ... Generally, some efforts succeed, while others fail, but *all* are clearly 'expended in pursuit of a successful resolution of the case.'").

[50] Block billing is the standard practice for recording time for the vast majority of cases handled by large Washington firms. JS, ¶ 184; EG, ¶ 67; JM, ¶ 40. Indeed, counsel for Meyer and MGC has specifically opined that block billing is "standard fare in today's world." JS, Ex. 10, Braga Supp. Decl. ¶ 2; *see also id.* ("Given the way litigators practice, some less than fulsomely detailed 'block' time entries are inevitable in a case of this magnitude; otherwise, they would be forced to spend too much of their time documenting what they were doing.").

[51] Courts in this district have refused to reduce fee awards where, as here, block bills are adequately detailed and allow the court to assess whether the time spent on the tasks was reasonable. *See Bridges Public Charter Sch. v. Barrie*, 796 F. Supp. 2d 39, 51 (D.D.C. 2011) (Berman Jackson, J.) (declining to make reduction for block billing; "the Court is satisfied with the level of detail provided by the entries and finds that plaintiff's attorneys expended a reasonable amount of time in this matter"); *Laborers' Int'l Union of N. Am. v. Brand Energy Servs. LLC*, 746 F.

F. Supp. 2d 151, 158 (D.D.C. 2006) (Kessler, J.) ("[I[t is essential for the trial court to be practical and realistic about how lawyers actually operated in their day-to-day practice."); JS, Ex. 10, Braga Supp. Decl. ¶ 2 ("[A] reasonable balance must be applied to any review of how detailed counsel's bills must be[.]"). *See also* BC at 5-6; JM ¶¶ 39-40 & 48. The records identify the particular task(s) handled by each attorney on a particular day.[52] Indeed, even during the period when Covington and Fulbright used block billing, a significant number of the time entries are for one task only. For example, when counsel attended the trial or a deposition for an entire day, or when an associate was researching and writing a brief for an entire day, only one task was recorded per entry.[53] However, to the extent any entries are vague, that problem may be remedied by considering the entries "in context, with clarification coming from surrounding billing entries as well as the docket." *Dorsey v. Jacobson Holman, PLLC*, 851 F. Supp. 2d 13, 18 (D.D.C. 2012) (Collyer, J.). *See also Heard v. Dist. of Columbia*, 2006 U.S. Dist. LEXIS

Supp. 2d 121, 127 (D.D.C. 2010) (Collyer, J.) (refusing to make block billing reduction, where billing statements provided "sufficient detail to permit the Court to 'make an independent determination whether or not the hours claimed are justified'"); *Mazoloum v. Dist. of Columbia*, 654 F. Supp. 2d 1, 6 (D.D.C. 2009) (Bates, J.) (no reduction for block billing; "Although the challenged entries set forth numerous activities per day, Mazloum need not set forth 'the precise activity to which each hour was devoted.'"); *Smith*, 466 F. Supp. 2d at 157-58 (no reduction for block billing, where use of block entries was "not unduly excessive nor did the entries ... suffer from [] inadequate description concerns"); *Does*, 448 F. Supp. at 144 n.5 (no reduction for block billing; block billing, "while not a practice to be encouraged, does not prevent the court from making a determination as to whether the hours devoted to a particular task were reasonable"); *Bolden*, 135 F. Supp. 2d at 181 (no reduction for block billing; the court undertook "careful review" of the billing records and found them "sufficiently detailed and descriptive").

[52] *Cf. In re North (Gardner Fee Application)*, 30 F.3d 143, 147-48 (D.C. Cir., Spec. Div., 1994) (applying collective 10% reduction for "imprecise descriptions" of work performed (*e.g.*, "various telephone conferences") and block billing); *In re Olsen*, 884 F.2d 1415, 1428-29 (D.C. Cir, Spec. Div., 1989) (time entries such as "meetings re: strategy" too vague; applying collective 10% reduction for block billing, vague entries and overstaffing); *McKesson*, 2013 U.S. Dist. LEXIS 43266, at *24-26 (time entries such as "work on appeal brief" too vague; collective 10% reduction for vague time entries and block billing).

