IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO TAKE LIMITED DISCOVERY

In accordance with the Court's July 17, 2013 Order, Plaintiffs Animal Welfare Institute, The Fund for Animals, Inc., and Born Free USA (collectively, "Plaintiffs"), by and through their undersigned counsel, respectfully submit this Memorandum of Points and Authorities in support of their Motion for Leave to Take Limited Discovery (the "Motion") regarding the reasonableness of Defendant Feld Entertainment, Inc.'s ("Feld") Petition for Attorneys' and Expert Witness Fees (Docket Nos. 635-665) (the "Fee Petition").

INTRODUCTION

In the Fee Petition, Feld seeks $25,462,264.26. This is unprecedented and is "the largest lodestar request made in this district." Fee Petition at 4. Quite simply, the Fee Petition is so over-blown that, if granted in its entirety, it is unlikely that any of these nonprofit organizations could survive. Plaintiffs do not intend to transform the Fee Petition into a second—or more accurately third—litigation. But for the sake of their very survival, Plaintiffs must exercise their right under this Circuit's precedent to inquire as to the reasonableness of this unprecedented fee request via limited, targeted discovery. The Court cannot evaluate the reasonableness of the fees

requested by seeing only a one-sided presentation by Feld, its highly paid counsel, and its highly paid experts on the alleged reasonableness of the Fee Petition. Instead, a fair presentation can only be accomplished if the Court permits Plaintiffs to conduct limited discovery concerning the Fee Petition and the supporting declarations and exhibits. The discovery sought in the Motion is limited and is the type that Courts in this Circuit permit. Plaintiffs seek:

- The unredacted narrative descriptions of time entries where Feld seeks attorneys' fees, but has impermissibly redacted the time entries based on privilege;
- Certain of Feld's attorney billing records in their searchable and native Microsoft Excel Format or Elite software format;
- Retainer agreements and any amendments thereto;
- Communications related to the reasonableness of the fees and costs requested;
- Limited depositions of Feld and its counsel and experts who submitted declarations in support of the Fee Petition; and
- Any materials that Feld's experts relied upon in reaching their conclusions.

Rule of Professional Responsibility 1.5 requires that all attorneys' fees and costs be reasonable and the limited discovery sought in this Motion is necessary to that determination.

ARGUMENT

An opponent of a fee petition "is entitled to the information it requires to appraise the reasonableness of the fee requested and in order that it may present any legitimate challenges to the application." *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1329 (D.C. Cir. 1982) ("*NACV*"). Documents and information related to the justification for the claimed billing rates and the nature and extent of the work performed by the fee applicant is not only essential in the calculation of the fee award, but the opponent of the fee award should have this

information as a "matter of right." *Id.* While broad discovery requests into fee applications that result in protracted litigation are not permitted, targeted discovery of a fee petition is permitted and facilitates legitimate challenges to the reasonableness of a fee application. *Id.* at 1329-31 (permitting discovery against fee applicant); *see also Brown v. Bolger*, 102 F.R.D. 849, 864 (D.D.C. 1984) (citing *NACV* for the proposition that discovery is permitted into fee applications); *Johnson v. Nat'l Ass'n. of Sec. Dealers, Inc.*, 81-0977, 1983 WL 613, at *6 (D.D.C. June 6, 1983) (unreported) (permitting a fee opponent to file a discovery proposal on a fee award pursuant to 28 U.S.C. § 1927).

A. Feld Should Be Ordered To Produce Unredacted Invoices/Bills For All Time Entries Where It Seeks Compensation, But Has Claimed Privilege

It is well settled in this and other Circuits that if a party seeks attorneys' fees, it must produce "the billing statements itemizing those fees in its entirety." *See Ideal Electronic Sec. Co., Inc. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143, 152 (D.C. Cir. 1997) (finding the reasonableness of billing statements could not be determined from the production of redacted billing statements and therefore the party seeking attorney's fees must produce "the billing statements itemizing those fees in its entirety, notwithstanding its claim that portions of the billing statements are privileged"); *Feld v. Fireman's Fund Ins. Co.*, 12-1789, 2013 WL 3340372, *8 (D.D.C. July 3, 2013) (citing *Ideal*, 129 F.3d at 152) (finding that ***Feld*** must produce attorney time sheets, itemized entries, and backup documentation associated with the invoices); *Robertson v. Cartinhour*, 883 F. Supp. 2d 121, 131 (D.D.C. 2012) (citing *Ideal*, 129 F.3d at 151) (finding that counsel must produce unredacted bills for those fees for which he is requesting compensation); *TIG Ins. Co. v. Fireman's Ins. Co. of Wash., D.C.*, 718 F.2d 90, 96 (D.D.C. 2010) (ordering

plaintiff to respond to discovery requests for billing documentation regarding the attorney's fees requested).[1]