[53] *See, e.g.*, JS, Ex. 31 (Part 3) at 108 (FJ00000341) (4/23/07 entry by Gasper; 4/24/07 entries by Petteway) & 113 (FJ00000346) (4/30/07 entry by Hartman; 4/30/07 entry by Petteway; 5/1/07 entry by Gasper); JS Ex. 31 (Part 9), at 97 (FJ00001007) (3/17/09 entry by Simpson); EG, Ex. 1 (Part 2) at 9 (COV 00000090) (6/4/03, 6/5/03, 6/6/03, 6/9/03 entries by Wolson; 6/11/03 entry by Perron); EG, Ex. 1 (Part 3) at 38 (COV00000203) (2/4/05, 2/5/05, 2/6/05 & 2/10/05 entries by Dalton; 2/5/05 & 2/10/05 entries by Wolson; 2/10/05 entry by Gulland). *Cf. Petties*, 2009 U.S. Dist. LEXIS 127505, at *27-29 (no reduction for block billing where, *inter alia*, most of the entries did "not actually lump multiple tasks together").

62912, at *44 (D.D.C. Sept. 5, 2006) (Kollar-Kotelly, J.) ("billing records must be read in context, taking into account surrounding entries, the activities on a court's docket, and other clarifying entries, such as attorney affidavits"). This is anything but the case where a large number of hours were billed to a matter that did not involve discovery and did not present complex or contested facts, and where the billing documentation contained "many" entries containing "little information." *Cf. Role Models v. Brownlee,* 353 F.3d 962, 971-73 (D.C. Cir. 2004) (50% reduction to number of hours requested for inadequate documentation; failure to justify the number of hours sought; inconsistencies; and improper billing entries). None of the factors at issue in *Role Models* are present here.[54]

Staffing. The case was reasonably staffed given that it was a novel, complex, "bet the company" case. *See* BC, at 12-20; JM, ¶¶ 32-36, 41-43, 49-61 & 65. The reasonableness of FEI's staffing is demonstrated by the fact that the number of lawyers defending FEI was comparable to the ostensible number of lawyers representing plaintiffs. JS, ¶¶ 18-23. *Cf. Heard,* 2006 U.S. Dist. LEXIS 62912, at *40-41 ("[I]n assessing the reasonableness of the Plaintiff's staffing, it is appropriate to also look [at] the resources employed by opposing counsel."). At trial, depositions and hearings, both sides generally had the same number of lawyers present. JS, ¶¶ 18-21; JS, Exs. 26 & 27.

The core Fulbright team, which, at any one time, included no more than five (5) lawyers, billed **72.76 percent** of the total fees billed. JS, ¶¶ 10 & 25; JS, Ex. 2. The core team, as augmented by discovery, expert witness and appellate teams, a total of fifteen (15) attorneys,

[54] *See Petties,* 2009 U.S. Dist. LEXIS 127505, at *24-25 ("'[T]he ruling in *Role Models* simply cannot be blindly applied without being mindful of the factual context in which it was decided.' ... [In *Role Models*, the fees were] dramatically disproportionate to the work required. ... The present case could not provide a starker contrast. This very complex case has been actively litigated for fourteen years ... .") (quoting *Smith*, 466 F. Supp. 2d at 157). Further distinguishing *Role Models* is that the fee award in that case was sought against the government. *See Role Models*, 353 F.3d at 975 ("[W]e have a special responsibility to ensure that taxpayers are required to reimburse prevailing parties for only those fees and expenses actually needed to achieve the favorable result.").

billed **98.24 percent** of the total fees billed. JS, ¶ 26; JS, Ex. 2.[55] *Cf. Blackman*, 677 F. Supp. 2d at 177 ("While numerous individuals worked on the case, more than 80% of the work was performed by eight individuals ... ."). Fulbright and Covington utilized its "core" and "augmented" teams to efficiently handle the demanding work of the case. JM, ¶¶ 32-36, 41-43, 49-61. In any event, the issue for the court is "not whether [FEI] used too many attorneys, but whether the work performed was necessary." *Donnell v. United States*, 682 F.2d 240, 250 n.27 (D.C. Cir. 1982).

B. FEI Has Exercised Careful Billing Judgment

FEI has exercised careful billing judgment and excluded certain categories of recorded time entries in an effort to narrow the areas of disagreement between the parties and facilitate resolution of FEI's fee claim. JS, ¶¶ 223-249; EG, ¶¶ 58-71. *See also Miller*, 575 F. Supp. 2d at 21 (fee applicant should exclude from its fee application any "hours that are excessive, redundant or otherwise unnecessary"). FEI's effort in this regard has been substantial, and resulted in a conservative fee request. FEI does not seek to recover for the following: (i) Any time recorded to the ESA Case by any Fulbright timekeeper who charged fewer than 100 hours to the case, and any Covington timekeeper who charged fewer than ten (10) hours to the case.[56] (ii) The time charged by temporary attorneys who were hired to work on document productions and other

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[55] The core Covington team was comprised of five (5) attorneys, augmented by two (2) attorneys to assist with the Circuit appeal. EG, ¶ 8.

[56] With regard to Fulbright, a total of 107 timekeepers records hours worked on the ESA Case, but FEI is only seeking to recover for the time recorded by 29 timekeepers who recorded more than 100 hours of work on this case. *See* JS, ¶¶ 226-27. With regard to Covington, a total of 54 timekeepers recorded hours worked on the ESA Case, but FEI is only seeking to recover for the time of 21 timekeepers who recorded more than ten (10) hours of work on the case. EG, ¶¶ 10 & 68; EG, Exs. 5 & 6. *Cf. Miller*, 575 F. Supp. 2d at 22 n. 32 (relator excluded "all time for individuals who worked fewer than ***65 hours***") (emphasis added) & *id.* at 41 n. 68 (through exercise of billing judgment, relator only sought to recover for time billed by ***18 lawyers and 3 paralegals***, even though ***52 attorneys and 30 paralegals*** worked on the case); *Heard*, 2006 U.S. Dist. LEXIS 62912, at *38-40 (Goodwin Procter wrote off the time of 19 out of 34 time keepers, which "reflects the kind of 'billing judgment' focused on by the Supreme Court").

projects, such as collecting and organizing exhibits. (iii) The time spent transitioning the case from Covington to Fulbright. (iv) The time spent dealing with the issues concerning the production of elephant veterinary records.[57] Further, with few exceptions, FEI does not seek to recover for time narratives that reveal either attorney-client communications or attorney opinion/work product, or both, which have been redacted.[58] Finally, travel time is claimed at half the rate at which it was billed to FEI.[59] *See* JS, ¶¶ 223-49 & JS, Exs. 16-20; EG, ¶¶ 66-79 & EG, Exs. 6-15; CA, Ex. 3.[60]

FEI's conservative exercise of billing judgment has resulted in significant reductions to its fee request. With regard to the fees Fulbright billed to FEI and which it paid, FEI has excluded from its fee request **5,446.43 hours**, valued at **$1,921,966.51**. The total number of hours excluded represents **11.69 percent** of the total number of hours Fulbright billed to FEI on the ESA Case; the value of the exclusions represents **9.80 percent** of the total fees that FEI paid to Fulbright. JS, ¶ 248; JS, Exs. 16-20. These figures are in addition to **2,677.36** hours, valued

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[57] In addition, with regard to Covington, FEI has excluded summer associate and administrative time. EG, ¶¶ 71-72; EG, Exs. 9 &10.