Despite this overwhelming authority, Feld has failed to meet this obligation. Indeed, there are eleven Fulbright time entries that are entirely redacted where Feld seeks compensation: 02/13/07 (Pardo); 02/16/07 (Gasper, Pardo & Simpson); 10/29/07 (Pardo); 01/10/08 (Simpson); 04/10/08 (Simpson); 07/03/08 (Simpson); 07/07/08 (Shea & Simpson); 01/24/09 (Simpson); 02/12/09 (Shea); and 03/04/13 (Pardo & Simpson). Simpson Decl., ¶ 242. Likewise, there are at least 175 Covington & Burling ("Covington") time entries that were partially redacted for which Feld still seeks compensation. Gulland Decl., ¶¶ 56 & 75 & Ex. 1.[2] Since Feld is seeking compensation for these allegedly privileged time entries, Feld has waived the attorney-client privilege and attorney work-product doctrine and should be ordered to produce these entries in their entirety. *Ideal*, 129 F.3d at 151 (under the common law doctrine of implied waiver, the attorney-client privilege is waived when the client places otherwise privileged matters in controversy); *Feld*, 2013 WL 3340372 at *8 (finding Feld waived the attorney-client privilege and work product doctrine as to the invoices itemizing the fees and expenses incurred, all supporting documentation, and "any other communications going to the reasonableness of the

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

[2] Exhibit A attached hereto is a list of the 175 privileged Covington time entries identified to date.

amount of the [fees and expenses]" when Feld sought indemnification of his attorney's fees); *Berliner Corcoran & Rowe LLP v. Orian*, 662 F. Supp. 2d 130, 135 (D.D.C. 2009) ("[C]lients are deemed to waive the privilege when they place privileged information at issue through some affirmative act for their own benefit."); *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir.1982) (a party asserting attorney-client privilege "cannot be allowed, after disclosing as much as he pleases, to withhold the remainder"). In these entries, Feld allegedly has redacted the identities of "potential fact or expert witnesses" that were never called to trial as opinion work product. Simpson Decl., ¶ 242; Gulland Decl., ¶¶ 56 & 75. However, as set forth above, the law is clear that there is an implied waiver of the attorney-client privilege and attorney work product doctrine where, as here, a party seeks to recover its attorneys' fees and Plaintiffs have a right to review the reasonableness of these time entries based on the identities of these purported "potential fact or expert witnesses." As such, Feld should be required to remove all redactions related to these entries and produce them in their entirety if Feld wants to be compensated for this time.[3]

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

B. Feld Should Be Ordered To Produce Certain Of Its Billing Records In Their Searchable And Native Microsoft Excel Format Or Native Billing Software Format

The Fee Petition, which spans at least four-and-a-half four-inch binders, includes nearly two thousand pages of time records and invoices as well as numerous other Excel spreadsheets and tables. The time records and invoices, accounting tens of thousands of attorney and staff hours, are so voluminous that FEI's paid experts were unwilling to review them.[4] Plaintiffs, unfortunately, do not have the luxury of limiting their review of the time records and invoices to a determination that the "time entries provide level of detail . . . that is typical of appropriate block billing practice," as Mr. Millian did, *see* D.I. 664 at 18, or to review only a ***supposedly*** "representative sample of litigation activities" limited to three brief periods of time, as Mr. Cohen did, *see* D.I. 663 at 11-12.[5] Rather, Plaintiffs and their experts must scrutinize all of the hours that Feld now seeks to pass on to them.

As Feld's experts make clear, and as Plaintiffs' counsel explained to counsel for Feld, this is not a task that can be accomplished by reading the PDF versions of spreadsheets and invoices that Feld included in the Fee petition. It can only be accomplished via computer-assisted analysis of the underlying time records using a program such as Microsoft Excel, which

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[4] *See* D.I. 663, Declaration of Barry E. Cohen, at p. 10 ("Nor, in my opinion, is it possible to assess the reasonability of the legal fees by examining each line-item of time charges. There are thousands of such time entries that were billed to Feld by Fulbright."); D.I. 664, Declaration of John C. Millian, at 15 ("[N]or is it feasible from any micro-analysis of Covington's time entries to evaluate meaningfully every aspect (much less every hour) of the work Covington performed."); *id.* at 18 ("Although it is not practicable to analyze every aspect of Fulbright's work . . .").

[5] In fact, Mr. Cohen's sample was anything but representative. For example, one of his three time periods was the month of February 2009, during which most of the bench trial occurred. During that month, Fulbright billed only about 20% more hours than MGC. By comparison, over the entire time period it represented Feld in this matter, Fulbright billed well over twice as many hours as MGC.

will allow Plaintiffs' counsel and/or experts to (i) sort the data, (ii) perform complex searches within the data, and (iii) mathematically compare time entries across (for example) timekeepers, law firms, and parties to the litigation.

There is no commercially available computer program that can take a PDF of an Excel spreadsheet, much less a PDF of actual invoices, and generate a functioning spreadsheet containing the underlying data. Accordingly, the only way Plaintiffs could independently recreate the time records of Feld's counsel would be to manually reenter tens of thousands of rows of numbers and text, a process that would take even highly-experienced data entry personnel hundreds to thousands of hours. It would be patently unfair to require Plaintiffs to undertake such an effort to recreate data that Feld's counsel already have at their fingertips. Moreover, because an analysis of Feld's billed time is one of the first steps needed to craft Plaintiffs' response to the Fee Petition, requiring Plaintiffs to replicate Feld's time records would inject months of needless delay into the fee application process, in addition to creating needless, and substantial, additional expense.