[58] FEI has redacted privileged items from its records, and, accordingly, does not seek to recover for them. JS, ¶¶ 240-41 & JS, Ex. 19; EG, ¶¶ 73-74 & EG, Ex. 11. *See Harvey*, 2013 U.S. Dist. LEXIS 89615, at *26 ("The Court sees no reason why the District should have access to claims omitted from plaintiff's fee request."); *Beck v. Test Masters Educ. Svs., Inc.,* 2013 U.S. Dist. LEXIS 28716, at *27 n.7 (D.D.C. Mar. 1, 2013) (Bates, J.) ("[T]he Court is concerned with the reasonableness of the hours claimed, not the hours excluded."); *Robertson v. Cartinhour*, 883 F. Supp. 2d 121, 131 (D.D.C. 2012) (Huvelle, J.) ("[C]ounsel must produce unredacted bills for those fees for which he is requesting compensation[.]"). However, FEI does seek to recover for a small group of time entries in which an attorney was interviewing or speaking with a potential witness who ultimately was never called to testify, and the identity of that witness has been redacted. JS, ¶ 242; EG, ¶ 75. *See Miller*, 575 F. Supp. 2d at 34 n. 58 (permitting relator to recover fees for partially redacted time entries referring to, *e.g.*, "Witness A").

[59] *See, e.g., Heller*, 832 F. Supp. 2d at 54; *Miller*, 575 F. Supp. 2d at 29-30; *Doe v. Rumsfeld,* 501 F. Supp. 2d 186, 193 (D.D.C. 2007) (Sullivan, J.).

[60] Where a block billed time entry contains a task which is excluded (*e.g.*, elephant veterinary records) as well as other tasks which are not excluded, it was assumed that each entry took up an equal amount of time; the total amount of time recorded was by divided by the number of tasks described in the narrative; and the appropriate proportion of time was deducted. For example, if a five (5) hour entry contained six (6) tasks, and three (3) of them related to elephant veterinary records, FEI is only claiming 2.50 hours for that entry. JS, ¶ 236; EG, ¶ 67. *See also Michigan v. EPA*, 254 F.3d 1087, 1091-92 (D.C. Cir. 2001); *In re Pierce (Abrams Fee Application)*, 190 F.3d 586, 594 (D.C. Cir., Spec. Div., 1999); *New York v. Microsoft*, 297 F. Supp. 2d 15, 46 (D.D.C. 2003) (Kollar-Kotelly, J.).

at **$1,472,564.54**, which Fulbright time keepers recorded, but which was not billed to FEI. JS, ¶ 223.[61] Accordingly, the amount sought by FEI is reasonable. *See* JM, ¶¶ 84-85.

III. A SIGNIFICANT SANCTION AGAINST COUNSEL IS WARRANTED

A significant sanction against Meyer and her firm, **$133,712.60**, is warranted. JS, ¶¶ 256-61; JS, Exs. 33 & 34. Meyer not only knew about more than $50,000 in payments at the time she signed the objections Rider's "affirmatively false" interrogatory response – ***she and her law firm had made some of them, and labeled them as "compensation."***[62] Judge Sullivan found that "***it was apparently Ms. Meyer's suggestion*** that the other organizational plaintiffs pay Mr. Rider, initially through MGC, and later through WAP." FOF 56 (emphasis added). Meyer was not an unknowing accessory to a plan hatched by others – she was at the center of the payments and the effort to conceal. ECF 620 at 3, 8-11 & 41-42.[63] *See also supra* 12-17. Meyer certainly was not acting as a citizen "attorney general" representing the "public interest" when she put advocacy above her duty, as an officer of the court, to act according to "recognized standards of ethics." LCvR 83.8(e).[64] Meyer's conduct multiplied the proceedings unreasonably

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[61] With regard to the fees Covington billed to FEI and which it paid, FEI has excluded from its fee request **672.97 hours**, valued at **$ 187,407.99**. EG, ¶ 78; EG, Exs. 13-15.

[62] FOF 56 ("***[T]he Court finds no excuse for this false response***. The lawyer who signed the objections to this answer, Katherine Meyer, was a principal in two of the entities – WAP and MGC – that had paid Mr. Rider and had sent him 1099's reporting such payments.") (emphasis added); ECF 620 at 42 ("[T]he record clearly and convincingly established that Ms. Meyer, who signed the objections to the false response, had been paying Rider through her law firm and WAP since 2001, and had sent him IRS Form 1099s reporting the payments as compensation.").

[63] Meyer's role in Rider's "affirmatively false" interrogatory response was not an isolated occurrence: it is only ***one*** of several false and/or misleading statements Meyer made, or assisted plaintiffs make, concerning the payments. *See supra* 12-17.

[64] *Cf. Business Guides, Inc. v. Chromatic Communs. Enters.*, 498 U.S. 533, 564 (1991) ("An attorney acts not only as a client's representative, but also as an officer of the court, and has a duty to serve both masters."); *In re Grand Jury Proceedings,* 117 F. Supp. 2d 6, 13 (D.D.C. 2000) (Holloway Johnson, J.) ("[A]s an attorney and an officer of the Court, Mr. Bakaly has a duty of candor which requires that he not make false representations to the Court. He also bears an obligation of fairness to opposing parties and counsel that includes a duty not to falsify testimony in an effort to mislead or obstruct justice."); ECF 300, at 4 ("On a daily basis in this Court, lawyers make representations to me and to each other about what they have or have not done in responding to discovery. Those responses are

and vexatiously. The work necessary to demonstrate that Rider's June 2004 interrogatory response was false was factually and legally complex. JS, ¶ 257. And, it was not limited to the motion to compel Rider. To obtain the information that should have been disclosed by Rider in June 2004 ***and which Meyer knew about***, FEI also had to subpoena and move to compel WAP (ECF 85) (an organization which she "controlled," ECF 620 at 10), and move to compel the organizational plaintiffs (ECF 149). Further, FEI's motion to compel was part and parcel with Rider's unsuccessful motion for a protective order, which Meyer signed (ECF 141). Thus, the requested sanction amount actually is a conservative figure because it only includes Fulbright's work associated with the Rider motion to compel, and not the total work actually generated by Meyer's conduct.

IV. EXPERT AND TECHNOLOGY FEES

FEI seeks to recover the expert witness fees to which it is statutorily entitled. 16 U.S.C. § 1540(g); JS, ¶¶ 262-63; JS Exs., 35-36. FEI also seeks to recover the cost of the trial technology consultant who provided assistance in complying with the Court directive that trial evidence be presented using state-of-the art technology. JS, ¶¶ 14, 21, 136 & 263; JS, Ex. 37.

V. PLAINTIFFS AND COUNSEL MUST PAY

No equitable arguments shield plaintiffs and counsel from liability for fees. FEI's entitlement has been established. ECF 620. When determining that the ESA Case was "from the beginning, frivolous and vexatious," *id.* at 27, Judge Sullivan considered and rejected plaintiffs' post-hoc claims that they brought and litigated the case in "good faith." *Id.* at 19 n. 6 & 28 n.9. No such rationales should be considered now either. Further, "nonprofit" organizations and/or those purporting to act in the "public interest" are not afforded any special exemption from fee

sufficient."); Pet. Ex. 2 (05/30/08 Hearing Tr. at 155) ("The Court: And you make that representation to me as an officer of this court? Meyer: Yes. Q: And you appreciate that if that representation is false, I will seek your disbarment? Meyer: Yes.").

liability.[65] That is particularly true here, where the organizations are repeat plaintiffs well versed in litigation under environmental fee shifting statutes. *Id.* at 32-33. *Cf. Marbled Murrelet v. Babbitt*, 1999 U.S. Dist. LEXIS 22898, at *17 (N.D. Cal. April 5, 1999) ("EPIC is no stranger to litigation, nor to the concept of costs which is an ordinary result of such litigation.").