Accordingly, Feld should be ordered to produce the following documents:

- The live Excel spreadsheet created by Feld in the course of preparing JS Exhibit 31 (D.I. 642-1 through 652-1 or native Elite (or other timekeeping program) file capable of being electronically converted into a live Excel spreadsheet. JS Exhibit 31 contains the time records of Fulbright from December 2005 through June 2010. It is a PDF printout of an Excel spreadsheet spanning over 1100 pages;

- A live Excel spreadsheet, or native Elite (or other timekeeping program) file capable of being electronically converted into a live Excel spreadsheet, containing the time entries giving rise to the invoices contained in JS Exhibit 32. JS Exhibit 32 contains 199 pages of Fulbright invoices from July 2010 through March 2013;

- A live Excel spreadsheet, or native Elite (or other timekeeping program) file capable of being electronically converted into a live Excel spreadsheet, containing the time entries giving rise to the invoices contained in EG Exhibit 1. EG Exhibit 1 contains 300 pages of Covington invoices; and

- A live Excel spreadsheet, or native Elite (or other timekeeping program) file capable of being electronically converted into a live Excel spreadsheet, containing the time entries giving rise to the invoices contained in CA Exhibit 2. JS Exhibit 32 contains 67 pages of Troutman Sanders ("Troutman") invoices.

For all Excel documents, Plaintiffs request that time entries descriptions should be formatted to include in a single cell so the descriptions will be readable and searchable. In requesting these four documents, Plaintiffs intend to make the process of production as effortless and inexpensive as possible for Feld. The first document requested by Plaintiffs, and by far the largest, will be particularly easy for Feld to provide as the native Excel spreadsheet already exists. The remaining three documents may not currently exist as Excel spreadsheets—though Feld likely created such spreadsheets in the course of preparing the Fee Petition—but it will require minimal effort for Feld's various counsel to export their time records into a format useable by Plaintiffs.[6] Furthermore, Plaintiffs propose two accommodations to minimize any burden and expense to Feld. First, Plaintiffs recognize that the four Fee Petition exhibits giving rise to Plaintiffs' request contain highlighting that does not exist in the underlying native files. Plaintiffs do not request that Feld replicate the highlighting, and will instead do so manually at their own expense. Second, Plaintiffs recognize that the four Fee Petition exhibits include numerous redactions. In this Motion, Plaintiffs explain why Feld must provide its unredacted invoices and timesheets for many of its time entries, reducing this problem. However, in the event that the Court approves Feld's redactions, Plaintiffs agree that Feld may simply delete, entirely, the time entries containing redactions. Plaintiffs will then manually reenter the nonredacted portions at their own expense.

[6] In its meet and confer for this Motion, Feld's counsel sated that Excel spreadsheets for this information do not exist. While highly unlikely, Plaintiffs request Feld to produce the native Elite (or other timekeeping) program for these time records. In the alternative, Feld can easily export the data to Excel format or a format that Plaintiffs can make searchable.

C. Feld Should Be Ordered To Produce Retainer Agreements And Any Amendments Thereto

The Court should order the production of all retainer agreements and any related amendments between Feld and its counsel. The retainer agreements are important evidence that go to the reasonableness of the attorneys' fees and billable rates and are the type of information that is produced in fee disputes. *See Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Sharp Plumbing*, 2012 WL 2502748, *4 (ordering the production of retainer agreements).

The retainer agreements and any subsequent amendments are likely the only documents in which the agreed fee structure and billable rates will be identified. Plaintiffs need to review this information in order to assess the reasonableness of the fees and billable rates. It is important to learn what billable rates Feld agreed to, and for what period, as Plaintiffs should not be obligated to pay a higher billable rate than what Feld agreed to pay. Moreover, the retainer agreements set forth the agreed billing structure between Feld and its attorneys.

This information is particularly important in light of Fulbright's use of "for professional services rendered" billing statements. Specifically, Mr. Simpson claims that Fulbright only sent Feld a one or two sentence bi-annual statement of "professional services rendered" from 2005 through mid-2010. Simpson Decl., ¶ 196.[7] This procedure is very unusual and highly suspect. Feld is a sophisticated, large corporation with an international presence. It is inconceivable why a sophisticated organization with a general counsel's office would not require regular itemized statements of billing narratives and rates, or why a sophisticated global law firm with Fortune

[7] Feld initially produced one exemplar of it's the "for professional services rendered" bills from the beginning of 2005 through June 30, 2010. Simpson Decl., ¶ 188. After the parties meet and confer on this Motion, Feld agreed to provide the remaining "for professional services rendered" bills, which totals approximately 10 pages. With respect to producing the retainer agreements and related amendments, Feld did not have a position on this issue as of the date of the Motion. However, Feld would not agree to produce any of the further information or documents requested herein.

500 clients would not produce such bills as a matter of course, just like virtually every other sophisticated consumer and provider of legal services.

The use of this unusual procedure may have had a significant impact on the attorneys' fees in this case because the vast majority of the attorneys' fees for which Feld requests reimbursement occurred ***before*** Fulbright began sending itemized bills that its client even arguably could have scrutinized and reviewed. During the relevant time period, Feld's attorneys billed approximately double the hours that Plaintiffs' counsel billed. These "for professional services rendered" bills may explain why that happened. Therefore, the "for professional services rendered" bills are relevant to the reasonableness of Feld's counsel's billing practices and directly relate to the reasonableness of Feld's unprecedented fee request. As such, Plaintiffs need to examine the retainer agreements that established the parameters of this highly unusual billing practice.

D. Feld Should Be Ordered To Produce Communications Related To The Reasonableness Of The Fees And Costs Requested

The Court should order limited discovery of any communications or other documents between Feld and his attorneys' and experts related to the reasonableness of the attorneys' and expert fees requested. Plaintiffs are certainly not requesting every communication between Feld and its attorneys and experts concerning the litigation strategy in the ESA action, such as why certain briefs were filed or why certain discovery was sought. To the contrary, Plaintiffs' only are requesting limited discovery into the communications between Feld and its attorneys and experts relating to the reasonableness of the Fee Petition. For example, any communication from Feld disputing the reasonableness of a bill or demanding a discount would be evidence the Court should consider when determining reasonableness. Likewise, any communications from the law firms or experts to Feld explaining why certain bills were higher than expected or responding to

complaints or billing questions would be relevant. In addition, communications between Feld and its attorneys or experts "to go for broke" and use unlimited resources no matter the reasonableness also would be relevant to the Fee Petition, as would an instruction, for instance, to spare no expense in litigation and to run up the bill because an award of attorneys' fees was anticipated.

Moreover, in mid-2010 Fulbright significantly changed its billing practices. Instead of providing bi-annual "for professional services rendered" statements devoid of timekeeper information, narratives, rates, or the number of hours actually billed, Fulbright suddenly began providing more typical monthly bills to Feld. Simpson Decl., ¶¶ 189-190. The new format contained information that is expected of lawyers' bills, including the number of hours billed, descriptions of the work performed, and the billable rates charged. *Id.* Feld should be ordered to produce those communications or documents concerning this change in billing practices, including what specifically prompted this change as such communications and documents are relevant to the reasonableness of the 2005-2010 time period, which makes up the vast majority of Feld's unprecedented fee request.

Ultimately, Plaintiffs "are entitled to the information they require to appraise the reasonableness of the fee requested and in order that it may present any legitimate challenges to the application." *NACV*, 675 F.2d at 1329. The limited communications Plaintiffs seek contain precisely such information. Moreover, for the reasons explained above, Feld should be required to produce such materials in unredacted form.

E. Plaintiffs Should Be Permitted To Take Limited Depositions Of Feld And Its Counsel And Experts That Submitted Declarations In Support Of The Fee Petition

Feld relies upon extensive declarations from its highly paid attorneys' and experts to support its unprecedented attorneys' fees request, including John Simpson of Fulbright, Eugene

Gulland of Covington, Christopher Abel of Troutman Sanders ("Troutman"), and proffered experts Barry Cohen, John Millian, and Cory Branden. Plaintiffs need to take limited depositions of these declarants to, *inter alia*, clarify discrepancies in the law firms' billing practices, to test the reasonableness of the fees and rates requested, and to test the opinions of the proffered experts. In addition, Plaintiffs request the limited deposition of a corporate representative of Feld regarding, *inter alia*, the billing arrangements with its attorneys and whether it contends that the fees and rates were reasonable. Ordering depositions in this context is not unusual, particularly in situations like this one involving a substantial number of hours and a fee rate structure well beyond what is normally accepted in this Circuit. Indeed, Courts have permitted depositions (and even evidentiary hearings) in this context if they would help resolve issues in a fee dispute and establish the reasonableness of the award. *See Palmer v. Rice*, CIV.A. 761439 (HHK/JMF), 2005 WL 1278262 (D.D.C. May 27, 2005) (permitting a two-stage evidentiary hearing after depositions to resolve a dispute over a fee application).[8] Plaintiffs' review of the voluminous declarations and the exhibits attached to the Fee Dispute is ongoing and will require additional time. However, the following identifies some of the reasons Plaintiffs need these limited depositions as well as some of the topics to be discussed. The enumerated reasons and topics are not exhaustive and may expand based upon further review of the Fee Petition and supporting declarations and exhibits.

[8] Moreover, in deciding that due process does not require that an evidentiary hearing accompany a Rule 11 Sanction award, the Fifth Circuit has suggested that deposing counsel about the reasonableness of fees is permitted in an attorney fee dispute. *Merriman v. Sec. Ins. Co. of Hartford*, 100 F.3d 1187, 1192 (5th Cir. 1996) ("In the almost two years between the court's order awarding sanctions and the court's determination of the amount, however, Noteboom never challenged Security's affidavit detailing attorneys' fees or asked to depose Security's counsel about the reasonableness of the fees.") Further, the Fifth Circuit has also admitted the deposition of an attorney during an evidentiary hearing on a motion for sanctions where the attorney deposed performed the majority of legal work on the matter. *F.D.I.C. v. Z & S Realty Co.*, 132 F.3d 1456 (5th Cir. 1997).