Plaintiffs have more than sufficient assets to pay. According to their 2011 tax filings, the net worth of the organizations collectively is more than $25 million, and with HSUS that number exceeds $200 million.[66] *See* Pet., Ex. 11. It is unimaginable that the organizations could meet the high evidentiary threshold necessary to demonstrate inability to pay, when their tax filings speak for themselves. *See Gibbs v. Clements Food Co.*, 949 F.2d 344, 345 (10th Cir. 1991). "When the plaintiff can afford to pay ... the congressional goal of discouraging frivolous suits weighs heavily in favor of levying the full fees." *Arnold v. Burger King Corp.,* 719 F.2d 63, 68 (7th Cir. 1985). *See also Faraci v. Hickey-Freeman Co.*, 607 F.2d 1025, 1028 (2d Cir. 1979) ("Where the plaintiff can afford to pay, of course, the congressional goal of discouraging frivolous litigation demands that full fees be levied."). The award of the full lodestar is necessary to deter these repeat litigants from instituting another case like this one, where plaintiffs caused more than thirteen (13) years of litigation and they should not have been in court to begin with. *See Miller v. L.A. County Bd. of Educ.*, 827 F.2d 617, 621 (9th Cir. 1987) ("[A]n award of attorney's fees for a frivolous lawsuit may be necessary to fulfill the deterrent purposes of [the statute][.]"); *Durrett v. Jenkins Brickyard, Inc.,* 678 F.2d 911, 917 (11th Cir. 1982) ("A fee must be assessed which will serve the deterrent purpose of the statute, and no fee

[65] *Cf. Copeland*, 641 F.2d at 895 ("[The] calculation of the fee should not vary with the identity of the losing defendant[.]"); *Rodriguez v. Taylor*, 569 F.2d 1231, 1249 n.32 (3d Cir. 1977) ("The reasonable value of an attorney's time does not depend on who his or her adversary is.").

[66] HSUS merged with FFA in 2005 and controlled FFA's participation in this case. Pursuant to the Court's 06/12/13 Order (ECF 629), FEI will file a separate motion pursuant to Fed. R. Civ. P. 25(c) to substitute HSUS as a party to this case.

will provide no deterrence."). Judge Sullivan did not equivocate when finding that this case was "frivolous," "vexatious," "unreasonable," and "groundless." ECF 620. Accordingly, plaintiffs must pay the full lodestar. *Arnold,* 719 F.2d at 68 n.7 ("a trial court must be sensitive to the degree of frivolousness involved in a Title VII suit when it decides the appropriate fee award").

Counsel likewise cannot escape liability for the § 1927 sanctions that Judge Sullivan has ordered. *Roadway Express*, 447 U.S. at 762 ("The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes. Dilatory practices of civil rights plaintiffs are as objectionable as those of defendants."). Any "professed inability to pay is irrelevant to a sanctions award under § 1927." *Robertson,* 883 F. Supp. 2d at 130.

CONCLUSION

For all of the reasons stated above, the Court should enter an award of **$25,462,264.26**, jointly and severally against plaintiffs, and a sanction of **$133,712.60**, jointly and severally against Meyer and MGC.

Dated: October 21, 2013

Respectfully submitted,

/s/ John M. Simpson

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CERTIFICATE OF SERVICE

I, John M. Simpson, do hereby certify that on October 21, 2013, the foregoing **Petition for Attorneys' and Expert Witness Fees**, including the exhibits thereto, was served on the following in the manners stated below:

PETITION AND EXHIBITS FILED PUBLICLY IN UNSEALED FORM VIA ECF:

All ECF-registered persons for this case, including plaintiffs' counsel

PETITION EXHIBITS 6 AND 7 SENT VIA FIRST CLASS MAIL TO :

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Chambers of the Honorable John M. Facciola
United States District Court for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

/s/ John M. Simpson

John M. Simpson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT FELD ENTERTAINMENT, INC.'S PETITION FOR ATTORNEYS' AND EXPERT WITNESS FEES

MASTER EXHIBIT INDEX

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