1. Limited Depositions Of Mr. Simpson And Mr. Gulland Are Necessary To Understand The Billing Practices Of Feld's Lead Counsel

a. "For Professional Services Rendered" Bills

Plaintiffs need to question Mr. Simpson about Fulbright's highly unusual practice from 2005 through mid-2010 of sending Feld a semi-annual "for professional services rendered" billing statements that did not include any breakdown of hours by timekeeper, narratives of the tasks involved, or rates charged. Simpson Decl., ¶¶ 188-189. This procedure is extremely unusual for large companies (or even smaller businesses) and is a striking departure from the commonly accepted practices of large law firm's billing departments. A deposition is critical because Mr. Simpson justifies this highly unusual billing practice by stating that "[t]he client did not require further detail because Fulbright kept FEI fully informed of all developments in the ESA Case on virtually a daily basis, obtained client input on all decisions in the case, and copied the client on all correspondence and filings related to the case." Simpson Decl., ¶ 188. Other than this single self-serving excuse, there is no evidence that the client (Feld) acted as a check on the number of hours billed or the rates charged. For the majority of this case, Feld apparently received bills devoid of any detail, but now, years later, claims those bills were entirely reasonable. Plaintiffs should be permitted to probe this billing practice and to determine what, if any, oversight Feld performed.

Indeed, the reasonableness of Feld's billing practices from 2005 through mid-2010 is one of the major issues that the Court will have to determine. Plaintiffs and the Court have a right to know whether Feld actually understood from 2005 through mid-2010 how many timekeepers were working on this matter, what each of their roles were, how much time each task was actually taking, and what rates were being charged. This is particularly important in that Feld was billed for an unprecedented number of hours from at least 185 timekeepers, much of which

was billed by senior partners at the highest rates. Indeed, Fulbright billed approximately 49,000 hours, while during the same time period Plaintiffs' attorneys billed less than half that amount of time at lower rates.[9] Plaintiffs have a right to know what all of these timekeepers were doing, why they were necessary, and why they were billing unprecedented hours at such elevated rates.

b. Excessive Reliance On Senior Partners With The Highest Hourly Rates

Moreover, a limited deposition is necessary to probe Fulbright's unusual practice of relying on senior partners at the highest rates for tasks rather than lower billing timekeepers. Contrary to normal pyramid practice utilized by large law firms where the majority of hours are billed by lower billing timekeepers, Feld's counsel turned the pyramid upside down and had senior partners billing the most hours at the highest rates. Plaintiffs need to ask Mr. Simpson why this occurred, whether Feld was informed, and whether this is typical of Fulbright's billing practices.

While still relying heavily on senior attorneys, Covington's practices in this area were not as pronounced as Fulbright's. Given Feld's position that the billing practices of both Fulbright and Covington were reasonable, Plaintiffs are entitled to depose Mr. Gulland about the staffing decisions made by Covington in this case, particularly concerning Covington's greater reliance on paralegals and associates who bill at much lower rates.

c. Redacted Time Entries And Related Reductions In The Fee Petition

There are at least several hundred instances where Mr. Simpson arbitrarily reduced the time recorded for a block billing time entry that included a privileged narrative. Simpson Decl., ¶¶ 240, 243, & 236. Mr. Gulland states that Covington utilized a similar methodology

[9] Troutman billed an additional 1350 hours for Feld during this same time period.

concerning block billing entries that contained privileged information. Gulland Decl., ¶¶ 67 & 74. For Covington, this occurred over 36 times. Specifically, whenever a block billing entry contained a narrative description where Feld wished to invoke the privilege, Mr. Simpson and Mr. Gulland would redact the privileged portion of the entry in the time records. Simpson Decl., ¶¶ 240, 243, & 236; Gulland Decl., ¶¶ 67 & 74. They then state that they arbitrarily reduced the amount of time for each privileged task by merely allocating equal weight to each task listed in the block entry, rather than examining the privileged narrative to determine how much time should ***actually*** be deducted. *Id.* For example, if five items were identified in the block billing entry but only one of them were privileged, Mr. Simpson and Mr. Gulland arbitrarily reduced the amount requested by a fifth. *Id.* This system lacks transparency and is not reasonable.

It is for this reason, to prevent arbitrariness, that courts require parties to waive the privilege if they want to be compensated for their time. However, there is no way for Plaintiffs to test the reasonableness of this arbitrary procedure based upon the documents provided to date because the privilege redactions are in place. Instead, Plaintiffs need to question Mr. Simpson and Mr. Gulland about the methodology they used and how it could be reasonable. For example, Plaintiffs need to question whether Mr. Simpson and Mr. Gulland ever considered the relative importance or time required to complete a privileged task versus the other tasks in the block billing entries. This information can only be obtained through a limited deposition or the production of the bills without the redactions, which Feld refuses to do.

In addition, Plaintiffs need to depose Mr. Gulland about the approximately 175 time entries in which Feld is attempting to maintain work product protection, yet still seeks ***all*** compensation for this time. As set forth above, this is not permitted under D.C. Circuit precedent.

d. Additional Lines Of Inquiry

Plaintiffs also are entitled to inquire as to the oversight Feld gave to the number of hours, billable rates, and time keepers used for certain tasks. For example, Plaintiffs are entitled to question Mr. Gulland regarding Covington's use of 54 timekeepers, and to question Mr. Simpson regarding Fulbright's use of 108 timekeepers. Not only is this information necessary to understand the reasonableness of Covington's time, but it is also relevant to understand the reasonableness (or lack thereof) of Fulbright's decision to employ 108 timekeepers for an astronomical 49,000 hours.[10] A better understanding as to the approaches used by both firms and the rationale for changing counsel in midstream is necessary to understand the hours expended and fees incurred. Furthermore, Plaintiffs need to inquire as to the rates charged by Covington and the reason why Covington felt it necessary to give an additional 5% discount on all fees from November 22, 2004 through April 25, 2006, with an additional 6% discount on the last invoice for this period. Gulland Decl., ¶¶ 51 & 57. While Mr. Gulland states that the discount was given "in view of the volume of work that Covington was performing for FEI" (*Id.*), it is important to understand if Feld was complaining about fees or was even reviewing narratives during this time period. As stated above with respect to Fulbright, Plaintiffs need to depose Mr. Gulland about the staffing decisions made by Covington in the case and the extensive use of senior lawyers who were billing at the highest rates.

[10] While some disparity can be explained by the stages of the litigation at which time each firm was retained, a comparison of both firms with Plaintiffs contemporaneous legal efforts reveals that while both firms significantly outpaced Plaintiffs' counsel in terms of hours expended, Fulbright did so by an order of magnitude more.

2. A Limited Deposition Of Mr. Abel Is Necessary To Understand The Hours Expended For What Should Have Been A Relatively Short Review Of Videos

First, Plaintiffs reject any notion that they should have to pay for a contentious and expensive fight Feld had to enforce a third party subpoena with PETA, a ***non-party***, and are entitled to inquire why such fees were not sought from PETA given Mr. Abel's characterization of PETA's actions as unreasonable. Plaintiffs should not be required to pay for those attorneys' fees and costs.

Second, the Troutman bills are addressed to "Feld Entertainment, Inc. Attn. Kara Lyn Petteway C/O Fulbright & Jaworski, LLP" with Fulbright's Washington, D.C. address. Abel Decl., Ex. 2. Plaintiffs need to depose Mr. Abel concerning this billing arrangement. Although Mr. Abel states that bills were sent to Feld and paid (Abel Decl., ¶ 29), it is unclear whether a review of Troutman's hours was conducted by Fulbright (the entity that retained Troutman), by Feld, or by anyone else. Plaintiffs are entitled to know what the nature of this relationship was and whether any limitations on fees and rates were imposed. Combined with Fulbright's own "for professional services rendered" bills, this practice suggests a highly unusual lack of interest by Feld in keeping litigation expenses down to a reasonable level.

Finally, Mr. Abel's declaration fails to explain why Troutman employed such a large team for such a long period. For this project, Troutman utilized thirteen attorneys and eleven non-attorneys (Abel Decl., ¶ 25), while a smaller team of professionals ranging from at least eight to at least twelve (*Id.* at ¶¶ 16, 17, & 22) were actually reviewing the videos. Although Mr. Abel repeatedly states that over 550 videos were reviewed, he is clear that "[i]n the aggregate, more than 325 hours of actual video running time was reviewed and reported to trial counsel." Abel Decl., ¶ 23. While 325 hours is a lot of video time, it is a relatively small amount considering the size of the team retained by Troutman. Troutman worked out of PETA's offices

from September 15 through September 23, 2008. *Id.* at ¶¶ 16 & 22. Mr. Abel states that during the week of September 15, "we were able to average approximately 75 hours of time pertaining to video viewing per day." *Id.* at ¶ 22. At an average of 75 hours of watching elephant videos per day, 325 hours of total video could have been reviewed in 4.33 days. Instead, Troutman did not complete the task until October 3, 2008 – over two weeks later. *Id.* This excessive manpower and time required for watching elephant videos is particularly confusing considering that Mr. Abel states that on September 24, his team expanded to twelve timekeepers, moved into Troutman's office space, and expanded reviewing hours. *Id.* During this time, Troutman was able to "log more than 125 hours of time [a day] on the project." *Id.* At that rate, even if Troutman started over they would have reviewed all 325 hours of video in 2.6 days. Yet, it still took them a week and a half to finish the videos. Abel Decl., ¶ 22. Quite simply, Mr. Abel's declaration is either internally inconsistent or *per se* evidence of unreasonableness. Plaintiffs should be permitted to depose Mr. Abel concerning these billing practices and inconsistencies.

3. Limited Depositions Of Messrs. Millian and Cohen Are Necessary To Investigate The Assumptions, Investigation And Opinions Expressed In Their Expert Declarations

Limited depositions of Feld's highly paid experts are critical as this case involves the reasonableness of the largest fee award ever sought in the D.C. Circuit and because Feld has sought to abandon the Laffey Matrix and Updated Laffey Matrix traditionally used by this Circuit to establish reasonable rates in favor of a proprietary billable rate survey that Feld has refused to share with Plaintiffs. Plaintiffs should be able to question the expert opinions on the reasonableness of the rates and number of hours expended, especially given that Feld's attorneys billed more than double the hours of Plaintiffs' attorneys and for a majority of the time utilized senior lawyers who billed at the highest rates. In addition, Feld should be required to produce any materials that its experts relied upon in formulating their opinions or drafting their

declarations.

a. A Limited Deposition Is Needed To Understand And Test Mr. Millian's Assumptions And Opinions

The declaration of Mr. Millian is replete with assumptions and opinions that require testing in a deposition. For example, Mr. Millian's entire report on the reasonableness of the attorneys' fees is based upon his assumption that this is "bet the company litigation" that required Feld to "leave no stone unturned." Millian Decl., ¶¶ 18 & 25-27. After reading Mr. Simpson's declaration and a statement on the Ringling Brothers website that described the Asian elephants as a lifelong symbol of the circus, Mr. Millian summarily concluded that a "[a]substantial portion of the Ringling Bros. circus's reputation and business 'goodwill' thus appears clearly to be tied to the presence of Asian elephants in the circus" and concluded that "this lawsuit was for FEI what lawyers sometimes refer to colloquially (often with a bit of hyperbole, but apparently not here) as a "bet the company case." *Id.* at ¶¶ 25 & 27. Other than the self-serving statement of Feld and its attorneys, Mr. Millian appears to have no support for his summary conclusion that this was a "bet the company case." Plaintiffs need to question Mr. Millian if he conducted any research into whether there would have been a financial impact if elephants had been banned or whether he is aware of other circuses that are financially profitable, but do not use elephants. The statement that the circus is not the circus without elephants proves nothing as Ringling Bros. is also known for clowns, lions, trapeze artists, etc. In addition, Plaintiffs need to question about the reasonableness of the "leave no stone unturned" litigation practices employed in light of the fact that Feld is a multinational corporation with numerous business interests other than the circus, including Disney on Ice performances, Disney Live performances, monster truck performances and Marvel Universe Live performances. Did Mr. Millian even consider the size of the company and the diversity of revenue streams when he

opined this was a "bet the company case?" Likewise, Mr. Millian states that Plaintiffs were aggressively litigating the ESA action (*Id.* at ¶ 62), but Plaintiffs need to ask Mr. Millian if he ever considered whether it was reasonable for Feld's attorneys to bill more than double the number of hours expended by Plaintiffs' counsel, to use mostly senior lawyers billing at the highest rates, or whether it was appropriate for Fulbright to bill—both in the absolute and relative sense—significantly more hours than Covington. In addition, Mr. Millian's descriptions of the Fulbright, Covington and Troutman bills are vague and rely upon generalities – indeed it is not clear from his declaration that he even reviewed the bills/invoices. Each of the opinions Mr. Millian discusses concerning the law firms' billing practices need to be addressed, and it needs to be determined how closely he reviewed their bills (if at all) versus relied upon statements by Feld or its counsel.

Plaintiffs also need to probe why Mr. Millian believes that certain billing practices were appropriate in this case. First among these is Fulbright's unusual practice of utilizing "for professional services rendered" bills that did not detail narratives of the work performed, the hours spent, or the rates billed for the clients' review. Likewise, Plaintiffs need to ask Mr. Millian how large law firms typically staff cases and whether, in his experience, it is unusual for senior partners to be the top billers.

Mr. Millian also makes specific representations that Plaintiffs need to investigate. For example, Mr. Millian opines that Feld's attorneys' fees due to expert witnesses are reasonable because Gibson Dunn has utilized specific teams to handle expert reports and *Daubert* motions in toxic tort cases. *Id.* at ¶ 57. Plaintiffs would like to understand why Mr. Millian believes that the expert issues in a case involving elephants is analogous to notoriously complicated toxic tort litigation. Similarly, Mr. Millian points to the 84,000 documents produced by Feld as indicative

of the difficulty and labor-intensiveness of this case. *Id.* at ¶ 62. Plaintiffs need to question Mr. Millian whether 84,000 documents is truly a large figure in the modern era of e-discovery. Mr. Millian also states that Feld received a discount from standard rates, which he claims means that there were restraints on fees. Millian Decl., ¶ 18. However, Mr. Millian does not explain his experience regarding whether other clients typically pay retail rates for attorney services without reductions and without write-off discounts. In this regard, Plaintiffs should be permitted to question Mr. Millian on his experience regarding such discounts. In addition, as an alleged expert on litigation, Plaintiffs need to question Mr. Millian why it was necessary to hire a separate international law firm to enforce a third party subpoena. Plaintiffs also need to question Mr. Millian as to what documents and statements from Feld and his counsel he relied upon and to determine what, if any, independent investigation he actually conducted. These are but a few of the obvious questions that arise from Mr. Millian's declaration.

b. A Limited Deposition Is Needed To Understand And Test Mr. Cohen's Assumptions And Opinions

Many of the questions for Mr. Millian also need to be asked of Mr. Cohen, including questions regarding Fulbright's "for professional services rendered" bills, the disparity between hours billed by Feld's counsel versus Plaintiffs' counsel, the disparity between hours billed by Fulbright and Covington, the fact that senior partners accounted for so many of the hours billed to Feld, and whether it is reasonable to staff a case of this nature with over 185 timekeepers. In addition, there are specific additional issues with Mr. Cohen's declaration that need to be addressed.

Mr. Cohen relied upon a sample of ***three*** tasks to determine whether the ***entirety*** of the lengthy Fulbright representation was reasonable. Cohen Decl., pp. 11-12. Plaintiffs need to know how this sample was selected and how Mr. Cohen determined that the motions to compel,

the bench trial, and the 2011 D.C. Circuit appeal were representative of the numerous other efforts Fulbright expended over an 8-year representation. Mr. Cohen needs to explain under oath whether he selected this sample or whether it was selected in consultation with Feld and/or its counsel. Mr. Cohen needs to explain, for example, whether he considered the bench trial time period was truly representative, given that during that time period, the disparity between the hours billed by Fulbright and the hours billed by MGC was far smaller than the same disparity over the entire span of Fulbright's representation (roughly 20% more during trial, versus well over double overall). Plaintiffs are also entitled to test Mr. Cohen's reasonableness opinion by presenting him with alternative sample tasks from the case.

Furthermore, Mr. Cohen should testify as to whether it was reasonable for Fulbright to include senior partner Joseph Small's time where his time entries regularly reflected his activities as "strategy and client liaison." *Id.* at pp. 15 & 18. Plaintiffs need to also question Mr. Cohen about why Fulbright switched back and forth regularly between a team of the "core" lawyers, the augmented core lawyers, and the alleged need for over 185 timekeepers. With respect to Troutman, Mr. Cohen should explain his statement that when approximately 325 hours of videos were to be reviewed, it was appropriate for paralegals to record 605 total hours. *Id.* at 23. With respect to the transition from Covington to Fulbright, Plaintiffs need to be able to probe Mr. Cohen's explanation for why the dramatic jump in hours occurred. *Id.* at p. 26. Plaintiffs also need to ask Mr. Cohen if he reviewed the discovery related time records (other than sample motion to compel) to see if excessive attorney and other professional time was used. He should also be questioned regarding the impact of switching from a traditional bill structure that Covington used (namely, providing regular bills that advise the client of what is being done at what rate) to Fulbright's "for professional services rendered" approach and whether this affected

the dramatic increase in attorneys' fees and costs. Plaintiffs also need to question Mr. Cohen with respect to what documents and statements from Feld and/or its counsel he relied upon in order to prepare his declaration and to determine what, if any, independent investigation he actually conducted. [11]

c. Feld Should Be Ordered To Produce Any Materials That Its Experts Relied Upon In Formulating Their Opinions Or Draft Their Declarations

Feld should be ordered to produce any materials that Mr. Millian, Mr. Cohen, and Mr. Branden relied upon in forming their expert opinions and in drafting their respective declarations. Plaintiffs need this information to assess these declarations and Plaintiffs' experts will need the information to formulate an appropriate response. In addition, Plaintiffs request that the Court order this material to be produced sufficiently in advance of the expert depositions. By producing this information sufficiently in advance, Plaintiffs will be able to use these materials to limit the time and scope of the depositions. Under Rule 26, parties routinely produce the materials that an expert relies upon in formulating an opinion. Of course, the production should also include any facts or data that Feld's counsel provided and that the experts considered in forming their opinions. *See* F.R.C.P 26 (a)(4)(C)(ii).

4. A Limited Deposition Of A Corporate Representative Of Feld Is Needed To Determine The Reasonableness Of The Fee Petition

In light of the unprecedented fee request and the unusual billing practices such as the "for professional services rendered" billing invoices, it is necessary for Plaintiffs to take a limited

[11] Feld also relies on the Declaration of Cory Branden in support of the Peer Review Survey that serves as an integral part of the Fee Petition. As the Court is aware, Feld has, without justification, refused to share these documents with Plaintiffs until the Court rules on Feld's motion to seal. Because Plaintiffs have been unable to review these materials, they are unable to determine whether any discovery, including a deposition of Mr. Branden, will be necessary. Accordingly, Plaintiffs reserve their right to depose Mr. Branden.

deposition of corporate representative of Feld concerning Feld's billing arrangement with its counsel and the overall reasonableness of the Fee Petition. Plaintiffs need to question a corporate representative of Feld that had knowledge and oversight of the ESA action to determine whether any controls were in place over attorney rates and hours. For example, Plaintiffs need to question a corporate representative about the terms of the retainer agreements, including whether Feld negotiated special rates. With respect to the Fulbright "for professional services rendered" billing statements, Plaintiffs need to question the corporate representative as to whether Feld ever reviewed the number of hours that were being expended on particular tasks or the billable rates that were charged. Similarly, Plaintiffs need to question Feld about whether Feld was aware that over 185 separate timekeepers were used by Feld in this litigation and whether Feld was aware that senior partners were the highest billing timekeepers, in contradiction to normal litigation practice. In addition, Plaintiffs need to question Feld why it was billed at least one million dollars for the time of a very senior partner, Joseph Smalls, who served primarily as a "second set of eyes" and as an "interface" with Fulbright's relationship partner (a New York transactional partner) with regard to Feld. (Simpson Decl., ¶ 35). Indeed, Feld's own expert acknowledges that Mr. Smalls' time was primarily billed as "strategy and client liaison" work. Cohen Decl., pp. 15 & 18.

Furthermore, Plaintiffs need to question a corporate representative as to whether Feld reviewed the enormous amount of time Troutman billed to review elephant videos. Plaintiffs also need to generally question a corporate representative to determine whether there were ever discussions concerning the reasonableness of its attorneys' hourly rates and hours expended on a regular basis. A limited deposition is also required to determine whether Feld instructed its attorneys to bill without abandon (*i.e.*, to win at any cost), and to test the assumptions underlying

Mr. Millian and Mr. Cohen's expert opinions, including that the ESA action was a "bet the company" litigation in which Feld's very existence was at stake.[12]

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant this Motion in its entirety.

Date: November 26, 2013

Respectfully submitted,
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By Counsel

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[12] Plaintiffs have only had a few short weeks to review the Fee Petition and supporting declarations and exhibits. As such, this is only a representative sample of the questions that need to be asked at the depositions.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 26th day of November, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

/s/
Stephen L. Neal, Jr.